Evaluating Section 230 Liability In The Sharing Economy

by Diego Focanti, Niall MacMenamin, Andrew Myers, Michael Williams, Haimin Zhang and Janos Zsiros
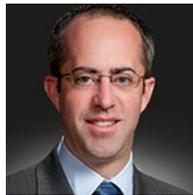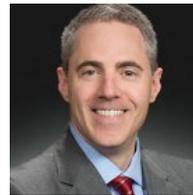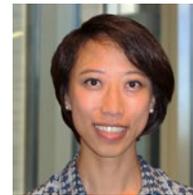
Diego Focanti   Niall MacMenamin   Andrew Myers   Michael Williams   Haimin Zhang   Janos Zsiros

In the last few years, the sharing economy has undergone rapid and profound growth, and with it has come a corresponding growth in legal challenges.[1] Courts have recently wrestled with matters arising from online activities on internet platforms such as Airbnb Inc., Uber Technologies Inc., Facebook Inc., Amazon.com Inc. and StubHub Inc.

These platforms have faced lawsuits related to their roles in allegedly wrongful conduct carried out by their users. Often at issue in these cases is a federal law intended to foster the internet's development by insulating internet platforms from liability for statements or information published by their users: Section 230 of the Communications Decency Act of 1996.

Often, the key question to be answered in these matters is whether an internet platform's policies and practices materially contribute to its users' allegedly wrongful acts and, if so, the extent to which the platform can be held liable for these wrongful acts. In this context, the application of modern marketing theory and economics can help the trier of fact understand the structure, key components and organization of the market. There are also a variety of analytical tools that can help establish whether or not there is a link between an internet platform's practices and policies on the one hand and its users' alleged wrongdoing on the other.

ANALYSIS GROUP
ECONOMIC, FINANCIAL and STRATEGY CONSULTANTS

LAW360

In this article, we briefly outline the limits of Section 230 immunity, discuss approaches to evaluating the potential causal relationship between an internet platform's policies and practices and user conduct and consider the relevance of these analyses on liability assessment. We also highlight recent court decisions related to internet platform policies and practices and their implications for future litigation.

The Limits of Section 230 Immunity

Since 1996, Section 230 of the CDA has provided a powerful defense against claims that an internet platform is liable for statements or information posted on the platform by its users.[2] A classic example of a Section 230 defense involves defamatory content posted to an online message board by a third-party user.[3] Section 230 prevents a court from holding the message board platform liable for defamation or from requiring the message board to remove the offensive content, because to do so would treat the message board as the publisher or speaker of the information provided by its user.

As platforms have evolved in terms of their business models, shifting from online directories or communication platforms to more complex and actively managed and curated advertising and retail channels, the application of Section 230 also has evolved. Although in the past courts typically granted Section 230 immunity in speech-based disputes, rulings over the past decade have increasingly shifted responsibility and enforcement to the platforms themselves.

One of the first decisions to reflect this evolution is Fair Housing Council v. Roommates.com LLC, from 2008.[4] There, the U.S. Court of Appeals for the Ninth Circuit held that Section 230 did not shield Roommates.com (a website that matched potential tenants with persons looking to rent out spare rooms) from alleged violations of fair housing laws. The court held that the site could be held liable for materially contributing to discrimination in violation of local and federal fair housing laws by requiring applicants and property owners to provide personal user data relating to gender and sexual orientation, which are protected classifications under applicable laws.[5]

Subsequently, courts in several other jurisdictions have adopted Roommates.com's "material contribution" test to restrict immunity under Section 230, allowing private or public plaintiffs to pursue liability claims for an online platform's own conduct.[6] For example, in Federal Trade Commission v. LeadClick Media LLC, the defendant, an internet marketing company, was found not to be entitled to Section 230 immunity for deceptive weight loss claims published online by a network affiliate because the company itself had directly participated in the scheme and knowingly controlled its affiliates' deceptive practices.[7]

Evaluating Liability in Internet Platform Litigation

The upshot of the previously mentioned cases is that, although Section 230 immunity was intended to shield online providers from liability based on publishing acts by third parties, it does not prohibit holding an internet platform liable for its own conduct.[8] Thus, the relevant question in many cases is whether a platform is simply a passive conduit between end users, who ultimately remain liable for any alleged wrongful conduct, or whether there is a causal link between the platform's practices and policies and the actions of its users.

