

The Fiduciary Role of Access Platforms

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Peer-to-peer platforms are becoming an important force in today's economy. Companies such as Airbnb, Turo, TaskRabbit, Eatwith and Uber are central market actors, generating millions of transactions, in multiple jurisdictions across the globe. These companies connect individuals and small businesses via online platforms and mediate transactions in the real, offline world between owners and renters, service providers and service recipients.

Despite their clear importance and their market influence, the legal role of peer-to-peer (access) platforms remains elusive. What is the function of access platforms as private law actors? What responsibilities does this role entail? The literature typically discusses access platforms together with other online platforms such as Facebook and Google, but I argue that that peer to peer platforms pose a unique challenge. Access platforms create and maintain a market with its own rules, conventions, and entry and exit points. This marketplace is sufficiently different from traditional markets, and is completely controlled by the platform itself. Platforms can withhold entry and force exit from its activity. They control participation in the market through their terms of service. In addition, the market is defined and structured by the platform. Access platforms determine the mechanism for closing a deal, and the terms that the parties can and cannot negotiate. They nudge users into a desired level and frequency of use. Access platform also create the evaluation mechanism by establishing and managing a system of reviews. Finally, platforms impact the level of intimacy and privacy in property use. To capture the role of platform as constituting a market, I suggest we draw inspiration from fiduciary law, an area of private law area concerned with power and vulnerability. Inspired by the tenets of fiduciary law and adjusted to the particular problem, I promote the concept of market constituting fiduciaries. This role generates responsibilities to the participants in this market (the duty of loyalty). This duty explains why, for example, the platform should be responsible for the discriminatory actions of its participants. Other obligations include the duty to give prior notice before pulling out from an area of activity, and duty to create and maintain fair entry and exit rules.

The concept can be placed between two competing understandings of access platforms: platforms as mere mediating technological companies, and platforms as employers. The market constituting fiduciary concept does not contend that platforms control users' activity entirely,

nor does it belittle the role of the platform. Instead, it discerns the concrete function of access platforms and draws the normative implications of this control.

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