
Non-Competition Covenants in Internet Time

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A recent case in New York brought by an online publisher against one of its senior officers, [EarthWeb, Inc. v. Schlack](#), now may make it tougher for Internet companies to enforce covenants not to compete and to protect themselves from employee departures to start-up competitors.

EarthWeb, an online publisher of IT materials, sought to enforce a twelve-month non-compete covenant against its former Vice President in charge of publishing content. At the time of his departure, the former officer informed EarthWeb that he was joining ITworld.com, one of EarthWeb's start-up competitors.

Covenant Not to Compete

Although EarthWeb's covenant not to compete was limited in scope to companies which "directly compete" with EarthWeb by providing IT information or software online to IT professionals and developers, the court refused to enforce the covenant. The court found that the twelve-month period was too long given the dynamic nature of the industry and its lack of geographic borders. The court reasoned that, when "measured against the IT industry in the Internet environment, a one-year hiatus from the workforce is several generations, if not an eternity."

In reaching this conclusion, the court cited [DoubleClick, Inc. v. Henderson](#), a 1997 New York State case, where that court enjoined former employees for only six-months. The court in the DoubleClick case held that: "given the speed with which the Internet advertising industry apparently changes, the [employees]' 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."

Moreover, the court in [EarthWeb](#) declined to modify the twelve-month covenant to a shorter period of time. The court concluded that the employment agreement, as a whole, overreached and was unreasonable. The employment agreement was "at will," and could be terminated at any time by EarthWeb. The agreement imposed a restrictive covenant on the former officer, but made no provision for the payment of severance pay if EarthWeb fired him. EarthWeb even reserved the right to modify the terms of the agreement on a quarterly basis, subject only to "notice and acknowledgment" by the former officer. The court concluded that: "read collectively, the effect of these provisions is to indenture the employee to EarthWeb."

Unlike copyrights and patents, non-competition covenants are governed by state law, and results may vary from state to state. While many states enforce reasonable non-competition covenants, California takes a very different approach. In California, agreements not to compete after the employment term has ended are generally invalid, except in connection with the sale of a business. Thus, California can be expected to be even less tolerant of non-competition covenants than is New York, no matter how short the term of that covenant may be.

Departures to Start-Up Competitors

The court's focus on Internet dynamics in the [EarthWeb](#) case also could make it harder for companies to bring claims for "inevitable trade secret disclosure" against employees who are leaving for start-up companies, rather than established competitors. Claims for inevitable disclosure may be brought when an employer has no evidence of actual misappropriation of trade secrets by the employee, but believes that the similarity between the employee's old and new positions, and the competition between the two companies, would make disclosure inevitable.

In the [EarthWeb](#) case, ITworld.com had not yet begun its operations or launched its website, and the court disagreed with EarthWeb's arguments that it could infer similarities between the two companies based on ITworld.com's preliminary, conceptual documents, such as its mission statements and business plans. Moreover, since ITworld.com is "an embryonic business entity that will compete in a nascent industry which is evolving and reinventing itself with breathtaking speed," the court held that "such comparisons may be ephemeral."

Conclusion

[EarthWeb](#) appears to be the first decision where a court has focused specifically on the pace of the Internet industry as a basis for declining to enforce a covenant not to compete. Prior to this decision, courts in New York and other states (excluding California) outside of an Internet context regularly have upheld non-compete covenants with terms as long as two or three years, where the covenants were also limited to certain geographic areas or to particular customers. However, the [EarthWeb](#) case demonstrates, once again, that old law is being applied in novel ways to reflect the profound changes caused by the Internet. If an Internet company wants to enforce a covenant not to compete, both that covenant and the overall employment contract may have to be less aggressive and overreaching than the contract in the [EarthWeb](#) case. Likewise, the court's unwillingness to conclude that a start-up will compete with the former employer may make it even more difficult for Internet companies to protect their trade secrets.

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