The fields of consumer behavior and economics each provide potential frameworks for assessing the relationship between a platform's operations and participation agreements and its users' alleged wrongdoing. Below we discuss these frameworks, as well as two empirical approaches that can be used to assess any possible role that a platform may play in the context of alleged CDA violations in the sharing economy.

The Attention-Comprehension-Persuasion Model: A Consumer Behavior Framework

One applicable standard framework from marketing theory is known as the attention-comprehension-persuasion model.[9] According to this framework, consumers can be influenced by the information put forward by a seller or provider only if consumers are made aware of such information (i.e., attention). Consumers can then form an understanding of the information (i.e., comprehension). Finally, they may change their behaviors based on their attention to and comprehension of the information (i.e., persuasion). This simple framework can be used to analyze whether a company's policies and practices can have a material impact on the behavior of users on either side of the platform. (See Figure 1.)

Figure 1: A Consumer Behavior Framework

Attention Is the consumer aware of the information?	→	**Comprehension** How does the consumer interpret the information?	→	**Persuasion** How does the message affect the consumer's behavior?

To see how this model might be useful, consider that a common issue in much litigation is whether a service provider has disclosed its terms of service and the content of that disclosure. In some recent e-commerce litigation, the parties have engaged in disputes as to whether the service or platform has sufficiently disclosed its usage requirements and to what extent users explicitly agree to the platform's policies. For example, in NPS LLC v. StubHub Inc., which concerned unlawful ticket scalping, the defendant argued that it required its users to agree to, among other things, comply

with "all applicable local, state, federal and international laws, statutes and regulations regarding the use of the Site and the selling of tickets."[10]

Similarly, in Bay Parc Plaza Apartments LP v. Airbnb, Airbnb — defending itself against claims that it encouraged and intentionally brokered illegal short-term rentals of apartment homes — took the position that its users "have to accept the Airbnb terms of service, which state that they need to comply with third-party agreements."[11] The critical question is whether such disclosures are adequate in informing users about relevant laws and regulations, assuming disclosures are necessary.

The attention-comprehension-persuasion model focuses attention on what information is presented to whom, and how. For example, was relevant information known to the platform presented to the user? If so, was the information presented in a way that would create awareness in users? Can evidence show whether users in fact paid attention to that information? Does the behavior of the users reflect that they have been persuaded by this information?

Cost-Benefit Analysis: An Economic Framework

Because internet users, like other economic agents, evaluate the potential costs and benefits of their options before making decisions, cost-benefit analysis is another framework that can be used to analyze whether and how a platform's practices and policies materially contribute to users' incentives to ignore other contractual obligations. For example, such analyses may be useful in showing the extent to which platform listing and privacy procedures may reduce the risk of detection, thereby raising the benefits of violating existing obligations.

Typically, the main costs or risks of unlawful behavior are penalties for getting caught. Economic theory establishes that a lower probability of detection by an actor is associated with a higher frequency of illegal behavior.[12] This theory is corroborated by recent empirical studies that link anonymity to a higher likelihood of a wide variety of illegal or unethical behaviors, including cheating, lying, driving aggressively and cyberbullying.[13] These findings can be extrapolated to analyze the effect of an internet company's policies and practices on its users' behavior.

Privacy protections that "sharing economy" platforms provide to their users shield identifying information from numerous third parties. Such policies are often adopted to ensure the privacy of a seller or a buyer from other platform users, which likely facilitates greater platform participation and can help ensure safety and security of users. For example, Airbnb and Craigslist Inc. protect their users' exact locations by showing only a general area on a map for an apartment or home rental, which may be critical to protecting platform participants from violations of privacy and safety.

Although some level of privacy may be legitimate, however, such protections also provide platform users with a level of anonymity that can reduce the probability of users' actions being detected by regulators, the owners of misappropriated or stolen

property and other stakeholders. A reduced probability of detection leads to a reduced risk of penalties associated with the alleged wrongful behavior.

For example, StubHub allows users to "mask" ticket locations by listing a different row, up to five rows away, than that printed on the original ticket and the actual seat locations cannot be disclosed to buyers until they receive the ticket. This feature makes it more difficult for venue owners and other original ticket sellers to identify season ticket holders without assistance from the underlying platform administrator.

