

REDISCOVERING THE PUBLIC INTEREST: AN ANALYSIS OF
THE COMMON LAW GOVERNING POST-EMPLOYMENT
NON-COMPETE CONTRACTS FOR MEDIA EMPLOYEES

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I. INTRODUCTION

Intense competition among media businesses and the mobility of media workers have prompted growing numbers of media employers to use contracts to prevent employees who leave their jobs from working for the competition.¹ These post-

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¹ See Jon H. Sylvester, *Validity of Post-Employment Non-Compete Covenants in Broadcast*

employment non-compete contracts have been described by one author as “business stability insurance” for the employer² and by a court as a possible form of “industrial peonage.”³ In the broadcast industry, the use of such contracts has “exploded to restrict everyone from the anchor to the tape editor.”⁴ In 2005, according to an annual salary survey conducted by the Radio-Television News Directors Association (RTNDA), more than forty percent of television newsroom personnel were under contract, and eighty-one percent of those contracts included post-employment non-compete clauses.⁵ Radio news staffers were less likely to be under contract, but the RTNDA survey showed that thirty-four percent of radio news workers were under contracts in 2005, and eighty-three percent of those contracts included post-employment non-compete provisions.⁶ Newspapers, advertising agencies, public relations firms, and Internet companies use these contracts too, although nobody appears to be tracking the frequency of the use of non-compete provisions in these industries.⁷

News Employment Contracts, 11 HASTINGS COMM. & ENT. L.J. 423 (1989). Sylvester described broadcast news as “a highly competitive field featuring subjective employment criteria, poor job security, and high turnover.” *Id.* at 423. Sylvester conducted his own survey of television stations in top broadcast markets and found that ninety-six percent had written employment contracts with their on-air talent. Seventy-six percent of the stations said the contracts always included post-employment restraints. *Id.* at 454. *See also* Marlo D. Brawer, *Switching Stations: The Battle over Non-Compete Agreements in the Broadcasting Industry*, 27 OKLA. CITY U. L. REV. 693, 711 (2002). Brawer expressed concern about the unequal bargaining power between employers and employees in broadcasting: because news directors get approximately one hundred tapes for each on-air opening, prospective employees effectively have no choice but to sign the contracts offered to them. *See also* Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002) (explaining current trends in the law across occupations).

² Harold William Hinderer III, *Covenants Not to Compete—Enforceability Under Missouri Law*, 41 MO. L. REV. 37, 40 (1976).

³ *Orion Broad., Inc. v. Forsythe*, 477 F. Supp. 198, 201 (W.D. Ky. 1979) (citing *Josten’s, Inc. v. Cuquet*, 383 F. Supp. 295, 299 (E.D. Mo. 1974)).

⁴ Brawer, *supra* note 1, at 708.

⁵ Bob Papper, *Where the Jobs Are: Salary Survey Reveals Specifics in Hiring Practices*, COMMUNICATOR, June 2006, at 43.

⁶ *Id.* The total number of broadcast news workers with non-compete contracts has dropped slightly, apparently due to the decisions of some states to pass laws disallowing them. In response to increasing alarm voiced by broadcasters over post-employment non-compete contracts, several states recently have adopted statutes limiting the use of such clauses in broadcast contracts. *See, e.g.*, ME. REV. STAT. ANN. tit. 26, § 599 (1999); MASS GEN. LAWS. ch. 149, § 186 (West 1998). Other states have adopted general statutes that clarify common law principles with relatively minor modifications. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 15.05 (Vernon 1999); WIS. STAT. ANN. § 103.465 (West 2001). These statutes are not analyzed in this article.

⁷ The case law analyzed in the various Parts of this article clearly supports this statement. Furthermore, anecdotal information indicates that the use of post-employment non-compete contracts is increasing in print journalism. E-mail from Bobbie Bowman, Diversity Dir., Am. Soc’y of Newspaper Editors (Mar. 23, 2006, 10:14 EST) (on file with authors); telephone interview with Rene Milam, Vice President and Gen. Counsel, Newspaper Ass’n of Am., in Vienna, Va. (Nov. 7, 2006). For the purposes of this article, “media employees” are defined as employees working for companies whose primary business is mass communication. The businesses include broadcasting,

A typical non-compete contract prohibits an employee who leaves one place of business from accepting a job at any competing place of business for one year. However, considerably broader and longer restrictions are not uncommon, especially in the television industry. Non-compete contracts are used in many fields of employment and have been brought before the courts for more than five hundred years.⁸ Non-compete agreements have been challenged by employees on the basis that they are unreasonable and, therefore, unenforceable under state common law.⁹ Employers initiate lawsuits against former employees when the employee is alleged to have violated a non-compete contract.

Though non-compete contracts are growing in use and popularity, scholarly literature on the law of post-employment restraints is sharply critical of these agreements. As has been noted: “The law of post-employment restraints has been described as a ‘sea—vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long.’ In this primal soup, one finds a murky intertwine of conflicting interests”¹⁰ Another scholar has observed:

[T]he law . . . consists of a mass of factually distinct and irreconcilable decisions. Thus, it is frequently asserted that each case is to be determined on its own particular facts, and thus the same identical agreement may be reasonable and valid under one set of circumstances, and unreasonable and invalid under another set of circumstances.¹¹

This article serves two purposes. First, it clarifies this confusing area of law by delineating guidelines for media employers and their employees to follow when negotiating post-employment non-compete contracts. The guidelines offered in this article suggest which contract provisions currently are likely to survive judicial scrutiny and which are not. Second, this article

newspapers, magazines, direct mail marketing, public relations, and advertising. The employees include reporters, radio disc jockeys, weathercasters, newspaper executives, and those who sell advertising.

⁸ Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 626 (1960).

⁹ See *id.* at 682-83.

For every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction.

Id. (emphasis added).

¹⁰ Stone, *supra* note 1, at 723 (citations omitted).

¹¹ Michael J. Hutter, *Drafting Enforceable Employee Non-Competition Agreements to Protect Confidential Business Information: A Lawyer's Practical Approach to the Case Law*, 45 ALB. L. REV. 311, 329 (1981) (citations omitted).

uses a two-level analysis to propose a significant change in the way the courts decide post-employment non-compete contract cases. The first level of analysis is that of the individual complaint, the level on which most legal analysis is conducted. The second level of analysis is that of law as social architecture, the idea that, in addition to settling individual complaints, law defines power relationships between various groups in society.¹²

Privacy scholar Daniel J. Solove has observed that the social architecture created by a body of law too often is overlooked in legal analysis. Discussing privacy law, Solove wrote: “The law often works at the surface of the problems, dealing with the overt abuses and injuries that may arise in specific instances. But thus far the law does not do enough to redefine the underlying relationships that cause those symptoms.”¹³ Solove further argued that legal problems often cannot be solved on a case-by-case basis. Instead, the “architecture” created by those cases needs to be reformed.¹⁴ This article analyzes the common law of contracts both at the level of individual cases and at the level of the social architecture of relationships among the media, the government, and the public.

Analyzing the law on post-employment non-compete contracts as social architecture is especially appropriate in cases involving media employees because a social architecture analysis recognizes the public’s interest in these contracts. Court rulings on challenges to post-employment non-compete contracts generally explain their decision-making process as a balancing of the interests of three groups: the employers, the employees, and the public. However, the public’s interest in actual practice is virtually always overlooked during the litigation of individual complaints.

In cases not involving media employees, the public’s primary interest is economic: that is, the interest in an unrestrained marketplace in which services and workers can freely compete. In cases involving media employees, however, there are additional and more important public interests that should be weighed by the courts, but currently are not. Some of these public interests are revealed through the case analysis conducted on the level of

¹² The term “social architecture” has been used in fields as varied as building architecture and psychology. However, legal scholar Lawrence Lessig popularized the term when he argued that computer code was defining the social architecture of the Internet. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999). Building on Lessig’s work, privacy law scholar Daniel J. Solove used the term more broadly “to refer to a particular power structure, not merely created by computer code or technology, but by the law.” Daniel J. Solove, *Digital Dossiers and the Dissipation of the Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1087 n.19 (2002).

¹³ DANIEL J. SOLOVE, *THE DIGITAL PERSON* 100 (2004).

¹⁴ *Id.*

the individual complaint. Additional public interests are revealed through the social architecture analysis.

In fifty-one court cases involving media professionals and their post-employment non-compete contracts, various courts have applied common law rules created to strike a balance between the competing interests in the cases. The common law calls on courts to examine three factors to determine whether such contracts are reasonable: duration, territory, and scope of activity prohibited.¹⁵ Then, according to the common law rules, courts should explore whether there is a legally protectable employer interest that is not outweighed by either the resulting hardship on the employee or the likely injury to the public.¹⁶ The judicial outcomes have been unpredictable, ad hoc, and heavily fact-dependent, leaving media employers and employees alike lacking clear guidance on what constitutes a legally acceptable non-compete contract. Furthermore, most courts ignore the public interest in these cases, and no court has acknowledged that the work of media employees might play a special role in society.

This article begins with a review of the history of non-compete contracts, a history that began with cases in which English master craftsmen used post-employment non-compete contracts to prolong their apprentices' periods of subservience in order to decrease competition in their trade. This history is essential to understanding current problems with the law on non-compete contracts. Second, this article analyzes the cases in which courts evaluated the reasonableness of post-employment non-compete contracts restraining media professionals. This analysis is conducted on the level of the individual complaint, and the findings are especially valuable to media employers and employees attempting to negotiate contracts that will survive judicial scrutiny. Finally, this article pays special attention to the effect of non-compete law on the public interest and concludes that most courts have failed to consider the compelling public interests in these post-employment non-compete contract cases.

II. THE HISTORY OF POST-EMPLOYMENT NON-COMPETE EMPLOYMENT CONTRACTS

The history of post-employment non-compete contracts and their treatment in the courts is part of the economic histories of both England and the United States. Legal historian Harlan M. Blake observed, in his seminal article on the topic, that the history

¹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

¹⁶ *Id.*

of these contracts reflects “the evolution of industrial technology and business methods, as well as the ebb and flow of such social values as freedom of contract, personal economic freedom, and business ethics.”¹⁷ The history of post-employment non-compete contracts is also a vivid example of how common law helps to draw the social architecture of a society by defining the relationships among, in this case, employers, employees, and the public. For centuries, courts viewed these contracts as illegal restraints on trade, reasoning that non-compete contracts benefited employers by imposing undue hardships on their former apprentices or employees and depriving the public of necessary goods and services.¹⁸ The economic hardships imposed on both the apprentices and the public resulted in an unacceptable social architecture in the eyes of the courts.

Well before contract law was a mature legal system,¹⁹ post-employment non-compete contracts were used in England to prevent apprentices from competing with the master craftsmen who had trained them. The first reported case was heard in the year 1414.²⁰ In that case, a dyer (a person trained to dye fabric) had agreed not to practice his trade in his master’s town for six months after the completion of his apprenticeship. The apprentice and his master disagreed over whether the apprentice had fulfilled his promise. Although the judge allowed the case to proceed,²¹ the judge suggested that the contract was illegal under the rules of common law. The judge’s reaction to the non-compete contract has been described as “[i]ncensed, the judge refused to issue the injunction sought by the covenantee [the master craftsman], instead declaring that if the plaintiff [master craftsman] was present in court, the judge would imprison him until the plaintiff paid a fine to the king.”²²

For the next two hundred years, non-compete contracts were consistently found to be illegal restraints of trade and contrary to public policy. In a handful of cases, all of which cited the *Dyer* case as precedent, the courts rejected attempts by craftsmen to prevent apprentices or other competitors from practicing their craft. For example, in 1578, a judge voided a contract that prohibited a

¹⁷ Blake, *supra* note 8, at 626-27.

¹⁸ See Hutter, *supra* note 11, at 318; Stone, *supra* note 1, at 740; Brawer, *supra* note 1, at 696-97.

¹⁹ See John v. Orth, *Contract and the Common Law, in THE STATE AND FREEDOM OF CONTRACT* 44 (Harry N. Scheiber ed., 1998) (explaining that modern contract law began to take shape in the eighteenth century and that the modern law of contract developed in the nineteenth century).

²⁰ Y.B. 2 Hen. 5, fol. 5, Mich, pl. 26 (C.P. 1414).

²¹ *Id.* No further proceedings were recorded.

²² Sylvester, *supra* note 1, at 424.

mercier's apprentice from practicing his craft for four years after the completion of his apprenticeship.²³ In 1602, an English judge for the first time articulated a public policy reason for invalidating a post-employment non-compete contract.²⁴ The judge said that the contract "is against the benefit of the Commonwealth For [the apprentice] ought not to be abridged of his Trade, and Living."²⁵ The contract in question obligated a haberdasher's apprentice to pay twenty pounds if he engaged in the haberdashery trade in the county of Kent prior to a certain date. Twelve years later, a tailor's guild sued a tailor for failing to first serve an apprenticeship in that town and for not being sanctioned by the town's guild to practice his trade.²⁶ The court ruled the restraint invalid because, under the common law, one could not be prohibited from working in any lawful trade.²⁷

These early cases are notable for having arisen from the medieval apprenticeship system. A major part of England's overall economy, the apprenticeship system was designed to give the master a small work force and to provide young men with training in a trade, thereby increasing both the master craftsman's and society's productivity and bolstering the economy. The employer, the apprentice, and the public were all part of the medieval social architecture. The relationship between a master craftsman and his apprentice was a contractual one.²⁸ The master agreed to train the apprentice in his craft in exchange for low-wage labor for a set period of time, usually seven years. Historians explained that the earliest post-employment non-compete contract cases involved "'unethical' masters attempting to prolong the traditional period of subservience of an apprentice or journeyman²⁹ and to interfere with his traditional rights to enter the guild as a craftsman, in violation of guild custom."³⁰ Master craftsmen were trying to protect their businesses from apprentices who were launching competing enterprises in the same town as their masters.³¹ The

²³ Moore K.B. 115, 72 Eng. Rep. 477 (Q.B. 1578). The case was initiated by the master who claimed his former apprentice had breached his contract. A mercier is a dealer in fabric, especially silks. *See also* Blacksmiths of South-Mims, 2 Leo. 210, 74 Eng. Rep. 485 (1587). The judge sent a blacksmith to jail because he had signed another blacksmith to a post-employment non-compete contract that had no time limit and overly broad territorial limits. It is not clear that this case involved an apprentice; it might have dealt with the sale of a business. *See generally* Blake, *supra* note 8 (discussing these early cases).

