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Legislative Prohibitions on the Enforcement of Post-Employment Covenants Not to Compete in the Broadcasting Industry

by

ALICE J. BAKER

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Introduction

Career patterns have changed in the post-industrial era. The traditional model of lifetime employment with a single employer is transforming to a model of serial employment with multiple employers over the employee's career. At the same time, an ever-increasing number of individuals are employed in positions where they have access to confidential business information belonging to the employer, or have ongoing, personal relationships with customers. One way in which employers have responded to these changes is by requiring employees in such positions to agree not to compete with the employer for a period of time following the termination of the employment relationship. This article addresses a recent backlash that has occurred against such noncompete agreements in the broadcasting industry.

Covenants not to compete with an employer after the termination of an employment contract are widely used with television newscasters and radio personalities. They are enforceable in most states, as long as the restrictions they impose on the employee's ability to work in the broadcasting industry are reasonable in terms of geography, duration, and the range of activities prohibited. In recent years, however, states have begun passing legislation aimed specifically at prohibiting noncompetes in the broadcasting industry, even where such contracts are enforceable in other employment contexts.

I address those legislative prohibitions on the enforcement of post-employment covenants not to compete in the broadcasting industry. In the first two sections of the article, I discuss the common-law doctrine of noncompetition agreements that gave rise to the legislation, beginning with a general discussion of covenants not to compete, and then discussing the application of that doctrine in the context of the entertainment industry. In the third section, I discuss the new legislative developments. In the fourth section, I discuss some possible justifications for a legislative prohibition on the enforcement of noncompetes in the broadcasting industry. Finally, I conclude that the costs of a blanket prohibition on noncompetes in the broadcast industry outweigh the benefits of such legislation, and that parties to broadcasting employment contracts should be free to negotiate and to enforce post-employment covenants not to compete in the same manner as any other contract provision.
Covenants Not to Compete Generally

A covenant not to compete is "[a]n agreement, generally part of a contract of employment or a contract to sell a business, in which the covenantor agrees for a specific period of time and within a particular area to refrain from competition with the covenantee." In the employment context, noncompete agreements are commonly entered with managerial, sales and technical employees who have access to confidential business information or develop close relationships with customers. Such agreements are thought necessary to prevent unscrupulous employees from appropriating confidential trade information and customer relationships for their own benefit, so that employers can invest optimally in research, employee training, improvement of business methods, and client relationships without fearing that their investments will be lost to competitors as soon as they begin to bear fruit. An employee who gains confidential business information and then takes a job with a competitor leaves the first employer, in the words of Judge Flaum, "in the position of a coach, one of whose players has left, playbook in hand, to join the opposing team before the big game."

On the other hand, post-employment restraints on competition are, by their very definition, anticompetitive. They prevent other employers from bidding, in a free market, for the employee's services, and thereby hinder the transfer of the employee's human capital to its most highly valued use. They prevent the employee from changing employers to maximize his own personal utility. To the extent that they prevent the flow of proprietary business information, they impede dissemination of knowledge that could be used to increase

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2. Harlan M. Blake, Employee Agreements not to Compete, 73 Harv. L. Rev. 625, 626 (1960).
3. Id. at 627; cf. Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp., 45 F. Supp. 2d 1164 (D. Kan. 1999) (holding that a covenant not to compete was valid where its purpose was to protect clinic's initial investment in helping physicians establish their practices); Ballesteros v. Johnson, 812 S.W.2d 217 (Mo. App. 1991) (holding that a covenant not to compete was valid where employer had established practice for several years prior to associating with cardiologist, and cardiologist had never been in private practice and had no patient or referral base prior to association with employer).
4. PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1270 (7th Cir. 1995) (discussing the "inevitable disclosure" doctrine).
6. Id.
overall societal productivity.\textsuperscript{7}