The cost-benefit model focuses attention on incentives and may be useful for demonstrating whether and how alternative policy conditions can be applied to ensure safety and privacy, while minimizing incentives for users to ignore other contractual obligations. For example, how does the masking of seat numbers or addresses alter usage and listing behavior? Can alternative privacy procedures be used to ensure both a viable platform and user compliance with standing obligations?

While the last two sections described the theoretical framework of such an analysis, the following section discusses the empirical and research methods experts can use to address these questions.

From Theory to Practice: Applied Economics and Survey Methodologies

Transaction data, internet traffic data and survey data are often useful sources of information for assessing the potential causal relationship between a platform's practices and procedures and its users' conduct. When analyzed correctly, such data can be used to answer the questions presented by the attention-comprehension-persuasion and cost-benefit frameworks. The breadth of data collected by many internet platforms is vast, not only as to volume but also as to the types and categories of data collected. These may include transactions, user demographics and internet traffic. Applied economists have developed a variety of methodologies to leverage these "big data" for descriptive statistics and statistical inference.[14]

One such technique evaluates changes in outcomes over time or across geographies by using changes in competition or regulations over time as a natural experiment to test outcomes under different conditions. For example, researchers evaluated whether Uber and Lyft Inc.'s exit from Austin in May 2016 affected other sharing economy platforms such as Airbnb, using the change in competitive conditions for ride-sharing applications to examine outcomes for other platforms. One finding was a reduced demand for Airbnb.[15]

Economists may also use multivariate regression techniques to understand differences in outcomes of certain groups of users. For example, economists have used data from Uber to estimate a 7% pay gap between male and female drivers.[16] Results from this study show that there may not be a link between the gender pay gap and Uber's policies; instead, the gender pay gap may be a byproduct of the behavior and preferences of drivers (e.g., male drivers are more experienced and can pick rides more strategically; male

drivers are more willing to drive in areas with more drinking establishments; and male drivers generally drive faster, which increases their hourly earnings).

Such techniques can also be used to assess whether and how differences across geographies or over time in a platform's disclosures to users, or its policies and practices, influence users' behaviors. If there are differences in corporate practices (or changes over time), one could test how the type and volume of listings or transactions are affected by these specific differences. Of course such techniques require careful consideration of both macro- and microeconomic factors, as well as other competitive shifts, to truly isolate the effects of shifts in platform outcomes.

In some cases, data from the ordinary course of business may not be adequate to address the issues at hand. This may arise because the data do not contain a key piece of information; because they are unavailable due to, for example, privacy concerns or because the platform made an intentional decision not to collect such data; or because there are too many confounding factors that may influence outcomes, making it impossible to isolate the question at issue.[17] In this context, it may be desirable for the researcher to produce the primary data, either by carrying out a consumer survey or by conducting a field experiment.

Surveys provide a systematic way to gather information and draw inferences about the relevant market participants and are widely used in judicial proceedings.[18] Surveys utilizing experimental designs can be particularly useful when attempting to isolate causal effects. For example, one could use a survey to identify whether or not an online ticket exchange platform's policy of masking listing locations (such as row and seat numbers on a concert ticket) has a material effect on users' choices to sell tickets where they are contractually forbidden from doing so (i.e., whether the opportunity to evade detection increases the likelihood of illegal selling on the platform).

Specifically, to isolate the effect of the specific at-issue policy, one can present two different groups of comparable potential users of the ticket exchange platform who are interested in selling tickets with different forms that only differ in the information about the policy at-issue. Figure 2 below presents such a hypothetical example: If one wanted to study the effect of the "Hide Seats?" option for listing seats with a ticket reseller, one could present one group with an "Add Ticket" screen that included a "Hide Seats?" option and a second group of respondents with an almost identical "Add Ticket" screen that lacked that option. One could then determine the rates at which respondents were willing to list their tickets.

Similar techniques also can be implemented in field experiments. For example, the online ticket exchange platform could create two distinct "Add Ticket" screens that would be randomly assigned to real-life potential ticket issuers. Actual listing rates between the two groups could be measured and compared. If conducted using academically rigorous techniques, both lab surveys and field experiments can be tailored to elicit answers to the specific questions at hand and provide reliable information on the relationship between corporate policies and practices and user decision-making.

