DOES SHARING MEAN CARING?

REGULATING INNOVATION IN THE SHARING ECONOMY

Sofia Ranchordás


Abstract

Sharing economy practices have become increasingly popular in the past years. From swapping systems, network transportation to private kitchens, sharing with strangers appears to be the new urban trend. Although Uber, Airbnb, and other online platforms have democratized the access to a number of services and facilities, multiple concerns have been raised as to the public safety, health and limited liability of these sharing economy practices. In addition, these innovative activities have been contested by professionals offering similar services that claim that sharing economy is opening the door to unfair competition. Regulators are at crossroads: on the one hand, innovation in sharing economy should not be stifled by excessive and outdated regulation; on the other, there is a real need to protect the users of these services from fraud, liability and unskilled service providers. This dilemma is far more complex than it seems since regulators are confronted here with an array of challenging questions: firstly, can these sharing economy practices be qualified as ‘innovations’ worth protecting and encouraging? Secondly, should the regulation of these practices serve the same goals as the existing rules for the equivalent commercial services (e.g. taxi regulations)? Thirdly, how can regulation keep up with the evolving nature of these innovative practices? All these questions, come down to one simple problem: too little is known about the most socially effective ways of consistently regulating and promoting innovation. The solution of these problems implies analyzing two fields of study which still seem to be at an embryonic stage in the legal literature: the study of sharing economy practices and the relationship between innovation and law in this area. In this article, I analyze the challenges of regulating sharing economy from an ‘innovation law perspective’, i.e., I qualify these practices as innovations that should not be stifled by regulations but should not be left unregulated either. I start at an abstract level by defining the concept of innovation and explaining it characteristics. The ‘innovation law’ perspective adopted in this article to analyze sharing economy implies an overreaching study of the relationship between law and innovation. This perspective elects innovation as the ultimate policy and regulatory goal and defends that law should be shaped according to this goal. In this context, I examine the multiple features of the innovation process in the specific case of sharing economy and the role played by different fields of law. Electing innovation as the ultimate policy target may however be devoid of meaning in a world where law is expected to pursue many other—and often conflicting—values. In this article, I examine the challenges of regulating innovation from the lens of sharing economy. This field offers us a solid case study to explore the concept of ‘innovation’, think about how regulators should look at the innovation process, how inadequate rules may have a negative impact on innovation, and how regulators should fine tune regulations to ensure that the advancement of innovation is balanced with other values such as public health or safety. I argue that the regulation of innovative sharing economy practices requires regulatory ‘openness’: less, but broader

1 Sofia Ranchordás, PhD, L.L.M., Assistant Professor, Tilburg Law School, The Netherlands; Visiting Scholar, Summer 2014, George Washington University Law School. I would like to thank Paul Schiff Berman and the George Washington University Law School. I am very grateful to Michael Abramovicz and Pierre Larouche for their comments on earlier versions of this article. I would also like to thank Claudia Koerbler and, particularly, Jemi Laclé for our discussions on sharing economy and for the multiple ‘sharing and caring’ moments.
rules that do not stifle innovation while imposing a minimum of legal requirements that take into account the specificities of innovative sharing economy practices, but that are open for future developments.

INTRODUCTION

A. ‘Ubering’ in D.C.

Pick-up address selected, four minutes waiting time, car selected, driver on her way. During a hot summer in D.C. I decided to introduce the concept of ‘sharing economy’ in my life. Not that hailing a cab is difficult around here, but being able to go out without cash, save some money and track who is picking you up might make any ride in this city more pleasant. Uber and other forms of ‘sharing economy’ are some of the innovations that are making markets more competitive and improving access to a number of facilities and services. Most of us welcome these innovations. Going on vacation, hiring a handy amateur to assemble our new furniture, renting a car for a short ride or swapping goods has never been so convenient and inexpensive. You are now what you can access, and not what you have. ² In this new model, access is “the new form of ownership”.

One decade ago, sharing economy practices would have been unthinkable not only because we were living in more prosperous times but also because we would not have conceived engaging in these transactions with strangers, not to mention with unlicensed strangers that “play taxi-drivers” in their spare time. Now we do, but there appear to be no rules or limits in this game. Can and should we set them? Should everyone play by the same rules? And is this a new game like no other we have seen before?

B. The adventures and misadventures of sharing economy

In the last couple of years, the popularity and business of sharing economy has increased tremendously. Uber, Airbnb, Lyft and other forms of ‘sharing economy’ are

innovative forms of sharing underused facilities. They have been welcomed by a significant number of users that now have access to a greater number of services for a lower price, have met other members of their communities and found an extra source of income. These are exactly the types of innovation we need in a time of crisis and increasing individualism. However, in a number of European and American cities ride-sharing practices are not being well-accepted by licensed taxi companies that have organized protests and strikes, filed complaints against Uber Technologies, leading to the prohibition of Uber for example in Berlin and Brussels in April 2014. This tendency culminated in a nationwide prohibition by the Frankfurt District Court. Berlin’s District Court, for example, qualified Uber as a rental car service which was violating German passenger transport laws. According to these laws, rental cars are required to return to its place of business after completing an assignment. This is not the case of Uber drivers that remain circulating in the city center after dropping off their customers. The Frankfurt District Court went further than previous cases on the topic and highlighted that Uber failed to have the necessary licenses and insurances and posed unfair competition to the local taxi industry.

In London, the regulation of this transportation service has also been highly contested and it seems to be pushing the boundaries of legal concepts and interpretation. To wit, it was recently discussed whether the Uber smartphone application could be qualified as ‘a taximeter’ within the meaning of the legislation. Taxi-drivers claimed that only licensed black-car drivers could use a ‘taximeter’ technology. The London’s transit regulator (Transport for London) has recently decided that that was not the case, removing an obstacle to Uber’s activity in London. However, the clash between the interests of licensed taxi-drivers and the need to encourage innovations such as this one


4 For a recent press release on the decision of the Frankfurt District Court, see Mark Scott, Uber Service Banned Across Germany by Frankfurt Court, NEW YORK TIMES (September 2, 2014), available at http://bits.blogs.nytimes.com/2014/09/02/uber-banned-across-germany-by-frankfurt-court/?_php=true&_type=blogs&_emc=eta1&_r=0

5 Jeevan Vasagar, Uber Taxi Service Suffers Setback in Berlin, FINANCIAL TIMES (April 17, 2014), available at http://www.ft.com/intl/cms/s/0/1591fa2-c638-11e3-ba0e-00144feabdc0.html#axzz387TxW RMa (Berlin Tax Association has won an injunction against Uber, but since Uber has appealed, the injunction will not be enforced for the time being).
is far from being solved. In addition, these are not the only licensed service providers frowning their brows to sharing economy. In New York City, Airbnb has also faced legal problems and numerous fines have been applied to Airbnb hosts for not complying with local regulations. According to New York regulations, Airbnb rooms and apartments can be qualified as illegal hotels. However, there appear to be alternatives to this all-or-nothing approach. In February 2014, the municipality of Amsterdam decided to innovate by authorizing the private rent of houses to tourists by their inhabitants in an attempt to reduce the regulatory uncertainty as to this phenomenon and control the growing problem of professionals who rent multiple houses through Airbnb.

Sharing economy practices challenge regulations on a daily basis, evidencing the tension between the need to encourage innovation and the need to protect customers from fraud and liability and practices that might endanger public health or safety. In the world of sharing economy, traditional legal boundaries are easily blurred, resulting in legal gray areas and regulatory uncertainty. In addition, these tensions cannot always be reduced to a combat between David—the innovative but small start-up connecting individuals—and Goliath—municipalities and agencies concerned with the compliance with safety regulation and welfare of the public, the large hotel chains or taxi corporations that do not wish to lose their clients. Instead, some electronic platforms such as Uber and Airbnb are far from being run from student basements. Still, this does not mean that their innovative potential should not be cherished. The real clash here is between the interest to stimulate innovation and the need to protect the public from its potential harms.

While we all worship innovation and praise the existence of sharing economy practices, we should first ask whether these sharing economy practices can be qualified as illegal hotels. All payments are done through this online platform and Airbnb users can provide feedback on their hosts and ‘clients’.

See, for example, the short article Room for All, for Now, THE ECONOMIST (April 26, 2014), available at http://www.economist.com/news/business/21601259-there-are-signs-sharing-site-starting-threaten-budget-hotels-room-all


as innovations. Second, we should analyze how regulation should approach innovation given its multiple complexities. Third, it is important to question whether the regulations of their equivalent commercial services are applicable to them or whether regulators should ‘lower their standards’—and for how long—taking into account the goals and nature of these practices, its innovative character and evolving nature. Fourth, we should examine whether these unlicensed services open the door to risks that could be controlled by enacting specific regulations or applying existing ones. In this context, regulators are at crossroads with multiple controversies. They do not have sufficient information about these innovations, their risks and might wonder whether the application of existing rules to these new forms of ‘taxis’ or ‘hotels’ might stifle innovation, be unreasonable and even constitute an unwarranted interpretation of statutes. Furthermore, the enactment of new regulations might leave out new sharing economy practices that might emerge in the meanwhile.

