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Disruptive Platforms

Author : Margot Kaminski

Date : July 19, 2017

Orly Lobel, *The Law of the Platform*, 101 **Minn. L. Rev.** 87 (2016), available at [SSRN](#).

Until recently, the law of the online platform involved intermediary liability for online content and safe harbors like [CDA §230](#) or [DMCA §512](#). The recent rise of online service platforms, a/k/a the “[Uberization of everything](#),” has challenged this model. What Orly Lobel calls the “platform economy”—which includes the delivery of services (see Task Rabbit), the sharing of assets (see Airbnb), and more—has led to new laws, doctrinal adjustments, and big questions. What happens when the internet meets the [localized, physical world](#)? Are these platforms newly disruptive, or old issues in new wrapping? And how do we best design regulations for technological change? *The Law of the Platform* will appeal to those looking for thoughtful discussion of these questions. It will also appeal, more practically, to those searching for an encyclopedic overview of the fast-developing law in this area, from permitting requirements to employment law to zoning.

Lobel argues that the platform economy represents the “third generation of the Internet”: built on online platforms, but affecting offline service markets. Unlike the first generation of the Web, which connected us to information through search engines, or the second generation, which disrupted publishing, news, music, and retail, the third generation is characterized by “transforming the service economy, allowing greater access to offline exchanges for lower prices.” The platforms do not themselves own the physical assets or hire the labor to which they provide access. Instead, they sell access and information—and desperately try to avoid labels like “employer” or “bank” that might lead to regulation. Lobel maps a number of these digital platforms to their physical world counterparts: Airbnb and VRBO to hotels; Parking Panda to parking sites; Uber and Lyft to taxis; and EatWith to restaurants.

Lobel’s take on these platforms is largely positive. She sees the platform economy as lowering transaction costs and leading to “the market... perfecting.” To share just several of the characteristics Lobel observes: the platform economy creates economies of scale, connecting individuals in huge marketplaces. It reduces waste, and allows the more efficient use of privately owned resources. It allows both supply and demand to be broken down into smaller parts, facilitating smaller exchanges. It allows hyper-customization—you can now rent a “non-smoking, pet-friendly, Kosher, and partially furnished apartment for three nights in a specific neighborhood.” The platform economy reduces intermediation, getting rid of the middleman and thereby lowering costs. And importantly to Lobel, the dynamic ratings that platforms provide can reduce search costs and monitoring costs by providing incentives for good behavior by participants. Coase explained that high transaction costs would in real life prevent many transactions from occurring, but according to Lobel, the logic, technology, and networks of trust that new platforms bring to bear can and do enable these previously lost transactions.

Lobel thus appears in many ways to be a platform optimist. There are indications, however, that such optimism might not be warranted. [Uber](#) lost \$2 billion in 2015 and \$2.8 billion in 2016, subsidizing both sides of transactions to hook drivers with bonuses and riders with cheaper rides. A [transportation industry analyst estimated](#) in November 2016 that Uber was covering 60 percent of the cost of each ride. The picture painted by these numbers does not suggest a company that is “[the concept of supply and demand embodied](#),” but rather a behemoth using significant venture capital resources to establish market dominance.

This brings us to the second half of Lobel’s article, on regulation. Lobel asks whether new platforms are successful “because they are introducing new business models... or because they seek regulatory avoidance and generate value from such avoidance.” Again, she seems to side with the platforms, characterizing them as both perfecting existing

markets (through competition) and creating new ones (through differentiation). VRBO, Airbnb, and Homeaway are not just substitutes for a hotel, but create a differentiated experience of adventuring at private homes. An Airbnb study in California found that fourteen percent of customers would not have visited San Francisco at all but for an Airbnb stay. And because the rentals are cheaper than hotels, people stay longer and spend more in the local economy. Lobel seems largely convinced that these platforms don't just lower costs in existing markets, but create new markets as well.

But the billion dollar question (or in Uber's case, [\\$68 billion](#)) is: are these platforms able to create these new markets because of innovation, or are they lowering costs by cleverly bypassing necessary regulatory regimes? What makes the platform economy legally disruptive is that these companies tend not to fit neatly into existing legal categories in regulated areas, like "employer" or "lender" or "bank." Whether this is because of the law's failure to keep pace with technological changes or these companies' deliberate strategies to evade high-cost regulatory compliance through "[sharewashing](#)" is debatable. Back in March, the New York Times [disclosed](#) that Uber deliberately tagged and evaded enforcement authorities in Portland, OR; Boston; Paris; Las Vegas; and more. The [DOJ is now investigating](#). But as Lobel points out, some attempts at regulation, like New York City's taxicab medallion system, seem clearly geared towards protecting incumbents and keeping new actors out.