Figure 2: Panel A-Treatment

Figure 2: Panel B-Control

Conclusion

Section 230 of the CDA is not a complete safety blanket for internet platforms in cases involving alleged misconduct of their users. When faced with a defense that the platform is merely passive, and the alleged harm is solely the result of publishing acts of the platform's users, it is imperative to determine whether the platform's policies and practices materially contribute to the users' alleged misconduct. In this setting, marketing and economic theories provide an array of theoretical and empirical tools to examine the evidence and assist the trier of fact in determining causal issues related to a platform's liability.

Niall MacMenamin is a vice president and Diego Focanti, Haimin Zhang and Janos Zsiros are associates at Analysis Group Inc.

Michael Williams is a partner and Andrew W. Myers is of counsel at Wheeler Trigg O'Donnell LLP.

Christopher Bosley, a litigation project specialist at Analysis Group, provided research assistance.

Disclosure: Niall MacMenamin, Diego Focanti, Haimin Zhang, Janos Zsiros and Christopher Bosley provided expert analysis for the plaintiffs, and Michael Williams and Andrew W. Myers are the plaintiffs' counsel on the Bay Parc v. Airbnb case mentioned above.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Endnotes

1   Sharing economy companies operate in categories such as media, short-term home/apartment rentals, ride sharing, task sharing, peer-to-peer lending, crowdsourcing, and reselling. They include, for example, Facebook, Google, YouTube, Airbnb, VRBO/HomeAway, Booking.com, Lyft, Uber, Etsy, eBay, Amazon Marketplace, Amazon Mechanical Turk, Craigslist, Lending Club, SoFi, Kickstarter, Taskrabbit, and StubHub.

2   The CDA states, in relevant part, that "no provider or user of interactive computer services shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

3   See, e.g., Zeran v. Am. Online, Inc. , 129 F.3d 327 (4th Cir. 1997) (holding that AOL was not liable for for defamatory material posted on an AOL message board by a third party).

4   Fair Housing Council v. Roommates.com , 521 F.3d 1157 (9th Cir. 2008).

5   Roommates.com, 521 F.3d at 1171.

6   See, e.g., Airbnb, Inc. v. City of Boston , 2019 U.S. Dist. LEXIS 74823 (D. Mass. May 3, 2019); HomeAway.com v. City of Santa Monica , 918 F.3d 676 (9th Cir. 2019); Bay Parc Plaza Apartments, LP v. Airbnb, Inc. , 2018 Fla. Cir. LEXIS 348 (Fla. Cir. Ct. July 11, 2018); Perkins v. LinkedIn Corp. , 53 F. Supp. 3d 1222 (N.D. Cal. 2014); Jones v. Dirty World

Entm't Recordings, LLC , 840 F. Supp. 2d 1008 (E.D. Ky. 2012); Fraley v. Facebook, Inc. , 830 F. Supp. 2d 785 (N.D. Cal. 2011); FTC v. Accusearch Inc. , 570 F.3d 1187 (10th Cir. 2009); NPS, LLC v. StubHub, Inc. , 2009 Mass. Super. LEXIS 97 (Mass. Sup. Ct. 2009). Even subsequent to Roommates.com, however, some courts have continued to rule that Section 230 immunity applies even where the plaintiff alleges that the platform materially contributed to users' tortious or illegal conduct. See, e.g., Pennie v. Twitter, Inc. , 281 F. Supp. 3d 874 (N.D. Cal. 2017); Kimzey v. Yelp! Inc. , 836 F.3d 1263 (9th Cir. 2016); Hill v. StubHub, Inc. , 727 S.E. 2d 550 (N.C. Ct. App. 2012); Doe v. MySpace, Inc. , 629 F. Supp. 2d 663 (E.D. Tex. 2009).

7   FTC v. LeadClick Media, LLC , 838 F.3d 158, 172 (2d Cir. 2016).

8   For the most recent federal circuit decisions, see Oberdorf v. Amazon.com Inc. , 930 F.3d 136 (3rd Cir. 2019) and HomeAway.com, Inc. v. City of Santa Monica , 918 F.3d 676 (9th Cir. 2019).

