



FACT SHEET

Why Airbnb's Challenges To State And Local Regulations Don't Pass Legal Muster

OVERVIEW



"In *HomeAway.com Inc. et al v. City of Santa Monica*, the U.S. Court of Appeals for the Ninth Circuit denied Airbnb's legal challenge and upheld a stringent short-term rental ordinance set by Santa Monica, California, exposing gaping holes in Airbnb's attempt to manipulate federal law to overturn short-term rental regulations.

The Santa Monica ruling was a blow to Airbnb in failing to stop a local ordinance that required home sharing platforms to monitor and regulate hosts' listings to ensure compliance with local laws and regulations, and the impact will have far-reaching consequences as online short-term rental companies attempt to utilize the same federal laws to block similar ordinances in major cities across the country including New York, Boston, Los Angeles and Washington, D.C.

Airbnb has attempted to intimidate policymakers and use several federal laws and the Constitution in its legal challenges to short-term rental ordinances in cities, large and small. However, the company's legal arguments fail to pass legal muster and will likely result in Airbnb losing in future and ongoing challenges in federal court."

Andrew Zacks

Managing Shareholder, Zacks Freedman & Patterson PC

[Law 360](#), 5/9/19

Zacks co-wrote an amicus curiae brief in the Ninth Circuit Court of Appeals in the *LA Park La Brea A LLC v. Airbnb* case for the California Apartment Association and other interested parties, and has handled many individual disputes between residential landlords and tenants over short-term rental activity.

FEDERAL COURTS RULE AGAINST AIRBNB



Associated Press

"Airbnb, HomeAway Lose Legal Challenge To Santa Monica Rules"

[The Associated Press](#), 3/13/19



REUTERS

"Judge Rejects Airbnb Bid To Halt San Francisco Ordinance"

[Reuters](#), 11/8/16



Given the recent federal court ruling upholding Santa Monica's strict short-term rental ordinance exposing the deficiencies in Airbnb's legal arguments, cities and localities facing similar challenges should remain steadfast. The law is on their side.

Andrew Zacks,

Managing Shareholder, Zacks Freedman & Patterson PC, [Law360](#), 5/9/2019





Communications Decency Act (CDA) Federal Courts Rule Against Airbnb's Attempt to Use CDA As Shield Against Regulations

Intent of Law: The Communications Decency Act shields certain computer service providers from liability for publishing third-party content. ([Law 360](#), 5/9/2019)

How Airbnb has tried to exploit: Airbnb argues that the CDA shields it from liability because Airbnb is merely a platform for others to post content, but this ignores the breadth of services Airbnb provides — as well as the reality of how the ordinances work. ([Law 360](#), 5/9/2019)

Why Airbnb's argument doesn't pass legal muster: Listings on the Airbnb platform are created in part by Airbnb: Airbnb sets format and content standards. Airbnb's smart pricing feature allows it to set prices, and its instant book feature enables guests to book properties without any involvement by the host. Airbnb also imposes numerous terms on listings, including cancellation policies and insurance requirements. Because Airbnb itself creates and controls listing content, it is not truly third-party content. Airbnb is not operating simply as a platform for others to post content — they actively engage in gathering, managing and facilitating sales — thus, Airbnb does not qualify to be protected by the CDA. ([Law 360](#), 5/9/2019)

Airbnb is attempting to misrepresent and redefine ordinances in court: The ordinances that Airbnb is litigating against do not proscribe, mandate or even discuss the content of the listings, but focus on the business transactions element. In other words, the ordinances prohibit hosting platforms from accepting fees for processing illegal business transactions. This does not require Airbnb to review or moderate third-party content provided by hosts. Processing a booking is entirely distinct from posting a listing, and booking transactions are internal and nonpublic. In other words, the ordinances regulate business transactions — not content publication. ([Law 360](#), 5/9/2019)

Airbnb's legal challenges against data transparency fall short of the law: Airbnb also pushes back against any attempt for data transparency, including addresses for their listings, which would allow cities and states to ensure tax law is followed properly. The requirement to cross-reference a property listing against a city registry does not constitute publication of third-party content. A city's registry is not edited by Airbnb, nor is Airbnb required to edit a property listing to include information from the registry. Rather, certain booking transactions are authorized by the registry, and other transactions are illegal. ([Law 360](#), 5/9/2019)

Bottom Line: The ordinances prohibit Airbnb from processing illegal transactions, and therefore data transparency is a critical element for any ordinance passed in an effort to properly oversee short-term rental business transactions. ([Law 360](#), 5/9/2019)

Bloomberg

Airbnb Loses Major Fight Over CA City's Rental Law

"The appellate panel agreed with the city that the restriction doesn't violate the U.S. Communications Decency Act of 1996, which shields online services from liability for the content that their users post on their sites."

([Bloomberg](#), 3/13/19)



Airbnb is not operating simply as a platform for others to post content — they are actively engaged in gathering, managing and facilitating sales — thus, Airbnb does not qualify to be protected by the CDA.

