

# The Cost of Sharing and the Common Law: How to Address the Negative Externalities of Home-Sharing

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## INTRODUCTION

Over the past several years, the “sharing economy” has proven more challenging to regulate than perhaps any other commercial industry in recent decades. An exact definition of the “sharing economy” is hard to pin down, however, the term is typically thought to refer to companies that either “(1) own goods or services that they rent to consumers on a short-term basis, or (2) create peer-to-peer (“P2P”) platforms connecting providers and users for short-term exchanges of goods or services.”<sup>1</sup> The variety of companies that embody the sharing economy are as numerous as they are creative, and each presents its own set of regulatory needs and challenges. Yet of the companies that comprise the “sharing-economy,” the need for regulation is most apparent for companies that provide for home-sharing, such as Airbnb, Inc., HomeAway, Inc., and Couchsurfing International, Inc. Though their respective target demographics differ, each of these home-sharing providers are similar in that they create digital P2P marketplaces that allow users all over the globe to rent and lease empty space in their homes for the short-term. While this practice is economically beneficial in a number of respects (utilization of an untapped resource, financial gain, increased tourism, etc.), oftentimes such benefits come at the expense of others.

When a user of one of the above-referenced home-sharing websites lives in a residential neighborhood and lists their property as a short-term rental, they are essentially commercializing a residential area. Unregulated, this activity causes nuisances in single-family-neighborhoods typically associated with commercial activities, such as noise, traffic, and transients. Such nuisances threaten the integrity of single-family

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<sup>1</sup> Daniel E. Rauch & David Schleicher, *Like Uber, But for Local Governmental Policy: The Future of Local Regulation of the “Sharing Economy”* 2 (George Mason Law & Econ. Research Paper No. 15-01, 2016).

neighborhoods and the property values of the homes therein, causing outrage amongst the residents in the neighborhood who chose not to rent out space in their homes. But it is not only residential areas that are affected, for even if a user of a home-sharing website lists an apartment for rent short-term, rather than a single-family-home, harm to the general public still results. As one apartment goes up for rent on a home-sharing website, one unit of housing disappears from the regular rental market.<sup>2</sup> In many cities this practice has an exacerbating effect on the housing market, causing availability to fall and the cost of living to rise.<sup>3</sup>

Compelled by the threat that home-sharing poses to single-family neighborhoods and its negative impact on the rental housing market, cities across the United States have attempted to regulate digital home-sharing markets.<sup>4</sup> These regulations are based on traditional, business-to-consumer business models and thus target the actual suppliers of short-term rentals—those who list properties for rent on home-sharing websites—rather than the platform providers, i.e. the websites.<sup>5</sup> However, because home-sharing websites utilize P2P business models, supply of the service is decentralized, rendering regulations based on a business-to-consumer model largely ineffective.<sup>6</sup> This is because the decentralized nature of home-sharing makes it difficult for violators of regulations to be discovered, thereby reducing

<sup>2</sup> See generally L.A. DEP'T OF CITY PLANNING, HOUSING ELEMENT 2013-2021, CHAPTER 1: HOUSING NEEDS ASSESSMENT (Dec. 3, 2013), <http://planning.lacity.org/HousingInitiatives/HousingElement/Text/Ch1.pdf> [<http://perma.cc/5MPFQ-G5WF>].

<sup>3</sup> *Id.*

<sup>4</sup> To name just a few, San Francisco, Los Angeles, New York, Portland, Chicago, and Philadelphia are cities that are currently attempting to regulate home-sharing. See Marielle Mondon, *S.F. Is Struggling to Make Good on Airbnb Regulation*, NEXT CITY (Mar. 25, 2015), <http://nextcity.org/daily/entry/san-francisco-airbnb-regulation-problems> [<http://perma.cc/3AJP-FD47>]; Robert Holguin, *Los Angeles City Leaders Want to Regulate Home-Sharing Websites Like Airbnb*, KABC EYEWITNESS NEWS (Dec. 5, 2014), <http://abc7.com/news/la-city-leaders-want-to-regulate-home-sharing-websites-like-airbnb/424126/> [<http://perma.cc/WD8Z-KBDD>]; Ronda Kaysen, *What's Up Next in New York? Airbnb and Rent Regulation Will Be Hot Topics*, N.Y. TIMES (Dec. 26, 2014), [http://www.nytimes.com/2014/12/28/realestate/new-york-airbnb-and-rent-regulation-will-be-hot-topics.html?\\_r=0](http://www.nytimes.com/2014/12/28/realestate/new-york-airbnb-and-rent-regulation-will-be-hot-topics.html?_r=0) [<http://perma.cc/K23B-2QRT>]; Steve Law, *Airbnb Resists City Efforts to Regulate It*, PORTLAND TRIB. (Dec. 18, 2014, 8:14 PM), <http://portlandtribune.com/pt/9-news/244479-112102-airbnb-resists-city-efforts-to-regulate-it> [<http://perma.cc/YAB7-P5LH>]; Alby Gallun & Ally Marotti, *Hotels to Airbnb Hosts: Pay Up*, CRAIN'S CHI. BUS. (Feb. 14, 2015), <http://www.chicagobusiness.com/article/20150214/ISSUE01/302149989/hotels-to-airbnb-hosts-pay-up> [<http://perma.cc/MLD6-8FAC>]; Mike Dunn, *Phila. Lawmakers Move Toward Regulating, and Taxing, Airbnb Room Rentals*, CBS PHILLY (June 1, 2015, 2:05 PM), <http://philadelphia.cbslocal.com/2015/06/01/phila-lawmakers-move-toward-regulating-and-taxing-airbnb-room-rentals/> [<http://perma.cc/J974-GH6V>].

<sup>5</sup> See *infra* Part II.

<sup>6</sup> *Id.*

incentive to comply. Thus in several cases, even where regulations prohibit home-sharing in a specific neighborhood or area, because there is substantial profit to be made and little chance of discovery, home-sharing continues, unabated.<sup>7</sup>

If regulatory efforts fail, the costs of home-sharing are borne by those who are not involved in its practice (“non-sharers”).<sup>8</sup> In single-family neighborhoods, non-sharer residents continue to experience nuisances typically associated with commercial activity, resulting in the loss of enjoyment of their property and a potential decrease in the monetary value of the property.<sup>9</sup> At the same time, non-sharer inhabitants of rental dwellings in the city continue to experience rent increases, causing the cost of living to rise.<sup>10</sup> As these problems continue, the number of aggrieved parties will grow and the aggregate damages will become substantial. As history has shown, once a tipping point is reached, a lawsuit will follow—a lawsuit that may just be the cost-shifting mechanism needed to address the negative externalities caused by home-sharing.

Based on precedent cases involving P2P business models and common-law rules of third-party liability, a class of individual landowners may one day bring and win a monumental lawsuit against home-sharing websites that will change the way home-sharing websites operate within the United States. While

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<sup>7</sup> Examples of regulation failure can be observed most clearly in San Francisco and Los Angeles. See Emily Alpert Reyes, *Los Angeles Gives Hosts, Neighbors Mixed Signals on Short-term Rentals*, L.A. TIMES (Feb. 7, 2015, 10:00 AM), <http://www.latimes.com/local/california/la-me-adv-illegal-rentals-20150208-story.html#page=1> [<http://perma.cc/FWJ7-DYSY>]; see also Matt Weinberger, *San Francisco Complains It Can't Enforce Its Own Airbnb Law*, BUS. INSIDER (Mar. 23, 2015, 4:41 PM), <http://www.businessinsider.com/san-francisco-calls-airbnb-regulations-unenforceable-2015-3> [<http://perma.cc/F7J6-3VZS>].

<sup>8</sup> See Steven Leigh Morris, *Airbnb Is Infuriating the Neighbors. Is It Time for New Rules?*, L.A. WKLY. (Jan. 22, 2015, 2:47 PM), <http://www.laweekly.com/news/airbnb-is-infuriating-the-neighbors-is-it-time-for-new-rules-5343663> [<http://perma.cc/GL67-3ECU>]; Benjamin Mueller, *Hearing Pits Tenants Who Denounce Airbnb Against Those Who Profit From It*, N.Y. TIMES (Jan. 20, 2015), <http://www.nytimes.com/2015/01/21/nyregion/hearing-pits-tenants-who-denounce-airbnb-against-those-who-profit-from-it.html> [<http://perma.cc/KC4V-8NZM>].

<sup>9</sup> See Morris, *supra* note 8; see also Walter Hamilton, *Renting Rooms Through Airbnb Riles Fellow Homeowners*, SEATTLE TIMES (Sept. 19, 2013, 6:56 PM), <http://www.seattletimes.com/business/renting-rooms-through-airbnb-riles-fellow-homeowners/> [<http://perma.cc/KL2S-M5AB>].

<sup>10</sup> See Daniel Hirsch, *Report: Airbnb Cuts into Housing, Should Share Data*, MISSION LOCAL (May 14, 2015, 5:00 PM), <http://missionlocal.org/2015/05/report-airbnb-cuts-into-housing-should-give-up-data/> [<http://perma.cc/5TB6-2AUS>]; Caroline O'Donovan, *The Rent Is Too Damn High: In Search of the Truth About Airbnb's Impact on Housing*, BUZZFEED NEWS (June 9, 2015, 3:59 PM), <http://www.buzzfeed.com/carolineodonovan/the-rent-is-too-damn-high-the-truth-about-airbnbs-impact-on#.mqaP1YmG5> [<http://perma.cc/X2ZY-P6LD>]; see also Rachel Monroe, *More Guests, Empty Houses*, SLATE (Feb. 13, 2014, 8:08 AM), [http://www.slate.com/articles/business/moneybox/2014/02/airbnb\\_gentrification\\_how\\_the\\_sharing\\_economy\\_drives\\_up\\_housing\\_prices.html](http://www.slate.com/articles/business/moneybox/2014/02/airbnb_gentrification_how_the_sharing_economy_drives_up_housing_prices.html) [<http://perma.cc/H9BM-RR8U>].

home-sharing is a recent phenomenon, digital P2P markets have been around since the late 1990s, and have already been the impetus for a pair of pivotal judicial decisions.