9   See Philip Kotler & Kevin Lane Keller, MARKETING MANAGEMENT, 173 (15th ed. 2016).

10 NPS, LLC v. StubHub, Inc. , 2009 Mass. Super. LEXIS 97 at *6 (Mass. Sup. Ct. 2009).

11 Joe Williams, "Florida trial tests Airbnb's protections under landmark 1996 tech law." Washington Examiner, Dec. 08, 2018, available at https://www.washingtonexaminer.com/business/florida-trial-tests-airbnbs-protec-tions-under-landmark-1996-tech-law; see also Dennis Schaal, "Airbnb and Major Landlord Settle Lawsuit Over Subletting Violations," Skift, Dec. 11, 2018, available at https://skift.com/2018/12/11/airbnb-and-miami-land-lord-settle-lawsuit-over-tenant-subletting-violations/.

12 See Gary S. Becker, "Crime and Punishment: An Economic Approach," Journal of Political Economy 76, no. 2 169–217 (1968) ("An increase in either [probability of conviction], or [punishment per offense] would reduce the utility expected from an offense and thus would tend to reduce the number of offenses").

13 See Catrine Jacobsen, Toke Reinholt Fosgaard, & David Pascual-Ezama, "Why Do We Lie? A Practical Guide to the Dishonesty Literature," Journal of Economic Surveys 32, no. 2 357–387 (2018); Patricia Ellison-Potter, Paul Bell, & Jerry Deffenbacher, "The Effects of Trait Driving Anger, Anonymity, and Aggressive Stimuli on Aggressive Driving Behavior," Journal of Applied Social Psychology 31, no. 2 431–443 (2001); Chen-Bo Zhong, Vanessa K. Bohns, & Francesca Gino, "Good Lamps Are the Best Police: Darkness Increases Dishonesty and Self-Interested Behavior," Psychological Science 21, no. 3 311–314 (2010); and Christopher P. Barlett, Douglas A. Gentile, and Chelsea Chew, "Predicting Cyberbullying From Anonymity," Psychology of Popular Media Culture 5, no. 2 171–180 (2016). See also Francesca Gino, Shahar Ayal, and Dan Ariely, "Self-serving altruism? The lure of unethical actions that benefit others," Journal of Economic Behavior & Organization 93 285–292 (2013) ("Recent research has found that when individuals have the opportunity to cheat when the probability of being caught and reputational costs are minimized, most people do cheat, but not as much as they could. They cheat enough to benefit financially, but not to the extent that they feel obligated to negatively revise their self-image").

14 See, e.g., Bruce D. Meyer, "Natural and Quasi-Experiments in Economics" (National Bureau of Economic Research, Technical Working Paper No. 170, 1994).

15 Shunyuan Zhang, Dokyun Lee, Param Vir Singh, & Tridas Mukhopadhyay, "Demand Interactions in Sharing Economies: Evidence from a Natural Experiment Involving Airbnb and Uber/Lyft," SSRN Electronic Journal (January 14, 2018), available at: https://ssrn.com/abstract=3124712 or http://dx.doi.org/10.2139/ssrn.3124712.

16 See Cody Cook, Rebecca Diamond, Jonathan Hall, John A. List, & Paul Oyer, "The Gender Earnings Gap in the Gig Economy: Evidence from over a Million Rideshare Drivers" (Stanford Graduate School of Business Working Paper No. 3637, June 7, 2018), available at: https://www.gsb.stanford.edu/faculty-research/working-papers/gen-der-earnings-gap-gig-economy-evidence-over-million-rideshare.

17 The Stored Communications Act ("SCA") governs voluntary and compelled disclosure of stored wire and electronic communications and transactional records by certain covered entities. In some respects, the SCA's prohibitions against disclosure of protected communications and records in discovery may be an equally high bar to litigants as Section 230 of the CDA. In re Subpoena Duces Tecum to AOL, LLC, 550 F. Supp. 2d 606 (E.D. Va. 2008).

18 Rebecca Kirk Fair & Laura O'Laughlin, "Ensuring Validity and Admissibility of Consumer Surveys," American Bar Association Consumer Litigation Committee Practice Points (March 31, 2017), available at: https://www.americanbar.org/groups/litigation/committees/consumer/practice/2017/ensuring-validity-and-admissibili-ty-of-consumer-surveys/; Shari Diamond "Reference Guide on Survey Research," Reference Manual on Scientific Evidence 364-365 (National Academies Press 3d Ed. 2011).