²⁴ Colgate v. Bachelier, Cro. Eliz. 872, 78 Eng. Rep. 1097 (Q.B. 1602).

²⁵ *Id.*

²⁶ Ipswich Tailor's Case, 11 Co. Rep. 532, 77 Eng. Rep. 1218 (K.B. 1614).

²⁷ *Id.*

²⁸ The contract was called an indenture.

²⁹ A journeyman was one who had completed his apprenticeship but was not yet granted master status by the local guild.

³⁰ Blake, *supra* note 8, at 632.

³¹ *See also* Stone, *supra* note 1, at 760 (explaining that the masters also made guild

problems with such contractual restraints were both economic and moral, and, due in part to the fact that there was no inter-craft mobility at the time, the post-employment non-compete contracts caused severe economic hardship to apprentices.³² The courts, therefore, rejected the contracts in order to promote economic freedom and to allow the trained apprentices to compete against their former masters.³³ Also, the violations of the traditional rules of apprenticeship by the master craftsmen were seen “as morally wrong and subversive of custom and order.”³⁴

It is also significant, in terms of social architecture, that the early cases arose in the context of deep labor shortages caused by the Black Death from 1348 through 1350.³⁵ Both the common law and statutory law acknowledged and protected the rights of the public to obtain goods and services. Because workers were in short supply, each worker was especially valuable, and the laws governing the English economy reflected that value. For example, the Statute of Laborers, adopted in 1350, required all men and women less than sixty years of age to work and to accept the wages that had prevailed before the catastrophe.³⁶ Due to these circumstances, some scholars have speculated that post-employment non-compete contracts worked to aid and abet criminal activity because they forced people to violate their legal obligation to work. Courts wanted the public to have access to skilled workers and their products.³⁷ The Statute of Laborers was replaced by the Statute of Artificers (often called the Statute of Apprentices) in 1563.³⁸ This law empowered the justices of the peace in each county to set wages, prohibited workers from leaving work unfinished, made work compulsory, and regulated the apprentice system.³⁹

The law on post-employment non-compete contracts and the

entrance exams more difficult and charged exorbitant entrance fees).

³² Hutter, *supra* note 11, at 318.

³³ Mark A. Glick et al., *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 GEO. MASON L. REV. 357, 361 (2002).

³⁴ Blake, *supra* note 8, at 634. Later, in 1536, an Act for Avoiding of Exactions Taken Upon Apprentices made it illegal for any person to prevent a former apprentice from going into business. *Id.*

³⁵ See James Bolton, *The World Upside Down: Plague as an Agent of Economic and Social Change*, in *THE BLACK DEATH IN ENGLAND* 27 (Mark Ormrod & P.G. Lindley eds., 1996). It is estimated that between thirty and forty percent of the population of England, possibly as many as three million people, died from the Black Death. *Id.* at 26, 28. The consequences for the economy and labor market were vast. Due to the population decline, wages fell and prices rose, and traders and manufacturers were among those who suffered from the economic upheaval. *Id.* at 18.

³⁶ Orth, *supra* note 19, at 51.

³⁷ Glick, *supra* note 33, at 363.

³⁸ Orth, *supra* note 19, at 51.

³⁹ *Id.*

resulting social architecture changed as England's economic system changed. England's labor supply gradually recovered from the ravages of the Black Death, and the guilds declined as the mechanization of the Industrial Revolution increased the demand for unskilled workers.⁴⁰ By the early nineteenth century, the apprenticeship system was defunct in England and was replaced by a market economy. In England's new market economy, factory labor was specialized, workers were mobile, operations were large, and personal relations were less important than under the medieval apprenticeship system.⁴¹ The market economy included a strong notion of freedom of contract, and "[t]he stable enforcement of contracts replaced the stability lost from the apprenticeship system."⁴² Thus, the demise of the apprenticeship system and the rise of the market economy changed the relationship among employers, employees, and the public, and the law responded to that change by allowing some post-employment non-compete contracts.

Mitchel v. Reynolds,⁴³ which was decided in 1711 in the midst of England's industrial revolution, is the case that is considered the start of modern law with respect to non-compete contracts.⁴⁴ The case involved the lease of a bakeshop. The baker who owned the shop leased it to another baker and agreed not to practice his craft in the area for the term of the lease.⁴⁵ The lessor violated this non-compete agreement and then argued that the agreement was an illegal restraint on trade that interfered with the practice of his craft. The judge reviewed the previous cases and noted that there was a presumption that all restraints of trade were illegal. However, the judge distinguished between "general" and "particular" restraints, finding that "general" restraints—those that have no geographic and/or temporal limits—are never valid and that it is never reasonable to keep a man from his trade where this restraint benefits no one.⁴⁶ However, a "particular" restraint—a restraint limited in area or in time—is acceptable if it can be

⁴⁰ Blake, *supra* note 8, at 638.

⁴¹ *Id.*

⁴² Glick, *supra* note 33, at 365.

⁴³ *Mitchel v. Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (Q.B. 1711).

⁴⁴ Blake, *supra* note 8, at 637.

⁴⁵ Post-employment non-compete contracts are of two types: those connected with the sale of a business and those involving former employees leaving to work for a competitor. Contracts of the first type are generally left intact by the courts, whereas contracts of the second type have been subject to much closer judicial scrutiny and are more frequently ruled invalid. The *Mitchel* decision falls in the first category of cases as it contained a contract involving the sale of a business. However, the media cases analyzed in this article do not involve the sale of a business and are thus of the second type: they involve contracts where former employees have left to work for a competitor.

⁴⁶ See Blake, *supra* note 8, at 630 (explaining that at the time of *Mitchel*, in 1711, there were no nationwide markets).

proven that there is an important business reason for the restraint and if it is supported by adequate compensation. This rule came to be known as the “rule of reason” or the “reasonableness test.”⁴⁷

As economic conditions continued to change, the rule of reason established in *Mitchel* was adapted to meet those changing conditions. For example, the general-versus-particular distinction became meaningless because national markets developed; consequently, general, i.e., national, restraints sometimes were reasonable. The general-versus-particular distinction was first narrowly applied and then abandoned altogether by English courts during the nineteenth century.

The English courts were flooded with cases involving post-employment non-compete contracts as employment contracts replaced the apprenticeship system in the late eighteenth and early nineteenth centuries. The first cases in the United States were reported in the mid-1800s, and American law developed parallel to English law.⁴⁸ Within fifty years, the reasonableness test, first articulated in *Mitchel*, was firmly established in the common law in the United States.

In the current information age, post-employment non-compete contracts are common in many industries because knowledge has great economic value. One scholar observed:

Employees bring knowledge and capabilities to their jobs and expect that their jobs will further increase their human capital, whether by providing experience and learning on the job, or by providing more formal training opportunities. Employees see the growth of their human capital and the enhancement of their labor market opportunities as one of the benefits of the job. Jobs are often evaluated and selected on the basis of whether and how much opportunity for learning and skill enhancement is provided. Accordingly, employees assume that the skills and knowledge they acquire on a particular job “belong” to them in the sense that they take these with them when they depart.⁴⁹

The fact that employers often take the opposite view of who owns the skills and the knowledge acquired on the job by the employee

⁴⁷ See *id.* at 630-31. Blake explained the application of this rule to the facts of *Mitchel*: [T]o refuse to enforce reasonable restraints accompanying the transfer of a business would result in unnecessary hardship or loss to a craftsman ready to retire but forced to continue in trade or to sell out at a lower price because no one would risk the purchase of this business without the protection of an enforceable covenant not to compete.

Id. at 629.

⁴⁸ *Id.* at 643-44 (explaining that one difference was that in United States cases, “almost from the beginning more emphasis was placed on protecting the employee from overly heavy burdens . . .”).

⁴⁹ Stone, *supra* note 1, at 722.

helps to explain the thousands of non-compete contract cases litigated in the United States since the start of the twentieth century.⁵⁰ A central problem remaining for courts in the United States is how courts should formulate the reasonableness test in more specific terms and how to apply it to individual cases.

III. UNITED STATES CASE LAW ON POST-EMPLOYMENT NON-COMPETE CONTRACTS

The first reported United States case regarding post-employment non-compete contracts was decided in 1949,⁵¹ and in fifty-one subsequently reported cases, courts have evaluated the reasonableness of post-employment non-compete contracts specifically binding media employees. Most of the cases are from state appellate courts, and several are from federal courts.⁵² The typical story of media non-compete litigation goes as follows: a new employee signed a contract that included post-employment non-compete provisions. The employee agreed not to compete with his employer within a specific geographic area for a limited time after his employment ended. After being fired or quitting, the media employee obtained new employment in apparent violation of his contract. At that point, a lawsuit could be initiated either by the original employer or by the employee. The original employer sometimes sought damages and an injunction to prohibit the employee from working for a competitor. Other times, the original employer sought to enjoin a competitor from hiring an employee. In still other cases, an employee seeking to be released from the terms of his contract sued for a declaratory judgment that his contract was unreasonable and thus unenforceable.⁵³ In

⁵⁰ See COVENANTS NOT TO COMPETE: A STATE-BY-STATE SURVEY (Brian M. Malsberger ed., 4th ed. 2004).

⁵¹ *Journal Co. v. Bundy*, 37 N.W.2d 89 (Wis. 1949). In this case, a radio entertainer signed a contract agreeing, in part, not to use his childhood and professional nickname "Heinie" or the expression "The Band of a Million Friends" in any radio broadcast within one hundred miles of Milwaukee, after leaving the employ of his original station. Three years later, when the employee went to work for a different Milwaukee station that advertised his new show as "Heinie and His Band—the Band of a Million Airs," the original employer sought to restrain the employee from using the names and to recover damages for prior uses of the names. The trial court denied the requests on the grounds that there was no evidence that any irreparable loss would result from the use of the names whereas it was probable that the radio entertainer would suffer irreparable loss if he were denied the right to use the names. The Supreme Court of Wisconsin affirmed. *Id.*

⁵² Most trial court decisions were not included in this study because they are generally not reported. One can safely assume, therefore, that these fifty-one cases represent a relatively small proportion of the conflicts between employers and employees over post-employment non-compete contracts.

⁵³ In some cases, plaintiffs filed additional legal claims that are beyond the scope of this article. They include tortious interference and misappropriation of trade secrets. See, e.g., *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892 (Minn. 1965) (plaintiff radio

all the cases analyzed here—regardless of who initiated the lawsuit—the courts were called upon to decide whether the contracts were unreasonable and thus unenforceable. Virtually all the courts deciding these cases began by stating that non-compete contracts are frowned upon as restraints of trade. As a federal district court judge said in 1996, “It is well established that restrictive covenants that tend to prevent an employee from pursuing a similar vocation upon termination or retirement from employment are disfavored by the law.”⁵⁴ However, non-compete contracts can be enforceable if they are reasonable.⁵⁵

The results in media non-compete contract cases have been anything but uniform. Because there was no uniformity in the terms of the contracts, who was bound by them, or the ways in which they were allegedly breached, the courts often pondered questions for which the case precedents and legal treatises offered little or no guidance. The courts had to sort through the facts of each case seeking to assess the reasonableness of the terms of the contract and to strike a reasonable balance among the interests of the employer, the employee, and sometimes the public. The cases hinged on such questions as: Is six months a reasonable duration for a non-compete contract?⁵⁶ Is five years a reasonable duration?⁵⁷ Is one county a reasonable territory in which a former employee can be prohibited from competing?⁵⁸ Is it reasonable to restrict a former employee from competing in all of the United States, Canada, and Mexico?⁵⁹

A. *Duration of Post-Employment Non-Compete Agreements*

The majority of the contracts analyzed by the courts were for a duration of three or fewer years.⁶⁰ In all but one of those cases, the three-year duration of the agreement was found to be reasonable, or the duration was not challenged and the case was decided on other grounds.⁶¹ Contractual restraints of five years⁶²

announcer sued his former employer for tortious interference with an employment agreement); *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999) (plaintiff Internet company sued former employee for misappropriation of trade secrets).

⁵⁴ *John Hancock Mut. Life Ins. Co. v. Austin*, 916 F. Supp. 158, 163 (N.D.N.Y. 1996) (quoting *Briskin v. All Seasons Servs., Inc.*, 615 N.Y.S.2d 166, 167 (N.Y. App. Div. 1994)).

⁵⁵ RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

⁵⁶ *Citadel Broad. Co. v. Gratz*, 52 Pa. D. & C.4th 534 (C.P. Ct. 2001).

⁵⁷ *Davis-Robertson Agency v. Duke*, 119 F. Supp. 931 (E.D. Va. 1953).

⁵⁸ *Cullman Broad. Co. v. Bosley*, 373 So. 2d 830 (Ala. 1979).

⁵⁹ *William B. Tanner Co. v. Taylor*, 530 S.W.2d 517 (Tenn. Ct. App. 1974).

⁶⁰ This was true in about eighty percent of the cases. In some cases, the duration was not specified, so those cases were not included in this analysis.

⁶¹ *See, e.g., Clooney v. WCPO Television Div. of Scripps-Howard Broad. Co.*, 300 N.E.2d 256 (Ohio Ct. App. 1973) (discussing the need to protect the employer’s business interest, whether the contract was unreasonably restrictive of the employee, whether the employee’s talents were unique, and whether the one hundred-mile territorial restriction

or longer generally were found to last for an unreasonable duration, unless the employee continued to receive compensation from his former employer during this period. Restraints without time limits never were found to be reasonable.⁶³

The one case in which the duration of a post-employment restraint of three or fewer years was found to be unreasonable involved a one-year restraint on a vice president of EarthWeb, a company that provided online services to information technology professionals through web sites.⁶⁴ The vice president of EarthWeb had agreed not to work for any of EarthWeb's competitors for one year after leaving EarthWeb. When the vice president resigned and accepted a job with a competitor, EarthWeb sued the former vice president for breach of contract and misappropriation of trade secrets, and sought to stop the former vice president from working for the competitor and disclosing EarthWeb's trade secrets. The United States District Court for the Southern District of New York stated:

As a threshold matter, this Court finds that the one-year duration of EarthWeb's restrictive covenant is too long given the dynamic nature of this industry, its lack of geographical borders, and [the employee's] former cutting-edge position with EarthWeb where his success depended on keeping abreast of daily changes in content on the Internet

. . . .

. . . [A] one-year hiatus from the workforce is several generations, if not an eternity.⁶⁵

On this and other grounds, the court ruled in favor of the employee.⁶⁶

was reasonable); *W. Group Broad. Ltd. v. Bell*, 942 S.W.2d 934 (Mo. Ct. App. 1997) (deciding whether there were trade secrets that justified the contract); *Hagerty, Lockenvitz, Ginzkey & Assocs. v. Ginzkey*, 406 N.E.2d 1145 (Ill. App. Ct. 1980). At issue in *Hagerty* was what it means to compete, not the terms of the contract.