In 1999, a class of recording producers brought suit against the infamous Napster Inc.,<sup>11</sup> and in 2004, a class of film producers brought suit against Grokster Ltd., Napster's more sophisticated cousin.<sup>12</sup> Interestingly, the stories of these lawsuits are remarkably similar. In each case, a company utilized a business model based on digital P2P marketplaces,<sup>13</sup> and each company thrived for a time, but at the expense of other entities in their respective industries. Eventually the costs which had been passed on to the other companies in the industry grew so large, it came to a tipping point, and a class-action lawsuit was brought. As a result, both Napster and Grokster were held accountable for the negative externalities each had caused.<sup>14</sup> Napster and Grokster were then left to either abandon their business for fear of future lawsuits, or re-evaluate their business models and conceive methods of doing business lawfully. In other words, Napster and Grokster were compelled by lawsuits to address and mitigate the negative externalities each had caused.

These cases exemplify how the common law can act as a cost-shifting mechanism for the negative externalities of P2P markets, and provide a framework outlining more effective regulations for home-sharing. Despite the fact that legislative regulation fails to shift the costs of harms caused by home-sharing back onto the companies that create them, the costs can still be shifted—and home-sharing can be successfully regulated—if a class of plaintiffs successfully brings suit against a home-sharing company. Once a lawsuit is successful, home-sharing companies will be compelled to re-evaluate their business practices and formulate methods of conducting business that do not expose the company to liability.

This Comment is divided into three parts. Part I details two of the most common negative externalities caused by home-sharing, identifies who bears the costs of those externalities, and discusses the legislative attempts by various

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11 See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

12 See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).

13 *Id.*; see also *supra* note 11.

14 See Ron Harris, *Napster Offers \$1 Billion Settlement*, ABC NEWS (Feb. 20, 2001), <http://abcnews.go.com/Technology/story?id=98832> [<http://perma.cc/DUY6-KBWA>]; see also Ben Fritz, *Grokster Plays Nice by Turning Radio Dial*, VARIETY (Nov. 15, 2004, 3:56 PM), <http://variety.com/2004/biz/markets-festivals/grokster-plays-nice-by-turning-radio-dial-1117913569/> [<http://perma.cc/CFZ6-LYKR>]; John Borland, *Last Waltz for Grokster*, CNET (May 30, 2006, 11:10 AM), <http://www.cnet.com/news/last-waltz-for-grokster/> [<http://perma.cc/J7AU-EJMC>].

municipalities to address them. Part II explains why legislative attempts to address negative externalities of home-sharing are ineffective. Part III then offers how, based on precedent P2P cases and common law rules of private nuisance and third-party liability, the common law is an adequate mechanism for shifting the costs of the negative externalities of home-sharing onto the companies that create them, so that these companies may finally be successfully regulated.

## I. THE NEGATIVE EXTERNALITIES OF HOME-SHARING

Generally speaking, a negative externality is an indirect cost of a commercial activity that is borne by society or bystanders outside of the industry rather than the commercial enterprise or individuals conducting the activity.<sup>15</sup> The number of negative externalities that result from the unregulated, wide-spread practice of short-term renting made possible by home-sharing websites are numerous and substantial. However, there are two externalities in particular that are most common in cities across the United States: the negative effect of wide-spread home-sharing on residential neighborhoods, and the negative effect of wide-spread home-sharing on the rental housing market.

### A. The Effect of Home-Sharing on Residential Neighborhoods

Los Angeles, California has experienced nearly all of the negative externalities associated with home-sharing on residential areas given the density and high cost of living. As is the case in many Los Angeles areas, home-sharing is a popular practice in the neighborhood of Silver Lake.<sup>16</sup> In 2013, Silver Lake was the location of at least 200 listings for short-term rentals on Airbnb.com, ranging from studio apartments for \$60 per night, to entire homes complete with swimming pools for \$425 per night.<sup>17</sup> Yet despite the numerous home-sharers in the area, many residents were strongly opposed (“non-sharers”) to the practice of home-sharing in their neighborhood. In fact, the non-sharers of Silver Lake were so opposed to home-sharing that they eventually petitioned their local government to enact an outright ban on short-term renting through home-sharing websites like Airbnb.com in the neighborhood.<sup>18</sup>

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<sup>15</sup> Thomas Helbling, *What Are Externalities?*, FIN. & DEV. (December 2010), <http://www.imf.org/external/pubs/ft/fandd/2010/12/pdf/basics.pdf> [http://perma.cc/783F-2JNW].

<sup>16</sup> *Will Airbnb Have to Check Out of Silver Lake?*, EASTSIDER (Aug. 14, 2013), <http://www.theeastsiderla.com/2013/08/will-airbnb-have-to-check-out-of-silver-lake/> [http://perma.cc/3KG3-8SQA].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

Non-sharers in Silver Lake opposed home-sharing with as much vigor and animosity as they would the development of a commercial short-term rental establishment such as a hotel or inn. They asserted that the “hotel-like room rentals,” made available by home-sharing websites like Airbnb.com “bring transients, traffic,” and “create potential safety issues.”<sup>19</sup> These are legitimate concerns for homeowners because property values are typically higher in quieter, secluded, crime-free areas.<sup>20</sup> But when land is put to commercial use, such as a hotel or retail store, the noise and traffic levels of the area increase as a result of people coming and going, and the transient nature of the establishment can increase the crime rate.<sup>21</sup> Thus, by their nature, commercial uses in residential areas cause the values of the surrounding residential properties to fall, and the loss of value is borne by the residents, not the home-sharing websites.<sup>22</sup>

In an effort to mitigate the negative impact of home-sharing on the neighborhood and restore their properties to their original perceived value, the non-sharers of Silver Lake petitioned the neighborhood council to pass a resolution that would ban all short-term rentals within the neighborhood.<sup>23</sup> At a meeting to discuss the resolution, more than 150 residents of Silver Lake appeared.<sup>24</sup> While there were plenty of non-sharers present to bemoan the parking shortages, increased transients, and excessive noise caused by home-sharing,<sup>25</sup> also present at the hearing were members of “Peers,” an Airbnb lobbyist group whose self-proclaimed mission is “to grow the sharing economy, to mainstream it, to tell its story, and to protect it.”<sup>26</sup> Ultimately, the non-sharers were outnumbered by the Peers, and the resolution to ban short-term renting on home-sharing websites did not pass.<sup>27</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> Mandi Woodruff, *9 Things That Will Trash Your Home's Value*, BUS. INSIDER (May 13, 2013, 9:30 AM), <http://www.businessinsider.com/what-hurts-home-value-2013-5?op=1> [<http://perma.cc/N2CY-EX35>].

<sup>21</sup> See generally John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 CITYSCAPE: 1 J. POL'Y DEV. & RES. 69 (2005), <https://www.huduser.gov/periodicals/cityscape/vol8num1/ch3.pdf> [<http://perma.cc/GXF7-8YGA>].

<sup>22</sup> *Id.*

<sup>23</sup> Neal Broverman, *Silver Lakers Want to Ban Airbnb Rentals in Their Neighborhood*, CURBED L.A. (Aug. 14, 2013, 6:16 PM), [http://la.curbed.com/archives/2013/08/silver\\_lakers\\_want\\_to\\_ban\\_airbnb\\_rentals\\_in\\_their\\_neighborhood.php](http://la.curbed.com/archives/2013/08/silver_lakers_want_to_ban_airbnb_rentals_in_their_neighborhood.php) [<http://perma.cc/N7Y6-XKYN>].

<sup>24</sup> Zak Stone, *The Battle Over Airbnb Moves to Los Angeles*, CO.EXIST (Sept. 17, 2013, 8:23 AM), <http://www.fastcoexist.com/3017486/the-battle-over-airbnb-moves-to-los-angeles> [<http://perma.cc/LYU4-3YTM>].

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



Regardless of who won the battle of Silver Lake, it is clear that unregulated home-sharing has a costly impact on residential communities. Similar disputes over whether home-sharing should be regulated have taken place not only in other neighborhoods throughout California such as Venice and West Hollywood, but also in cities across the United States including New Orleans, Louisiana, and Portland, Oregon.<sup>28</sup> Thus, it would seem that no matter the city, widespread unregulated home-sharing brings nuisances to residential areas, thereby lowering the values of all homes in the neighborhood, and leading non-sharers to demand regulation. While the story of Silver Lake demonstrates that, for the time being, non-sharers are in the minority, this does not change the fact that the cost of the degradation of the neighborhood is borne by residents who do not participate in home-sharing.

## B. Pressure on Housing Market

In addition to the costs that home-sharing places on non-sharing homeowners in single-family neighborhoods, the proliferation of home-sharing also generates costs for renters.<sup>29</sup> Home-sharing websites reduce traditional barriers to entry into the hotel industry, and thus, more and more landlords and leasing companies are converting long-term rental units into permanent short-term rental units or de facto hotels.<sup>30</sup> As a result, the number of rental units available on the market is falling, and the market is shrinking.<sup>31</sup> Such shrinkage has an exacerbating effect on the high cost of living in dense areas such as San Francisco, New York City, and Los Angeles.<sup>32</sup> But just like the cost of lowered property values in single-family neighborhoods, this higher cost of living is borne by those who do not participate in home-sharing.

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<sup>28</sup> See Stevie St. John, *Airbnb Is Raising the Ire of WeHo Apartment Managers and Tenants*, WEHOVILLE (Mar. 14, 2014), <http://www.wehoville.com/2014/03/14/airbnb-raising-ire-weho-apartment-managers-tenants/> [<http://perma.cc/CNE5-AYVK>]; see also Juliet Bennett Rylah, *WeHo Might Ban Airbnb*, LAIST (Feb. 4, 2015, 1:15 PM), [http://laist.com/2015/02/04/weho\\_considers\\_banning\\_airbnb.php](http://laist.com/2015/02/04/weho_considers_banning_airbnb.php) [<http://perma.cc/U5U7-8N9A>]; Robert McClendon, *Battle Brewing over Short-Term Rentals, as Residents Discuss Airbnb*, TIMES-PICAYUNE (May 20, 2014, 9:51 PM), [http://www.nola.com/politics/index.ssf/2014/05/battle\\_brewing\\_over\\_bed\\_and\\_br.html](http://www.nola.com/politics/index.ssf/2014/05/battle_brewing_over_bed_and_br.html) [<http://perma.cc/H34E-K28M>]; Elliot Njus, *Portland Tries to Make Peace with Airbnb as 'Sharing Economy' Moves into the Mainstream*, OREGONIAN (Jan. 31, 2014, 5:18 AM), [http://www.oregonlive.com/front-porch/index.ssf/2014/01/airbnb-style\\_vacation\\_rentals.html](http://www.oregonlive.com/front-porch/index.ssf/2014/01/airbnb-style_vacation_rentals.html) [<http://perma.cc/7WTK-CRP7>].