Innovation is a moving and evolving target that one can observe at a distance. Regulators can try to shape and guide the means to hit this target, ensuring that it follows certain routes. However, these routes should be in line with the movement of innovation and should not involve shooting down the arrow before it finally hits this ‘moving target’.10

C. The adventure of regulating innovation

Innovation is ‘a hot topic’ these days. 11 It is a particularly hot topic at a time of crisis, when we are reminded that governments must prioritize investments in R&D and redefine their innovation policies so as to enhance productivity and foster economic growth. Contrarily to our common perception of innovation, this phenomenon also occurs outside large research centers, laboratories and the garages and basements of courageous inventors. Innovation is more than the latest technology, it is a phenomenon

10 For an overview of the general problems encountered by regulators when faced with the need to regulate new technologies and innovation, see ROGER BROWNSWORD & KAREN YEUNG (EDS), REGULATING TECHNOLOGIES: LEGAL FUTURES, REGULATORY FRAMES AND TECHNOLOGICAL FIXES (HART PUBLISHING 2008) 3-22.

11 ORLY LOBEL, TALENT WANTS TO BE FREE: WHY WE SHOULD LOVE LEAKS, RAIDS, AND FREE RIDING (Yale Univ. Press 2013).
that can result in the improvement of the living conditions of people and strengthening communities. Innovation can be technological and social and the first might assist the second to empower groups in ways we once thought unimaginable.

In a period where innovation has been given the leading role, regulators face the additional responsibility of regulating innovative products and services without stifling innovation. While “much has been written about invention and innovation (...) [there are not many] precise clues as to what needs to be supported, promoted or measured (...) [leading] to policy formulations that are seriously flawed, or at best, ineffective”. Innovation is a difficult phenomenon to understand, promote and regulate: within and beyond sharing economy. Innovation is that ‘crazy little thing’ that we simultaneously fear and long for. Innovation is the hope for better and wealthier times, but once it is out there, it loses its magic and we remain thirsty for more.

The regulation of innovation in sharing economy is particularly complex because it is unclear whether these practices fit within existing legal frameworks and should ‘play by the same rules’. In this context, it is unclear whether these practices should remain to a great extent unregulated, be submitted to existing regulations or benefit from less demanding regulations. This hesitation has opened the door to uncertainty and lack of transparency. A great number of sharing practices does not require regulation since they belong to the personal sphere or fall under the scope of the so-called ‘Samaritan laws’. This is the case of swaps or rides between friends or charity. However, ‘sharing’ does not always mean ‘caring’ about someone. While there are numerous sharing practices that are closer to forms of social innovation since they are mainly motivated by a spirit of giving, others (such as Uber) are mainly profit-driven. In addition, these platforms open the backdoor to fraudulent behavior, and risk becoming parallel, unsafe and underinsured practices. A ‘laissez faire’ approach does not suffice in this scenario and, as mentioned earlier, it has resulted in the prohibition tout court of these sharing

---


13 For a thorough analysis of sharing economy practices and advice on applicable regulations and drafting of contracts and other documents, see JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES (ABA 2012).

14 Think about collaborative practices among neighbours.
economy practices since different courts have not been convinced by Uber’s arguments. More litigation involving other sharing economy practices is expected. If this judicial trend continues, this can relegate Uber and other practices to the past, stifling innovation. Rules are required but Uber, Lyft, and other similar transportation systems might not be interested in ‘sharing’ the same rules with taxi-drivers.

While the economic and business literature\(^{15}\) has devoted particular attention to the economic and social dimensions of innovation, this article innovates by reflecting upon the challenges faced by the regulation of innovative practices such as sharing economy. In addition, this article describes the legal problems that might arise if sharing economy practices remain unregulated and proposes a number of aspects to be considered by regulators.

D. The approach

In this article, I approach the regulation of sharing economy practices from an ‘innovation law’ perspective, \textit{i.e.}, I focus on the challenges that characterize innovation and try to find a balance between the need to encourage innovation and limit the uncertainty and risks attached to sharing economy. By analyzing the characteristics of sharing economy practices, I discuss potential approaches to the regulation of these phenomena that meet the interests of innovators in this field while offering a minimum of guarantees to the users.

In this article, I concretize the broad perspective of innovation law in light of the example of sharing economy. This article aims to answer the following central question: \textit{how can we find the balance between encouraging innovation in sharing economy practices while regulating it to protect customers from a number of risks that might arise from unlicensed practices?}

\(^{15}\) For business literature on innovation, see, for example, CLAYTON CHRISTENSEN, THE INNOVATOR’S DILEMMA: THE REVOLUTIONARY BOOK THAT WILL CHANGE THE WAY YOU DO BUSINESS (HarperCollins Publishers 1997); DAVID A. AUDRETSCH, OLIVER FALCK, STEPHAN HEBLICH, ADAM LEDERER, HANDBOOK OF RESEARCH ON INNOVATION AND ENTREPRENEURSHIP (Edward Elgar Publishing 2011).
I start this contribution at an abstract level by addressing the first challenge: encouraging and regulating innovation implies knowing what ‘an innovation’ is, what its characteristics are and, in the particular case of sharing economy, being able to define what exactly is innovative about these sharing economy practices. Part II focuses thus on the phenomenon of innovation and distinguishes between different types of innovation. One of the main challenges of regulating innovation resides in the need to address the uncertainty and complexity that characterize innovation. As I shall explain, these difficulties are equally present in the case of sharing economy. To wit, innovative platforms for sharing economic practices might fail if certain services require specific skills that cannot be easily assessed with the mere peer-review mechanism offered by most platforms. Based on this preliminary analysis of the innovation process, I address the regulation of innovation in part III. I argue that, when regulating innovative phenomena, regulators should focus on the need to tackle their newness, uncertainty and inherent risks. Part IV is specifically devoted to sharing economy practices. In this part, I describe the most common forms of collaboration and introduce its regulatory challenges. The last part of this article applies the theoretical aspects discussed in the first parts and discusses existing and proposed regulatory solutions for the regulation of sharing economy. In this part, I propose overarching solutions to ensure that rules can keep up with innovation or, at least, show openness to future improvements and innovative practices. More than offering a set of solutions for the regulation of innovation in sharing economy, this article aims to ask the right legal questions regarding what regulators (or even judges) should be considering when confronted with innovative products and services, the need to decide on the application of existing regulations to sharing economy practices, and the consequent authorization or prohibition of novel sharing economy practices.

II. INNOVATION

The economic and social benefits of innovation for the growth and development of any developed nation are nowadays almost indisputable.\textsuperscript{16} In the last decades, different social and technological innovations have contributed substantially to the improvement

of living standards, and enhanced the diversity, quality and safety of products in the market. Not surprisingly, the stimulation of innovation has been included in the priorities of the Europe 2020 Strategy and is conceived as a step towards a “more competitive, sustainable and inclusive economy”. Innovation has been placed at the center of the US policies, Europe 2020 priorities and the OECD has pleaded, in numerous occasions, for the development of renewed visions and ‘strategic road maps to encourage innovation’. This leading role for innovation results from the idea that creativity, entrepreneurship and innovation should put us on the path of economic growth. While it is clear that legal institutions should play a role in shaping the environment conducive to innovation, we are still very far from mastering the paths of innovation. As Geoffrey Manne and Joshua Wright point out “the ratio of what is known to what is unknown with respect to the relationship between innovation, competition, and regulatory policy is staggering low”. What we often do not know is how innovation emerges and what its complexities are, how to deal with its inherent uncertainty, and how to design a set of legal institutions and instruments that encourage it. “A journey of a thousand miles [always] begins with a single step”, and here the first step should be the definition of “innovation”.

A. Innovation: more than a word

Innovation is inherent to the human being. Throughout the centuries the pursuit of innovation has awakened our curiosity, eagerness to learn, the need to constantly challenge ourselves, and improve the state-of-art. Innovation is a broad concept which can be defined differently depending on the context and fields in question. Innovation rarely emerges due to fortuitous discoveries, instead it is most of the times the result of the persistence of actors that dare to ‘think out of the box’, try to develop new solutions for existing problems, resist opposition to new ideas and break new ground with their inventions. Innovation emerges, evolves and is rapidly dissolved in banal daily objects. This evolving nature of innovation means that policymakers and regulators are forced to chase a chameleon.

In the legal context, ‘innovation’ is a known concept frequently associated with ‘something significantly new’. Nonetheless, the former cannot be qualified as a legal concept. Rather, it is particularly in the business and public policy literature that the concept of ‘innovation’ has been explored and defined. Nelson/Winter, for example, define ‘innovation’ as “a wide range of variegated processes by which man’s technologies evolve over time”. More simplistic definitions refer to innovation as “the application of new knowledge to industry (...) [including] new products, new processes, and social and organizational change”. In sum, the innovation process is the “process of putting ideas into useful form and bringing them to the market”.

For the purpose of this article, I define innovation as: “the ability to take new ideas and translate them into (commercial) [or effective social] outcomes by using new

26 Stefan Müller, Innovationsrecht—Konturen einer Rechtsmaterie, 2 Innovations- und Technikrecht 58 (2013) 60.
29 EUGENE FITZGERALD; ANDREAS WANKERL; CARL J. SCHRAMM, INSIDE REAL INNOVATION: HOW THE RIGHT APPROACH CAN MOVE IDEAS FROM R&D TO MARKET AND GET THE ECONOMY MOVING (Kauffman Foundation 2011) 2.
processes, products or services”. Innovation is more than an idea or a novelty; it must be the first successful concretization of an idea in the marketplace or in society. Contrarily to an ‘invention’, ‘innovation’ is not the ‘first occurrence of an idea for a new product of process’ but rather ‘the first attempt to carry it out into practice’.

