



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
 Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Law Will Not Help Airbnb Evade Rental Ordinances

By **Andrew Zacks** (May 9, 2019, 1:55 PM EDT)

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

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



Andrew Zacks

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

Communications Decency Act

The Communications Decency Act shields certain computer service providers from liability for publishing third-party content. Airbnb argues that the CDA shields it from liability because Airbnb is merely a platform for others to post content, but this ignores the breadth of services Airbnb provides — as well as the reality of how the ordinances work.

Airbnb's system is more than a blank slate for third parties to post on. Listings on the Airbnb platform are created in part by Airbnb: Airbnb sets format and content standards. Airbnb's smart pricing feature allows it to set prices, and its instant book feature enables guests to book properties without any involvement by the host. Airbnb also imposes numerous terms on listings, including cancellation policies and insurance requirements.

Because Airbnb itself creates and controls listing content, it is not truly third-party content. Therefore, Airbnb is not operating simply as a platform for others to post content — they are actively engaged in gathering, managing and facilitating sales — thus, Airbnb does not qualify to be protected by the CDA.

Moreover, the ordinances that Airbnb is litigating against do not proscribe, mandate or even discuss the content of the listings, but rather are focused on the business transactions element. On other words, the ordinances prohibit hosting platforms from accepting fees for processing illegal business transactions. This does not require Airbnb to review or moderate third-party content provided by hosts. Processing a booking is entirely distinct from posting a listing, and booking transactions are internal and nonpublic. In other words, the ordinances regulate business transactions — not content publication.

Airbnb also pushes back against any attempt for data transparency, including addresses for their listings, which would allow cities and states to ensure tax law is followed properly. But, this argument falls short of the law. The requirement to cross-reference a property listing against a city registry does not constitute publication of third-party content. A city's registry is not edited by Airbnb, nor is Airbnb required to edit a property listing to include information from the registry. Rather, certain booking transactions are authorized by the registry, and other transactions are illegal. The ordinances prohibit Airbnb from processing illegal transactions, and therefore data transparency is a critical element for any ordinance passed in an effort to properly oversee short-term rental business transactions.

Stored Communications Act, 18 U.S.C. §§2701 – 2702

The Stored Communications Act regulates electronic communications system providers' disclosure of customer information. It requires system providers to obtain subscribers' consent before disclosing their information to the government.

Again, recent ordinances passed by cities and states of which Airbnb is waging a legal challenge do require hosting platforms to periodically file reports regarding their short-term rental listings. Airbnb argues that some cities' ordinances violate the SCA because they require hosting platforms to obtain subscribers' consent and disclose subscribers' confidential information to government agencies.

Airbnb's arguments don't pass legal muster. Airbnb itself requires its customers to accept its privacy policy as a condition of service. The ordinances are no more coercive than Airbnb's own policy. Moreover, some of the ordinances require Airbnb to report information that is already accessible to the public or which can be derived from public information.

Importantly, Airbnb's own privacy policy already establishes effective consent to disclosure of customers' information to government agencies. Its mandatory privacy policy states: "Airbnb ... may disclose your information, including personal information, to courts, law enforcement or governmental authorities, or authorized third parties, if and to the extent we are required or permitted to do so by law or if such disclosure is reasonably necessary ... to comply with our legal obligations"

Airbnb has already established mandatory, effective consent to disclosure of customers' information to governmental entities. Airbnb cannot turn around at this point and object to disclosure requirements based on a lack of consent or based on consent being mandatory.

First Amendment

The First Amendment protects freedom of speech, including so-called "expressive" conduct. Despite this fact, Airbnb has cited the First Amendment in federal court, and claimed that these local ordinances place a "content-based" restriction that infringes on their right to protected commercial speech. It is settled law that the First Amendment does not prevent incidental burdens on speech when a law regulates commercial activity, and it certainly does not protect speech promoting and capitalizing on illegal transactions. When a commercial activity is illegal and a restriction on advertising is incidental to a valid regulation, there is no First Amendment protection.

The Ninth Circuit Court of Appeals has persuasively determined that processing a booking for financial gain is not expressive conduct that is protected by the First Amendment. The ordinances are valid regulations on non-expressive conduct — business transactions — rather than protected speech.

There is no content-based restriction. Rather, the ordinances specifically regulate unlawful booking transactions. The First Amendment does not protect this illegal activity.

Fourth Amendment

The Fourth Amendment's central command is that official searches and seizures be reasonable. Courts decide Fourth Amendment cases with a balancing test that weighs legitimate governmental interests. A governmental subpoena of corporate books or records need only have a limited scope, a relevant purpose and specificity.

In recent legal challenges, Airbnb has cited the Fourth Amendment claiming that these local ordinances authorize cities to administrative searches and require Airbnb to disclose private user information, violating hosts' privacy. The local and state ordinances in question do meet the Fourth Amendment's strictures, requiring only that hosting platforms periodically file a report with information regarding short-term rental listings. Airbnb does not have a reasonable expectation of privacy in this information because much of it is already public or can be derived from hosts' voluntary tax filings.

The requests are limited to the information necessary to identify illegal listings. Ordinances serve a relevant government interest in limiting the negative impacts of short-term rentals on the availability of permanent housing opportunities for cities' residents. The required information is specific and limited in scope to accomplish the legitimate purpose of identifying illegal short-term rental listings. With limited exceptions, this information is kept confidential by the government agencies.

Airbnb has challenged the ordinances on the basis that it should have an opportunity for precompliance judicial review before filing the reports, but even if it had a right to such review, the fact of the matter is that Airbnb is receiving extensive precompliance review via its various lawsuits.

While Airbnb has tried to argue similarities with the case of *City of Los Angeles, California v. Patel*,^[1] that case does not apply to the short-term rental ordinances. In *Patel*, a Los Angeles ordinance required hotel operators to keep records of their guests' information, as well as to produce those records for inspection by police officers on demand. The ordinance was struck down because of the risk it would be used by police "as a pretext to harass local hotel operators and their guests."

Unlike the ordinance in *Patel*, the short-term rental ordinances do not create that risk. There are no on-site police inspections, and these ordinances specifically limit the types of information government agencies can obtain from the hosting platforms, as well as how and when the information is disclosed.

Conclusion

As policymakers continue to grapple with the best legislative and regulatory framework to address the challenges raised by the growth of the short-term rental market in their communities, this article serves as a resource to tackle further legal challenges by Airbnb and other platforms. The precedent set by the recent ruling of the United States Court of Appeals for the Ninth Circuit denying Airbnb's legal challenge and upholding Santa Monica's stringent short-term rental ordinance is further confirmation that Airbnb's legal arguments will not hold up to careful scrutiny.


Airbnb has proved they are willing to continue its legal strategy as a ploy to intimidate city officials into allowing short-term rental laws in contravention of sound public policy, and force cities to the settlement table to water down existing ordinance. Given the recent federal court ruling upholding Santa Monica's strict short-term rental ordinance exposing the deficiencies in Airbnb's legal arguments, cities and other localities facing similar challenges should remain steadfast.

The law is on their side.

Andrew M. Zacks is a managing shareholder at Zacks Freedman & Patterson PC.

Disclosure: Zacks co-wrote an amicus curiae brief in the Ninth Circuit Court of Appeals in the LA Park La Brea A LLC v. Airbnb case for the California Apartment Association and other interested parties. He has also handled many individual disputes between residential landlords and tenants over short-term rental activity. He is not involved in the Airbnb v. Santa Monica case.

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.

[1] *City of Los Angeles, California v. Patel* , 135 S. Ct. 2443 (2015)