Spring 2016

Regulation of the Sharing Economy: Uber and Beyond

Jack Beermann
Boston Univeristy School of Law, beermann@bu.edu

Regulation of the Sharing Economy: Uber and Beyond

*Jack M. Beermann**

On January 8, 2016, the Section held a program entitled "Regulation of the Sharing Economy: Uber and Beyond." I served as moderator of the program, which included four excellent speakers, Nicole Benincasa, Attorney for Uber Technologies, Inc., Bernard N. Block, Managing Principal, Alvin W. Block & Associates, Chicago, Illinois, Randy May, Founder and President, Free State Foundation (and long-time active member of the Section) and Peter Mazer, General Counsel to the Metropolitan Taxicab Board of Trade and former General Counsel to the New York City Taxicab Licensing Commission.

The program began by asking general questions about regulatory issues concerning the new "sharing economy" including vacation rental operations like Airbnb and ride-sharing companies like Uber and Lyft. It then focused on the regulatory environment surrounding ride-sharing and the economic and social effects that the development of ride-sharing companies like Uber have had. The panel and the audience engaged in a wide-ranging discussion of the regulatory challenges facing industry and government in the face of evolving technology and consumer behavior.

Randy May, of the Free State Foundation, set the stage for the discussion by presenting his perspective on the appropriate conditions for government regulation of businesses like Uber. Drawing from his experience in the communications field, he observed that a great deal of regulation is used by existing regulated parties to try to prevent competition, which in his view is similar to the way that taxicab interests are trying to use regulation to keep new entrants like Uber out of the market. He presented regulation as taking two forms—precautionary regulation to prevent harms and permissionalist regulation to enable innovation and economic expansion. Unless there are documented harms that need to be addressed, he observed that given the pace of innovation today, permissionalist regulation is preferable to precautionary regulation. In his view, too much regulation today is contrary to economic development and freedom.

> *"The panel and the audience engaged in a wide-ranging discussion of the regulatory challenges facing industry and government in the face of evolving technology and consumer behavior."*

Nicole Benincasa, of Uber, began by defining the sharing economy and presenting Uber in an historical perspective. She noted that Uber provides transportation in areas that have been traditionally underserved by public transportation and taxis. Drivers like Uber because they can work around their other commitments, such as family responsibilities and other employment. Uber is now available in 361 cities across the world. She recounted how at the beginning of the twentieth century, jitneys were a common form of transportation with an historical perspective. Streetcars were the predominant form of transportation. They had no competition and lacked incentives to provide better service, so people started providing cheap rides in their own car. This was known as the jitney nickel.

The effects of the advent of jitney were immediate and striking. Within a year, for example, there were over 500 jitneys in Seattle, accident rates soared and insurance was generally lacking. The railroads started losing money and they put political pressure on municipalities to regulate jitneys, which they did, and those regulations limited the ability of jitneys to compete. Among other regulatory burdens, jitneys were required to pay for expensive licenses and insurance policies, and this doomed the jitneys. They went from 62,000 nationwide to virtually none by 1919.

Ms. Benincasa also provided details on how Uber works with regulators to enable the development of the sharing economy. Ride-sharing is forbidden in New York City, so Uber drivers get licenses from the taxicab commission. The model doesn't allow for part-time and more casual drivers as in other places, and she called the New York rules "a broken system." Uber is seeking regulation across the country to legitimate their business. At this time, 70 municipalities in the U.S. have regulations for Uber. She is worried about unnecessary protectionist regulation, which could destroy Uber the way regulation in the early twentieth century destroyed the jitney business. She agrees that safety and consumer protection rules

* Professor of Law, Boston University School of Law.

are necessary, but also believes that people should be free to use their cars to offer rides using the Uber system.

Peter Mazer of the New York Taxicab Board based his presentation on his 15 years of experience as a taxicab regulator, writing and enforcing regulations, and 15 years as an attorney representing taxicab industry interests, where he realized that the regulators did not have all the answers. His view is that we don't need excessive regulation, we need sensible regulation. He noted that taxicab regulation is historically local and that there are two main reasons for this local regulation—promoting public safety and promoting equity and fairness across the industry.

With regard to safety, Mr. Mazer said that regardless of how a driver summons a ride, the driver is transporting people for hire and should be subject to safety regulation. The passenger client has a right to know that the driver has been properly vetted for safety and carries adequate insurance. New York has set the standard for this. Fingerprinting and background checks are mandatory for all drivers in transportation for hire and this, along with continued monitoring, ensures the safety of passengers. He agrees that industry should not be trusted to self-regulate. Insurance requirements are also very important, and regulations in the last few decades have prevented taxicab companies from under-insuring, which provides compensation for injured customers.

Mr. Mazer expressed disagreement with the prior speakers on the need for economic regulation. One important aspect of regulation is to ensure adequate service and not allow the market to be saturated with so many taxis and other cars that drivers cannot make a living. In his view, the lack of regulation would ultimately drive down the level of service. There has to be a balance between providing adequate service and adequate economic incentives to provide that service. If income decreases too much, service will suffer. He also disputed the notion that it's difficult to get a taxicab license in New York City—there are 94,000 people with such licenses including many people from immigrant communities. For safety and ensuring that drivers can make a living, while the regulations are not perfect, they work pretty well and all drivers for hire should be subject to the same rules.

Bernard Block spoke from the perspective of a lawyer who works extensively in the field of secured financing of the taxicab industry. The original sharing economy was like "carpooling on steroids" but now ride-sharing cars are often former taxicabs and other cars that are leased by the week for use in the ride-sharing industry. The internet has allowed developments to outpace the structure of regulation, and regulation is needed to deal with developments that could not have been anticipated before these developments.

Mr. Block provided a very clear explanation of how selective non-enforcement of regulations has allowed ride-sharing to flourish at the expense of the taxicab industry. Almost all decent sized municipalities have licensing and other regulatory requirements for transportation for hire, and ride-sharing companies claim that these rules do not apply to them. He said that some cab companies have used apps to summon rides within the regulatory scheme, but they could not lower their fares (or increase them in times of high demand to attract more drivers) without violating local rules. Uber and other ridesharing companies could compete by not following these rules, which was unfair to taxicab companies that were obeying the rules.

Mr. Block also discussed how taxicab businesses, including many relatively small family-owned businesses are suffering because they have to pay for licenses, medallions and commercial insurance while ridesharing enterprises do not. The taxicab industry depends on extensive lending of capital, but the business model has now been decimated and many loans are in default. In his view, evenhanded regulation is the key to the continuing viability of the taxicab industry and non-enforcement is unfair to those against whom all the rules are enforced.

The presentations were followed by a lively discussion among the panelists and audience members. One thing is certain—given all of the controversy over the sharing economy, this panel is not the last word on these matters, but it provided an excellent introduction to the regulatory issues surrounding the development of the sharing economy, mainly in the ride-sharing area.