My concept of innovation includes not only technological but also social innovation: with the latter I refer to ‘the design and implementation of creative ways of meeting social needs’ (e.g. strengthening social relationships in less privileged neighborhoods, empowering minorities). Innovation does not need to be profit-oriented, as long as it translates the first successful realization of an idea which improves, from a technological, social or economic perspective, the status-quo. Innovation refers not only to technological inventions in breakthrough innovative fields (e.g. biotechnology), but also to socially innovative programs or services that aim to reduce poverty, discrimination or integrating minorities—the so-called ‘social innovation’. This broad concept of innovation is relevant in the context of collaborative practices which are designed to empower communities and incentivize interaction between strangers. For example, one could question whether the social contact promoted by sharing transportation practices such as Lyft where strangers are expected to do more than just sit next to each other and share a ride. Engaging in casual conversations in the context of car sharing systems might not fit our traditional perception of social innovation which is more often connected with charity. However, breaking the circle of individualism by ‘sharing’ and ‘caring’ does not necessarily stretch the concept of social innovation too far.

---


Innovation—particularly in the case of sharing economy—is a complex concept composed by multiple dimensions which require a thorough analysis. First, innovation should have a welfare dimension, consisting of positive changes for society in general or groups of individuals. Second, innovation should be regarded as a relative concept, which means that ‘new’ does not always amount to absolutely inventive, but new in a determined setting, time and place. Last but not least, innovation can be translated either in social or technological improvements. In the following subsection, I elaborate on these different elements of the concept of ‘innovation’ and apply them to the context of sharing economy.

B. The elements of the concept of ‘innovation’ in the context of sharing economy

(i) A change for the better

Innovation should be ‘a change for the better’. However, such welfare considerations should take place at the time of the occurrence of the innovation (decades later everything could have been done better). In addition, ‘innovation’ is a relative concept, depending on the concrete social and economic circumstances of a country, state or community. Moreover, innovation is contextual/sector-specific, i.e., innovation depends on the socioeconomic conditions it is embedded in and should therefore ‘meet the needs of most people, especially in countries [or regions] where innovation and poverty reside side by side’.

To wit, a socially innovative idea which provides more access to knowledge and information to an impoverished community might not be absolutely new in other places and contexts, but its application in that community may be highly innovative and worth rewarding.

The innovative ideas included in the concept of ‘innovation’ refer to new products, services and public policies, which may either have a commercial goal or simply an altruistic aim to solve social problems.

(ii) Innovation as a relative concept

For the purposes of this article, an innovation fulfills the presented definition if it is unknown in a certain region, state or country. For example, in the case of a federation, a program or policy will be qualified as an innovation when ‘it is new to the states adopting it, no matter how old the program may be or how many other states have adopted it’. The regulation of this innovation might still pose important challenges to a jurisdiction even if it has been implemented and regulated elsewhere. In this study, the ‘newness’ of the innovation in question is not assessed in absolute terms but related to the experience and knowledge of the jurisdiction in question: have sharing economy practices been used in city x or y? Or are they entirely new? The fact that Uber has been used for some years in San Francisco does not mean it cannot be qualified as an innovation in a European city.

‘Innovation’ is often distinguished from ‘invention’: the conception of a new idea, a discovery or a unique finding. In the case of sharing economy, this degree of newness (understood as invention) is not required for the adopted concept of innovation since common examples of collaborative consumption have existed for centuries. However, many of them have gained a new dimension with the emergence of online platforms and smartphones application. To illustrate, before the time of hotels or hostels, pilgrims and other travelers would request to stay at strangers they would encounter on their travels. These strangers would provide food and more or less comfortable shelter and would receive very often a compensation from their hosts. We should nonetheless see ‘Airbnb’ and other platforms of hosting guests as innovations since they are new in their current forms.

The aspect of ‘newness’ of an innovation is thus a relative concept: something is new from the ‘here and now’ perspective, even if it had existed previously—but had been abandoned particularly due to the rise of individualism and the consumption society—or elsewhere with similar characteristics. Newness is assessed here as a subjective value conditioned by time and space. From a temporal perspective, the faster and the more widely spread effects an innovation might have, the sooner it will lose its new character. Although the diffusion of an innovation might determine its successful commercialization, it will also erode its ‘new’ character. Temporary or local oblivion might allow an old practice to rise like a phoenix and contribute in an innovative fashion to the improvement of current living conditions.

There are two basic interpretations of ‘newness’: the Schumpeterian idea of invention (‘creative destruction’), implying the development of a product which creates a discontinuity in relation to the existing ones; and the notion of a continuous improvement in a product design, changes in organization or processes that increase its efficiency or ensure environmental sustainability. The Schumpeterian concept of ‘innovation’ refers to breakthrough innovations that translate the development of revolutionary new products or changes in paradigms. Differently, incremental innovation builds on existing knowledge and constitutes an extension or improvement of present technologies or practices. Most innovations, even if they break with existing paradigms, are built on existing knowledge and derive from a ‘step-by-step co-evolutionary process of change’.

---


The concept of ‘innovation’ also refers to an original transformation, without which it would be mistaken with the concept of ‘mere change’. Innovation is also a type of change: one that brings along a new approach to technology or a new method (e.g. of reducing poverty). Contrarily to some breakthrough changes that can be accompanied by mixed feelings or perceived as negative changes, innovation—particularly in the field of sharing economy and other fields with a high social relevance—should stand for ‘improvement’. Mere changes can be a reaction to a social problem (e.g. arrest homeless people to reduce the visibility of poverty), whereas innovative solutions are proactive responses to problems (e.g. develop social structures guaranteeing shelter, healthcare and reintegration programs to homeless).

(iii) Technological and social improvements

In this article, I do not reduce innovation to the mere ‘development and deployment of technological improvements.’ Instead, I accompany the trend we have seen in the last decades to pay more attention to the encouragement of innovation in social fields. Before qualifying something as a ‘social’ or ‘technological innovation’, we should be able to identify the improvement inherent to the innovative policy or practice. What is exactly changing the status quo and making it better? What is the component of the alleged innovation under analysis that is able to make things better? Innovations in the field of sharing economy merge the concepts of both technological and social

42 Carol Slappendel, Perspectives on Innovation in Organizations, 17(1) ORGANIZATIONAL STUD. 107 (1997).
43 Peter Schramade, Innovatie en verandering, 135 HOLLAND MGMT. REV. 3 (2011)
44 Peter Schramade, Innovatie en verandering, 135 HOLLAND MGMT. REV. 3 (2011)
innovations. Even if the idea of ‘sharing’ was already there before, the creation of an online platform or a smartphone application that connects users in a simple way might actually constitute the innovative element of the practice.

The technological elements of an innovation are usually palpable technical improvements that can be easily identified. 48 Socially innovative aspects are however more difficult to capture. This results from the fact that social innovation is not tangible, requiring further enlightenment. Social innovation is in itself not a recent phenomenon.49 Examples of hospices, mutual aid associations and benefit societies can be traced back to centuries ago.50 Still, the emergence of social innovation detached from religious institutions and as a new field is undeniably a recent idea. In the EU context, social innovation has been described as the “design and implementation of creative ways of meeting social needs”.51 A true social innovation is generated when the benefits to society of a product or process have substantially more social than private value, i.e., the added value to society is greater than the gains yield to entrepreneurs.52

The distinctive character of social innovation lies on the inventor’s main intrinsic motivation: social change.53 The social value generated by social innovative programs or policies is not a mere byproduct but rather its primordial goal. This is visible in a number of sharing economy enterprises, particularly in non-profit organizations. Accordingly, social innovation has been defined as “a novel solution to a social problem that is more effective, efficient, sustainable (...) than existing solutions and for

48 Nicholas A. Ashford; George R. Heaton, Jr, Regulation and Technological Innovation in the Chemical Industry 46(3) L. & CONTEMP. PROBS. 110 (1986).
49 European Commission, This is European Social Innovation, ENTERPRISE & INDUSTRY MAGAZINE, 9 (2010).
50 Medieval gilds, for example, served as inspiration for modern benefit societies. See STEVEN E. EPSTEIN, WAGE LABOR AND GUILDS IN MEDIEVAL EUROPE (The University of North Carolina Press 1991). For the history of the combat of poverty, SEE LORIE CHARLESWORTH, WELFARE’S FORGOTTEN PAST: A SOCIO-LEGAL HISTORY OF THE POOR LAW (Routledge 2010).
which the value created accrues primarily to society as a whole rather than private individuals.”

In this broad definition, different types of social innovation are captured: from the fair trade labeling, laws and policies promoting integration of minorities or aiming at reducing poverty to collaborative consumption initiatives. Common examples of social innovation in the United States and Europe are local partnerships which tackle social exclusion, homelessness, overcrowded or poor conditions of orphanages; initiatives which assist the labor integration of non-qualified young adults.