⁶² In the cases in which the reasonableness of post-employment non-compete contracts was an issue, there were three-year restraints and five-year restraints, but nothing in-between.

⁶³ *See, e.g.*, *Harris v. Bolin*, 247 N.W.2d 600 (Minn. 1976).

⁶⁴ *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999).

⁶⁵ *Id.* at 213.

⁶⁶ A related Internet case involved DoubleClick, a company that sold Internet advertising. In that unreported case, a New York court decided the appropriate length of a preliminary injunction against two former employees rather than the reasonableness of the duration of a contract, but the analysis was similar to that applied in the *EarthWeb* case. After two vice presidents left the company and started a competing company in apparent violation of their one-year non-compete contracts, DoubleClick asked the court to enjoin its former employees from competing with DoubleClick for one year. The court held that one year was too long. The court further stated, "Given the speed with which the Internet advertising industry apparently changes, defendants' knowledge of DoubleClick's operation will likely lose value to such a degree that the purpose of a preliminary injunction will have evaporated before the year is up." The court granted DoubleClick a

That brief discussion of duration constituted more discussion than was found in most cases. In fact, in most cases, the courts have noted the duration of the contracts without comment.⁶⁷ When the courts did discuss the duration of the post-employment non-compete agreement, they usually did so, not as a separate variable, but in conjunction with other variables. For example, in 1985, an Illinois appellate court considered the duration of a contract in conjunction with five other issues.⁶⁸ The plaintiff in the breach-of-contract case was the publisher of a national magazine for music teachers and directors of school bands and orchestras. The publisher sued the former editor and advertising manager, a fourteen-year employee who went to work for a competitor magazine despite having contracted not to compete anywhere in the nation for two years. The lower court found for the employer, and the employee appealed. The appellate court found as follows:

[A]s to the time limitation, we believe that in the light of the circumstances here, including the broad nature and extent of [the employee's] responsibilities and authority throughout his 14-year association with the plaintiff, as well as the near-exclusive contacts and close relationships he maintained with the advertisers, that the two-year limitation—which represents a reduction from the time restriction in previous contracts and a compromise between plaintiff's proposal of three years and his counter-proposal of one—is reasonably related to the protection of plaintiff's interests, and neither adversely affects the general public nor imposes an undue hardship on [the employee].⁶⁹

Courts have been less approving of five-year post-employment contractual competition restraints. In two cases where the duration of the non-compete clause was five years, the contracts were found to be of unreasonable duration;⁷⁰ in a third, the contract was found unreasonable on other grounds, with no discussion of the contract's duration.⁷¹ In one of the cases in which a five-year contract was held to be unreasonable, *Richmond*

six-month injunction. *DoubleClick, Inc. v. Henderson*, No. 116914/97, 1997 WL 731413, at *8 (N.Y. Sup. Ct. Nov. 7, 1997). *See also* *Sprint Corp. v. Deangelo*, 12 F. Supp. 2d 1188, 1195 (D. Kan. 1998) (noting that “speed is critical in the rapidly evolving Internet services industry; enormous changes can occur during extremely short periods; and exclusion from the industry could destroy defendant's future in that industry.”).

⁶⁷ *See, e.g.*, *Audio Props., Inc. v. Kovach*, 655 N.E.2d 1034 (Ill. App. Ct. 1995); *Punzi v. Shaker Adver. Agency*, 601 So. 2d 599 (Fla. Ct. App. 1992); *Pathfinder Commc'ns Corp. v. Macy*, 795 N.E.2d 1103 (Ind. Ct. App. 2003).

⁶⁸ *Instrumentalist Co. v. Band, Inc.*, 480 N.E.2d 1273 (Ill. App. Ct. 1985).

⁶⁹ *Id.* at 1282.

⁷⁰ *Richmond Bros., Inc. v. Westinghouse Broad. Co.*, 256 N.E.2d 304 (Mass. 1970); *Davis-Robertson Agency v. Duke*, 119 F. Supp. 931 (E.D. Va. 1953).

⁷¹ *Dial Media, Inc. v. Schiff*, 612 F. Supp. 1483 (D. R.I. 1985).

Brothers, Inc. v. Westinghouse Broadcasting Co.,⁷² a radio disc jockey was released from an employment contract in Boston in order to work for a non-competing Chicago radio station, after he agreed to sign a contract containing a five-year non-compete clause. When the disc jockey was terminated from the Chicago station after three years, he returned to Boston to work in competition with his original employer. The original employer sued the competing Boston radio station, seeking to prevent it from hiring the announcer. The Supreme Judicial Court of Massachusetts ruled that the five-year duration of the contract was unreasonable. The court said that the reasonableness of the duration of a contract depends on the facts of each case:

In determining whether a restriction as to time is reasonable, we must consider the nature of the plaintiff's business and the character of the employment involved, as well as the situation of the parties, the necessity of the restriction for the protection of the employer's business and the right of the employee to work and earn a livelihood.⁷³

In the case before it, the court stated that the three years the announcer worked in Chicago "sufficiently protected any business interests of the plaintiff."⁷⁴ The court observed that the employee did not solicit advertisers as part of his job and thus was not in a position where he could exploit any previous business contacts. The disc jockey did not have trade secrets or confidential information. Thus, the court concluded:

We are of the opinion that the restrictive covenant . . . is no longer reasonably necessary for the protection of the plaintiff's business. Enforcement of the covenant beyond the years of [the employee's] absence from Boston would merely be protecting the plaintiff against ordinary competition. It is not entitled to such protection.⁷⁵

The court also noted that an employee in a similar position at the same radio station had an eighteen-month non-compete contract and that the contract between the employees' union and the station provided that such contracts should not exceed sixty days in length.⁷⁶

While no non-compete contract with a duration of five years survived judicial scrutiny, two ten-year non-compete contracts were found to be reasonable; but in both these cases, the employee continued to receive compensation from the employer. In

⁷² *Richmond Bros.*, 256 N.E.2d 304.

⁷³ *Id.* at 307 (citing *Club Aluminum Co. v. Young*, 160 N.E. 804, 806 (Mass. 1928)).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 306.

Bradford v. New York Times Co.,⁷⁷ the employee was the general manager, vice president, and a director of the *New York Times*. While employed, he signed a contract under which he would receive company stock in installments after leaving the company and would not compete with the *New York Times* while he was receiving those installments. While still receiving stock payments, he went to work as general manager of Scripps-Howard Newspapers, prompting a lawsuit against him. The United States Court of Appeals for the Second Circuit determined: “The time fixed, ten years, is commensurate with the payment of benefits” and was therefore reasonable.⁷⁸

Finally, two contracts with no time limits to their non-compete agreements were found to be unreasonable. One of those contracts was found unreasonable by the Minnesota Supreme Court in *Harris v. Bolin*.⁷⁹ In *Harris*, an advertising agency employee left his job to join a competitor and lost his profit sharing under the terms of his non-compete contract. The employee sued to have the contract declared an illegal restraint of trade. The court agreed with the employee: “The clause which causes [the employee] to forfeit part of his compensation in order to exercise his right to compete is broader than necessary to protect the legitimate interest of the employer and is not reasonably limited as to time and territory.”⁸⁰ The contract contained no territorial limit, which appears to have been another factor in the court’s decision finding the clause unreasonable.⁸¹

In sum, these cases show that contracts that restrict post-employment competition for three or fewer years are generally found to be of reasonable duration. The one notable exception was an Internet case in which the court observed that the dynamic nature of an Internet business rendered a one-year restraint unreasonable.⁸² Furthermore, restraints of five years or longer generally were found to be of unreasonable duration unless the employee was continuing to receive compensation from his original employer.⁸³ In deciding these cases, the courts engaged in very little discussion of duration, but clearly considered duration in conjunction with many other variables, all of which are discussed below.

⁷⁷ *Bradford v. N.Y. Times Co.*, 501 F.2d 51 (2d Cir. 1974).

⁷⁸ *Id.* at 58.

⁷⁹ *Harris v. Bolin*, 247 N.W.2d 600 (Minn. 1976).

⁸⁰ *Id.* at 603.

⁸¹ *Id.*

⁸² *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999).

⁸³ *Bradford*, 501 F.2d 51; *Harkness v. Scottsboro Newspapers*, 529 So.2d 1000 (Ala. 1988).

B. *Territorial Limits on Post-Employment Non-Compete Agreements*

Most of the contracts evaluated in the cases studied here defined the territory in which post-employment competition was prohibited in terms of specific counties, regions of the country, countries, or, most commonly, a distance from the employee's original media outlet. For example, several contracts prohibited post-employment competition within a fifty-mile radius of a television station. Some other contracts did not prohibit competition in a specific geographic area, but instead, stipulated that the employee could not work for specific competing media outlets or, in cases involving advertising sales, solicit the original employer's clients. In these contracts, the territorial limits were implicit; the prohibited territory was the area in which the original employer conducted business. Some contracts had no territorial limits, implicit or otherwise.

In only three of fifty-one cases in which courts evaluated post-employment non-compete contracts were the territorial limits found to be unreasonable. In one of these cases the territory was unclear, and in the other two cases there were no territorial limits at all.⁸⁴ In all of the other cases, the courts found the territorial limits to be reasonable or did not address the issue, deciding the cases on other grounds.

The most commonly used contracts defined the non-compete territory in terms of a radius from the original employer or a specific geographic area.⁸⁵ Territories defined by a radius of thirty-five, fifty, or one hundred miles from a media outlet were routinely found to be reasonable.⁸⁶ Most of these cases involved television or radio stations, and the territories appeared to correspond to the viewing or listening areas of those stations. One contract specified that the employee could not compete within the television station's Arbitron rating area.⁸⁷ In *Midwest Television, Inc. v. Oloffson*,⁸⁸ an Illinois appeals court reviewed a contract that

⁸⁴ *Wake Broadcasters, Inc. v. Crawford*, 114 S.E.2d 26 (Ga. 1960) (ruling the territorial limit unreasonable because it was unclear); *Harris*, 247 N.W.2d 600 (ruling it was unreasonable to have no territorial limit on the post-employment restraint); *Davis-Robertson Agency v. Duke*, 119 F. Supp. 931 (E.D. Va. 1953) (same).

⁸⁵ The contracts in twenty-nine cases fit this description.

⁸⁶ *See, e.g.*, *Skyland Broad. Corp. v. Hamby*, 75 Ohio Law Abs. 545 (Ohio C.P. 1957); *Tyler v. Eufala Tribune Publ'g Co.*, 500 So. 2d 1005 (Ala. 1986); *Clooney v. WCPO Television Div. of Scripps-Howard Broad. Co.*, 300 N.E.2d 256 (Ohio Ct. App. 1973).

⁸⁷ *French v. Cmty. Bd. Coastal Bend, Inc.*, 766 S.W.2d 330 (Tex. Ct. App. 1989). Arbitron, Inc., is an international media and marketing research firm that, among other things, measures radio stations' audiences. From 1949 to 1993, Arbitron provided similar services for television stations, measuring the audience within the area in which homes received the station's signal—also known as the Arbitron rating area. Nielsen Media Research currently provides this same service for television stations.

⁸⁸ *Midwest Television, Inc. v. Oloffson*, 699 N.E.2d 230 (Ill. App. Ct. 1998).

prohibited an employee from competing within one hundred miles of his station's broadcast tower. The court held the territorial restriction to be reasonable:

Because the evidence indicates that Oloffson is an extremely popular radio personality, Midwest's concern that its listeners and advertisers would follow him to a station within an overlapping broadcast zone is not unreasonable. In fact, Midwest's station manager testified that both listeners and advertisers followed Oloffson when he moved between its AM and FM stations.

The geographical restriction in this case is reasonably coextensive with Midwest's business territory; it is not unreasonable.⁸⁹

The only contract in which the territorial limits were found to be unreasonable was one in which the territorial limits described in the contract were unclear. In *Wake Broadcasters, Inc. v. Crawford*,⁹⁰ the Georgia Supreme Court found unreasonable a contract that prohibited an employee from performing managerial, sales, marketing, programming, transmitting, or broadcasting services at any radio or television station within fifty miles of the radio station for which he had worked or for any other station owned by the same company. The court observed that the contract specified only some of the states and none of the cities in which the company owned stations.⁹¹ Thus, the court concluded, "It would be extremely difficult, if not impossible, under the terms of the contract, for the defendant to know whether or not he is violating the terms of the contract."⁹²

Other contracts prohibited competition in a list of counties; in New England; in the United States; or in the United States, Canada, and Mexico.⁹³ None of these agreements was found to be unreasonable.⁹⁴ In some cases, national and international restrictions were approved "because . . . the nature of the business"⁹⁵ being protected was national or international. Two

⁸⁹ *Id.* at 235.

⁹⁰ *Wake Broadcasters, Inc. v. Crawford*, 114 S.E.2d 26 (Ga. 1960).

⁹¹ *Id.* at 28.

⁹² *Id.*

⁹³ *See, e.g.*, *Daytona Group of Tex., Inc. v. Smith*, 800 S.W.2d 285 (Tex. Ct. App. 1990) (reviewing a contract that prohibited the employee from working in a list of counties); *Richmond Bros., Inc. v. Westinghouse Broad. Co.*, 256 N.E.2d 304 (Mass. 1970) (reviewing a contract that prohibited the employee from working in New England); *Dabora, Inc. v. Kline*, 884 S.W.2d 475 (Tenn. Ct. App. 1994) (reviewing a contract that prohibited the employee from working in the United States); *William B. Tanner Co. v. Taylor*, 530 S.W.2d 517 (Tenn. Ct. App. 1974) (reviewing a contract that prohibited the employee from working in the United States, Canada, or Mexico).