<sup>29</sup> See L.A. DEP'T OF CITY PLANNING, *supra* note 2.

<sup>30</sup> See generally Denise Cheng, *Is Sharing Really Caring? A Nuanced Introduction to the Peer Economy*, OPEN SOC'Y FOUND. (Oct. 2014), <http://static.opensocietyfoundations.org/misc/future-of-work/the-sharing-economy.pdf> [<http://perma.cc/4VRE-E2PK>].

<sup>31</sup> See Hirsch, *supra* note 10; O'Donovan, *supra* note 10.

<sup>32</sup> See L.A. DEP'T OF CITY PLANNING, *supra* note 2, at 1–3.

In some respects, the practice of home-sharing is fairly consistent with the practice of running a hotel. Generally speaking, the success of any given hotel can be attributed to its reputation and visibility.<sup>33</sup> Hotels spend hundreds of thousands of dollars on amenities and employees in order to gain the reputation of a clean, comfortable, and safe hotel.<sup>34</sup> In addition, hotels spend significant sums of money on advertising in order to increase visibility and draw guests. Successful home-sharing relies on similar techniques. Just like a hotel, home-sharers must establish their reputation, and then advertise their short-term rental properties in order to draw guests. But where hotels have money to spend on amenities and advertising, the average homeowner or renter does not.

If in fact a homeowner or renter had a spare room and was willing to rent it short-term, the search for a short-term tenant could be challenging and ineffective. Advertising for the room would be done either on community bulletin boards, newspapers, or word-of-mouth. Granted, the emergence of Craigslist made advertising easier and more effective (as anyone with an internet connection gained the ability to broadcast an advertisement capable of reaching unlimited viewers), but as the breadth of the advertisement increased, so did the risk for hosts and guests.<sup>35</sup> Once the advertisement spreads beyond the scope of the neighborhood, would-be hosts and guests have no way to vet one another.<sup>36</sup> Therefore, prior to the recent rise of home-sharing websites, for most prospective home-sharers advertising a residential property as a short-term rental either failed to reach enough prospective guests or it posed an unacceptable degree of risk, and thus home-sharing occurred on a much smaller scale.<sup>37</sup>

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<sup>33</sup> See generally Pedro Colaco, *10 Success Tips on Online Visibility for Independent Hotels*, HOTEL BUS. REV., [http://hotelexecutive.com/business\\_review/2120/10-success-tips-on-online-visibility-for-independent-hotels](http://hotelexecutive.com/business_review/2120/10-success-tips-on-online-visibility-for-independent-hotels) [<http://perma.cc/DAP9-UKT5>]; Vanessa Horwell, *How to Market Your Hotel Today for Success Tomorrow*, HOTEL BUS. REV., [http://hotelexecutive.com/business\\_review/2139/how-to-market-your-hotel-today-for-success-tomorrow](http://hotelexecutive.com/business_review/2139/how-to-market-your-hotel-today-for-success-tomorrow) [<http://perma.cc/4EBE-THMJ>].

<sup>34</sup> See Sam Trotter, *How Much Does it Cost to Build a Hotel – 2015*, BOUTIQUE HOSPITALITY MGMT. (Feb. 11, 2015), <http://www.boutique-hospitality.com/how-much-does-it-costs-to-build-a-hotel-2015/> (stating midscale hotels spend on average \$95,600 on building and site improvements; full service hotels spend roughly \$193,600; and luxury hotels and resorts spend roughly \$392,600) [<https://perma.cc/3VJB-3L26>].

<sup>35</sup> David C. Wyld, *Renter Beware: Craigslist is Fast Becoming the Go-to Site for Rental Property, But the Lack of Trustworthiness Makes the Prospect of Renting Via the Internet a Very Risky Proposition Indeed*, WEB.ARCHIVE (June 7, 2012) [https://web.archive.org/web/20160115133914/https://www.escrow.com/news/Articles/craigslist\\_is\\_fast\\_becoming\\_the\\_go\\_to\\_site\\_for\\_rental\\_property/16](https://web.archive.org/web/20160115133914/https://www.escrow.com/news/Articles/craigslist_is_fast_becoming_the_go_to_site_for_rental_property/16) [<http://perma.cc/WP2H-W5HM>].

<sup>36</sup> *Id.*

<sup>37</sup> *Airbnb in the City*, N.Y. ST. OFF. ATTY GEN. (Oct. 2014), <http://www.ag.ny.gov/pdfs/Airbnb%20report.pdf> [<http://perma.cc/BZD3-7ZXY>].



Presently, however, home-sharing websites like Airbnb.com have essentially eliminated these problems, thereby greatly reducing traditional barriers to entry to the hotel/home-sharing industry for individuals and commercial enterprises alike. Through user rating systems, home-sharing websites like Airbnb.com create a substitute for trust that reduces the risk of home-sharing for both hosts and guests.<sup>38</sup> Hosts can see which guests have the highest reputations as respectful guests, and guests can see which hosts have the best reputation for providing well-kept rooms and amenities.<sup>39</sup> This manufactured trust drastically reduces costs for homeowners seeking to list their property for rent, as their reputation becomes established through user reviews.

The cost of advertising is likewise eliminated, as home-sharing websites make it possible for home-sharers to be globally visible for free.<sup>40</sup> Through their sophisticated user interfaces, home-sharing websites allow any listed property to be viewed by any potential guest at any time when they use the website's search function. Thus, the user who seeks to rent out space in his or her home need not invest any more in advertising than the cost of a few pictures. Accordingly, home-sharing websites have substantially reduced the cost of entry into the home-sharing/hotel industry for both individuals seeking to self-employ, and commercial entities seeking to establish de facto hotels.<sup>41</sup>

Lower barriers to entry to the hotel industry result in conversion of residential units into rental accommodations on a much larger scale than ever before.<sup>42</sup> For instance, in Los Angeles (and in other cities as well) whole units, as opposed to a spare bedroom within a unit or a shared unit, dominate the listings on home-sharing websites.<sup>43</sup> Of all the Airbnb listings in Los Angeles, sixty-four percent are for entire units, while thirty-two percent are for private rooms, and four percent are for shared rooms.<sup>44</sup> Of the entire-unit listings, six percent are rented out by what can be classified as "leasing companies," which are property owners that

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<sup>38</sup> See generally Wyld, *supra* note 35.

<sup>39</sup> Cheng, *supra* note 30, at 5.

<sup>40</sup> See generally *How It Works*, AIRBNB, <https://www.airbnb.com/help/getting-started/how-it-works> [<http://perma.cc/Z48L-SLJ6>].

<sup>41</sup> Cheng, *supra* note 30, at 17.

<sup>42</sup> *Id.*; see also Tim Logan, Emily Alpert Reyes & Ben Poston, *Airbnb and Other Short-Term Rentals Worsen Housing Shortage, Critics Say*, L.A. TIMES (Mar. 11, 2015, 3:00 AM), <http://www.latimes.com/business/realstate/la-fi-airbnb-housing-market-2015-0311-story.html#page=1> [<http://perma.cc/HBC7-WNTQ>].

<sup>43</sup> See Roy Samaan, *Airbnb, Rising Rent, and the Housing Crisis in Los Angeles*, LAANE: A NEW ECONOMY FOR ALL (Mar. 2015), <http://www.laane.org/wp-content/uploads/2015/03/AirBnB-Final.pdf> [<http://perma.cc/6C6J-E737>].

<sup>44</sup> *Id.* at 18.

list two or more whole units at a time.<sup>45</sup> While these leasing companies represent a minority share of the market, they actually account for thirty-five percent of all the revenue generated by Airbnb in Los Angeles.<sup>46</sup>

Global Homes and Condos (“Global”) is one such leasing company. Global describes itself as “a full service vacation rental management company,”<sup>47</sup> and is known as “the most prolific host” in Los Angeles, listing at least seventy-eight whole units as short-term rentals on home-sharing websites in a cluster that spans the border between Santa Monica and Venice.<sup>48</sup> By using home-sharing websites, Global is able to pit “tourist dollars against rental dollars,” and consistently finds that it can generate significantly more revenue by converting its long-term rental stock into short-term rental listings on home-sharing websites than if it were to lease the properties long term.<sup>49</sup>

Meanwhile, the city of Los Angeles suffers from a deficit of rental housing, needing an additional 5300 units of rental housing per year to meet demand.<sup>50</sup> The Mayor and City Council of Los Angeles are currently working to make the availability of rental housing a priority by requiring developers to set aside units for affordable housing in exchange for permitting other development. The City is also working to preserve the number of rental housing units on the market by “adopting a ‘no net loss’ policy that ensures subsidized units don’t disappear when buildings are demolished or replaced.”<sup>51</sup> Measures like these demonstrate that the City is spending tax dollars and other municipal resources to not only ensure that new units of rental housing will be added to the market, but current units will remain available. Entities like Global, however, which make commercial use of home-sharing websites, directly hinder the City’s goal of keeping rental housing units on the market, and the City (i.e. taxpayers and renters) pays the costs in two ways.<sup>52</sup> First, as more long-term rental units are converted into permanently listed short-term rentals, the cost of living in the

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 20.

<sup>50</sup> The Times Editorial Board, *L.A. Has a Serious Housing Crisis and It’s Time for City Officials to Do Something About It*, L.A. TIMES (Jan. 11, 2015, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-affordable-housing-part-1-20150111-story.html> [<http://perma.cc/N2HK-XG9S>]; see also Logan, Reyes & Poston, *supra* note 42.