In a time of economic crisis, both technological and social innovation should be stimulated. Diverse forms of sharing economy and collaborative consumption innovative practices are often not profit-driven. New gadgets might ensure higher levels of performance, but they shall not solve the isolation and ageing problems faced by a great part of our population. Socially innovative structures developed thanks to these gadgets might perform this function. Cooperative enterprises between neighbors to share items, babysit children or provide assistance to the elderly are some examples of innovations that oblige us to think out of the common box of business innovation.

Instead of analyzing technological innovation in itself, i.e., the technological platform used to connect users of sharing economy practices, attention shall be devoted to the service dimension of sharing economy’s innovations and its advantages and disadvantages. Technology plays here a secondary role since it is a mere a facilitative element for the concretization of an idea.

The nature of the innovation under analysis is determinant not only to understand its elements but also to decide upon its regulatory regime. It is important to distinguish between mainly socially innovative activities (i.e., not primarily profit-oriented) and innovative activities that might have a beneficial impact on a community but have become at the same time someone’s primordial source of income. In the case of sharing economy, we can distinguish between occasional or spontaneous transactions (e.g. renting an extra room to guests for a number of limited days, providing dinner to a couple of neighbors in exchange for compensation once or twice a week), daily profit-oriented transactions, and solely non-profit oriented swaps or practices to empower


minorities or assist neighbors. Since in the last case the main goal of the initiative is to strengthen the sense of community, get to know new neighbors or learn from cultural exchange, this new idea can be qualified as a social innovation and it should benefit from a less stringent regulatory regime (see also part IV). The expectations of the parties benefiting from these activities are in principle lower when compared to the hiring of a professional service for the same purpose. In the first and second cases, however, the social goals of the sharing initiative may be diluted and confused with a profit-driven activity. While the idea might remain innovative and socially useful, it is important to ask whether the main goal of the person(s) behind it is still ‘social change’ or profit. Although Uber was originally regarded as a start-up, one could question whether that is still the case and whether it should be compared to a garage-managed electronic platform connecting a small community of neighbors. This qualification can be relevant since non-profit activities and organizations can be either excluded from the application of a number of regulations or subject to specific legislation. There is however a gray regulatory area whenever a compensation or a more regular practice are involved.

B. The challenges of innovation

In the EU context and in the United States, the promotion of innovation has been regarded as both an economic and social challenge.\textsuperscript{56} To wit, innovation has often been pointed out as the key to entrepreneurship and enhanced competitiveness of European firms. Nonetheless, understanding the significance of innovation for economy, defining the relationship between technological innovation and economic growth, and calculating the commercial potentiality of an innovation in light of the existing uncertainty have not been simple tasks.\textsuperscript{57} From a societal perspective, innovation in social services and structures is expected to solve the problems resulting from an increasingly individualist society; yet an accurate definition of the concept of ‘social innovation’ appears to be the first obstacle to the definition of innovation policy.


\textsuperscript{57}Bart Verspagen, \textit{Innovation and Economic Growth}, in JAN FAGERBERG, DAVID C. MOWERY, RICHARD R. NELSON (EDS.), \textit{THE OXFORD HANDBOOK OF INNOVATION} (Oxford University Press 2007), 487.
A third dimension must be added to the economic and social challenging sides of innovation: the regulatory facet. Regulating social and technological innovation with little information on the novelties in question, their effects and side-effects poses equally significant challenges to regulators. This can be explained by the difficulty in finding the balance between the need to encourage innovation; and the respect for legal principles and norms. An increasing number of governmental policies have aimed to promote innovation in the last decade through innovation oriented policy. Most of them have been based on economic incentives. However, this economic approach is only one of the available forms used to influence the behavior of private actors: information transfer and the enactment of legislation with a ‘stimulating character’ can be equally used to attain the same purpose.

The option for any of these instruments depends on the underlying objective, field in question and level of intervention required or intended, i.e., a subsidy might be sufficient when minor or incremental developments are required. Not always do economic benefits serve the mentioned objectives. In fact, there appears to be an under-investment in innovation in fields which do not yield immediate economic benefits. This is the case of environmental innovation and/or social innovation. In addition, there is insufficient regulation in this field because it has been assumed that law can do little to change the behavior of private actors, not to mention promote innovation. There is insufficient empirical evidence to demonstrate whether regulation can play here a substantial role. Leaving innovation unregulated would be an easier option but it would also leave society exposed to a number of undesirable risks.

Regulation has been traditionally thought of as an obstacle to innovation and creativity: law is about routine and regulation, defining boundaries and standardizing procedures, whereas innovation emerges from freedom, room for new ideas and

60 Nicholas A. Ashford; Ralph P. Hall, The importance of Regulation-Induced Innovation for Sustainable Development, 3 SUSTAINABILITY 270 (2011).
openness to diversity. However, a balance between these two dimensions must be found.

The advancement of innovation in the current times of crisis and in the near future might actually imply rethinking and redesigning the role of law and its legislative and regulatory instruments in the process of innovation. This is justified, on the one hand, by the increasing government cuts in R&D, support to social institutions and other innovation related investments which have called for the enactment of ‘cheaper’ strategies to spur innovation, or, at least, for the acceptance innovative practices that deviate from traditional standards. To wit, reducing the regulatory burdens imposed on innovators might be a relatively efficient strategy to release more time and private funds for investment in R & D. On the other, the 2008 credit crunch revealed the shortcomings of conventional financial theory based on models of strong reliance on economic policy instruments and principles-based regulation deprived of effective regulatory enforcement. This approach failed to meet the need to keep up with financial innovation and, at the same time, accompany the complexity of financial markets and generating the trust of investors. Besides, innovation appears to be posing novel and more complex challenges to regulation, crossing borders that one once thought to be unsurmountable.

One of the most relevant challenges encountered by regulators when asked to regulate innovation is uncertainty. Innovation does not come fully-labeled or with a manual of instructions: even after laboratory tests, regulators might still lack information regarding the effects and side-effects of the introduction of a new product or service in the market.

---

61 SHUBBA GHOSH & ROBIN PAUL MALLOY (EDS.), CREATIVITY, LAW AND ENTREPRENEURSHIP (Elgar Law and Entrepreneurship 2011) 3.
Up until now, regulation has played a modest role in the life of sharing economy. However, protests and controversies associated with sharing economy practices appear to be calling for a regulatory intervention. Are we on the verge of witnessing the emergence of a new field of law for innovation? Or do we only have to learn how to adapt our rules to a world where we share instead of own? This is the topic of part III.

III. Where law and innovation meet

In the last years, legislators and regulators have become increasingly ‘curious’ as to the regulation of innovation. However, this curiosity has not always put legislators and regulators on the innovation path. Despite large annual investments in R&D, still too little has been researched and is known about the most adequate and efficient mix of legal and policy instruments to promote innovation.\textsuperscript{65} Worse: laws are often the source of all evil, imposing costly burdens on innovators that may stifle innovation, impede entrepreneurship or influence innovators to ‘shop’ for jurisdictions offering ‘innovation friendly’ legal conditions. The same goes for the advancement of innovation through legislative instruments. During many years, law was simply told to stay away and admire it from a distance to avoid impeding innovation. However, beyond laboratories, laborious inventions and serendipitous discoveries, law can play a greater role than a mere walk-on in the ‘innovation film’. In fact, law can act as a ‘brakeman’ or ‘a driver’ of innovation.\textsuperscript{66} We are still far from knowing what ‘innovation-friendly rules’ should look like. Reaching this final destination may imply adopting a ‘comprehensive, complicated mix of federal institutions’, context-specific instruments, multiple funding

\textsuperscript{65} Gaia Bernstein, \textit{In the Shadow of Innovation}, 31 CARDOZO L. REV. 2257 (2010).
choices,\textsuperscript{67} and using both economic and legal instruments, if not to stimulate, at least to guide innovation.

Government intervention in innovation might have costly results, if incorrectly targeted.\textsuperscript{68} The absolute lack of rules can also be undesirable, opening the doors to conflicts between innovation and other values. This is particularly true when it comes to the inevitable relationship between legal conditions and innovation since the lack of an effective legal framework is in the poorest countries the main obstacle to innovation and consequently to economic growth.\textsuperscript{69}

The relationship between law and regulation and innovation can be threefold: firstly, regulation can hinder innovation by placing excessive burdens on entrepreneurs. This is the case of licenses on industries or entry requirements\textsuperscript{70} or by forbidding, often on a precautionary basis, the production of new products due to their potential risks. Innovation can also be frustrated by the very same laws that aimed to promote it. Secondly, law and regulation may facilitate the introduction of innovations in the market, notably by waiving requirements or the observance of standards, granting exemptions or authorizing companies to develop novel activities and projects on a temporary or permanent basis.\textsuperscript{71} Thirdly, regulation can have no direct effect on innovation and only accidentally foster it (serendipity).