⁹⁴ *Id.*

⁹⁵ *Instrumentalist Co. v. Band, Inc.*, 480 N.E.2d 1273, 1281 (Ill. App. Ct. 1985) (quoting the trial court).

typical cases involved specialty magazines with national circulations—one about school bands⁹⁶ and the other about the Morgan and Saddlebred breeds of show horses.⁹⁷ In both cases, the courts allowed nationwide restrictions because the employees were only prohibited from working for a limited number of competing national magazines. In *Dabora, Inc. v. Kline*,⁹⁸ the case involving the horse magazine, a Tennessee appeals court said that territorial considerations were not as important as the horse breed to which a magazine was dedicated. The court stated:

As the covenant only prohibits Ms. Kline's employment by Saddlebred and Morgan publications, we agree with the trial court that it is not overly broad. She [the employee] is not prevented from seeking employment with publications covering quarter horses, walking horses, or other breeds, or publications of a more general nature. The restriction is no broader than it needs to be to protect . . . from unfair competition.⁹⁹

As in their discussions of contract duration, the courts usually discussed territory in conjunction with one or more other variables. For example, compare *Dabora* with *Midwest Television*,¹⁰⁰ in which an employee was prohibited from competing in a wide range of positions in all electronic media spanning a 100-mile radius of his employer. The comparison clearly suggests that courts allow employers to restrict employees from working in a wide range of positions in several media if the territory involved is relatively small. The territory can be much broader, however, if the contract is more limited in terms of the media outlets and positions that the employee is prohibited from holding in that territory.

In five separate cases, the courts evaluated contracts without territorial limits. In two of these cases, the courts found the lack of a specified limit to be reasonable.¹⁰¹ In two other cases, the courts found the lack of territorial limits to be unreasonable.¹⁰² And in the remaining case, the contract was found to be unreasonable on other grounds, with no discussion of territory.¹⁰³ The courts have generally allowed contracts without territorial limits when the employer's business was worldwide and the post-

⁹⁶ *Id.*

⁹⁷ *Dabora*, 884 S.W.2d 475.

⁹⁸ *Id.*

⁹⁹ *Id.* at 478.

¹⁰⁰ *Midwest Television, Inc. v. Oloffson*, 699 N.E.2d 230, 235 (Ill. App. Ct. 1998).

¹⁰¹ *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999); *Gorman Publ'g Co. v. Stillman*, 516 F. Supp. 98 (N.D. Ill. 1980).

¹⁰² *Davis-Robertson Agency v. Duke*, 119 F. Supp. 931 (E.D. Va. 1953); *Harris v. Bolin*, 247 N.W.2d 600 (Minn. 1980).

¹⁰³ *Modern Commc'ns, Inc. v. Zimmerman*, 528 N.Y.S.2d 68 (N.Y. App. Div. 1988).

employment restraint was limited in some other way.

In one of two cases in which a court approved a contract without a territorial limit, *Gorman Publishing Co. v. Stillman*,¹⁰⁴ the publisher of a food industry trade magazine restricted an advertising salesman from competing with his employer anywhere in the United States or overseas for two years. The court said this lack of territorial limit was justified because the contract applied to only a limited number of jobs—advertising sales jobs for food industry trade magazines—and the employee had no trouble finding a new job that did not violate the contract.¹⁰⁵ In the second case, which involved an Internet company executive, the lack of a territorial limit was accepted by the court without comment.¹⁰⁶

Contracts without territorial limits were found unreasonable in two advertising agency cases. In *Harris*,¹⁰⁷ a case in which the non-compete contract also contained no time limit, the court ruled that the contract was “broader than necessary to protect the legitimate interest of the employer and is not reasonably limited as to time and territory.”¹⁰⁸ In *Davis-Robertson Agency v. Duke*,¹⁰⁹ the second case to rule that a non-compete contract with no territorial limits was unreasonable, the court considered several factors, including the context of the restraint (the advertising business) and the five-year duration. The court stated, “When it is remembered that advertising of the general type here involved had been conducted by others prior to the entry into the field of either the defendant or the plaintiffs,” the long duration and unlimited territory are unreasonable.¹¹⁰

In about a dozen other cases in which the territorial limits of a post-employment non-compete agreement were discussed, the contracts prohibited employees from soliciting advertising from former clients, from working for competing broadcast stations generally, or from working for competing broadcast stations that were specified in the contract.¹¹¹ As noted above, the territorial limits in these contracts were implicit, and no such restrictions were found to be unreasonable.

In sum, the territorial limits in post-employment non-compete contracts were found unreasonable in only three cases.

¹⁰⁴ *Gorman Publ'g Co. v. Stillman*, 516 F. Supp. 98 (N.D. Ill. 1980).

¹⁰⁵ *Id.* at 104.

¹⁰⁶ *EarthWeb*, 71 F. Supp. 2d 299.

¹⁰⁷ *Harris*, 247 N.W.2d 600.

¹⁰⁸ *Id.* at 603.

¹⁰⁹ *Davis-Robertson Agency v. Duke*, 119 F. Supp. 931 (E.D. Va. 1953).

¹¹⁰ *Id.* at 936.

¹¹¹ *See, e.g.*, *Thompson Recruiting Adver., Inc. v. Wedes*, 651 F. Supp. 107 (E.D. La. 1986); *Birmingham Television Corp. v. DeRamus*, 502 So. 2d 761 (Ala. Civ. App. 1986).

In one of those, the territory was unclear.¹¹² In the other two, there were no territorial limits.¹¹³ Generally the courts did not comment at length about territorial limitations, but considered territory issues in conjunction with other variables. Even contracts without territorial limits were found to be reasonable if an unlimited territory accurately reflected the worldwide nature of the employer's business and if the contracts were limited in other ways.¹¹⁴

C. *Type of Activity Prohibited in Post-Employment
Non-Compete Agreements*

Few cases discussing post-employment non-competes discussed whether the activity which the non-competes contract prohibited an employee from engaging in was overbroad and thus unreasonable. In those cases that did discuss the employee's employment activity, however, courts generally found that an employee could be prohibited from performing the job the employee had performed for the original employer, but could not be prohibited from working in an entire industry.¹¹⁵ The generally applicable common law rule is that the post-employment restriction can be no broader than necessary to protect a legitimate employer interest.¹¹⁶

One case finding the non-competes agreement at issue to have an unreasonable activity restriction is *Pathfinder Communications Corp. v. Macy*.¹¹⁷ *Pathfinder* involved a radio show host whose non-competes contract stated that the host could "not engage in activities or be employed as an on-air personality" at fourteen competing Indiana stations.¹¹⁸ The employee complained that this stipulation prevented him from seeking employment in any capacity including "producing, owning, directing, cleaning or acting as a security guard" for those stations.¹¹⁹ The Indiana Court of Appeals agreed and found the restriction overbroad and thus unreasonable.¹²⁰ The court explained that preventing the employee "from being employed in any capacity by any radio station listed in the covenant . . . extends far beyond [the

¹¹² *Wake Broadcasters, Inc. v. Crawford*, 114 S.E.2d 26 (Ga. 1960).

¹¹³ *Harris*, 247 N.W.2d 600; *Davis-Robertson Agency*, 119 F. Supp. 931.

¹¹⁴ *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999); *Gorman Publ'g Co. v. Stillman*, 516 F. Supp. 98 (N.D. Ill. 1980).

¹¹⁵ *See, e.g., Pathfinder Commc'ns Corp. v. Macy*, 795 N.E.2d 1103 (Ind. Ct. App. 2003).

¹¹⁶ RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

¹¹⁷ *Pathfinder*, 795 N.E.2d 1103.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1114 (quoting Brief of Appellee-Defendant at 24).

¹²⁰ *Id.* The contract survived judicial scrutiny, however, because the court ruled that the overbroad language was divisible and could be deleted from the contract.

employer's] legitimate interests" in the employee.¹²¹

Other cases in which an activity restriction in a non-compete agreement was discussed all involved broadcast employees whose non-compete contracts were found to be reasonable because these agreements allowed the employees ample post-employment job opportunities that did not violate their contracts. For example, in *French v. Community Broadcasting of Coastal Bend, Inc.*,¹²² the general manager of a Texas television station was fired. He then applied to the Federal Communications Commission to take over his employer's broadcast license. The television station sued to halt the employee's application process, arguing that the application violated the employee's non-compete contract.¹²³ The contract stated, in part, that the employee could not "enter into or engage generally in direct competition with the Employer in the business of television broadcasting, excluding low power television stations . . ." ¹²⁴ The Texas Court of Appeals held that the activity restriction here was reasonable, stating that "French [the general manager] was not forbidden from employment in a radio station, which made up the bulk of his past work experience. He was not prohibited from making a livelihood or to engage in the television business outside the . . . area." ¹²⁵

In other cases, the activity restrictions in post-employment non-compete contracts were found to be reasonable because they did not make all jobs within the same communication medium off-limits, but rather restricted the employee from doing the same job that he or she had previously done. In *Murray v. Lowndes County Broadcasting Co.*,¹²⁶ for example, the non-compete contract of a salesman and announcer for a Georgia radio station said he could "not engage in the business of announcer, disc jockey, advertisement selling, station manager or director for any other radio station . . ." in the same county as his original place of employment.¹²⁷ The Georgia Supreme Court said that the listed jobs were reasonably restricted because there was evidence that the employee could do other jobs at local radio stations, including working as a radio engineer, a position for which he was licensed.¹²⁸ In another non-compete contract case involving a television weatherman, an activity restriction that prohibited the

¹²¹ *Id.*

¹²² *French v. Cmty. Broad. Co.*, 766 S.W.2d 330 (Tex. Ct. App. 1989).

¹²³ *Id.* at 331.

¹²⁴ *Id.* at 332.

¹²⁵ *Id.* at 334.

¹²⁶ *Murray v. Lowndes County Broad. Co.*, 284 S.E.2d 10 (Ga. 1981).

¹²⁷ *Id.*

¹²⁸ *Id.*

weatherman from competing “on air” was found reasonable because it did not prohibit him from working for competitors in other capacities.¹²⁹

In summary, the limited case law on this topic suggests that a non-compete contract contains reasonable activity restrictions only if it prevents an employee from engaging in post-employment activities similar to those which he or she performed for the first employer. An industry-wide proscription in a post-employment non-compete agreement would likely be found overbroad, and thus unreasonable, because it is broader than necessary to protect a legitimate employer interest.

D. *Determining If an Original Employer Has a Protectable Business Interest*

To justify a post-employment non-compete contract, a business must demonstrate that it has a legally protectable interest. In the mass media cases studied for this article, businesses claimed one or more of three interests:¹³⁰ 1) interest in the services of a unique media personality, for example, an employee who had been trained or promoted into prominence by the employer and whose defection to a competing media outlet would unfairly harm the original employer (most of these cases involved on-air broadcasters); 2) protection of trade secrets, which is most commonly claimed in cases involving advertising sales representatives and others working on the business side of media companies; and 3) protection of customer relationships. However, the courts clearly state that an employer interest in stifling competition is impermissible.¹³¹ As a Missouri appeals court stated: “An employer cannot extract an enforceable restrictive covenant merely to protect himself from the competition of an employee.”¹³²

1. The Interest in a Unique Personality

In almost half of the cases studied here, employers asserted that non-compete contracts were necessary to protect them from having to compete against a former employee who was a unique

¹²⁹ Beckman v. Cox Broad. Corp., 296 S.E.2d 566 (Ga. 1982).

¹³⁰ In *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999), and *West Group Broadcasting v. Bell*, 942 S.W.2d 934, 938 (Mo. Ct. App. 1997), employers claimed the three protectable interests. In *Bradford v. New York Times Co.*, 501 F.2d 51 (2d Cir. 1974), and *Modern Telecommunications v. Zimmerman*, 528 N.Y.S.2d 68 (N.Y. App. Div. 1988), the courts evaluated the non-compete agreements in light of the three protectable interests.

¹³¹ See *Weissman v. Transcon. Printing U.S.A., Inc.*, 205 F. Supp. 2d 415 (E.D. Pa. 2002); *Knowles Broad. Co. v. Oreto*, 322 N.E.2d 791 (Mass. App. Ct. 1975).

¹³² *W. Group Broad.*, 942 S.W.2d 934, 937 (Mo. Ct. App. 1997).

media personality. The employer usually argued that it had spent thousands or even millions of dollars promoting the employee to the public¹³³ and that consequently the public identified the employee with the media company. All but two of these cases involved radio or television stations.¹³⁴ In approximately half of the cases, the media companies were found to have a protectable interest in a unique personality. In the other half, the courts found the employee either was not special or had not been made so through the efforts of his employer. As the analysis below demonstrates, there is no clear definition of what constitutes a unique personality, and there are no guidelines for determining whether a station's promotional efforts or training deserves credit for having created one.

In one of the cases in which there was a unique personality at issue, Atlanta station WSB-TV prohibited an on-air weatherman, Johnny Beckman, from appearing on any other commercial television station in that city for six months after leaving WSB-TV.¹³⁵ When Beckman went to work for a competing station and sued to have his contract declared invalid, the original employer argued that the post-employment restraint was reasonable because the station had spent in excess of one million dollars promoting Beckman's name, voice, and image as part of its news team.¹³⁶ The station said it needed to keep Beckman off the local airwaves for six months "to diminish its association with Beckman in the public's mind and provid[e] the viewing public an opportunity to adjust to Beckman's replacement."¹³⁷

Beckman countered that his on-air image belonged to him because he developed it by his own skills and resources and that he was entitled to use it at another station.¹³⁸ Beckman said that a prolonged absence from the Atlanta airwaves would have a "disastrous" effect on his career.¹³⁹ The Georgia Supreme Court

¹³³ See *Orion Broadcasting, Inc. v. Forsythe*, 477 F. Supp. 198, 200 (W.D. Ky. 1979), in which the television station said it spent two million dollars promoting its reporter and anchor. In several other cases, the employer unsuccessfully claimed a protectable employer interest in the services of an employee who had received "unique or novel" training or skills. See, e.g., *Daytona Group of Tex., Inc. v. Smith*, 800 S.W.2d 285 (Tex. Ct. App. 1990). In *Daytona*, a case involving a radio station advertising sales manager, the court rejected the employer's claim that it had a protectable interest in the special training it had provided to its employee. The court concluded, "The evidence showed that the training program primarily consisted of video tapes and other aids which were purchased on the open market. This training program was not unique." *Id.* at 290.

¹³⁴ The exceptions were *Bradford*, 501 F.2d 51, and *EarthWeb*, 71 F. Supp. 2d 299. These cases involved the *New York Times* and an Internet company, respectively.

¹³⁵ *Beckman v. Cox Broad. Corp.*, 296 S.E.2d 566 (Ga. 1982).

¹³⁶ *Id.* at 567.

¹³⁷ *Id.* at 568.

¹³⁸ *Id.* at 568-69.