<sup>51</sup> The Times Editorial Board, *supra* note 50.

<sup>52</sup> See Tim Logan & Emily Alpert Reyes, *Airbnb Cuts Ties with Vacation-Rental Firms in Los Angeles*, L.A. TIMES (Apr. 3, 2015, 5:41 PM), <http://www.latimes.com/business/la-fi-airbnb-rift-20150404-story.html> [<http://perma.cc/EG4S-Z3MH>].

area rises.<sup>53</sup> Second, as more of the City's tax dollars are spent on ensuring the supply of rental housing, less is available for other municipal needs.

The costs generated by home-sharing that are being borne by the City of Los Angeles are common throughout several other cities in the United States. In response, many cities have attempted to regulate home-sharing.<sup>54</sup> As discussed *infra*, the effectiveness of such regulation remains to be seen. However, it is readily apparent from the regulation efforts that, just like the negative externalities home-sharing imposes on single-family neighborhoods, the costs that home-sharing imposes on the city are also being borne by those who do not participate in home-sharing.

In sum, as home-sharing becomes more widely used throughout neighborhoods and cities in the United States, negative externalities result, the costs of which fall on homeowners in single-family neighborhoods where home-sharing is particularly prevalent, and cities where rental housing is in short supply. These externalities are substantial, leading homeowners to petition local government for the prohibition of home-sharing, and compelling cities to devote additional tax dollars to maintaining adequate levels of rental housing. Thus, the externalities created by home-sharing create a clear demand for regulation, and unless regulation can effectively shift the cost of those externalities back onto the home-sharing industry, those not involved in home-sharing will continue to pay.

## II. INEFFECTIVE REGULATIONS

Given that home-sharing generates substantial negative externalities, there is little doubt that the industry needs to be regulated. Unsurprisingly, several municipalities have tried. However, current attempts at regulation are based on normative business-consumer ("B2C") business models, and as such, these regulations target the supplier of services. Thus, current regulatory attempts have all targeted those who supply space for rent (hosts) rather than the home-sharing websites themselves. However, the digital P2P marketplaces utilized by home-sharing websites thwart normative regulation methods that are effective on traditional commercial enterprises. Digital P2P marketplaces reduce the effectiveness of supplier-targeting regulation because such regulation is only successful if hosts police themselves, or if neighbors blow the whistle. Moreover, neither self-policing nor

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

whistleblowing is occurring because there is little incentive for hosts to self-police, there is little opportunity for neighbors to whistle-blow, and there are few ways to actually enforce regulations even when whistleblowing occurs. Accordingly, nearly every attempt to regulate home-sharing, from city-wide to neighborhood specific, has failed (with one exception discussed *infra*), leading to the conclusion that a different cost-shifting mechanism should be called upon to effectively mitigate the negative externalities of home-sharing.

Airbnb.com and many other home-sharing websites employ a P2P marketplace or “platform.”<sup>55</sup> These marketplaces “act as a meeting point between providers and customers to transact over individual services,”<sup>56</sup> thereby enabling individuals to monetize skills and assets within their possession.<sup>57</sup> The concept of a P2P marketplace is not new, but thanks to ever-increasing internet access and ever-falling utilization costs, companies like Airbnb can use the internet to organize and distribute essential market information (such as where consumers are, what they will pay, whether they can be trusted, etc.) necessary to create a thriving, digital, P2P marketplace.<sup>58</sup> As the market thrives, the responsible website takes a commission of all transactions occurring within its digital marketplace. Thus, companies like Airbnb have turned P2P platforms into the backbones of their operations: they allow users to monetize resources (such as a spare room) at a rate they would not be able to before, and for that they take a percentage of the revenue.<sup>59</sup>

While the use of P2P platforms creates resource utilization, as stated before, it also creates a challenge from a regulatory perspective. Until recently, most large companies operated using a B2C platform, which is one commercial producer/provider selling goods or providing services to several consumers (like a hotel chain and its guests), or business-to-business (“B2B”) platform, where companies sell goods to secondary vendors who sell the goods directly to the end consumer.<sup>60</sup> Such companies can be easily regulated because they are the initial and/or sole producers of the product or service. Therefore, a regulation that targets the producer/provider will be effective because the producer/provider is the company, which has complete control

<sup>55</sup> Cheng, *supra* note 30, at 8.

<sup>56</sup> *Id.* at 2.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> James Corbett, *The Peer-to-Peer Economy—A Turning Point in Human History*, WALDEN LABS SOLUTIONS IN SELF-RELIANCE (Apr. 8, 2015), <http://waldenlabs.com/peer-to-peer-economy/> [<http://perma.cc/82UK-X7J4>].

<sup>60</sup> Cheng, *supra* note 30, at 9.

over the product/service. For instance, if a hotel (provider) conducts business in a way that generates a nuisance to nearby landowners or disrupts a city's rental housing market, the *hotel* will be the target of any necessary regulation. The hotel will then comply with the regulation because, as the producer *and* the commercial establishment, its infractions will be visible, reportable, and therefore punishable.

Companies that utilize P2P platforms, however, decentralize control over their goods and services, and move commercial activity into residential homes.<sup>61</sup> The company provides the general rules for users, but it is the *user* that provides the actual services to consumers, and does so from the privacy of the user's own dwelling.<sup>62</sup> In that sense, companies such as Airbnb that employ P2P platforms are not the providers of the services rendered on its website. Users are not employees or agents of the company, but rather are business partners or "micro-entrepreneurs" making independent business decisions with little influence from the company facilitating the transaction.<sup>63</sup> Therefore, when regulators seek to impose regulations on home-sharing using traditional methods that target the producer/provider, the regulations do not target a company like Airbnb, but rather target the *users* of the website, as they are the actual providers of the service. However, because the users are providing services from their homes, their infractions are far less visible than those of a commercial establishment, and thus, regulations that target the users of home-sharing websites are largely ineffective.

Currently, the most common forms of home-sharing regulations are zoning codes, ordinances, and Homeowner Associations' Covenants, Conditions, and Restrictions ("CC&Rs"). Regardless of whether these regulations existed before the advent of home-sharing websites or were enacted as a response, they all suffer from the same fatal flaw: they target the user of the website and not the website itself. The following hypothetical sheds light on the problem.

Assume Louis Landowner discovers that people in his city are making great money by listing their spare rooms on Airbnb.com. Landowner decides to investigate, so logs onto Airbnb.com and creates a profile. Instantly he is presented with a geographically tailored statistic of the average revenue other users in his area are generating monthly by listing their

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<sup>61</sup> *Id.* at 8.

<sup>62</sup> *Id.* at 9.

<sup>63</sup> *Id.*

properties on Airbnb.com. Seeing a lucrative opportunity, Landowner lists a spare bedroom in his house on Airbnb.com. He heeds the admonition on Airbnb's website to check his local laws and regulations and discovers that his city (like many) has an ordinance prohibiting rentals for less than thirty days in residential areas.

Unless Landowner is extremely scrupulous and willing to police himself, the ordinance will have no deterring effect standing alone. Moreover, even if Landowner is afraid of violating prohibitive zoning ordinances, if he types his own region and arbitrary dates into Airbnb's search engine, a map will appear, showing all the listings available in his area for those dates and their prices. Thus Landowner will see that no one is deterred by the ordinance, but rather people are generating revenue by violating an ordinance that no one is enforcing. Because Landowner is now incentivized *not* to self-police, the prohibitive regulation is ineffective to prevent Landowner from engaging in short-term renting.

Host-based regulations fail not only because there is a lack of incentive for the host to self-police, but also because home-sharing is hard to detect, making whistleblowing nearly impossible. Returning to the hypothetical, suppose Landowner has listed a spare bedroom in his home on Airbnb.com for a reasonable price. Landowner receives a "request"<sup>64</sup> from Gary Guest to rent his spare room. Landowner accepts the request and a pleasant rental experience follows. Of course, there is no alarm sounding informing city officials that Landowner is engaging in a prohibited land use. If no one witnesses and reports the activity to the city, there cannot even be an attempt at enforcing the ordinance. But even assuming a neighbor witnesses guests coming and going from Landowner's home, there is little likelihood that such activity would be reported. To a neighbor, the individual coming and going could just as likely be a visiting friend or family member as an Airbnb guest, so a neighbor is unlikely to report a fellow landowner unless there are other indications of home-sharing occurring.

Furthermore, the inability of city officials to investigate alleged home-sharers, even once home-sharing has been reported, further proves that whistle blowing is an ineffective means of regulating home-sharing. Continuing the hypothetical, assume

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<sup>64</sup> When an Airbnb guest wants to stay at a listing, they select the listing and click a box entitled "request." Airbnb's server sends a notification to the owner with the option to accept or reject the potential guest. *See generally* AIRBNB, [www.airbnb.com](http://www.airbnb.com) [<http://perma.cc/7SKN-YU3X>].



Nathan Neighbor, who lives across the street from Landowner, somehow learns that Guest is actually a short-term renter from Airbnb.com. He calls the local officials and states that he believes Landowner is engaged in a prohibited land use—short-term renting. A city official arrives, knocks on Landowner’s door, and asks Landowner if he is renting his room short-term to Guest. Landowner says “no.” Absent any additional evidence that Landowner is renting out his room short-term on Airbnb.com, this is likely the end of the investigation.

For many municipalities and neighborhoods across the United States, this hypothetical is not far from what actually occurs when anti-home-sharing residents attempt to blow the whistle on their neighbors. In Los Angeles for instance, short-term rentals violate zoning ordinances and are generally subject to fines if discovered,<sup>65</sup> yet just as in the above-hypothetical, enforcement is scarcely called upon and largely ineffective when it is.<sup>66</sup> One spokesman from the Building Department of Los Angeles stated that “it is extremely difficult to prove someone is illegally renting out a home.”<sup>67</sup> Upon being notified, a building department official could knock on the door of the alleged short-term rental location and ask if the owner is renting short-term, but if the owner denies it, that is the end of the investigation.<sup>68</sup> To pursue the matter further, someone from the Building Department would need to solicit a search warrant from a judge to investigate for “serious violations [of a zoning ordinance] that threaten life, limb or property.”<sup>69</sup> The unlikelihood of seeking and obtaining such a warrant for every alleged short-term rental is obvious, and considering the fact that thousands of L.A. residents still list their units on Airbnb today, it appears home-sharers are aware of the unlikelihood that they will be discovered and fined.<sup>70</sup> In sum, because home-sharing is popular, profitable, and difficult to prove, zoning regulations that target users and rely on self-policing and whistleblowing are ineffective to actually regulate home-sharing.