There is not one magical formula to produce innovation, and if there is one, it is not a one-ingredient-recipe. Innovation is not always the mere and direct result of

\textsuperscript{67} Joshua D. Sarnoff, Government Choices in Innovation Funding (with Reference to Climate Change), 62 EMORY L. J. 1087 (2013).
\textsuperscript{68} Brett Frischmann, Innovation and Institutions: Rethinking the Economics of U.S. Science and Technology Policy, 24 VT. L. REV. 347 (2000).
\textsuperscript{70} Gillian Hadfield, Legal Barriers to Innovation: The Growing Economic Cost of Professional Cost of Professional Control over Corporate Legal Markets, 60 STANFORD L. R. 1689 (2007); purporting that excessive self-regulation of the legal profession annihilates any margin of creativity in legal services and the development of innovation.
\textsuperscript{71} See the example of securitization given by Ian M. Ramsay, Financial Innovation and Regulation: The case of securitization, J. OF BANKING & FIN. L. & PRAC., 169 (1993): Ramsay describes the example of Australian mortgage-back securitization programs which exempt the issue and transfer of securities in a part of the country from stamp duty.
investment. Creativity, entrepreneurship and ultimately innovation result from an ‘innovation-friendly climate’ which is composed by both internal and external elements. To wit, the emergence of innovation can be influenced both by the dynamics of the innovation process (including how much one invests in it), institutional, governance and regulatory elements that may either hinder, delay or advance innovation. The latter refers also to the way regulators see innovation, understand its complexities, interact with innovators, regulate it, and, above all, think forward without regulating backwards.

Up until now, this second group of elements has received limited attention from the legal literature which has narrowed the study of innovation to IP and, in certain cases, to competition laws. Regulators should think out of this box, by trying to understand the challenges of innovation to traditional regulatory instruments and institutions—including how to ‘marry’ the fast-changing character of innovation with the need for predictability and legal certainty; bridge innovation with regulatory procedure and requirements; understand how charity and philanthropy are permeating the legal sphere and convince legislators and regulators to accommodate and incentivize social innovation.

A. A challenging relationship

The regulation of innovation or the advancement of innovation through regulation have often been criticized and qualified as a true antithesis: innovation is a fast-changing and fluid reality that does not go well with rigid top-down rules. Nonetheless, even critics of the regulation of innovation admit that the former is necessary because, on the one hand, the lack of an effective legal framework can be the main obstacle to innovation and consequently to economic growth. On the other, ‘a


form of case-by-case-litigation can easily prove to be worse’.  

The awareness that the government should intervene in the regulation and promotion of innovation is insufficient: firstly, many of the laws originally designed to promote innovation have proved to produce the opposite result; secondly, incorrectly targeted innovation may produce costly results.

The path to ‘innovation-friendly law’ may be tortuous, but it is a road we have to follow, particularly in the case of sharing economy. In the next subsection, I discuss the questions one might have to ask in order to understand and grasp the essence of innovation and provide innovation-friendly regulations. I argue the need for a new field of law that understands how the innovation process works and tries to answer accordingly.

B. Innovation law?

‘Innovation law’ is a field of research ‘pretty much in its infancy’. This field of research departs from the nature and determinants of innovation, trying to understand this particular phenomenon, its multiple facets and how different legal instruments can be employed to regulate and facilitate innovation. A ‘innovation law’ approach can be beneficial since it tries to think in abstract about the goals that are common to different fields, reflecting about the influence that law can have in elements such as creativity or entrepreneurship.

Real-world innovations (and their problems) emerge in different shapes and sizes, transcending artificially delineated fields of law and policy. Solving these problems implies a coordination and commitment across agencies that might be difficult to

---

achieve. This perspective acknowledges the two main challenges of regulating innovation—uncertainty and complexity—and the need to find a balance between the desire to advance innovation and the observance of legal rules and principles. These are aspects that also characterize sharing economy. Before analyzing potential and specific regulatory solutions for sharing economy, I introduce some guidelines of ‘innovation law’.

(i) Uncertainty

The concept of innovation is often associated with indeterminate realities: ‘the unknown’, ‘yet to be discovered’, or ‘the surprisingly new’. Uncertainty is present throughout the entire innovative process and can be translated in multiple questions:

- Will a certain type of sharing economy practice work? Will it improve access to certain services? What are the risks implied in this practice? Should this activity be regulated?

These questions arise because innovation implies both inherent and external uncertainties: the inherent uncertainties are connected with the process of innovation and the unpredictability of its outcomes; whereas external uncertainties refer to the regulatory framework or the necessary conditions to enable the introduction of innovative products or services in the market.

Uncertainty impacts the regulation of innovation and the innovation process in multiple ways. External regulatory uncertainty can have a strong impact on the incentives to innovate, namely when the time span to develop profitable technology or, in the case of sharing economy, valuable social practices, is more significant. This

---

80 Martin Eifert, Innovationsfördernde Regulierung, in WOLFGANG HOFFMANN-RIEM, MARTIN EIFFERT (EDS.), INNOVATIONSFÖRDERNDE REGULIERUNG: INNOVATION UND RECHT II (Duncker & Humblot 2009), 11.
happens in the case of uncertainty regarding the regulatory delay: if firms do not know when and if their products or services will be authorized and how they will be regulated, the incentives to invest may decrease. Regulatory delays are costly and, whenever the product introduction benefits decrease progressively, an additional day of regulatory delay can be extremely costly. Excessive regulatory uncertainty is detrimental to innovation, since it can result in industry inaction.

In sum, uncertainty is an inherent and accepted part of the innovation process. However, innovators do not welcome excessive regulatory uncertainty, regulatory delays or constant and incoherent legislative reviews as the response to the uncertainties of the innovation process. Consumers and users of sharing economy practices might also be reluctant to participate in these activities if they are not provided with a minimum of guarantees, notably that they will arrive safe and sound at their destination or that the risk of food poisoning from private kitchens is limited.

(ii) Complexity

The second of ‘innovation law’ is that innovation is a complex phenomenon: it can be a process or a result, a product or a service, a technological or social novelty. Innovation law should be open to all these dimensions of the innovation process and choose regulatory instruments that respond adequately to the complexities of the reality in question. John Braithwaite argues that complex phenomena should be regulated by principles, instead of rules that may be more adequate for simple realities. This complexity of innovation is also visible in the multiplicity of institutions involved.

Institutions play a very important role in innovation. The encouragement of innovation is executed by a mix of institutional arrangements, which involves the higher education system, multiple publicly funded instruments such as R & D, grants, tax

---

83 Regulatory delay refers to the period of time between the moment a firm requests the approval of a new product or the regulation of a new service and its administrative approval or enactment of the respective regulation.


incentives, government subsidies, procurement policies, and intellectual property rights. Innovation should be thus encouraged by a mix of public and private instruments that are coherent and aligned to respond to the challenges of innovation.

In light of this complexity, innovation should be conceived as a ‘multicephalous’ creature: it is pursued as a private good but it has a public good nature; if the incentives to innovate are low, it may require, under certain circumstances, ex ante public law incentives (e.g. tax incentives) but its future subsistence may as well be dependent on patents or other IP rights.

In addition, the regulation of innovation may be ‘hard’ or ‘soft’; technology or information-forcing or adaptable; public, private or hybrid. Briefly, ‘innovation law’ perceives innovation as an isolated and complex phenomenon and accepts its complexity by opening the doors to a myriad of regulatory instruments. Nothing new here, one could argue. However, the ‘newness’ of my argument lies in the fact that we should shift the focus of our analysis from specific technology-related aspects to the main challenge of regulating innovation: uncertainty. It is because a phenomenon is new that we do not know how to regulate it. We lack information not only as to the phenomenon but also as to how we should regulate it.

(iii) Temporariness and flexibility

As mentioned earlier, innovation is a complex, fluid and moving target. Law will necessarily lag behind innovation since it cannot be adapted at its speed. “The innovator is always in credit, product cycles will [always] be faster than justice”. 91 Nevertheless, even if law does not have the pretension to regulate the latest fashion in the world of technologies, it should be open and responsive to innovation. In addition, it has been claimed in the literature focused on the regulation of telecommunications that regulatory resilience and the development of an ‘adaptive policymaking and regulation paradigm are essential for the advance of sustainable policies’. 92 Regulators and policymakers should act as ‘adaptive agents’ who adjust regulations and policies according to the evolution of the markets and technologies. 93 According to Richard Witt, the ‘adaptive regulator’ must be guided by nine principles, including: a) an incremental approach, meaning that small steps should be taken and social change should be based on experience; b) an experimental approach justified by the ‘combination of uncertainty and constraints on predictability [which] creates the necessity for policymakers to experiment’; c) flexibility is required by the existence of deep uncertainty. In the context of telecommunications and other sectors characterized by rapid evolution and uncertainty as to the nature of problems, policymakers should possess the flexibility to revise and adapt the structure of policies and programs to changing circumstances.

Regulatory flexibility is equally necessary to face informational problems characterizing the innovation process. If innovation is elected as the primary regulatory purpose, its concretization can be achieved by dividing the regulatory process in multiple stages, and structure it in a way that it can incorporate new knowledge as more


information becomes available.\textsuperscript{94} To wit, when regulators are confronted with the need to regulate a novel sharing economy practice, they could allow for ‘an incubating period’ by experimenting with a new temporary rule on a small-scale basis. During this period, regulators should gather further information as to the innovation itself as well as to the effects of the regulation in question.\textsuperscript{95} The use of experimental regulations that are not enacted ‘forever’ but only for a short period of time, will be evaluated within at the end of the experimental period, and can be later adapted so as accommodate the gathered evidence.