¹³⁹ *Id.* at 569.

agreed with parts of Beckman's argument, but ultimately ruled in favor of his employer because the restraint on the weatherman's future employment was reasonably narrow:

It is true that an employee's aptitude, skill, dexterity, manual and mental ability and other subjective knowledge obtained in the course of employment are not property of the employer which the employer can, in the absence of a contractual right, prohibit the employee from taking with him at the termination of employment. . . . However, the record supports the trial court's determination that throughout Beckman's career the resources of WSB-TV have been used to bolster and promote the image of Beckman *as a part of the image of WSB-TV*. As such we conclude that for a limited time and in a narrowly restricted area, WSB-TV is entitled to prevent Beckman from using the popularity and recognition he gained as a result of WSB-TV's investment in the creation of his image so that WSB-TV may protect its interest in its own image by implementing its transition plan.¹⁴⁰

The court observed that viewers select a local newscast based partly on those appearing in the newscast and that local television personalities "are strongly identified in the minds of television viewers with the stations upon which they appear."¹⁴¹

Other unique personalities identified by courts include a radio announcer-disc jockey described as specializing in "hillbilly" entertainment¹⁴² and a radio announcer who had the highest profile of any of his station's on-air personalities and also had supervisory and promotion responsibilities.¹⁴³ The only non-broadcaster found to be a unique personality in which an employer had a protectable interest was a top executive for the *New York Times*.¹⁴⁴ In that case, the United States Court of Appeals for the Second Circuit stated:

The earlier description of [the employee's] duties should leave no real doubt that he, if anyone at the Times, was in the category "special, unique or extraordinary." He was the No. 2 executive of the publication directly responsible for its business operation, which involved circulation, advertising, production and promotion. He was privy to confidential discussions regarding possible mergers and joint printing arrangements with other New York papers. He reported directly to the

¹⁴⁰ *Id.* (citations omitted).

¹⁴¹ *Id.* at 567 (quoting the trial court).

¹⁴² *Skyland Broad. Corp. v. Hamby*, 75 Ohio Law Abs. 545 (Ohio C.P. 1957).

¹⁴³ *New River Media Group, Inc. v. Knighton*, 429 S.E.2d 25 (Va. 1993).

¹⁴⁴ In *Bradford v. New York Times Co.*, the employee was the general manager, vice president, and a director of the company. 501 F.2d 51 (2d Cir. 1974).

publisher.¹⁴⁵

When courts rejected an employer's claim of a protectable interest in a unique personality, they did so for one of two reasons. In some cases, courts found the employee's job performance simply was not special or unique.¹⁴⁶ These included cases in which the employee had been fired or demoted or had not had his contract renewed.¹⁴⁷ In other cases, the court suspected that the employee became successful through his or her own talents and efforts, not through the employer's efforts.¹⁴⁸

In one of the cases in which an employee's services were found not to be special or unique, *Gopen v. The Ten Eighty Corp.*,¹⁴⁹ a Connecticut radio station did not renew the contract of one of its show hosts. The employee then challenged his one-year non-compete contract.¹⁵⁰ In finding the contract unenforceable, the court noted briefly that the employee's services were not "unique, extraordinary and of exceptional value" and that the employee would not be difficult to replace.¹⁵¹

In *EarthWeb, Inc. v. Schlack*,¹⁵² the United States District Court for the Southern District of New York noted that excelling at a job does not necessarily make an employee "unique." The court said the services of an Internet company vice president who was responsible for the content of the company's web sites were not "unique and extraordinary."¹⁵³ Such characteristics "traditionally have been associated with 'various categories of employment where the services are dependent on an employee's special talents; such categories include musicians, professional athletes, actors and the like.'"¹⁵⁴ The court elaborated:

[T]o justify a [sic] enforcement of a restrictive covenant, "more must . . . be shown to establish such a quality than that the employee excels at his work or that his performance is of high value to his employer. It must also appear that his services are of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury."¹⁵⁵

¹⁴⁵ *Id.* at 58.

¹⁴⁶ *See, e.g.*, *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999).

¹⁴⁷ *See, e.g.*, *Gopen v. Ten Eighty Corp.*, No. 92-CV-070-35-56-S, 1993 WL 4444 (Conn. Super. Ct. Jan. 6, 1993).

¹⁴⁸ *See, e.g.*, *Richmond Bros., Inc. v. Westinghouse Broad. Co.*, 256 N.E.2d 304 (Mass. 1970).

¹⁴⁹ *Gopen*, 1993 WL 4444.

¹⁵⁰ *Id.* at *1.

¹⁵¹ *Id.*

¹⁵² *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999).

¹⁵³ *Id.* at 307.

¹⁵⁴ *Id.* at 313 (quoting *Ticor Title Ins. Co. v. Cohen*, 173 F.3d 63, 70 (2d Cir. 1999)).

¹⁵⁵ *Id.* (quoting *Am. Inst. of Chem. Eng'rs v. Reber-Friel Co.*, 682 F.2d 382, 390 n.9 (2d

In *Richmond Bros.*,¹⁵⁶ another court suggested a media employee's success was due to the employee's own talents and hard work rather than the promotional efforts of the station, and thus there was no protectable interest. The Massachusetts radio station sued a competitor for hiring one of its former show hosts.¹⁵⁷ The original employer claimed that the employee's success was "a direct product" of its promotional efforts over many years.¹⁵⁸ The Supreme Judicial Court of Massachusetts disagreed:

Even though a broadcasting company may have expended large sums to promote a performer's popularity with the listening public, it would indeed be difficult to determine that such expenditures and promotion have resulted in the performer's popularity. The performer's popularity may well be attributed to his own personality and ability.¹⁵⁹

The lack of consistency in these cases is striking. The concept of "unique personality" has not been defined, and the courts appear split over whether an employee's success is due to his or her hard work and innate abilities or to the employer's promotional efforts.

2. Trade Secrets

In about a dozen cases, the courts discussed whether the employer had a legally protectable interest in its trade secrets. In slightly fewer than half of those cases, the courts ruled that they did. Most of the cases involved employees on the business side of media companies.

A trade secret is a "formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors"¹⁶⁰ In the cases analyzed here, trade secrets were held to include the following: names of potential advertisers and subscribers;¹⁶¹ an employee's recollection of who was responsible for a client's advertising decisions and "how those individuals could most effectively be approached";¹⁶² strategic web site content plans;¹⁶³ programming strategies;¹⁶⁴ a high-level

Cir. 1982)).

¹⁵⁶ *Richmond Bros., Inc. v. Westinghouse Broad. Co.*, 256 N.E.2d 304, 307 (Mass. 1970).

¹⁵⁷ *Id.* at 305.

¹⁵⁸ *Id.* at 307.

¹⁵⁹ *Id.*

¹⁶⁰ BLACK'S LAW DICTIONARY 1533 (8th ed. 2004).

¹⁶¹ *Tyler v. Eufala Tribune Publ'g Co.*, 500 So. 2d 1005, 1007 (Ala. 1986).

¹⁶² *Gorman Publ'g Co. v. Stillman*, 516 F. Supp. 98, 105 (N.D. Ill. 1980) (describing this information as trade secrets, although it just as easily could have been discussed in terms of protectable customer relationships).

¹⁶³ *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999) (discussing the employee's knowledge of company plans including target audiences, the reasons behind the site design, gaps in content, and plans to improve the site).

¹⁶⁴ *Murray v. Lowndes County Broad. Co.*, 284 S.E.2d 10 (Ga. 1981); *Citadel Broad. Co.*

employee's "intimate understanding" of an employer's business;¹⁶⁵ and a magazine binding process and the machinery used in it.¹⁶⁶ Information held not to constitute trade secrets included an old, off-the-shelf computer system;¹⁶⁷ a list of advertisers that could be discovered by reading the magazine;¹⁶⁸ a list of video production clients;¹⁶⁹ ratings information generally available throughout the radio industry;¹⁷⁰ the existence and terms of a licensing agreement;¹⁷¹ general computer knowledge;¹⁷² acquisition plans;¹⁷³ and ordinary advertising practices.¹⁷⁴

In *Gorman*,¹⁷⁵ a district court applying Illinois law explained the difference between what could and what could not be protected as a trade secret. The court stated that a non-compete contract is not enforceable "where the employee is merely aware of the identity of the employer's customers and where the information is readily available to any member of the public."¹⁷⁶ In the case before that court, however, the employee remembered not only the employer's advertisers and advertising prospects, but also "which individuals in these companies were most responsible for advertising decisions and how these individuals could most effectively be approached."¹⁷⁷ Those latter memories were found to be protectable trade secrets.¹⁷⁸

The Texas Court of Appeals explained that a list of radio advertisers was not a trade secret because "anyone could obtain it simply by listening to the radio station."¹⁷⁹ In *Dial Media v. Schiff*,¹⁸⁰

v. Gratz, 52 Pa. D. & C.4th 534, 540 (C.P. Ct. 2001).

¹⁶⁵ *Gorman*, 516 F. Supp. at 105.

¹⁶⁶ *Inflight Newspapers, Inc. v. Magazines In-Flight, LLC*, 990 F. Supp. 119 (E.D.N.Y. 1997).

¹⁶⁷ *Id.*

¹⁶⁸ *Birmingham Television Corp. v. DeRamus*, 502 So. 2d 761, 764 (Ala. Civ. App. 1986).

¹⁶⁹ *Modern Commc'ns Inc. v. Zimmerman*, 528 N.Y.S.2d 68, 70 (N.Y. App. Div. 1988) (noting that the company disclosed the names of its clients in its own articles and press releases).

¹⁷⁰ *Citadel Broad. Co. v. Gratz*, 52 Pa. D. & C.4th 534, 542 (C.P. Ct. 2001).

¹⁷¹ *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999).

¹⁷² The court stated, "Here as in *Inflight Newspapers*, the Court draws a distinction between pursuing 'a general conceptual goal [by] incorporating specific needs and wants in the form of instructions for a programmer' and the nuts and bolts of actually designing the software and hardware architecture." *Id.* at 316 (citing *Inflight Newspapers*, 990 F. Supp. at 130). As the employer did only the former, he did not possess a trade secret. *Id.*

¹⁷³ *Id.* at 313 (explaining that while acquisition plans are generally confidential, they do not qualify as trade secrets because they are not a "process or device" but rather "information as to single or ephemeral events") (quoting *Emtec, Inc. v. Condor Tech. Solutions, Inc.*, No. Civ. A. 97-6652, 1998 WL 834097, at *8 (E.D. Pa. Nov. 30, 1998)).

¹⁷⁴ *Dial Media, Inc. v. Schiff*, 612 F. Supp. 1483 (D. R.I. 1985).

¹⁷⁵ *Gorman Publ'g Co. v. Stillman*, 516 F. Supp. 98 (N.D. Ill. 1980).

¹⁷⁶ *Id.* at 105.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 104-05.

¹⁷⁹ *Daytona Group of Tex., Inc. v. Smith*, 800 S.W.2d 285, 289 n.3 (Tex. Ct. App. 1990).

¹⁸⁰ *Dial Media v. Schiff*, 612 F. Supp. 1483, 1490 n.3 (D. R.I. 1985).

a case involving direct-response television advertising, the district court described as “spurious” the employer’s claim that an employee who helped select products to be advertised had access to valuable information to which he would not otherwise have been privy. The court said: “The factors which Dial Media uses in its product selection and advertising are nothing more than well-known advertising techniques (e.g., use an attention-getting device early in the ad).”¹⁸¹ The court noted that an “employee is entitled to use general knowledge and expertise learned during his employment to continue his livelihood”¹⁸²

In all the cases involving top-level media executives, the courts found the executives had protectable trade secrets. However, at least one court refused to assume that high-level employees automatically have access to protectable trade secrets. In *French*,¹⁸³ a case involving the contract of the general manager of a television station, the Texas Court of Appeals found a protectable employer interest in what the general manager knew about the station’s operations. The court said:

We find it significant that French was the general manager of the television station and was responsible for and directed all activities at the station—promotions, sales, programming, hiring, firing, etc. He set policies and determined marketing strategy. French knew all of the strengths and weaknesses of the station that would be influenced directly by the actions he took as general manager or by the policies he adopted. He was not an ordinary employee but was the chief operating officer of the station.¹⁸⁴

The court observed that the general manager “had access to customer lists, files, records and other proprietary matters of the station” including pricing schedules and “how air time was bartered for services, but more importantly, the financial and credit problems that [the] station had with certain suppliers of video so it could not obtain products it needed.”¹⁸⁵ Likewise, the top business executive at the *New York Times* was found to be privy to trade secrets including confidential discussions regarding possible mergers and joint printing arrangements with other New York papers.¹⁸⁶ Despite these cases, a district court in Illinois held to the contrary that “while it is probably a valid generalization that high level employees are proper subjects for restrictive covenants,

¹⁸¹ *Id.* at 1490 n.3 (emphasis added).

¹⁸² *Id.* at 1491 n.5.

¹⁸³ *French v. Cmty. Board of Coastal Bend, Inc.*, 766 S.W.2d 330 (Tex. Ct. App. 1989).

¹⁸⁴ *Id.* at 334.

¹⁸⁵ *Id.* at 333.

¹⁸⁶ *Bradford v. N.Y. Times Co.*, 501 F.2d 51, 58 (2d Cir. 1974).

the court declines to grant this generalization any legal status.”¹⁸⁷

3. Customer Relationships

Courts generally hold that an employer has no legally protectable interest in his or her customers.¹⁸⁸ Courts make an exception, however, when the customer relationship is near permanent and the employee would not have had the relationship were it not for his association with the employer.¹⁸⁹ That issue was discussed in several of the cases in this study, most of them involving advertising salespeople and their relationships with their clients. In approximately half of those cases, the court found a protectable employer interest.

To determine whether a protectable customer relationship existed, courts typically considered several factors, but these factors varied from court to court. Such factors included the extent of an employee’s contact with customers;¹⁹⁰ the employee’s knowledge of customers;¹⁹¹ the amount of money invested in acquiring clients,¹⁹² including the fact an employee had an expense account to “nourish” relationships with customers;¹⁹³ and, for one court, the value of the customer relationship to the employer, the length of time required to develop the clientele, the degree of difficulty in acquiring clients, the duration of the customer’s association with the employer, and the continuity of the employer-customer relationships.¹⁹⁴

In *Dabora*, a case in which an advertising sales representative for a horse magazine went to work for a company selling video accounts of horse shows, the Tennessee Court of Appeals ruled

¹⁸⁷ *Gorman Publ’g Co. v. Stillman*, 516 F. Supp. 98, 105 n.1. (N.D. Ill. 1980). Despite its refusal to create a legal rule approving of post-employment non-compete contracts for all high-level employees, the court in *Gorman* did approve the post-employment restraint of the employee in that case, a magazine publisher. The court stated, “While it is probably the case that certain aspects of this knowledge standing alone would not justify enforcement of the covenant not to compete, the court must conclude that taken as a totality Stillman’s intimate understanding of Gorman’s business gave Chilton [the employee’s new employer] an unjustified competitive advantage.” *Id.* at 105.