Preexisting user-targeting regulations such as zoning codes are not the only regulations that fail to effectuate meaningful

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<sup>65</sup> Deputy Director of Planning Alan Bell, *Short Term Rentals*, EXECUTIVE OFFICES L.A. DEP’T CITY PLAN. (Mar. 19, 2014), [http://cityplanning.lacity.org/code\\_studies/misc/shortterm rentals.pdf](http://cityplanning.lacity.org/code_studies/misc/shortterm%20rentals.pdf) [<http://perma.cc/2PNN-RLNK>].

<sup>66</sup> Emily Alpert Reyes, *Los Angeles Gives Hosts, Neighbors Mixed Signals on Short-term Rentals*, L.A. TIMES (Feb. 7, 2015, 10:00 AM), <http://www.latimes.com/local/california/la-me-adv-illegal-rentals-20150208-story.html#page=1> [<http://perma.cc/3BZ8-6NA5>].

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Samaan, *supra* note 43.

regulation of home-sharing. On the contrary, San Francisco has shown that even legislation specifically crafted to regulate home-sharing also fails.<sup>71</sup> Like Los Angeles, San Francisco has experienced a substantial shrinkage of its rental housing market as a result of home-sharing.<sup>72</sup> Perhaps since San Francisco is “ground-zero” for home-sharing (as it is the birthplace of Airbnb as well as the location of its headquarters),<sup>73</sup> it is one of the first cities to pass legislation specifically to address the effects of home-sharing on the rental housing market.

In October 2014, San Francisco’s Board of Supervisors approved, and the Mayor signed into law, a bill aimed at regulating home-sharing within the city, commonly referred to as the “Airbnb Law.”<sup>74</sup> David Chiu, President of the Board, stated that the law is an attempt at “a balanced solution that protects housing from hotel conversion while allowing some flexibility for residents to help them afford to stay in their homes.”<sup>75</sup> In a nutshell, the Airbnb Law legalizes short-term rentals inasmuch as they were prohibited by the City’s former zoning code, with some caveats:<sup>76</sup> only primary residential units (units occupied by the permanent resident for at least 275 days out of the year) may be listed on home-sharing platforms as short-term rentals; listing a property for rent when the host is not present is limited to ninety days out of the year; and hosts are required to register with the city planning department and obtain a permit in

<sup>71</sup> See Jay Barmann, *Airbnb Law Impossible to Enforce, Says Agency Tasked with Enforcement*, SFIST (Mar. 23, 2015, 4:30 PM), [http://sfist.com/2015/03/23/airbnb\\_law\\_impossible\\_to\\_enforce\\_sa.php](http://sfist.com/2015/03/23/airbnb_law_impossible_to_enforce_sa.php) [<http://perma.cc/H82B-UF8Q>]; see also Matier & Ross, ‘No way of Enforcing’ Airbnb Law, S.F. Planning Memo Says, S.F. CHRON. (Mar. 22, 2015), <http://www.sfchronicle.com/bayarea/matier-ross/article/No-way-of-enforcing-Airbnb-law-S-F-planning-6151592.php> [<http://perma.cc/A5VD-ZWLY>].

<sup>72</sup> See Rachel Swan, *Protesters Accuse Airbnb of Desecrating San Francisco’s Neighborhoods*, S.F. WKLY. (Oct. 27, 2014, 11:25 AM), <http://www.sfweekly.com/thesnitch/2014/10/27/protesters-accuse-airbnb-of-killing-san-franciscos-neighborhoods> [<http://perma.cc/7R37-NGFE>]; see also Carolyn Said, *Window into Airbnb’s Hidden Impact on S.F.*, S.F. CHRON. (June 2014), <http://www.sfgate.com/business/item/Window-into-Airbnb-s-hidden-impact-on-S-F-30110.php> [<http://perma.cc/PAK2-LF9C>]; Dara Kerr, *Sen. Feinstein Urges San Francisco Not to Pass ‘Airbnb Law’*, CNET MAG. (Oct. 20, 2014, 7:28 PM), <http://www.cnet.com/news/sen-feinstein-urges-san-francisco-not-to-pass-airbnb-law/> [<http://perma.cc/9V83-JE8Z>].

<sup>73</sup> Lisa Davis, *To BnB – or Not?*, CAL. LAW. (Nov. 2014), [https://ww2.callawyer.com/Clstory.cfm?eid=937933&wteid=937933\\_To\\_BnB\\_-\\_or\\_Not?](https://ww2.callawyer.com/Clstory.cfm?eid=937933&wteid=937933_To_BnB_-_or_Not?) [<http://perma.cc/9APZ-VHR9>].

<sup>74</sup> Dara Kerr, *Sen. Feinstein Urges San Francisco Not To Pass ‘Airbnb Law’*, CNET MAG. (Oct. 20, 2014, 7:28 PM), <http://www.cnet.com/news/sen-feinstein-urges-san-francisco-not-to-pass-airbnb-law/> [<http://perma.cc/9V83-JE8Z>].

<sup>75</sup> Dara Kerr, *San Francisco Mayor Signs Law Making Airbnb Legal*, CNET MAG. (Oct. 28, 2014, 1:25 PM), <http://www.cnet.com/news/san-francisco-mayor-makes-airbnb-law-official/> [<http://perma.cc/574A-HHZU>].

<sup>76</sup> Stephen Fishman, *Overview of Airbnb Law in San Francisco*, NOLO, <http://www.nolo.com/legal-encyclopedia/overview-airbnb-law-san-francisco.html> [<http://perma.cc/5C9U-R9SV>].

exchange for a fifty-dollar fee every two years.<sup>77</sup> Additionally, the Airbnb Law requires that prospective hosts register their activity with the City's Planning Department.<sup>78</sup> While at first blush this legislation appears promising, upon closer inspection it bears the same fatal flaw as zoning ordinances that prohibit short-term rentals: it targets users and relies on self-policing and whistleblowing to be effective. Unsurprisingly then, since the Airbnb Law was enacted, San Francisco residents and city officials alike have described it as "a mess."<sup>79</sup>

Because the Airbnb Law relies on self-policing, it fails in the same fashion as the zoning ordinances that preceded it. For home-sharers, the registration process is so cumbersome that compliance is difficult and unappealing. The registration process mandates that every host interested in listing their property on a home-sharing website fill out an application; provide a number of documents as proof of permanent residency;<sup>80</sup> present a Business Registration Certificate to the planning department; present proof of liability insurance covering at least \$500,000; present a signed affidavit agreeing to abide by all conditions of the short-term residential rental ordinance; and last but not least, present and a fifty-dollar check made out to the San Francisco Planning Department.<sup>81</sup> Due to the sheer intensity of the registration process, the incentive to participate is low, and home-sharers are unlikely to police themselves into compliance. The fact that only about two percent of home-sharers have even attempted to comply with the new regulations suggests that this is true. As of March 2015, there were at least 6000 short-term rentals operating in San Francisco listed on various home-sharing websites (5000 of which were listed on Airbnb.com), and of those hosts, only 159 have applied for the mandatory registration.<sup>82</sup>

The Airbnb Law is further ineffective because, just like with ordinances, the entity in charge of enforcement, the San Francisco Planning Department, lacks the ability to effectively enforce the Law.<sup>83</sup> In order to enforce the Airbnb Law, the Planning Department would need some way to track and locate

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<sup>77</sup> *Id.*

<sup>78</sup> See generally *supra* Part I; Fishman *supra* note 76.

<sup>79</sup> Matier & Ross, *supra* note 71.

<sup>80</sup> Caleb Pershan, *Get Ready To Register Your Airbnb and Follow All the New Rules Starting Next Month*, SFIST (Jan. 19, 2015, 9:50 AM), [http://sfist.com/2015/01/19/get\\_ready\\_to\\_register\\_your\\_airbnb\\_w.php](http://sfist.com/2015/01/19/get_ready_to_register_your_airbnb_w.php) [<http://perma.cc/CX3P-Q8K6>].

<sup>81</sup> *Id.*

<sup>82</sup> Carolyn Said, *S.F. Airbnb Law off to Slow Start; Hosts Say It's Cumbersome*, SFGATE (Mar. 3, 2015, 1:52 PM), <http://www.sfgate.com/business/article/S-F-Airbnb-law-off-to-slow-start-hosts-say-6110902.php> [<http://perma.cc/KU38-RGCN>].

<sup>83</sup> Matier & Ross, *supra* note 71.

hosts that are noncompliant. But to do so it would need to be able to cross-reference its record of registered hosts with hosts on home-sharing websites to discover the identities and locations of non-register hosts. The only entity capable of accurately collecting and reviewing the names and locations of all hosts on its website are the home-sharing websites themselves, but for the time being, they do not cooperate with city officials.<sup>84</sup>

Additionally, the Planning Department claims it would need home-sharing companies to monitor their sites and actually prohibit users from accepting more than ninety days worth of guest requests for rentals in multi-dwelling buildings in San Francisco,<sup>85</sup> but home-sharing websites decline to do this as well. Given that the San Francisco Planning Department needs meaningful cooperation from home-sharing websites to effectively enforce the new Airbnb Law, without such cooperation, the law is just as impotent as the preexisting zoning code it was designed to replace.<sup>86</sup>

The problems of self-policing and whistleblowing that frustrate the effectiveness of city-enacted regulations also prevent regulation of home-sharing on a smaller scale. Homeowners Associations (“HOAs”), with few exceptions, are equally incapable of regulating home-sharing as municipalities because, just like municipalities, HOA regulations target users of home-sharing websites. As demonstrated above, when a regulation targets users, its success is tied to the users’ willingness to self-police or third parties’ ability to blow the whistle. While the smaller size of an HOA compared to a municipality can reduce some barriers to enforcement, for the most part, HOA regulations targeting home-sharing still fail.