Yair Listokin argues that adapting laws and regulations to the changing times and to new information can actually contribute to finding optimal policy solutions. Relying on Edmund Burke, Listokin claims that new policies should only be partially implemented, submitted to evaluations, changed if necessary or terminated.\textsuperscript{96} Regulators can ‘flexibilize’ regulations so as to accompany the pace of innovation both by including a sunset clause, which determines their expiry at the end of a certain period; or by experimenting with new rules. In the first case, regulators predict fast and disruptive changes in technology and society which may imply a thorough redesign of regulations. In such scenario, regulators are better off allowing regulations to be terminated. When regulators predict incremental innovations and consequently the need to promote a continuous process of regulatory experimentation and learning, experimental regulations should be a better choice. Without going into further detail as to these two legislative instruments, it is important to mention that regulators should convert the process of regulating innovation into a learning process. By experimenting, policymakers and regulators can draw valuable lessons from their own legislative acts and later change these laws accordingly.\textsuperscript{97} This reversibility can be namely created by

\textsuperscript{94} Martin Eifert, \textit{Innovationsfördernde Regulierung}, in WOLFGANG HOFFMANN-RIEM, MARTIN EIFERT (EDS.), \textit{INNOVATIONSFÖRDERNDE REGULIERUNG: INNOVATION UND RECHT II} (DUNCKER & HUMBLOT 2009), 11, 16.


introducing sunset clauses in legislative acts.\textsuperscript{98} Although all policies have a certain degree of irreversibility as to their impact in society and economy; the introduction of this temporary disposition would ensure that the policy at stake would indeed terminate and be rethought.

Terminating regulations by employing sunset clauses or by experimenting on a small-scale can be useful to ensure that rules keep up with the changes in technology and society. In addition, when little information regarding the potential risks of a new sharing economy practice and regulators do not wish to stifle this innovation by enacting stringent regulation, experimenting with new regulations may be a wiser response.

(iv) Travelling beyond IP

Having accepted the complexity of the nature of innovation, the innovation law perspective adopted in this article goes forward by expanding its scope. There is innovation beyond IP and there should also be rules to tackle innovation beyond this important field of law. It results from the definition of innovation above-presented that not all forms of innovation will be deserving of a patent. This is particularly true in the field of sharing economy. However, this does not mean that law should turn its back on it. Innovation law is still in its infancy since the existing studies on innovation and law are usually not studied within a wider regulatory context. ‘IP’ appears to be the first—and often the only acronym—that comes to our mind when we are told that the encouragement of innovation implies the enactment of specific rules. Some of us might even whisper ‘competition laws’, thinking about the well-known Microsoft case.\textsuperscript{99} Administrative authorities are aware of the importance of innovation for a country’s competitiveness and have tried (though sometimes haphazardly) to actively encourage firms to innovate. This was the case of the U.S. Department of Justice’s command on Microsoft to sell its Internet Explorer as a separate product from its


Windows operating system. This idea that authorities should actively intervene, can be also indirectly derived from the ‘Porter hypothesis’, according to which public authorities, and specifically competition authorities, should guarantee that market forces drive firms to innovate, namely through the implementation of stringent competition policy.

The concretization of legislative or administrative interventions in this field does not always need or can be reduced to an aggressive implementation of competition law. Innovation is essential to increase the competitiveness of firms, but the regulation of the former goes beyond competition concerns and requires a comprehensive regulatory approach. Furthermore, this limited approach to innovation leaves unregulated a new body of innovative practices in social fields.

Gone are the days when patents were regarded as the only legal mechanism to incentivize innovation and when innovation was mainly related to solitary garage inventors. Not only has the impact of Intellectual Property law been contested in the last years, but we have also become aware of the fact that other fields of law may equally promote or impede innovation. This is the case of immigration laws that, if well targeted, can attract high-skilled immigrants and entrepreneurs that can be a source of strength for innovative competitiveness. This has been, for example, the rationale behind the Startup Visa Act of 2013: a bill meant to amend the Immigration and Nationality Act in order to attract entrepreneurs that can create the much-needed jobs in America. In Canada, the Startup Business Visa has been recently enacted and promises to be ‘the first of its kind’, linking immigrant entrepreneurs with Canadian private sector organizations. Immigrant entrepreneurs must be able to demonstrate that their business ideas are supported by a local organization, meet language and education

requirements, and have sufficient settlement funds. An attractive aspect of this visa is the fact that the failure of the startup shall not affect the permanent resident status of the applicant. While this and other legislative initiatives to attract entrepreneurs may have in theory undoubted benefits, they may also carry implementation risks and costs: are the criteria to qualify for a visa not too onerous? Should the effort to try to raise capital not be rewarded? Would looser criteria open a Pandora box to Immigration services?

Another objection to the excessive focus on the study of IP in the context of law and innovation relates to the limits of the mentioned field: a number of innovations that surround us cannot be protected by Intellectual Property rights. This refers both to technological and social innovations. However, the more complex examples come from the field of social innovation: local initiatives organized by college students to empower minorities, teach immigrants English or develop innovative forms of encouraging businesses that have a positive environmental and social impact. These initiatives are often not eligible for IP protection and do not attract the attention of lobbies or even powerful philanthropists because they do not involve significant profit. Nonetheless, these forms of innovation also need rules. Rules that reflect an understanding of the nature of the innovation process, do not lag behind innovation, do not delay the authorization and commercialization of new products and services or send negative signals to the market as to these innovations. Rules that, at the same time, are stable and predictable enough to transmit confidence to entrepreneurs, guarantee that regulators do not authorize products that may pose a risk to our health or environment, support innovators and entrepreneurs without endangering other fundamental values and principles of our legal order. Rules that are ‘innovation-friendly’ without being overambitious or over-pessimistic about the role to be played by regulation in the innovation process

IV. Innovation and regulation in the sharing economy

As mentioned earlier (see introduction), recent innovations in the field of the so-called ‘sharing economy’ illustrate well the regulatory challenges faced by lawmakers and regulators when asked to regulate innovation. Think about Uber, Lyft, Airbnb:

104 For the eligibility requirements, see the official website of the Canadian government, http://www.cic.gc.ca/english/helpcentre/answer.asp?q=657&t=6
symbols of contemporary innovation and a new urban trend of sharing and collaborating. In the world of sharing economy, there appear to be infinite possibilities to be an entrepreneur, explore one’s talents, play taxi-drivers or handymen, turn your house into a hotel, and be connected with people with similar interests and needs. The possibilities are infinite, and so are the risks of unregulated practices and the concerns of municipalities, agencies and tax officers that are now obliged to understand unfamiliar business schemes and adapt their rules to these new realities.\textsuperscript{105} Sharing practices are far from being a novelty of the 21\textsuperscript{st} century. Instead, they are primitive practices that used to bind and connect communities. These practices became diluted in our consumerist society, where we started gathering goods for the pleasure of gathering and showing off, forgetting the benefits of sharing. Online platforms are taking us back to the time when we used to trust strangers and offer them shelter and food, trade goods with them to seal bonds of friendship, and share items in order to avoid acquiring goods that we do not need more than once or twice in a lifetime. Although sharing practices have historical roots, they are reemerging and they are blossoming thanks to new technologies that bring strangers together and facilitate mutual trust. Trusting in the kindness and honesty of strangers can be rewarding or deceiving, that is why these practices are never risk-free. In the following subsections, I elaborate on the concept of sharing economy and distinguish it from other socially innovative practices (A), on the novel risks brought along by these practices and how online platforms and regulators are taking action (B), and finally on how these sharing economy practices fit or not in the existing regulations (C).

A. Sharing Economy and the others

\textit{“Sharing economy lacks a common definition”}: it is a concept that is often linked with concepts such as ‘collaborative consumption’, ‘peer economy’ or ‘collaborative economy’.\textsuperscript{106} The common element to these phenomena is the idea of ‘sharing’ either for monetary or non-monetary benefits.


\textsuperscript{106} RACHEL BOTSMAN, ROO ROGERS, WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION (HARPERCOLLINS PUBLISHERS 2010).
Sharing economy can be placed in the context of a number of social initiatives designed to empower communities and improve access to a number of goods, services and facilities that would otherwise be restricted to an elite. While sharing economy and other forms of collaborative consumption remain fairly overlooked in the legal literature, more attention has been paid to social enterprises. Social enterprise is a broader concept that refers to “any business model that, to a significant degree, has a mission-driven motive. This mission-driven motive may be exclusive of a profit motive or blended with one”. This definition does not depend on how the entity operates and pursues its mission-driven motives. Social enterprises can be organized as nonprofit, tax-exempt organizations, or even as hybrid forms of profit-driven organizations. According to Nobel Prize Winner M. Yunus, a “social business should be entirely dedicated to achieving a social goal”, not profit. Social enterprise and other social empowering practices are not only connected with the idea of charity but also “doing good through sound business principles”. We easily realize that social enterprise goes beyond the concept of sharing economy. In many cases, sharing economy practices will not be formally organized as social enterprises. They are often informal collaborative practices between individuals or within communities which are facilitated by online platforms.