¹⁸⁸ *Punzi v. Shaker Adver. Agency*, 601 So. 2d 599 (Fla. Ct. App. 1992); *Audio Props., Inc. v. Kovach*, 655 N.E.2d 1034 (Ill. App. Ct. 1995).

¹⁸⁹ *Punzi*, 601 So. 2d. at 601; *Instrumentalist Co. v. Band, Inc.*, 480 N.E.2d 1273, 1279 (Ill. App. Ct. 1985).

¹⁹⁰ *Instrumentalist*, 480 N.E.2d at 1277; *Dabora, Inc. v. Kline*, 884 S.W.2d. 475, 477 (Tenn. Ct. App. 1994).

¹⁹¹ *Dabora*, 884 S.W.2d. at 478.

¹⁹² *Gorman Publ’g Co. v. Stillman*, 516 F. Supp. 98, 106 (N.D. Ill. 1980).

¹⁹³ *Booth v. WPMI Television Co.*, 533 So. 2d 209, 211 (Ala. 1988).

¹⁹⁴ *Audio Props., Inc. v. Kovach*, 655 N.E.2d. 1034, 1037 (Ill. App. Ct. 1995). Applying Illinois common law, the *Kovach* court listed these seven factors to be considered in determining whether an employer has a near-permanent relationship with his customers. However, the court added that the employer was not required to show that the customer relationship was perpetual or indissoluble, that a near-permanent relationship existed with each customer, or that the employer had an exclusive relationship with its clients. *Id.*

that the magazine had a protectable interest in the salesperson's relationships with advertisers.¹⁹⁵ The court observed that the salesperson had "extraordinary access to, and knowledge of the owners and trainers" who were the magazine's primary advertisers.¹⁹⁶ The court stated:

We do not wish to minimize the importance of the social skills and the innate ability that Ms. Kline undoubtedly brought to the sale of advertising for Dabora. But we also cannot ignore the fact that doors were opened for her because horse owners care about what *Saddle Horse Report* prints about them and their animals. By virtue of her association with that magazine, she was able to quickly develop close personal relationships with many of the major players in the saddle horse industry. It would subject Dabora to unfair competition if she were now able to use those contacts for the benefit of a competing publication.¹⁹⁷

Likewise, in *Booth v. WPMI Television Co.*, the Alabama Supreme Court found that a television station had a protectable interest in an advertising salesman's relationships with the station's advertisers.¹⁹⁸ The court pointed out that the salesman had worked for the station for three and a half years and had an expense account to "nourish" close relationships with advertisers.¹⁹⁹ The court held, "He was not merely a technician whose client contact was limited. Rather, client contact was the most important aspect of his job and WMPI's most valuable asset with regard to his employment."²⁰⁰ By contrast, an Illinois appeals court found no near-permanent customer relationships in a case involving a recording studio that made little or no effort to recruit clients, instead relying on word of mouth, and employed no specific marketing or sales personnel.²⁰¹

¹⁹⁵ *Dabora*, 884 S.W.2d 475.

¹⁹⁶ *Id.* at 477-78.

¹⁹⁷ *Id.* at 478.

¹⁹⁸ *Booth*, 533 So. 2d 209.

¹⁹⁹ *Id.* at 211. The court distinguished this from the "mere two-month employment" of the employee in *Birmingham Television Corp. v. DeRamus*, 502 So. 2d 761 (Ala. Civ. App. 1986).

²⁰⁰ *Booth*, 533 So. 2d at 211; see also *Instrumentalist Co. v. Band, Inc.*, 480 N.E.2d 1273, 1280 (Ill. App. Ct. 1985). The court found a protectable interest in the fourteen-year relationship between the magazine's advertising manager and its advertisers. The court said these relationships were near-permanent because they were lengthy and involved "closeness and goodwill" that would not have been possible except for the fact the employee worked for the magazine. Furthermore, the court said the customer relationships qualified for protection because the employee had near-exclusive authority for dealing with most of the employer's top forty or fifty advertisers. *Id.*

²⁰¹ *Audio Props., Inc. v. Kovach*, 655 N.E.2d 1034 (Ill. App. Ct. 1995). Compare *Audio* with *Nationwide Advertising Service, Inc. v. Kolar*, 302 N.E.2d 734, 736 (Ill. App. Ct. 1973), in which the court came to the opposite conclusion because the trial court had heard testimony that "as a general rule an advertising agency's relationship with its customers is transitory and not permanent" and because there was no confidential information

In *Cullman Broadcasting Co. v. Bosley* and *West Group Broadcasting v. Bell*, courts debated whether there was a protectable employer interest in radio stations' relationships with their listeners. In *Cullman Broadcasting*,²⁰² the Alabama Supreme Court enforced a one-year, one-county non-compete contract between a radio station and an announcer, in part because the radio station had a protectable interest in its relationship with its listeners. The court explained:

We believe that the appellant possessed a substantial right in its business sufficiently unique to warrant the type of protection contemplated by this non-competition agreement. The very nature of radio broadcasting is such that often the only personalized contact the broadcaster makes with the listening audience is through its individual announcers. To the casual listener, the only personal means of identifying the broadcaster (and its advertisers) is through the announcer. For better or worse, the announcer establishes the identity of the broadcaster and conveys the broadcaster's message to the community.²⁰³

The court further explained that the trial court record indicated that the station considered its relationships with its "listening customers" one of its most valuable assets and that the radio announcer represented the station "to its customers and prospective customers."²⁰⁴

In *West Group Broadcasting*,²⁰⁵ however, a Missouri appeals court found no protectable employer interest in the relationship between a radio station's announcer and the station's listeners. The case involved a radio announcer who quit her job at one station to work for a competing station.²⁰⁶ The original employer argued that the radio announcer's voice was "very recognizable" and, therefore, radio audiences might recognize her voice and follow her to the new station.²⁰⁷ The court disagreed, noting that the announcer originally worked under the name "Hurricane Hannah" but changed names when she changed jobs.²⁰⁸ The radio announcer also changed time slots and program formats.²⁰⁹ "The only things that Bell took with her and used when she went from KXDG to KSYN were her aptitude, skill, mental ability, and the voice with which she was born," the court said, and the employer

involved.

²⁰² *Cullman Broad. Co. v. Bosley*, 373 So. 2d 830 (Ala. 1979).

²⁰³ *Id.* at 836.

²⁰⁴ *Id.* at 835.

²⁰⁵ *W. Group Broad., Ltd. v. Bell*, 942 S.W.2d 934 (Mo. Ct. App. 1997).

²⁰⁶ *Id.* at 935.

²⁰⁷ *Id.* at 937.

²⁰⁸ *Id.* at 938.

²⁰⁹ *Id.*

had no protectable interest in those capabilities.²¹⁰ The court noted that it might have ruled differently if the announcer “had used or attempted to use the Hurricane Hannah radio personality to exert special influence over . . . area radio listeners and, in that fashion, adversely affected . . . advertising revenue by diverting listeners” from one station to another.²¹¹

A dissenting judge in *West Group Broadcasting* said that the court’s conclusion that the radio announcer did not take with her anything in which the original employer had a legally protectable interest “ignores reality.”²¹² The dissenter held that the announcer was in a position to entice listeners to switch stations and, consequently, to cut into her original employer’s advertising revenues.²¹³ In addition, the dissenting judge noted that although the announcer did not continue to use the name Hurricane Hannah, in the small market in which she worked, listeners nevertheless recognized her.²¹⁴

E. *Employee Hardship*

The hardship that a post-employment non-compete contract inflicted on a media employee was another factor discussed by the courts. In these cases, the courts weighed the employer’s legally protectable interest against the burden imposed on the employee. The employer’s interest had to outweigh the harm to the employee or the contract was found to be unreasonable.²¹⁵ A significant finding of this study was that the employer’s interest always was found to outweigh the burden imposed on the employee—except when the court found there was no protectable employer interest at all.

To assess the hardship inflicted on the employee by his or her contract, the courts considered whether it was difficult for the employee to find a new job without violating the terms of the contract. An employee’s inability to find new work suggested an undue burden on the employee, and, conversely, an employee’s ability to find a new job without violating the contract suggested there was no undue burden.²¹⁶ Also, despite their proclivity for ruling in favor of employers, some courts expressed sympathy for employees whose contracts forced them to uproot themselves and

²¹⁰ *Id.*

²¹¹ *Id.* at 939.

²¹² *Id.* at 941 (Crow, J., dissenting).

²¹³ *Id.* at 940 (majority opinion).

²¹⁴ *Id.* at 939-41.

²¹⁵ *See, e.g.,* Orion Broad., Inc. v. Forsythe, 477 F. Supp. 198, 201 (W.D. Ky. 1979).

²¹⁶ *See, e.g.,* Gopen v. Ten Eighty Corp., No. 92-CV-070-35-56-S, 1993 WL 4444 (Conn. Super. Ct. Jan. 6, 1993); William B. Tanner Co. v. Taylor, 530 S.W.2d 517 (Tenn. Ct. App. 1974).

their families to find work and had harsh words for their non-compete contracts.²¹⁷

For example, in *Orion Broadcasting, Inc. v. Forsythe*, a district court in Kentucky held that enforcing a contract against a television reporter and news anchor, when there was no protectable employer interest, “seems to the Court to be an example of industrial peonage which has no place in today’s society.”²¹⁸ In this case, the television station sued to enforce a contract to prevent an employee who was fired from working in an on-air job for a competing station for one year.²¹⁹ The court held that the contract was not enforceable because the station had no legally protectable interest in an employee whom it had fired.²²⁰ The court said the employee “at the whim of plaintiff, could [not] be deprived of her livelihood in a highly competitive market. . . .”²²¹

In a second case, *Bennett v. Storz Broadcasting Co.*,²²² a radio announcer who was demoted and was considered by his employer to be “an ordinary, if not less than ordinary” employee, quit his job and then challenged his eighteen-month, thirty-five-mile-radius non-compete contract. The Minnesota Supreme Court struck down the contract, noting that the employee was “a thirty-seven year old married man with a dependent mother”²²³ and observing:

The restrictive provision, if valid, would leave him in a situation where he would have to continue work for an additional 18-month period at a substantial decrease in salary. His alternative was to move himself and his family to another community, and even then his choice of where to go was limited. Nor does the record here indicate that defendant would benefit in any way by subjecting plaintiff to these onerous conditions.²²⁴

²¹⁷ See, e.g., *Bennett v. Storz Broad. Co.*, 134 N.W.2d 892, 900 (Minn. 1965).

²¹⁸ *Orion Broad. Inc. v. Forsythe*, 477 F. Supp. at 201 (citing *Josten’s, Inc. v. A.G. Cuquet, Sr.*, 383 F. Supp. 295, 299 (E.D. Mo. 1974)).

²¹⁹ *Id.* at 199.

²²⁰ *Id.* at 201.

²²¹ *Id.*

²²² *Bennett*, 134 N.W.2d at 900.

²²³ *Id.* at 895.

²²⁴ *Id.* at 900. See also *Birmingham Television Corp. v. DeRamus*, 502 So. 2d 761, 764 (Ala. Civ. App. 1986). The court expressed concern for a defendant who was twenty-five years old and recently married, saying his contract imposed a “severe and undue hardship” on him. This case was litigated under both common law and Alabama’s non-compete contract statute, ALA. CODE § 8-1-1 (1975), which was not an uncommon phenomenon in the cases studied here. Reliance on the statutes did not appear to alter the legal analysis in any significant way. See also *Nigra v. Young Broad. of Albany, Inc.*, 676 N.Y.S.2d 848, 849 (N.Y. Sup. Ct. 1998) (explaining that “WTEN has failed to establish that it is reasonable or necessary for it to require plaintiff to work for half the salary that other television stations would pay her or leave this area where she was raised and her immediate and extended family still lives, or leave broadcasting” and that the employer was merely trying to insulate itself from competition from a former employee); *Gopen v. Ten Eighty Corp.*, No. 92-CV-070-35-56-S, 1993 WL 4444 (Conn. Super. Ct. Jan. 6, 1993).

In *Gorman*,²²⁵ a case involving an executive for a food industry trade magazine who violated his three-year, worldwide employment restraint and was sued by his employer, a district court in Illinois found the contract reasonable, in that it protected a valid employer interest and did not impose an undue burden on the employee because the contractual restraint was limited to competing magazines. The court stated:

[P]rior to working for [his current employer] he was able to find work with a magazine that did not violate the covenant's terms. In view of the limited number of jobs to which the covenant applied, the temporal and geographic restriction must also be viewed as imposing only an insignificant burden.²²⁶

Likewise, in *William B. Tanner Co. v. Taylor*, a Tennessee appeals court upheld a contract as reasonable because, in part, “[t]here is no contention that defendant is unable to earn a living for his family in any other field of endeavor. Unquestionably, he is a man of considerable ability and able to command a good salary in more than one field.”²²⁷

In the case involving horse magazines, the court factored into its analysis of employee harm the fact that the employee left her job willingly. In finding the contract reasonable, the court said:

We are aware that enforcement of the injunction does impose a financial hardship on the appellant, the more so in that other comparable job opportunities may not exist in Shelbyville, Kentucky where she now lives. But we are also mindful of the fact that the appellant voluntarily left her job with the appellee; that she was aware that she had signed the covenant not to compete; and that the owner of Dabora Inc. warned her that he would not waive the covenant but would strictly enforce it.²²⁸

Similarly, in *West Group Broadcasting*, the Missouri Court of Appeals observed that a radio announcer who worked as a waitress after quitting her radio job was not unduly harmed by her post-employment non-compete contract.²²⁹ The court reasoned that

In *Gopen*, the court explained that one reason the contract was unreasonable was because an on-air host of a morning radio show still had not found a new job after four months—a month after he had been replaced. The radio show host had signed a contract agreeing not to work for any other radio station within fifty miles “of the Old State House in Hartford, Connecticut” for twelve months. The court concluded that “to enforce the covenant would be purely punitive.” *Id.* at *2.

²²⁵ *Gorman Publ'g Co. v. Stillman*, 516 F. Supp. 98 (N.D. Ill. 1980).

²²⁶ *Id.* at 104.