When a landowner purchases property governed by an HOA, he agrees to abide by the CC&Rs. A common restriction in CC&Rs is a prohibition on short-term renting; thus most HOAs make it a finable offense for one of its members to rent space in their properties for less than thirty days. But still, the target of the regulation is the host, and just like zoning ordinances or specially crafted legislation, the regulation relies on self-policing and whistle-blowing. Accordingly, before any regulation can occur, a neighbor must report the offending property owner and an HOA official must actually investigate the claim. The size of neighborhoods compared to the size of cities gives HOAs an advantage in that the HOA has fewer properties to police than a

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2.

<sup>86</sup> *Id.*

municipality, but generally speaking, that advantage is still insufficient to overcome inherent problems with user-based regulations. However, a minority of HOAs have demonstrated that with the right infrastructure and extreme vigilance, they can overcome the barriers to whistleblowing and enforce their prohibitions on home-sharing to some degree. Take for example, the case of The Mark Condominium Association in downtown San Diego.<sup>87</sup>

Thomas Stevens lived in a condo in a high-rise run by The Mark Condominium Association in downtown San Diego.<sup>88</sup> At the time Stevens bought his condo, he agreed to the CC&Rs (as is always a condition of purchasing a dwelling controlled by an HOA).<sup>89</sup> The CC&Rs of the condominium prohibited rentals of less than 90 days,<sup>90</sup> yet Stevens, either in ignorance or disregard of the prohibition, decided to list his condo on a home-sharing website.<sup>91</sup> Stevens was eventually discovered by his HOA when one of his guests revealed to a receptionist at the building that she was a short-term renter.<sup>92</sup> The HOA then fined Stevens \$350.<sup>93</sup> Apparently this was but a slap on the wrist to Stevens, who reportedly pocketed \$2,500 from the week-long rental which resulted in the fine.<sup>94</sup> Perhaps Stevens continued to somehow remain ignorant of the specifics of the CC&Rs after his fine, or perhaps simple math (Stevens' large profit margin despite the fine) is a better explanation for why Stevens continued to list his condo on home-sharing websites. However, Stevens was eventually sued by The Mark.<sup>95</sup> Initially, Steven tried what many home-sharers are likely to do—he claimed his guests were friends or family members, but to no avail.<sup>96</sup> While the frequency of Stevens' rental activities were disputed in litigation, a Superior Court Judge ultimately found for The Mark, and concluded that Stevens was in breach of his contract (the CC&Rs) with The Mark.<sup>97</sup> The court awarded the condominium

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<sup>87</sup> Jonathan Horn, *Man Who Rented out Condo Fined \$106K*, U-T SAN DIEGO (Oct. 24, 2014, 4:55 PM), <http://www.utsandiego.com/news/2014/oct/24/airbnb-vrbo-mark-rent-steelers-gaslamp-condos/?#article-copy> [<http://perma.cc/G6P7-9GGC>].

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*; see also Ariel Bedell, *Short-Term Vacation Rentals and Homeowners Associations (HOAs)*, LOFTIN FIRM, P.C. (Nov. 3, 2014), <http://www.loftinfirm.com/blog/2014/11/short-term-vacation-rentals-and-homeowners-associations-hoas.shtml> [<http://perma.cc/C6BL-2Q49>].

<sup>96</sup> Horn, *supra* note 87.

<sup>97</sup> *Id.*

roughly \$16,000 in costs, and \$90,000 in attorneys' fees for breach of contract.<sup>98</sup> If the math was not simple before, it certainly is now: Stevens' home-sharing activities earned him a few thousand dollars, but in the end it cost him over a hundred thousand, and Stevens had to sell his condo to pay for the ordeal.<sup>99</sup>

While Stevens' story may be a cautionary tale for some home-sharers, it is unlikely to deter the majority of homeowners from home-sharing because there are two characteristics of The Mark that are unique to high-rise style HOAs that make enforcement of anti-home-sharing regulations possible. The first characteristic is the dense, vertical layout of a condominium style HOA. As one general manager of a high-rise condominium pointed out, "you're not going to keep anything secret in a vertical village."<sup>100</sup> First, management is likely to be working in the lobby for several hours a day and is likely to take notice of any unusual increase in new faces or non-residents coming and going with luggage. Second, the residents all use the same parking structure, elevators, hallways, lobby, and common-areas, making it much easier for whistleblowing neighbors to be aware of short-term guests coming and going than in typical low density residential areas.

The second characteristic unique to condominium-style HOAs is the apartment-like management system. Unlike typical HOAs, which are policed by a board of elected, volunteer homeowners, high-rise condominium HOAs like The Mark are policed by paid managerial staff.<sup>101</sup> Since they are paid to keep the condominium functioning smoothly for all members, condominium managers have the time and motivation to vigilantly watch for activities such as home-sharing that threaten the quiet enjoyment (and thereby the value) of the condos. A general manager of one condominium complex in downtown San Diego stated he "checks sites like Airbnb every two weeks to see if people are advertising their units," and checks those websites even more frequently during times of increased tourism in the city.<sup>102</sup> Unlike these downtown high-rise condominiums, most neighborhood HOAs are not patrolled by paid managerial staff, and thus they are unable to go to such lengths to investigate for home-sharing.

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*



While the HOA of a high-rise condominium complex may be in an advantageous position to weed out short-term rentals, they are the exception. Neither of the two characteristics that overcome enforcement difficulties are found in typical, sprawling, single-family-home style HOAs. Unlike The Mark and similarly situated HOAs, most HOAs are still barred from enforcing anti-home-sharing regulations by a lack of self-policing and whistleblowing.

Whether the regulation of home-sharing is citywide or neighborhood specific, if such a regulation targets hosts, it is unlikely to be effective. The majority of cities and HOAs do not have the resources or ability to monitor hosts regularly, and neither do neighbors. Because there is no enforcement, and the potential for revenue is great, users are not incentivized to self-police. Therefore, regulatory attempts thus far have resulted in little to no change in the home-sharing industry; the costs of the negative externalities are still fully borne by those outside of the industry. This epic failure of legislative regulation suggests that another cost-shifting tool is needed to address the negative externalities generated by the proliferation of home-sharing across the United States.

### III. USING NUISANCE LAW TO TARGET WEBSITES AND EFFECTIVELY REGULATE HOME-SHARING

As discussed above, home-sharing generates substantial negative externalities, the cost of which are currently borne by individuals and entities who do not participate in home-sharing. Meanwhile, the P2P nature of the home-sharing industry frustrates traditional methods of regulatory enforcement, making regulatory attempts to mitigate the negative impacts ineffective. But where regulations fail, the common law can succeed. Recent case law regarding digital P2P platforms shows that common law rules of fault-based liability can be used to hold the creators of P2P platforms liable for the damages caused by third parties using their platforms.<sup>103</sup> Thus the common law acts as a cost-shifting mechanism for negative externalities: when a company generates substantial negative externalities, if the company is found liable, it must pay the damages—i.e. the cost of the negative externalities. Furthermore, once liability has been established, the company will be compelled to implement new business methods that insulate the company from liability. In other words, the company will stop producing negative

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<sup>103</sup> See generally *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

externalities, or else it will pay the cost of them in court. Therefore, in the event that legislative action fails to regulate an industry, the common law can be used to shift the costs of the negative externalities caused by home-sharing away from the general public and onto the cost-generating industry.

The cases of *A&M Records, Inc. v. Napster, Inc.* and *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* provide the framework for applying rules of fault-based liability to digital P2P platforms. In 1999, Napster, Inc. created a P2P platform that allowed users to share music, and in 2001, Grokster, Ltd. created a P2P platform that allowed users to share music and movies.<sup>104</sup> The practices of music sharing and movie sharing caused a negative externality—wide-spread copyright infringement—and for a time the cost of the externality (lost profits) was borne by music and movie producers. However, once these companies were taken to court, the cost of copyright infringement was shifted from music and movie producers onto Napster and Grokster respectively.

In 1999, Shawn Fanning developed one of the first digital P2P platforms, Napster, Inc.—a file-sharing service that made it fast and simple for users to share music over the Internet.<sup>105</sup> With the help of a few programmers, Fanning launched his software and incorporated Napster, Inc.<sup>106</sup> Within months, user numbers skyrocketed, billions of songs were being shared, and Napster generated substantial revenue through venture capitalists' investments. Unfortunately for Napster, however, the negative externalities generated from music sharing were substantial enough to compel those affected by them to take action,<sup>107</sup> and less than a year after its creation Napster, Inc. was sued by the RIAA (Recording Industry Association of America) for copyright infringement.<sup>108</sup>

At the trial court level, Napster was enjoined from operating based on claims of copyright infringement.<sup>109</sup> Eventually appearing before the Ninth Circuit Court of Appeals,<sup>110</sup> Napster defended its liability by citing *Sony Corp. of America v. Universal City Studios, Inc.*, a case in which Sony was sued for its sale of

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<sup>104</sup> Richard Nieva, *Ashes to Ashes, Peer to Peer: An Oral History of Napster*, FORTUNE MAG. (Sept. 5, 2013, 9:00 AM), <http://fortune.com/2013/09/05/ashes-to-ashes-peer-to-peer-an-oral-history-of-napster/> [<http://perma.cc/8F5L-7L3E>]; see also *Grokster, Ltd.*, 545 U.S. at 919.

<sup>105</sup> Nieva, *supra* note 104.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

Videocassette Recorders (“VCRs”).<sup>111</sup> To give a brief history, when VCRs became available to the general public, several copyright owners of television programs sued Sony for copyright infringement, arguing that by distributing a product that allows consumers to record and re-watch television programs, Sony was contributorily infringing on their copyrights.<sup>112</sup> Simply put, the Supreme Court of the United States ruled that because the VCR was equally capable of being used by consumers for noninfringing purposes, sales of VCRs to the public did not constitute contributory infringement of copyrights.<sup>113</sup>

The Ninth Circuit distinguished Napster’s software from the VCR, pointing out the VCR “did not distribute taped television broadcasts,” but rather merely allowed users to watch them at a different time, whereas the technological process of Napster’s software actually involved duplicating and subsequently distributing copyrighted material to the general public.<sup>114</sup> The Ninth Circuit ultimately upheld a modified injunctive order and mandated Napster remove all infringing material from its servers.<sup>115</sup> By 2002, Napster ceased doing business as a music-sharing company,<sup>116</sup> however, the company since has been bought and now conducts legitimate business as Rhapsody. Thus in the end, the judicial system was able to shift the cost of the negative externalities caused by file-sharing back on the company that controlled the practice, and the company then found a business practice that eliminated those externalities.