Collaborative consumption and sharing economy are often considered to be synonyms. ‘Collaborative consumption’ has been defined in the literature as “a form of consumption where people share consumption of goods and services online”. The motivation to participate in these collaborative schemes may vary from simply “doing good” to obtaining limited economic benefits. However, Rachel Botsman argues that ‘collaborative consumption’ should be distinguished from ‘sharing economy’ since the latter is largely a “person to person” practice and is based on an economic model based

---

107 Marc J. Lane, Social Enterprise: Empowering Mission-Driven Entrepreneurs (ABA 2011) 7.
on sharing underutilized assets such as spaces and skills for monetary or non-monetary benefits. In the case of collaborative consumption the emphasis lies primarily in the idea of sharing, swapping, trading or renting products enabling access over ownership.\textsuperscript{111} Collaborative consumption (e.g. swap-trading online platforms) often implies a transfer of ownership either temporary or permanent, this does not occur in sharing economy (e.g. Uber, Lyft, Zipcar). Despite this distinction, both forms of collaborative practices bring along similar risks for the users and pose comparable challenges to regulators.

B. Sharing is not always caring

Sharing economy appears to be an innovative idea that we can only welcome. However, while numerous cosmopolitan users might be open to the idea of sharing their rides, food and living-rooms with strangers, others might frown their eyebrows just at the thought of it. Sharing economy practices are not risk or nuisance-free. Neighbors of ‘airbnb’ hosts around the world have complained that they do not wish to transform their buildings into hotels, sharing access to common facilities with total strangers.\textsuperscript{112} We can also think about the “private kitchen” offerings where you can order your dinner at someone’s place. While this might be economical, restaurants have often complained that these private kitchens are not licensed, they are not subject to health or safety standards, and may put the health of customers at risk.\textsuperscript{113}

In July 2014, the Pennsylvania Public Utility Commission issued cease and desist orders in Pittsburgh to Uber and Lyft. These orders are motivated by concerns related to

\textsuperscript{111} RACHEL BOTSMAN, ROO ROGERS, WHAT’S MINE IS YOURS: THE RISE OF COLLABORATIVE CONSUMPTION (HARPERCOLLINS PUBLISHERS 2010).


public safety since both companies are not complying with state law that requires a certificate of public convenience granted by the Public Utility Commission.114

Sharing economy practices can raise multiple concerns regarding the background checks of drivers and house hosts, safety of vehicles and facilities, location of house and the position of neighbors, driving or other skills required for the task, and sufficient insurance. These are some of the aspects that should be brought under the attention of online platforms facilitating the contact between individuals. Airbnb started its business by sending employees to New York City to meet hosts in person, however, with the expansion of its business this is far from being possible. The system’s safety and protection against fraud relies heavily on peer-reviews and the fact that the payment will only be transferred to the host after the traveler has checked in. However, travelers may see their reservations suddenly cancelled—something that would rarely happen in the case of a hotel; or find houses that do not comply with safety and fire regulations. In the case of Uber, the company guarantees that it is performing criminal background checks on all drivers, all drivers are required to be sufficiently insured and have their vehicle inspected. How transparent are these inspections and background checks? Are these drivers self-employed entrepreneurs or are they under the control of Uber? Uber argues that it is creating business and these drivers are independent. However, customers would certainly be better protected if Uber could be held liable. The same argument goes for Airbnb: hosts are required to comply with local regulations, Airbnb only facilitates the contact between hosts and travelers and ensures the payment. Yet, more recently it has announced that the company will start collecting local taxes for their hosts. Uber maintains nonetheless that it is not a taxi company and it should not comply by the rules applicable to this sector. In the following section, we analyze the reasons why taxis should be regulated and question whether these arguments are equally applicable to Uber and other similar network transportation systems.

C. Rules for the ride

In August 2014, the Maryland Public Service Commission ruled that Uber Technologies should be subject to the same regulations imposed on other for-hire vehicle services in

the state since it was ‘a common carrier other for-hire car services’. However, the commission acknowledged that new rules were necessary for these new forms of transportation and recognized that "many industry changes and technological advances have occurred since these regulations were adopted, including the everyday use of the Internet". The Commission announced that new rules reflecting the evolution of transportation should be crafted within 90 days, and should welcome input from Uber and other interested parties. Maryland Public Service Commission appears to have adopted a hybrid position: on the one hand, it considers that Uber should be regulated because it is ‘a common carrier’, on the other, it acknowledges that modern rules might be necessary. Before adopting a position on this topic, it is important to question why taxicabs are regulated, whether these elements are equally present in sharing economy and whether they still make sense in a world where any driver can find her way around with GPS devices.

Taxicabs are among the most extensively regulated forms of transportation. It affects the quantity, quality, price and availability of taxicabs. However, the heavy regulation of the taxi market has also been mentioned as an example of inefficient governmental regulation. Price regulation is necessary firstly because consumers’ demand is usually immediate, meaning that they will not willing to bargain the price or look for another service provider. The aggregate search performed by riders and drivers would tend to be extremely high. This can happen sometimes when one uses Uber: taking an Uber or Lyft on a busy 4th of July evening after the fireworks on the Mall might mean that you have to pay twice as much. Thanks to price regulation, hailing a taxi in the same evening should cost you just as much as on any other evening. Secondly, we have a clear case of information asymmetry between the professional taxi driver that knows how to get around the city and can extend the passenger’s journey far beyond what was desired. In the case of Uber, the rider is dealing with an individual that very often does not know the area very well and will use the Uber app to find her

---


way or follow the rider’s instructions. Thirdly, in cities like London taxi-drivers have to take a knowledge exam and proof they have a basic knowledge of the city. Uber drivers do not know their way, but does it still make sense to impose this type of entry controls in the age of technologies when one can simply use a GPS device? Last but not least, a license is also required to guarantee that drivers do not have a criminal record, do not abuse drugs or have health conditions that can affect their driving skills. After all, you get in a car with a stranger you will never see again. Although Uber executes a backup check on its drivers, provides their picture, name and rating, a more thorough and regulated control would do no harm. It does not make sense to impose individuals who ‘play taxi drivers’ on Friday evenings the same requirements imposed to professional taxi drivers. Riders have different expectations, the information asymmetries and the market failures are more reduced in the case of network transportation systems. In addition, the tracking and peer-review systems provided by Uber offer an additional protection—even it is just a psychological one—to most riders. Taxi regulations was not conceived for the relationship between individuals, but this does not mean that Uber and other transportation systems should not left unregulated. Instead, ‘modern regulations’ are required: ‘modern’ in the sense that they comprehend new concepts of transportation, and ‘modern’ because they remain open to what it is yet to come in the world of transportation.

We come to the point where we start understanding that we need regulations that allow ‘sharing, renewing and caring’. Can you share and innovate by the book? You can, but first someone has to write this book.

V. Sharing by the book

Sharing economy offers a number of advantages: lower prices, stronger communities, a greater number of players in the market, and greater access to services that were once regarded as a luxury. Notwithstanding these innovative practices, sharing economy is opening the door to a number of problems as well. Protests regarding the unfair competition and lack of licenses of providers of some sharing economy services, scams on numerous websites, risks to public health and safety may lurk around the
corner. We book a hotel because we trust that it will have all the required licenses, be submitted to inspections, and we will have a pleasant place to spend the night. Our expectations might be lower in the case of sharing economy, but they are not inexistent. Sharing economy is based on the ‘bona fides’ of all participants: we trust that all participants will abide by the rules of the game and we use peer-review as a control mechanism. However, peer-review of other users might come too late in certain cases. Law is being called in as a ‘weapon’ to avoid social conflict\textsuperscript{119} and as a shield against the uncertainty implied in innovative forms of sharing economy practices.

A number of sharing practices do not require any regulation, they belong to our personal sphere. This is the case of transactions that happen on a small-scale, involve greater accountability, are motivated by a spirit of giving and taking, engage people working together as equals, and involve significant transparency.\textsuperscript{120} The sharing economy practices analyzed in this article are situated in the gray area between these socially-oriented activities and commercial activities.

Up until now, ‘sharing economy’ has been left to a great extent unregulated. While a ‘laissez faire’ approach might not be enough to conquer the trust of risk-averse consumers, one may also inquire how far stringent regulation of sharing economy should go. On the one hand, innovators—here talented housewives, handymen, individuals playing taxi-drivers or master-chefs—must have the freedom to create their own social enterprises or allow entrepreneurs behind smartphone applications to develop electronic platforms to bring them together. However, as Robert Cooter argues, “freedom requires law, not its absence”, so the freedom to concretize innovative ideas implies effective law, complete contracts, and specialized rules to fill gaps in business contracts.\textsuperscript{121} Although Cooter’s argument is focused on the regulation of innovation in developing countries, his reasoning could also be tested against the background of


\textsuperscript{120} See JANELLE ORSI, \textit{PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISE, AND LOCAL SUSTAINABLE ECONOMIES} (ABA 2012)

sharing economy. Cooter argues that “the [real] enemy of economy liberty is monopoly, which only permits a few to seek wealth (...) with restrictive laws, state officials can (...) choose who is allowed to do business. To sustain monopoly, public officials crowd out private law with public law”.\(^{122}\)

Law may sometimes show little understanding of the rules of entrepreneurship and this is far from being a recent topic. Almost one century ago, Roscoe Pound regretted that “law [was] not determined by the needs of business nor [did] it draw its ideas of partnership from the universal understanding and practice of business men. It was fixed centuries ago when Roman jurists sought to understand partnership in terms of consortium of co-heirs after the death of the head of a household”.\(^ {123}\) While the idea of co-heirs of businesses and the need to maintain certain monopolies have had better days, it is important to be critical and question how we can (or should) “legalize” the freedom to share without transgressing the borders of current legal frameworks.