The middle third of the article taxonomizes the differences between illegitimately protectionist regulation and legitimate regulatory goals and regimes. Lobel divides platform regulations into three categories: (1) permitting, licensing, and price controls; (2) taxation; and (3) broadly speaking, "regulations that are about fairness, externalities, and normative preferences." Lobel breezes through the tax issues, explaining that questions of collection are "largely technical" and platform providers should be responsible for tax collection for efficiency reasons. In contrast, Lobel characterizes regulations in the first category—permitting, occupational licensing, and price controls—as largely the result of industry capture, where incumbents extract rent at the expense of consumers and competitors (presumably, she's not a fan of the bar). She argues that we should more directly regulate towards the goals these systems are designed to get at—safety, professionalism, and other forms of consumer protection—rather than using *ex ante* systems that favor incumbents.

The hardest cases, Lobel argues, are those that revolve around issues of "public welfare in the platform," such as governing the characteristics and safety levels of particular neighborhoods (zoning) or protecting workers' rights (employment laws). Her nuanced analysis of zoning regulations calls for empirical evaluation of the safety impact of short-term housing on residential neighborhoods. Her discussion of employment law makes two important observations: one, that the rise of the contingent workforce is not a feature of platforms alone; and two, that the resulting employment law issues—whether an employee is a covered employee or independent contractor—also arise in cases having nothing to do with the platform economy (eg, FedEx [in the Ninth Circuit](#)).

In other words, the legal disruption in these areas may have as much to do with the law itself, with older categories that are now breaking down in a number of areas, as with particular disruptive features of the platform economy. Solving these problems requires balancing competing social values, such as fairness with freedom of contract. "The platform provides new opportunities to continue these debates, but it does not transform or transcend these hard choices in any meaningful way."

The last third of the article ventures into more dangerous territory. Lobel has previously done [important work](#) on the relationship between public regulation and private (or public-private) governance. She closes *The Law of the Platform* by returning to this topic. Where traditional regulation fails, Lobel argues, platforms themselves can through private "regulation" ensure consumer trust and a certain degree of consumer protection. Platforms do this by obtaining insurance, by voluntarily running background checks, and through rating and recording systems that track all transactions on a platform. It is this last form of governance that most excites Lobel, and most worries me.

"The confidence generated by state permitting, occupational licensing, and other regulatory requirements is substitutable with crowd confidence," Lobel claims. Consumer review systems, Lobel proposes, now serve as a type of

governance, forcing transparency better than a command-and-control public regulatory regime. “[W]atchdogging is crowdsourced,” she states. Constant data-gathering means prices will stay updated, and bad actors will quickly be uncovered, protecting consumers and ensuring their trust.

Unfortunately, Lobel does not discuss the downsides of ubiquitous data collection, from creating or exacerbating power disparities, to chilling positive behaviors in addition to negative behaviors, to the economic consequences of hacking. She does not address significant governance concerns—over transparency, discrimination, and self-serving behavior—that come from having this data housed [in private, not regulatory or public, hands](#). And she does not discuss the economic or normative costs of business models formed on [selling that privately gathered data back to government](#) for a range of purposes, from infrastructure improvement to government surveillance.

The article closes with a general paean to dynamic and experimental governance as a better approach than command-and-control rule-making and enforcement. Experimentation (for example, in different localities) and data-gathering in the name of anti-discrimination policies are all well and good, but again there are costs to a more universal shift to softer enforcement that Lobel does not address here. Companies are often inspired to self-regulate because of a background threat of harsher government enforcement. The risk in a larger move towards soft self-governance over government regulation in the area of technological development is that consumer concerns will take a decided backseat under that kind of a regime.

The Law of the Platform is rich, complicated, and raises many questions. Lobel does romanticize the platform, even as she acknowledges public welfare issues. She also romanticizes a lighter regulatory touch in the area of technological development, even while recognizing the legitimacy of a number of consumer concerns. But her discussions throughout of legal disruption and regulatory design make this a piece well worth reading for anyone following changes to technology and the law.

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