²²⁷ *William B. Tanner Co. v. Taylor*, 530 S.W.2d 517, 523 (Tenn. Ct. App. 1974); *see also* *Murray v. Lowndes County Broad. Co.*, 284 S.E.2d 10 (Ga. 1981) (observing that the employee could still fill several other positions at radio stations, including that of radio engineer, a position for which the employee was licensed).

²²⁸ *Dabora, Inc. v. Kline*, 884 S.W.2d 475, 479 (Tenn. Ct. App. 1994); *see also* *W. Group Broad., Ltd. v. Bell*, 942 S.W.2d 934, 941-42 (Mo. Ct. App. 1997).

²²⁹ *W. Group Broad.*, 942 S.W.2d at 941-42.

she quit her job because she could earn more money as a waitress—the waitress had earned only six dollars an hour as a radio announcer.²³⁰ In several other cases, the courts noted that a contract would not unreasonably burden an employee but did not elaborate.²³¹

In summary, the hardship a post-employment non-compete contract inflicted on a media employee was a factor discussed in a dozen cases. A significant finding of this study was that the employer's interest was always found to outweigh the burden imposed on the employee—except when the court found there was no protectable employer interest at all.

F. *Public Interest*

In many courts' analyses, the final piece of the reasonableness assessment when examining post-employment non-compete contracts was whether the employer's interest was outweighed by harm to the public. If public harm outweighed the employer's interest, the contract was held to be unreasonable.²³² In these cases, courts stated that a reasonable contract did not contravene public policy or the public interest or did not injure the public.²³³ In a few cases, the courts clarified what it considered to be the public interest. In the vast majority of the cases, however, the courts merely mentioned the public interest but did not discuss it.²³⁴ In other cases, the public interest factor was not even mentioned.

The primary public interest recognized by the courts was economic—the public interest in an unrestrained economic marketplace in which services and workers freely compete.²³⁵ Additionally, one court noted a public interest in the enforcement of contracts.²³⁶ Whatever the public interest highlighted by the

²³⁰ *Id.*

²³¹ *See, e.g.*, *Cullman Broad. Co. v. Bosley*, 373 So. 2d 830, 836 (Ala. 1979) (stating that it did not see “how any less onerous burden could be placed on the appellee without completely derogating the covenant not to compete”); *Clooney v. WCPO Television Div. of Scripps-Howard Broad. Co.*, 300 N.E.2d 256, 259 (Ohio Ct. App. 1973) (stating that the evidence in the case failed to show the non-compete contract unreasonably restricted the rights of the employee).

²³² The *Restatement of Contracts* defines the public interest as “the likely injury to the public” and explains that the employer's interest cannot be outweighed by the hardship to the employer or likely injury to the public. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

²³³ These phrases are generally used interchangeably or in combination.

²³⁴ *See Blake, supra* note 8, at 686 (explaining that courts typically balance the employer's claims to protection against the burden on the employee and that, “[o]nce that judgment is made, almost never does a court proceed to consider possible injury to society as a separate matter.”).

²³⁵ *See, e.g.*, *Weissman v. Transcon Printing U.S.A., Inc.*, 205 F. Supp. 2d 415 (E.D. Pa. 2002); *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299 (S.D.N.Y. 1999).

²³⁶ *Pino v. Spanish Broad. Sys. of Fla., Inc.*, 564 So. 2d 186 (Fla. Dist. Ct. App. 1990).

courts, the public interest has never been an important part of the reasonableness analysis. As was the case when courts weighed harm to the employee against the employer's interest, the public interest was found to outweigh the employer's interest only when there was no legally protectable employer interest at all. Furthermore, no court suggested that there might be an especially strong public interest in contracts restraining the employment of media employees as opposed to contracts restraining other types of employees.

In recognizing a public interest in an unrestrained economic marketplace, a district court applying New York law in *Weissman v. Transcontinental Printing U.S.A., Inc.* said: "Our economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas. Therefore, no restrictions should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment."²³⁷ The court added that "public policy favors 'free exchange of goods and services through established market mechanisms.'"²³⁸ In *Weissman*, the court ruled invalid a non-compete contract between a direct mail marketing company and its employee because the court found the company had no legally protectable interest—no trade secrets or unique employee services—just a desire to stop the employee from working for a competitor.²³⁹ That, the court said, was contrary to public policy.²⁴⁰ In an Internet case, another district court similarly noted:

The policy underlying this strict approach [to evaluating the reasonableness of post-employment, non-compete contracts] rests on the notions of employee mobility and free enterprise. "[O]nce the term of an employment agreement has expired, the general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition."²⁴¹

A different public interest was noted by a Florida appellate court in *Pino v. Spanish Broadcasting System of Florida, Inc.*,²⁴² a case involving a radio disc jockey. The issue in *Pino* was whether the disc jockey continued to be restrained by his contract after the

²³⁷ *Weissman*, 205 F. Supp. 2d at 427 (quoting *Reed, Roberts Assoc., Inc. v. Strauman*, 353 N.E.2d 590, 593 (N.Y. 1976)).

²³⁸ *Id.* (quoting *Am. Broad. Cos., v. Wolf*, 420 N.E.2d 363, 369 (N.Y. 1981)). See also *French v. Cmty. Bd. of Coastal Bend, Inc.*, 766 S.W.2d 330, 334 (Tex. Ct. App. 1989) (discussing the need to not injure "the public health" by depriving the public of "needed competition or goods").

²³⁹ *Weissman*, 205 F. Supp. 2d at 425-26.

²⁴⁰ *Id.* at 426.

²⁴¹ *EarthWeb, Inc. v. Schlack*, 71 F. Supp. 2d 299, 313 (S.D.N.Y. 1999) (quoting *Am. Broad. Cos. v. Wolf*, 420 N.E.2d 363, 368 (N.Y. 1981)).

²⁴² *Pino v. Spanish Broad. Sys. of Fla., Inc.*, 564 So. 2d 186 (Fla. Ct. App. 1990).

radio station for which he worked was sold. In ruling that the contract was, in fact, assignable to the new station owners, the court noted a societal interest in enforcing contracts, quoting an earlier Florida case:

[I]f contracts are to have any viability at all, there must be some means of meaningful enforcement available from the courts. This is increasingly true as society becomes, or is perceived by many as having become, more litigious. The bargain struck and perpetually enshrined by a simple handshake is a thing of the past. Society needs assurance that written contracts will not follow in the footsteps of the “gentleman’s agreement” and become extinct.²⁴³

In *Bradford*,²⁴⁴ the court suggested a contract would be unreasonable if it forced an employee to become a “public charge.” The implication could be that the public should not have to bear the expense of supporting the unemployed worker. However, the court did not explicitly mention any public interest, instead saying that in the case of *Bradford*, a newspaper company executive receiving annual stock payments for ten years after he stopped working for the company, there were “no . . . elements of unfairness.”²⁴⁵

In one other case, the court simply noted that the contract did not contravene public policy.²⁴⁶ In another, the court stated that the contract had various flaws and also conflicted with the public interest, although it did not specify what that interest was or how it was infringed upon.²⁴⁷

IV. REDISCOVERING THE PUBLIC INTEREST

The case analysis set out above clearly demonstrates that courts only rarely have considered the public’s interests when evaluating the reasonableness of the post-employment non-compete contracts of media employees. When the public interests were considered, they usually were defined in economic terms, and, even then, a protectable employer interest always outweighed the public interest.

²⁴³ *Id.* at 189 (quoting *Silvers v. Dis-Com Sec., Inc.*, 403 So. 2d 1133, 1137 (Fla. Dist. Ct. App. 1981)).

²⁴⁴ *Bradford v. N.Y. Times Co.*, 501 F.2d 51, 58 (2d Cir. 1974).

²⁴⁵ *Id.* See also George A. Richards, *Drafting and Enforcing Restrictive Covenants Not to Compete*, 55 MARQ. L. REV. 241, 248 (1972) (discussing the idea of an employed person becoming a public charge).

²⁴⁶ *Clooney v. WCPO Television Div. of Scripps-Howard Broad. Co.*, 300 N.E.2d 256, 259 (Ohio Ct. App. 1973).

²⁴⁷ *Wake Broadcasters, Inc. v. Crawford*, 114 S.E.2d 26, 28 (Ga. 1960) (finding the contract to be unreasonable because it restricted the employee from working in an unreasonably broad territory).

What are the public's interests in media employees' contracts? First, the public interest is not primarily economic. The United States economy today is far removed from the fourteenth century English economy, in which society needed the labor of every worker because the Black Death had claimed so many lives. Furthermore, today the public interest in allowing a media employee to work, lest he or she become "a public charge," a possibility discussed briefly by the United States Court of Appeals for the Second Circuit in *Bradford*,²⁴⁸ is not of significance. There is no case in this study in which a media employee with a non-compete contract failed to find other work, even if that work was waiting tables.²⁴⁹

There are significant public interests in these cases, however, on both the level of the individual complaint and the level of social architecture. Totally ignored by the courts in contract cases, these interests are well established in other areas of communication law and related scholarship.

On the level of the individual complaint, the public has three strong, interrelated interests, the first of which is the public's interest in each media employee's contributions to the free flow of information through society.²⁵⁰ Each contribution to the free flow of information helps to inform the public's decision-making on political, cultural, consumer, and personal issues. Media employees gather information, prepare stories or other media products, and publish or "air" them. The media output includes reports of government corruption, routine reports of current events, weather forecasts, a disc jockey's musical selections and clever banter on social issues, and advertisements for goods and services. The public relies on such information to make decisions ranging from whom to vote for to what car to buy. Therefore, a post-employment non-compete contract contravenes the public's interest to the extent that it interrupts or reduces the free flow of information by preventing a media employee from contributing to it.

The idea of a public interest in the free flow of information and the other public interests articulated here is well developed and influential in First Amendment jurisprudence.²⁵¹ Admittedly, the First Amendment does not play a role in the common law

²⁴⁸ *Bradford*, 501 F.2d at 58.

²⁴⁹ See *W. Group Broad., Ltd. v. Bell*, 942 S.W.2d 934, 941-42 (Mo. Ct. App. 1997).

²⁵⁰ Former Supreme Court Justice Potter Stewart said in *Branzburg v. Hayes* that there is a "broad societal interest in a full and free flow of information to the public." 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

²⁵¹ See generally THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966).

cases analyzed in this study;²⁵² however, this public interest is nevertheless relevant—not as a matter of First Amendment law or theory, but as a matter of public policy. The public has an interest in the work of media employees, which deserves judicial recognition because protecting the free flow of information is good public policy. Protection of the free flow of information has clear benefits for both individual citizens and for society as a whole.

Closely related to the public interest in the free flow of information is the public's interest in a properly functioning marketplace of ideas. The theory of the marketplace of ideas has been discussed for centuries by scholars and jurists and heralded by many of them as a means of discovering the truth.²⁵³ Only through the unrestricted competition between ideas, many believe, can the public discover the truth. Poet John Milton planted the seed for this theory when he wrote in 1644:

And though all the winds of doctrin [sic] were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing [sic] and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the wors [sic] in a free and open encounter.²⁵⁴

More than three hundred years later, United States Supreme Court Justice William H. Brennan Jr., relied, in part, on marketplace theory to explain in *New York Times Co. v. Sullivan*²⁵⁵ why the media deserved strong protection against libel suits filed by government officials. Brennan said this nation has “a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open”²⁵⁶

The public interest in the marketplace of ideas extends even to the work of media employees who are inexperienced or unskilled. Because in theory every idea has value in the marketplace of ideas, even a poorly produced or erroneous news report has value. According to marketplace theory, such stories challenge members of the public to think critically about what they believe to be true and why, and this process of testing ideas contributes to the continuing process of discovering the truth.

²⁵² The First Amendment protects citizens—including media employees—only from state actors. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

²⁵³ See JOHN STUART MILL, *ON LIBERTY* (Crofts Classics 1947) (1859); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 28 (1982); C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 37-46 (1989); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²⁵⁴ JOHN MILTON, *AREOPAGITICA AND OF EDUCATION* 50 (George H. Sabine ed., Harlan Davidson 1987) (1644).

²⁵⁵ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

²⁵⁶ *Id.* at 270.

The third public interest that merits judicial recognition on the level of the individual complaint is the public's interest in certain media employees' roles as watchdogs of the government. As legal scholar Vincent Blasi opined, press freedom is especially important in a democracy because only a free press can check the abuse of official power.²⁵⁷ "The central premise . . . [of this theory]," Blasi wrote, "is that the abuse of official power is an especially serious evil—more serious than the abuse of private power, even by institutions such as large corporations which can affect the lives of millions of people."²⁵⁸ Implicit in what Blasi called his "checking value" theory of free expression is the assumption that government officials will perform their duties more honestly if they are being watched by the media, and, if they do not perform their duties honestly, the watching media can alert the public.

A news reporter who is prohibited from working in a town because of a post-employment non-compete contract ceases to be a watchdog of the government. Had he been allowed to work for a nearby competitor, he might have utilized his experience in covering local government to uncover corruption in City Hall or provide insightful coverage of a school-assignment dispute involving the local school board. The public's interest in such stories is its interest in being informed about public affairs, so that the public can participate knowledgably in the democratic process; if the public disapproves of the performance of its elected officials, it can complain to them or, if necessary, vote them out of office.

While most of the above discussion of public interests involves media employees engaged in the gathering and dissemination of news, the public also has strong interests in the work of advertising and public relations employees. Public relations and advertising employees contribute to the free flow of information to the public and the marketplace of ideas. Advertising sales representatives provide financial support for the media; without that support, most media would not be able to disseminate information. Advertising employees who create advertisements contribute to the commercial marketplace of ideas and help to inform consumer decision-making.²⁵⁹ Similarly, public relations practitioners contribute to the free flow of information and the

²⁵⁷ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977).

²⁵⁸ *Id.* at 538.

²⁵⁹ See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 485 (1996); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

marketplace of ideas by circulating information and ideas on behalf of corporations and other organizations. Some public relations practitioners also serve a watchdog function when they scrutinize the operation of the government and publicize their findings. For example, the public relations staffs of the Sierra Club and the American Civil Liberties Union serve as watchdogs. On its web site, the ACLU criticizes a federal statute that the ACLU says allows unconstitutional censorship of the Internet.²⁶⁰ The Sierra Club, on its web site, advocates stronger government enforcement and funding of the Endangered Species Act to protect wildlife and wildlife habitats.²⁶¹

On the level of social architecture—the level of power dynamics between groups in society—the public has two additional interests, an interest in insuring that the government serves its citizens and an interest in insuring that media companies do the same. To insure that these interests are served, the proper balance of power must be struck between the government and the public and between media companies and the public. Courts can help strike the proper balance by considering the social-architecture-level of public interest when deciding a media employee non-compete contract case. Courts that continue to ignore these public interests, however, risk creating a social architecture that cannot support a healthy democracy.