First, we should question why (artificial) monopolies and regulations are imposed in certain fields, \textit{i.e.}, why do we need a license to be a taxi-driver or regulations to start a hotel? While these strict regulations might protect a professional group and keep fares high, it is important to be reminded that these regulations also aim to protect our safety, public health or urban planning. In addition, the lack of clear and specific rules for some sharing economy practices might open the door to multiple legal problems: think about car sharing initiatives. Car-rental companies have specific insurance and are subjected to frequent inspections. Hotels are subject to health and safety laws, zoning restrictions, special taxes, rules on governing public accommodation and even on advertising rates.\(^ {124}\) I can rent my living-room to anyone and no one will check whether my house complies with safety standards. Perhaps my guests do not


\(^{123}\) ROSCOE POUND, \textit{INTERPRETATIONS OF LEGAL HISTORY} (THE MACMILLAN COMPANY 1923) 112.

expect it either because my house is not a hotel. They do not expect it until a fire breaks out and they have troubles finding the emergency exit.

The description of the potential risks regarding sharing economy practices bring us to an interesting question: if this area has been left unregulated—and supposing that no specific rules are required—can we try to extend existing legal concepts to sharing economy practices? How creative can judges and regulators be in the interpretation of concepts such as ‘taxi’, ‘taximeter’, ‘restaurant’ or ‘hotel’? Can we use current legal frameworks to regulate sharing economy or do we need new rules?

In times of sharing and innovation through collaboration, we are required to ask whether we should convert interpretation into a ‘creative activity’. After all, legislators were not thinking about private rooms when they drafted regulations on hotels and inns. However, when we look at the text of some state or local laws, we might realize that judges might not need to be very creative in order to consider a sharing economy hosting guests as an unlicensed hotel. For example, in Virginia, a hotel is “any place offering to the public for compensation transitory lodging or sleeping accommodations, overnight or otherwise, including but not limited to facilities known by varying nomenclatures or designations as hotels, motels, travel lodges, tourist homes, or hostels.”125 In other states, and despite the objections of the owners of online platforms, not much creativity is required either. In May 2013, Judge Clive Morrick, in New York, decided that a host was indeed operating an unlicensed hotel and was sentenced to a fine of $2,400. He was hosting strangers for three days for compensation.

The application of current legal frameworks to sharing economy has also opened the doors to stringent approaches on the other side of the Atlantic. In April, a Belgium court126 declared Uber’s activities illegal and warned that a $13, 800 fine would be applied every time an Uber car tried to pick up a client. Neelie Kroes, vice-president of the European Commission at the time, expressed her outrage toward this decision, arguing that this “decision was not about helping or protecting passengers, [but] it was about protecting the tax cartel”.127 Uber and other forms of ‘sharing economy’ are

125 Code of Virginia, Title § 35.1-Hotels, Restaurants, Summer Camps, and Campgrounds.
126 Tribunal de Commerce de Bruxelles.
facing legal objections in different parts of the globe, challenging entrenched groups and forcing prices to go down. However, the lack of adequate regulation appears to be harming innovation since judges are extending the scope of current legal frameworks to sharing economy practices. As I mentioned earlier, regulations of hotels and restaurants were conceived for professional-consumers relationships and not for individual to individual transactions.

While we do not want excessive and outdated regulations that do not pass a cost-benefit test and stifle innovation, not regulating sharing economy seems to be opening the door to the application of existing stringent regulations. This may lead to a total discouragement of innovation in this sector. In addition, sharing economy practices survive thanks to the ‘kindness of strangers’, peer-reviews and a strong reliance on other people’ skills and ‘bona fides’. Things might go wrong one day, jeopardizing the whole system if users perceive an accident as sufficient to stop trusting in these online platforms. In any case, we do not need to call the regulatory heavy artillery.

The California Public Utilities Commission (CPUC) has recently legalized ride-sharing practices, requiring, amongst others, that Uber, Lyft and other transportation network drivers have a license to operate, inspect the vehicles, require drivers to undergo a criminal background check, and carry a $1 million liability insurance.\textsuperscript{128} This Commission imposed 28 rules to transportation network drivers but considered that these sharing economy practices did not endanger public safety. Although the number of rules might sound excessive, CPUC President Michael R. Peevey declared that these rules would allow “transportation network companies to compete with more traditional forms of transportation and for both drivers and consumers to have greater choice within the transportation industry.”

In Colorado, ride-sharing has also been authorized in June 2014. By enacting a specific law on ride-sharing practices, Colorado aims to combine the desire to encourage innovation with the need to guarantee public safety. This law requires Uber

\textsuperscript{128} See Press release California Public Utilities Commission, CPUC Establishes Rules for Transportation Network Companies, available http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M077/K132/77132276.PDF
and Lyft and other ride-sharing companies to carry primary commercial insurance during the whole activity.\footnote{See the full text of the Senate Bill 14-12 concerning the regulation of transportation network companies, available at \url{http://www.leg.state.co.us/Clics/CLICS2014A/csl.nsf/fsbillcont3/70364091166B28FC87257C4300636F6B?Open&file=125_enr.pdf}}

Specific rules seem to be a solution to share with other regulators in the future. However, can these rules keep up with the fast changing nature of sharing economy?

A more innovation-friendly approach to sharing economy could imply establishing broader or principle-based rules for sharing economy. Such rules would not be bound by the limitations of existing technology but would rather be open to potentially new sharing economy practices in different fields. There are different aspects that seem to be common to most of these practices and should be considered in their regulation. This is the case of background checks, personal inspection of premises or take-in interviews with service-providers, insurance, and the collection of taxes. In addition, it is important to make sure that there is no uncertainty as to liability should accidents occur. Online platforms are often in a better position to protect the customer than the small-entrepreneurs providing the service. Moreover, in order to respond to the uncertain nature of innovation in sharing economy (see above), regulations could be first enacted on a temporary and/or even experimental basis and later be evaluated and adapted.

As above-mentioned, although sharing practices are far from being recent phenomena, the shared access to a number of facilities and services has been facilitated by new technologies.\footnote{Russell Belk, \textit{You Are What You Can Access: Sharing and Collaborative Consumption Online}, 67 J. BUS. RES. 1595 (2014).} These examples of sharing economy allow a greater number of people to have access to certain services for a reduced price. Sharing economy is ‘democratizing’ the access to innovation and innovation in technologies is creating a wider scope of opportunities of sharing. However, our democratic and administrative systems are not always sufficiently responsive to these new challenges and to the fast tempo that characterizes their emergence. Nonetheless, as John McGinnnis explains \textit{“democracy serves many functions. It helps create the preferences of citizens, making...”}
the government responsive to what the public want”. If the public seems to want to share rides, government should be responsive to these preferences, while remaining cautious about potential risks.

(VI) Conclusion

The basic idea of sharing economy is to own less and have access to more. ‘Show hospitality to strangers’ (...) for by doing so some people have shown hospitality to angels without knowing it’. A noble idea, but sharing does not always mean caring, particularly if it is done for a compensation and with total strangers. The innovative character of these sharing practices poses a number of challenges to regulators: should they be submitted to the requirements of equivalent commercial practices? When should they be considered economically and legally irrelevant? How can regulators find the balance between the advancement of innovation and the need to safeguard public safety, health and protect customers from problems with liability and fraud? Up until now, regulators have refused to understand the phenomenon of sharing economy and have applied instead the legal tools they were granted for the equivalent commercial practices. In the case of transportation, this has resulted in the prohibition of Uber and Lyft in many cities. Simply put, the formula has been: Different Game + Same Rules = Game Over. However, consumers want to continue playing ‘taxi-drivers/taxi-riders’ and, in a world where the ‘customer is king’, the show must go on.

In this article, I put the phenomenon of sharing economy on the legal spotlight. Most practices in this field are innovative and as such difficult to regulate. In addition, they often oscillate between the border of personal and commercial activities. In the context of specific rules designed to respond to these new realities—innovation law—I plead for now for greater transparency in the policies of the online platforms facilitating sharing economy practices, and for limited but effective regulation of sharing economy. However, regulators should soon start thinking about specific rules that should be

---

132 Hebrews 13:2.
imposed on all sharing economy practices that come closer to commercial practices. Regulation at this level should refer to compulsory contracts between parties, compensation, minimum skill requirements, and rules on liability. Relying on the goodness and hospitality of strangers should always be our starting point. Knowing that rules can be enforced when these values are not there can be the key element to avoid disappointment.

Sharing economy needs a brand new legal framework. Current legal frameworks do not suffice. Innovators in this area want to fly away from traditional perceptions, ownership-related concepts, and business to consumer relationships in the direction of innovation. Before you share the flight with these innovators, we must make sure these innovators obtain their light-weighted licenses for your own safety. Without them, their wings might melt as they approach the sun. Can regulators provide them with ‘licenses to fly’ or will innovators feel “prisoned and palsied by these giant wings”?