Though Napster was the first company to use digital P2P platforms with disregard for the negative impacts on third parties, they were far from the last. Grokster, Ltd., emerged on the heels of Napster in 2001, and like Napster, Grokster used a P2P platform to enable users to exchange not only music, but movie files as well.<sup>117</sup> Grokster was nearly identical to Napster in purpose—allowing users to freely share movies and music files over the Internet—but Grokster employed an essential “technological tweak” that distinguished itself from the music-sharing pioneer from a liability perspective.<sup>118</sup> Napster’s

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<sup>111</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019 (9th Cir. 2001).

<sup>112</sup> See generally *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>113</sup> *Id.* at 455.

<sup>114</sup> See *Napster, Inc.*, 239 F.3d at 1010.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> David McGuire, *At a Glance: MGM v. Grokster*, WASH. POST (June 27, 2005, 12:37 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/03/AR2005050301028.html> [<http://perma.cc/AYH6-TPAN>]; see also *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923 (2005).

<sup>118</sup> McGuire, *supra* note 117.

software allowed users to search through each other's computers and share copyrighted music with one another, but in the process, each music file shared would pass through Napster's servers electronically. In the eyes of the Ninth Circuit, this gave Napster a degree of control over copyrighted material after it was sent from a sender and before it arrived on the receiver's computer. This control was a significant factor in finding Napster liable for contributory copyright infringement.<sup>119</sup> However, Grokster's software "abandoned centralized servers, allowing users to connect directly with each other."<sup>120</sup> So unlike Napster, Grokster maintained no control over the files being sent using its software and therefore believed it could not be viewed as the distributor of copyrighted material and would not be held liable for copyright infringement as Napster was.

This belief was in fact shared by the District Court for the Central District of California when Grokster was eventually sued by a number of copyright holders claiming that Grokster "knowingly and intentionally distributed their software to enable users to reproduce and distribute the copyrighted works."<sup>121</sup> The District Court held that since Grokster retained no control over the activities of its users, and because the file-sharing software could be used for noninfringing purposes, it was protected from liability based on the Supreme Court's ruling in the *Sony* case.<sup>122</sup>

The case was ultimately appealed to the United States Supreme Court, which granted certiorari and reversed the rulings of the District Court and Court of Appeals, finding Grokster liable for contributory copyright infringement.<sup>123</sup> One of the many factors that led the Court to its decision included the fact that Metro-Goldwyn-Mayer ("MGM") had "commissioned a statistician to conduct a systematic search [using Grokster's software], and his study showed that nearly 90% of the files available for download on [Grokster's network] were copyrighted works."<sup>124</sup> Additionally, Grokster conceded its awareness that users typically employed its software primarily to download copyrighted files, since MGM had previously notified Grokster of roughly eight million copyrighted files that could be obtained using its software.<sup>125</sup> Discovery also showed that Grokster adamantly promoted and marketed itself as software that

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119 *Id.*

120 *Id.*

121 *See Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 921.

122 McGuire, *supra* note 117.

123 *See Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 919.

124 *Id.* at 922.

125 *Id.* at 923.

enables users to download copyrighted works, and Grokster made no effort to filter copyrighted material from the network or otherwise prohibit the sharing of copyrighted files.<sup>126</sup> The Court found that overall, the facts indicated that Grokster was not a mere passive creator of a digital P2P platform that allowed for possible infringement, but rather, it had “clearly voiced the objective that recipients use it to download copyrighted works.”<sup>127</sup>

Despite these findings, Grokster attempted to argue that “because it was the users themselves who searched for, retrieved, and stored the infringing files,” Grokster was like Sony and could not be said to have materially contributed to its user’s copyright infringement.<sup>128</sup> The Court disagreed, stating that the lower courts misinterpreted the *Sony* rule to mean “that whenever a product is capable of substantial lawful use, the producer can never be held contributorily liable for third parties’ infringing use of it.”<sup>129</sup> Rather, the Court clarified that “nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence, and the case was never meant to foreclose rules of fault-based liability derived from the common law.”<sup>130</sup> Ultimately, because Grokster “showed itself to be aiming to satisfy a known source of demand for copyright infringement,” Grokster never “attempted to develop filter tools or other mechanisms to diminish the infringing activity,” and “the commercial sense” of Grokster’s enterprise turned on high-volume infringing use, the Court could infer Grokster’s intent to induce and encourage its user to directly infringe on the plaintiff’s copyrights, and concluded by stating that Grokster’s “unlawful objective [was] unmistakable.”<sup>131</sup>

The Supreme Court’s decision in *Metro-Goldwyn-Mayer* can be applied to home-sharing to the extent that it provides a frame-work for analyzing the liability of P2P platform creators. Although *Metro-Goldwyn-Mayer* revolved around a copyright dispute, the Supreme Court’s decision was based on “rules of fault-based liability derived from the common law” that go beyond copyright law.<sup>132</sup> Thus, through *Metro-Goldwyn-Mayer*, the Supreme Court iterated a general rule (“the MGM rule”) regarding P2P networks: when a cause of action can establish third-party liability, the fact that a P2P platform is capable of

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<sup>126</sup> *Id.* at 926.

<sup>127</sup> *Id.* at 924.

<sup>128</sup> *Id.* at 928.

<sup>129</sup> *Id.* at 934.

<sup>130</sup> *Id.* at 934–35.

<sup>131</sup> *Id.* at 939–40.

<sup>132</sup> *Id.* at 934–35.

lawful use, standing alone, will not shield the creator of the platform from liability. If the P2P platform's primary intent is to facilitate unlawful activity, the party who creates and has the power to regulate the platform can be held liable based on a common law cause of action for the damages caused by third-party use of the platform. Since home-sharing websites are similar to Grokster in that they create and have the power to regulate their P2P networks, the rule from Grokster can be applied to analyze whether home-sharing websites can be liable for the negative externalities caused by third-parties activities on their websites.

By combining the MGM rule with nuisance law, home-sharing websites can conceivably be held liable for damages caused by the unlawful activity of third parties using their platforms. Like the common law cause of action for contributory copyright infringement, the common law cause of action for private nuisance allows a plaintiff to hold a defendant liable for the unlawful acts of third parties. Before *Metro-Goldwyn-Mayer*, a home-sharing website may have been able to claim that because its P2P platform is equally capable of lawful use, it could not be liable for a claim of private nuisance. However, after *Metro-Goldwyn-Mayer*, the fact that a P2P platform is capable of lawful use is not a bar to a plaintiff's recovery from a defendant for third-party torts, when the action is based on a common law cause of action. If a plaintiff can show that the primary intent of a home-sharing P2P platform is to facilitate unlawful home-sharing, the home-sharing website itself could be held liable for the damages caused by the unlawful home-sharing of third-parties.

As stated by the Supreme Court of California, liability for private nuisance arises when a plaintiff can establish "interference with the plaintiff's use and enjoyment" of their property.<sup>133</sup> And while the law recognizes that "[l]ife in organized society . . . involves an unavoidable clash of individual interests," the law will also recognize "liability for damages . . . in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances."<sup>134</sup> Furthermore, the Restatement of Torts, Second, provides that "the fact that other persons contributes to the nuisance is not a bar to the defendant's liability,"<sup>135</sup> and "one is subject to liability for a nuisance caused by an activity, not only when he carries on the

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<sup>133</sup> *San Diego Gas & Electric Co. v. Superior Court*, 920 P.2d 669, 696 (Cal. 1996).

<sup>134</sup> *Id.*

<sup>135</sup> RESTATEMENT (SECOND) OF TORTS § 840(e) (AM. LAW INST. 2006).



activity but also when he participates to a substantial extent in carrying it on.”<sup>136</sup>

Given that courts across the U.S. have enunciated the well-established tenet of private nuisance law, which states that a defendant can be held liable for contributing to the nuisance, assisting in the creation of nuisance,<sup>137</sup> controlling that which creates the nuisance,<sup>138</sup> participating in the nuisance,<sup>139</sup> and even *instructing* others to create a nuisance,<sup>140</sup> it cannot be gainsaid that nuisance law allows for a plaintiff to recover from a defendant for the tortious actions of third-parties—much like the laws of copyright expounded upon by the Supreme Court in *Metro-Goldwyn-Mayer*. Accordingly, if a plaintiff can establish all of the elements of private nuisance, under the MGM rule, that plaintiff may be able to not only bring a cause of action against a home-sharing company for private nuisance, but actually recover damages for the nuisances caused by third-parties—the users.

To establish a *prima facie* case for private nuisance, a plaintiff must establish: (1) the defendant committed an act;<sup>141</sup> (2) the act was a substantial invasion of the plaintiff’s interest in the private use or enjoyment of his land;<sup>142</sup> and (3) the invasion was unreasonable under the circumstances of the particular case.<sup>143</sup> Analyzing each of these elements in turn reveals that if a class of landowners become so inclined—conceivably motivated by the perpetual nuisances of short-term rentals in their neighborhoods—they could establish a *prima facie* showing of private nuisance against a home-sharing website like Airbnb.com.

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<sup>136</sup> *Id.* § 834; *see also* *Cty. of Santa Clara v. Atlantic Richfield Co.*, 40 Cal. Rptr. 3d 313, 325 (Cal. Ct. App. 2006) (stating “liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant *created or assisted in the creation of the nuisance*”) (quoting *City of Modesto Redevelopment Agency v. Superior Court*, 13 Cal. Rptr. 3d 865, 872 (Cal. Ct. App. 2004), as modified on denial of reh’g (June 28, 2004)).