The public's interest in insuring that the government is responsive to the needs of citizens is closely related to the public's interest in having media employees serve as watchdogs of the government. The difference is that on the level of social architecture, the issue is the distribution of power between the public and the government, not merely the more limited public interest in the ability of a media employee to scrutinize the performance of government officials.

The idea that a government must serve its citizens is a cornerstone of democratic theory. In the seventeenth century, philosopher John Locke wrote that the government should answer to the people, instead of the people to the government.²⁶² Locke held the view that government authority derives solely from the consent of the governed, a view that influenced the Founding Fathers and, through them, the course of the American

²⁶⁰ American Civil Liberties Union, ACLU Defends Free Speech Online, <http://www.aclu.org/freespeech/internet/onlinefreespeech.html> (last visited Nov. 13, 2006).

²⁶¹ Sierra Club, America's Wild Legacy, <http://www.sierraclub.org/wildlegacy/overview/> (last visited Nov. 13, 2006).

²⁶² JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Mark Goldie ed., Everyman 1993) (1699).

Revolution and the writing of the United States Constitution.²⁶³ Karla K. Gower briefly explained the development of this idea in *Liberty and Authority in Free Expression Law*:

Prior to the Enlightenment, the attitude of the state toward expression was authoritarian. . . . Power was located in the state, and “command, obedience, and order [were] higher values than freedom, consent, and involvement.” Individuals were expected to obey the public law, which was used by the state as an instrument to control expression and maintain order. With the Enlightenment came the rise of liberalism. . . . Liberalism changed . . . the locus of power. . . .²⁶⁴

Thus, the social architecture of this nation should grant the public more power than it grants the government. One way to achieve that balance is to protect the power of media employees who serve the public by scrutinizing the operation of the government. In today’s busy and complex society, it is difficult, if not impossible, for the public to scrutinize the operation of the government on its own. To the extent that courts allow media employers to restrain their employees from working for their competitors, courts are tipping the balance of power away from the public and toward the government.

On the level of social architecture, it is equally clear that media owners are also supposed to serve the public; their enterprises are protected by the First Amendment so they can do just that. Media owners often fulfill that obligation, for instance, through a contribution to the free flow of information and service as watchdogs of the government. However, powerful media conglomerates frequently are accused of serving the corporate bottom line at the expense of the public. Thus, the public has a strong interest in curbing the power of the nation’s dominant media conglomerates.

As media critics Ben Bagdikian²⁶⁵ and Robert McChesney²⁶⁶ have noted, more and more American media outlets are owned by fewer and fewer companies. Currently, the American media are dominated by five multinational corporations.²⁶⁷ That number has steadily dropped since the middle of the twentieth century, and, since 1983, the number of dominant media companies—those that own substantial portions of the American media market,

²⁶³ *Id.*

²⁶⁴ KARLA K. GOWER, *LIBERTY AND AUTHORITY IN FREE EXPRESSION LAW* 1 (2002) (quoting Ruth Walden, *A Government Action Approach to First Amendment Analysis*, 69 *JOURNALISM Q.* 65, 66 n.5 (1992)).

²⁶⁵ BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* (2004).

²⁶⁶ ROBERT MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (1999).

²⁶⁷ BAGDIKIAN, *supra* note 265, at 3.

including both content production and distribution channels—has declined by ninety percent from roughly fifty to five.²⁶⁸

In *The New Media Monopoly*, Bagdikian argues that in the current state of concentrated ownership, five dominant media companies overwhelmingly control the flow of information to the public.²⁶⁹ He wrote that those five companies “decide what most citizens will—or will not—learn” and that weakens democracy.²⁷⁰

Researcher and activist Robert McChesney, in *Rich Media, Poor Democracy*, argued that big media have become “a significant anti-democratic force in the United States” and that “[t]he wealthier and more powerful the corporate media giants have become, the poorer the prospects for participatory democracy.”²⁷¹ McChesney argues that allowing the current system to continue in the United States is essentially derailing the democratic process.²⁷²

Some mass communication scholars have begun to quantify the impact of conglomerate media ownership on editorial content. For example, Michelle L. Wood et al. found evidence that corporate and commercial interests influenced the selection of topics for local network affiliate news programs.²⁷³ Also, Dimitri Williams examined how network nightly news shows covered the industries and specific products of companies within their corporate family. Williams found that vertically-integrated media companies were likely to cover the products of their related companies more frequently and more favorably than those with no financial stake in the content.²⁷⁴

²⁶⁸ *Id.* at 16. Bagdikian identified the dominant media companies as Time Warner, Disney, Viacom, NewsCorp, and Bertelsmann. They own most of the 37,000 traditional media outlets in the United States. Bagdikian described the net effect of this ownership pattern as exhibiting “many of the characteristics of a cartel.” *Id.* at 3.

²⁶⁹ *Id.* at 3, 102.

²⁷⁰ *Id.* at 16, 102.

²⁷¹ MCCHESENEY, *supra* note 266, at 2.

²⁷² *Id.* See also Patrick Lee Plaisance, *The Concept of Media Accountability Reconsidered*, 15 J. OF MASS MEDIA ETHICS 257 (2000) (explaining that the public’s ability to hold the press accountable has been eroded by the rise of large media conglomerates).

²⁷³ Michelle L. Wood et al., *Tonight’s Top Story: Commercial Content in Television News*, 81 JOURNALISM & MASS COMM. Q. 807 (2005).

²⁷⁴ Dimitri Williams, *Synergy Bias: Conglomerates and Promotion in the News*, 46 J. OF BROADCASTING & ELECTRONIC MEDIA 453 (2002); see also J. Jung, *The Influence of Media Ownership on News Coverage: A Case of CNN’s Coverage of Movies*, Paper Presented at the Ass’n for Educ. in Journalism and Mass Commc’n Annual Meeting (Aug. 2001) (ERIC Document Reproduction Service No. ED 459, 505) (demonstrating that CNN, a subsidiary of Time Warner, showed a favorable bias toward covering that company’s movie products after the two companies merged); Tien-Tsung Lee & Hsiao-Fang Hwang, *The Impact of Media Ownership: How Time and Warner’s Merger Influences Time’s Content*, Paper Presented at the Ass’n for Educ. in Journalism and Mass Commc’n Annual Meeting (Aug. 1997) (asserting that *Time* magazine was more likely to provide favorable coverage of its new owner’s entertainment products after the Time-Warner merger in 1989); Johanna Cleary & Terry Adams, *The Family Business: Entertainment Products and the Network Morning News Shows*, Paper Presented at the Ass’n for Educ. in Journalism and Mass Commc’n Annual Meeting (Aug. 2005) (stating that morning television news programs,

The popular press has often questioned whether large media conglomerates exert undue influence on their subsidiaries to the detriment of the public's interest. For example, Jonathan Alter wrote that a 1998 report filed by ABC's Brian Ross on possible pedophiles at Disney World may have been quashed by ABC's parent corporation, Disney.²⁷⁵ Alter also criticized conglomerate Time Warner after *Time* magazine ran a cover story about the movie *Eyes Wide Shut*. Both *Time* and the movie's producer, Warner Brothers, were owned by Time Warner.²⁷⁶

This vigorous and growing critique of current patterns of media ownership suggests that courts determining the reasonableness of post-employment non-compete contracts of media employees should consider the growing power of media conglomerates relative to the public's power. To the extent that conglomerate media ownership causes media outlets to serve their conglomerate owners, rather than the public, thereby interfering with the media's well-established duty to serve the public, the power of the media needs to be checked. The courts must recognize the strong public interest in a social architecture that limits media power and encourages the media to serve the public. Increasing judicial attention to social architecture in non-compete contract cases is one significant, albeit simple, way to correct the problems associated with the shifting social architecture described here.

On both levels of analysis proposed here, the public interests are broad and compelling. Courts may say that they balance the interests of the employers, employees, and the public, but they almost never consider the public interest. Courts need to begin to consider the public interests in the free flow of information, the marketplace of ideas, and the watchdog function of the press. Courts must also work toward a social architecture that limits government and media power relative to the public. When courts consider these interests in their deliberations of media contract

on average, fill their daily news "hole" with entertainment and sports topics featuring products that are more likely to have been produced by the networks' parent companies or a corporate sibling than by a competitor, and that the coverage of this entertainment content is almost certain to be favorable).

²⁷⁵ Jonathan Alter, *Big Media Gets Even Bigger*, NEWSWEEK, Jan. 24, 2000, at 135, 142.

²⁷⁶ *Id.* See also T. L. Stanley, *Pirates of the Caribbean*, ADVERTISING AGE, Nov. 17, 2003, at S-13 (reporting that promotion for the movie *Pirates of the Caribbean* included a two-and-a-half-minute trailer that aired "across all the Disney channels, from ABC to ESPN to Lifetime," months before the movie opened, in order to create buzz); J. Glaser, *Coming Distractions: ABC News Goes to the Movies*, 37 COLUM. JOURNALISM REV. 13 (1998) (citing the inclination of ABC's *World News Sunday*, owned by Disney, to feature big-budget Disney films including *Good Will Hunting*, *The Horse Whisperer*, and *Armageddon*, as the basis for relatively light news stories during a five-month period in 1998, at the same time that other networks had no coverage of those topics).

cases, they will certainly find their calculus altered from the status quo.

V. CONCLUSIONS

Currently, the common law on post-employment non-compete contracts for media employees ignores the strong public interests in the work of media employees. The courts need to return to the well-established common law principle that the judicial evaluation of non-compete contracts should include a balancing of the interests of employers, employees, and the public. Furthermore, the courts should utilize a two-level analysis to help them focus more clearly on the broad and varied public interests at stake in media cases.

On the level of the individual complaint, in the media cases analyzed here, the courts applied a reasonableness analysis that prevented egregious violations of the rights of workers under contract. To determine whether a contract was reasonable, the courts examined a variety of interdependent variables in the employee contracts: duration, territory, the type of activity prohibited, whether there was a legally protectable employer interest involved, and whether that employer interest outweighed the hardship inflicted on the employee and the harm done to public interest. The interdependence of these variables is demonstrated by the fact that courts frequently considered two or more variables together. Whether the duration of a post-employment restraint was reasonable, for example, frequently depended on the size of the territory in which the employee was forbidden to work or the scope of the activities in which he could not engage. A longer duration was deemed reasonable if the territory and/or the scope of activity was narrowly drawn.

Courts routinely approved contracts that restricted employees from competing with their former employers for three or fewer years. Courts also routinely approved contracts that restricted employees from working within the territory in which the employer did business (i.e., a specific broadcast market) or restricted employees from going to work for a limited and specific set of competitors, regardless of where the employees were located. The courts did not allow post-employment restraints that prohibited employees from engaging in such a broad range of jobs that the employees would be unable to find new employment.

Courts required that employers demonstrate a legally protectable interest in order to enforce post-employment non-compete contracts. Those protectable interests included the interest in not having to compete against a former employee who

was a unique media personality created at the employer's expense and through the employer's efforts, the interest in protecting trade secrets, and the interest in protecting near-permanent customer relationships. The courts then considered whether that employer interest outweighed the hardship inflicted on the employee by the contract. That hardship was generally evaluated in terms of how difficult it would be for the employee to find a new job. Finally, the courts considered whether the employer interest outweighed the harm to the public interest—although that interest was discussed in only six of the fifty-one cases in this study. The courts appeared to ignore the public's interest in the other cases.

In the few cases in which the courts did consider employee and public interests, the courts always ruled that the employer interest outweighed the harm to the employee and the harm to the public interest—except where there was no ascertainable legally protectable interest. In other words, a legally protectable employer interest always outweighed employee and public interests.

Thus, on the level of the individual complaint, the law clearly favors employers over employees and largely ignores the public. In the very competitive media business, new employees willingly sign contracts that are not in their best long-term interest in order to secure employment. Later, these contracts can restrict their professional and economic advancement. Still, on the level of the individual complaint, the case law is not especially alarming at first glance, and it would be reckless to suggest that the modern on-air television personality or advertising salesperson, for example, was working under employment constraints similar to those of an apprentice not allowed to practice his newly learned craft as was the case in 1578 when a judge voided a contract that prohibited a mercer's apprentice from practicing his craft for four years after the completion of his apprenticeship.²⁷⁷ The courts stress that non-compete contracts cannot be used simply as a means to stifle competition. Courts have found contracts unreasonable and invalid where they last too long, are too broad in terms of territory or activity, or do not serve a legally protectable employer interest.

Are the public's interests similarly protected? No, they are not. While courts typically noted that the common law requires the balancing of the rights of the employer, the employee, and the public, they merely gave lip service to the public interest facet of the balancing analysis. The law, as currently applied, gives media

²⁷⁷ Moore K.B. 115, 72 Eng. Rep. 477 (Q.B. 1578). *See also supra* notes 23-27 and accompanying text.

company employers and employees the power to negotiate the extent to which the public can enjoy the benefits of the work of a media employee. The law mostly ignores the possibility that even if a media employee is not unduly harmed by his contract, the public might be. The courts need to define and protect the public's interests.²⁷⁸

When one focuses on the public interests involved in these cases, the results are more alarming than when one focuses solely on the employees' interests. The public has strong interests in the free flow of information, the marketplace of ideas, and the watchdog function of the press. A significant problem is that employers and employees are allowed to privately negotiate the extent to which the public will enjoy the benefits of access to information and freedom of expression. Furthermore, and perhaps more importantly, the public has an interest in a social architecture that limits the power of the government and of increasingly concentrated media ownership. As Bagdikian wrote, "the media conglomerates are not the only industry whose owners have become monopolistic in the American economy. But media products are unique in one vital respect. They do not manufacture nuts and bolts: they manufacture a social and political world."²⁷⁹ For this reason, the courts must recognize and give due weight to the public interests served by media employees in a democratic society.

²⁷⁸ See Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998). Garfield called for careful judicial scrutiny of "promises of silence"—contracts that might violate a public policy favoring freedom of speech and access to information. While Garfield did not focus on media cases or determinations of reasonableness, he did include in his analysis post-employment contracts that prohibit employees from disclosing trade secrets. Garfield also observed that one of the problems with contracts of silence is that sometimes neither party has an incentive to challenge them because "people outside of the contract bear the costs of the commitment to silence. This is particularly true with contracts that impinge on the public interest." *Id.* at 280.

²⁷⁹ BAGDIKIAN, *supra* note 265, at 9.