Andrew Zacks

Managing Shareholder, Zacks Freedman & Patterson PC, [Law360](#), 5/9/2019





Stored Communications Act

Airbnb's mandatory consent already enables disclosure of customers' information to governmental entities

Intent of Law: The Stored Communications Act regulates electronic communications system providers' disclosure of customer information. It requires system providers to obtain subscribers' consent before disclosing their information to the government. ([Law 360](#), 5/9/2019)

How Airbnb has tried to exploit: Recent ordinances passed by cities and states require hosting platforms to periodically file reports regarding their short-term rental listings. Airbnb argues that some cities' ordinances violate the SCA because they require hosting platforms to obtain subscribers' consent and disclose subscribers' confidential information to government agencies. ([Law 360](#), 5/9/2019)

Why Airbnb's argument doesn't pass legal muster: Airbnb itself requires its customers to accept its privacy policy as a condition of service. The ordinances are no more coercive than Airbnb's own policy. Moreover, some of the ordinances require Airbnb to report information that is already accessible to the public or which can be derived from public information. ([Law 360](#), 5/9/2019)

Airbnb's own mandatory privacy policy defeats its SCA legal argument: Airbnb's own privacy policy already establishes effective consent to disclosure of customers' information to government agencies. Its mandatory privacy policy states: "Airbnb ... may disclose your information, including personal information, to courts, law enforcement or governmental authorities, or authorized third parties, if and to the extent we are required or permitted to do so by law or if such disclosure is reasonably necessary ... to comply with our legal obligations ..." ([Law 360](#), 5/9/2019)

Bottom Line: Airbnb has already established mandatory, effective consent to disclosure of customers' information to governmental entities. Airbnb cannot turn around at this point and object to disclosure requirements based on a lack of consent or based on consent being mandatory. ([Law 360](#), 5/9/2019)



"For one, the SCA indicates that customer consent is a complete basis for sharing customer information. One might not expect an Airbnb host to consent to its information being shared with government authorities who, to be sure, may in turn penalize the host. **But Airbnb's Terms of Service require exactly this consent:** 'Airbnb may access, preserve and disclose any of your information if we are required to do so by law.'"

Nancy Leong

Law Professor, University of Denver
([Yale Journal on Regulation](#), 7/15/16)



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Managing Shareholder, Zacks Freedman & Patterson PC, [Law360](#), 5/9/2019





1st and 4th Amendment

Federal courts have rejected Airbnb's attempts to invoke constitutional law to overturn local short-term ordinances

First Amendment

Intent of Law: The First Amendment protects freedom of speech, including so-called "expressive" conduct. ([Law 360](#), 5/9/2019)

How Airbnb has tried to exploit: Airbnb has claimed that local ordinances place a "content-based" restriction that infringes on their right to protected commercial speech. ([Law 360](#), 5/9/2019)

Why Airbnb's argument doesn't pass legal muster: It is settled law that the First Amendment does not prevent incidental burdens on speech when a law regulates commercial activity, and it certainly does not protect speech promoting and capitalizing on illegal transactions. When a commercial activity is illegal and a restriction on advertising is incidental to a valid regulation, there is no First Amendment protection. ([Law 360](#), 5/9/2019)

Court rules against Airbnb: The Ninth Circuit Court of Appeals has persuasively determined that processing a booking for financial gain is not expressive conduct that is protected by the First Amendment. The ordinances are valid regulations on non-expressive conduct — business transactions — rather than protected speech. ([Law 360](#), 5/9/2019)

Bottom Line: There isn't any content-based restriction. Rather, the ordinances specifically regulate unlawful booking transactions. The First Amendment does not protect this illegal activity. ([Law 360](#), 5/9/2019)

Fourth Amendment

Intent of Law: The Fourth Amendment's central command is that official searches and seizures be reasonable. Courts decide Fourth Amendment cases with a balancing test that weighs legitimate governmental interests. A governmental subpoena of corporate books or records need only have a limited scope, a relevant purpose and specificity. ([Law 360](#), 5/9/2019)

How Airbnb has tried to exploit: Airbnb has cited the Fourth Amendment claiming that these local ordinances authorize cities to administrative searches and require Airbnb to disclose private user information, violating hosts' privacy. ([Law 360](#), 5/9/2019)

Why Airbnb's argument doesn't pass legal muster: The local and state ordinances in question do meet the Fourth Amendment's strictures, requiring only that hosting platforms periodically file a report with information regarding short-term rental listings. Airbnb does not have a reasonable expectation of privacy in this information because much of it is already public or can be derived from hosts' voluntary tax filings. ([Law 360](#), 5/9/2019)

Why federal courts have ruled against Airbnb: The requests are limited to the information necessary to identify illegal listings. Ordinances serve a relevant government interest in limiting the negative impacts of short-term rentals on the availability of permanent housing opportunities for cities' residents. ([Law 360](#), 5/9/2019)

Bottom Line: The required information is specific and limited in scope to accomplish the legitimate purpose of identifying illegal short-term rental listings. With limited exceptions, this information is kept confidential by the government agencies. ([Law 360](#), 5/9/2019)



The precedent set by the recent ruling of the U.S. Court of Appeals for the Ninth Circuit denying Airbnb's legal challenge and upholding Santa Monica's stringent short-term rental ordinance is further confirmation that Airbnb's legal arguments will not hold up to careful scrutiny.

Andrew Zacks,

Managing Shareholder, Zacks Freedman & Patterson PC, [Law360](#), 5/9/2019