<sup>137</sup> *Cty. of Santa Clara*, 40 Cal. Rptr. 3d at 325; *Shurpin v. Elmhirst*, 195 Cal. Rptr. 737, 740–41 (Cal. Ct. App. 1983).

<sup>138</sup> *City of Greenwood v. Martin Marietta Materials, Inc.*, 299 S.W.3d 606, 621 (Mo. Ct. App. 2009); *Rosenfeld v. Thoele*, 28 S.W.3d 446, 452 (Mo. Ct. App. 2000).

<sup>139</sup> *Abbatiello v. Monsanto Co.*, 522 F. Supp.2d 524, 541 (S.D.N.Y. 2007); *see also* *Penn Cent. Transp. Co. v. Singer Warehouse & Trucking Corp.*, 447 N.Y.S.2d 265, 266 (N.Y. App. Div. 1982).

<sup>140</sup> *California Dept. of Toxic Substances Control v. Payless Cleaners, College Cleaners*, 368 F.Supp 2d. 1069, 1081 (E.D. Cal. 2005) (stating “[n]uisance liability also extends to defendants who create ‘a system that causes hazardous wastes to be disposed of improperly, or who instruct users’ to do so”) (citing *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.*, 271 Cal. Rptr. 596 (Cal. Ct. App. 1990)).

<sup>141</sup> RESTATEMENT (SECOND) OF TORTS § 824.

<sup>142</sup> *San Diego Gas & Electric Co. v. Superior Court*, 920 P.2d 669, 696 (Cal. 1996); RESTATEMENT (SECOND) OF TORTS § 822.

<sup>143</sup> *San Diego Gas & Electric Co.*, 920 P.2d at 696; RESTATEMENT (SECOND) OF TORTS § 822 comment (c).

First, the class could assert that Airbnb participated to a substantial extent in the act of home-sharing by creating a P2P platform that instructs and allows third-parties (users) to list their properties for rent short term. While the act of unlawful home-sharing is directly done by the third-party that lists their property for rent on Airbnb.com, as stated above, the laws of private nuisance state that one who substantially contributes to an unreasonable invasion can also be held liable. Thus, the fact that Airbnb.com is not the party listing the property for rent unlawfully would not defeat the assertion that Airbnb.com has committed an act for the purposes of making a prima facie showing of private nuisance.

Second, the class could establish that Airbnb's act of instructing and allowing users to create short-term rentals was a substantial invasion of their respective interests in the private use and enjoyment of land by pointing to the negative externalities caused by home-sharing on residential neighborhoods. For instance, if the plaintiff class included residents of Silver Lake, Los Angeles, the class could point to the increased traffic, noise, transients, and subsequent effects on property values of the neighborhood, as facts sufficient to establish that, by enabling unlawful home-sharing, Airbnb has substantially invaded their interest in the private use and enjoyment of their land.

The last hurdle the plaintiff-class would have to leap over would be the establishment of Airbnb's invasion of their interests as unreasonable.<sup>144</sup> When determining whether an invasion of an interest is unreasonable, courts consider "whether the gravity of the harm outweighs the social utility of the defendant's conduct."<sup>145</sup> As is apparent from the language, this test is a fact-based inquiry, and in general, is "to be determined by the trier of fact in each case."<sup>146</sup> Conceivably then, a class of landowners could succeed in establishing Airbnb's invasion as unreasonable by making an offer of proof as to the aggregate monetary diminishment of properties owned by members of the class as a result of home-sharing facilitated by Airbnb, and by offering objective, fact-based reports that show the negative impact of unregulated home-sharing on the cost of living in dense areas. The diminishment of property values would speak to the gravity of harm caused by Airbnb, while the reports of Airbnb's negative impact on cost of living in dense areas would point out a lack of social utility in Airbnb's actions.

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<sup>144</sup> *San Diego Gas & Electric Co.*, 920 P.2d at 696.

<sup>145</sup> *Id.* at 697.

<sup>146</sup> *Id.*

Because the common-law tort of nuisance allows for certain contributors to the nuisance to be held liable for the unreasonable invasions of third-parties, if a plaintiff class is one day successful in pleading all the elements of private nuisance, the plaintiff class could then argue that the MGM rule should be applied, for just like Napster and Grokster, Airbnb is the creator of a P2P network that results in tortious action. Accordingly, a court will then be able to consider whether the same factors of fault-based liability that led to Grokster being held liable in *Metro-Goldwyn-Mayer* are present in home-sharing companies like Airbnb.

Under the MGM rule in *Metro-Goldwyn-Mayer*, the Court concluded that Grokster could be held liable for torts of third-parties using its platform because its primary intent was to facilitate unlawful activity. The Court reached this conclusion by finding that three factors were present: (1) Grokster was aiming to satisfy a demand for unlawful activity (copyright infringement); (2) Grokster did not attempt to reduce the amount of unlawful activity that took place in its network; and (3) the more activity that took place on Grokster's network, the more profitable the company became, and most of the activity was unlawful. Thus if the same three factors can be proven of a home-sharing website such as Airbnb, like Grokster, that home-sharing website could be held liable for the torts of third-parties using its platform.

To continue to use Airbnb as an example, a plaintiff class of landowners could make a strong argument that the second two factors that gave rise to the fault-based liability of Grokster's P2P network under the MGM rule are present in Airbnb's P2P network as well. First, Airbnb does not attempt to reduce the amount of unlawful activity taking place on its network. Airbnb knows or has reason to know that home-sharing is prohibited in several areas, but yet Airbnb makes no substantial effort to limit its potential to be used by people living in those areas. For example, if Airbnb so desired, it could prohibit users from posting a short-term rental located in places like The Mark Condominiums, or prohibit users from listing properties in violation of San Francisco's Airbnb Law, but it does not. Thus, by continuing to make its platform available to all landowners everywhere, without limitation, Airbnb is declining to reduce the amount of unlawful activity taking place on its network.

It could be argued that because Airbnb has content on its website encouraging users to consult their leases, HOAs, and local regulatory agencies, it does in fact attempt to limit the amount of unlawful activity taking place on its website. However, the content can only be found by clicking on a small link titled

“FAQs for Housing” at the very bottom of Airbnb’s webpage, while the words “List Your Property” appear in large, colorful font in the center of the page.<sup>147</sup> Furthermore, at no point in the listing process is the user re-directed to the page with the content that encourages hosts to check with the various regulatory entities.<sup>148</sup> In light of these circumstances, the fact that Airbnb warns users to check with local regulations may carry little weight. Therefore, a class would most likely still be able to establish that Airbnb does not limit the amount of unlawful activity on its website, despite the fact that at some point it encourages users to check local regulations.

Second, a plaintiff class could assert that, like *Grokster*, the more activity that takes place on Airbnb’s network, the more profitable it becomes, since Airbnb takes a commission from every transaction occurring on its website. Furthermore, after propounding extensive discovery, the class would also likely be able to assert that the majority of short-term listings on Airbnb’s website are unlawful in one way or another (violative of city ordinance, HOA regulation, lease agreement, etc.), for as discussed *supra*, there were nearly 5000 unlawful units listed on Airbnb in March 2015 in San Francisco alone.<sup>149</sup> Indeed, the plaintiffs in *Metro-Goldwyn-Mayer*, were able to establish the majority of the activity taking place on *Grokster*’s network was illegal by hiring a statistician to determine the percentage of file downloads on *Grokster*’s network that were copyrighted files. Perhaps the future class could even hire the same statistician. Thus, with the help of a detailed investigation, a plaintiff asserting a claim of private nuisance could establish that, like *Grokster*, the more activity that occurs on Airbnb’s network, the more profitable it becomes, and most of the activity is unlawful.

The biggest challenge for a class of landowners using the MGM rule to assert a claim of private nuisance against a home-sharing company like Airbnb would be to establish that, like *Grokster*, Airbnb is aiming to satisfy a demand for unlawful activity. Though not impossible, the success of that argument would depend on whether the class can establish that despite Airbnb’s efforts to encourage users to check with local laws and regulations, Airbnb is still encouraging users in restricted areas to list their properties for rent on Airbnb.com. The class may be able to succeed if it can show that Airbnb still targets restricted home-owners through its marketing campaigns. Accordingly, if a

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<sup>147</sup> See generally AIRBNB, *supra* note 64.

<sup>148</sup> *Id.*

<sup>149</sup> Said, *supra* note 82.

plaintiff can show that Airbnb solicits and induces homeowners or lessees to violate regulations and list their properties on Airbnb.com, a plaintiff could establish that, like Grokster, Airbnb is aiming to satisfy a demand for unlawful activity.

In sum, because the common law tort of private nuisance can be used to hold a defendant liable for the torts of third-parties, using the MGM rule, a court could find Airbnb liable for private nuisance. Under the MGM rule, the mere fact that Airbnb can be used for lawful activity does not bar defendants from recovery. Airbnb created the platform, and has the power to regulate it. Thus if a court determines all the elements of private nuisance are met and the primary purpose of Airbnb's P2P network is to facilitate unlawful activity, a court could hold Airbnb liable for the damages caused by the users of its website.

### CONCLUSION

Home-sharing is a rapidly growing new industry that provides for utilization of an often unused resource (space), but the negative externalities that result are numerous and substantial. In communities where home-sharing is prevalent, landowners experience invasions of their property interests typically associated with commercial activities. Meanwhile, the cost of living for the city as a whole rises, as units of rental housing are converted into permanent short-term rentals, reducing the overall supply and driving the price of those remaining units upward. Because the costs of these externalities are currently borne by those outside the home-sharing industry there is a demand for regulation, but due to challenges presented by digital P2P platforms, regulatory methods both new and old that are designed to address such externalities fail to shift the costs of the negative externalities onto the home-sharing industry. However, where legislative regulations fail, the common law can succeed. Once aggregate damages reach a tipping point, a plaintiff class of landowners may bring a lawsuit for private nuisance against home-sharing companies themselves, and using the rule of P2P platform liability stated by the U.S. Supreme Court in *Metro-Goldwyn-Mayer*, that class may just prevail. If so, the defendant home-sharing website will be forced to account for the negative externalities caused by the industry, or cease to do business in the manner in which they currently operate. As such, the common law will have provided the mechanism for shifting the costs of home-sharing back to the industry.