Although the common law’s treatment of restraints on the alienation of human capital developed separately from its treatment of restraints on the alienation of real property, both types of restrictive covenants are in fact subsets of a broader category: restraints on the alienation of entitlements.\textsuperscript{8} Restraints on the alienation of entitlements are disfavored in the common law, whether those entitlements are interests in real property,\textsuperscript{9} goods, services, or human capital.\textsuperscript{10} Regardless of the type of entitlement, transferability is thought to be necessary to promote the efficient use of entitlements.\textsuperscript{11}

\begin{itemize}
\item \textsuperscript{7} See Blake, supra n. 2, at 627. Of course many areas of the law recognize that minor anticompetitive effects are a necessary cost of encouraging individuals and firms to design better mousetraps. Indeed, the entire concept of protecting intellectual property – whether it is by copyright, patent, trademark, or otherwise – is premised on such a notion.


\item See Sir Anthony Mildmay’s Case, 6 Coke 40a, 41b, 77 Eng. Rep. 311, 315 (1606) (Coke, J.) (holding that a restraint on alienation is repugnant to power characteristic of fee simple estates).

\item See The Dyer's Case, Y.B. 2 Hen. 5, 5 Mich. 26 (1414) (holding that a covenant not to compete for six months following termination of employment unenforceable on the ground that it constituted an improper restraint of trade).

\item With regard to real property, at least four justifications are generally given for the policy underlying free alienation: (1) if some property is removed from the market through restraints on alienation, the artificially reduced supply will cause an increase in the market price of property that is available on the market, thereby keeping prices above a normal equilibrium level; (2) restraints tend to perpetuate the concentration of wealth because owners cannot sell the property and consume the proceeds; (3) restraints discourage improvements by the possessor who is unable to market the improved land, which prevents the land being put to its highest valued uses; and (4) restraints are a hardship on creditors who lend money in reliance on being able to reach the debtors' property in the event of default. See 6 American Law of Property § 26.3 (1952). The first and third justifications are efficiency arguments. An additional, closely related, argument holds that restraints on alienation remove a certain amount of the national capital from trade. Herbert A. Bernhard, The Minority Doctrine Concerning Direct Restraints on Alienation, 57 Mich. L. Rev. 1158, 1180 (1959). The second justification, as Professor Robinson points out, is probably wrong, as illustrated by the expression “land poor.” Glen O. Robinson, Explaining Contingent Rights: The Puzzle of “Obsolete” Covenants, 91 Colum. L. Rev. 546, 568 n. 81 (1991). The second justification has sometimes been couched in terms of restraints on alienation leading to “survival of the least fit.” See Bernhard, supra n. 11, at 1180. Again, it is difficult to see how a restraint that prevents the owner of property from transferring it to higher-valued uses can reasonably be described as increasing the owner’s wealth. The fourth justification is unrealistic, since no sensible creditor would lend money on the basis of a nontransferable security interest. As an additional justification for the policy favoring alienation, it has sometimes been said that where the restrictive covenant has been imposed in a death conveyance, there are public policy concerns about dead-hand control. Id. Those concerns, of course, are
In the context of a freely negotiated covenant not to compete, however, the fact that the covenant exists is evidence that the parties to the contract believed the gains achieved from restricting competition in the context contemplated by the contract outweighed the costs associated with that restriction. The question then becomes whether, and to what extent, courts and/or legislatures should intervene to promote the alienability of entitlements over the objection of parties who have sought to restrain such alienability. If it is determined that noncompetition agreements should be enforced, a question of remedy arises: should such agreements be specifically enforced by injunction, or are damages an adequate remedy for the violation of a covenant not to compete?

As to the first question, on the enforcement of covenants not to compete, most jurisdictions in the United States follow the rule set forth in the Restatement of Contracts that:

(1) A promise to refrain from competition that imposes a restraint that is ancillary to an otherwise valid transaction or relationship is unreasonably in restraint of trade if
   (b) the restraint is greater than is needed to protect the promisee's legitimate interest, or
   (a) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public.
(2) Promises imposing restraints that are ancillary to a valid transaction or relationship include the following:
   (b) a promise by an employee or other agent not to compete with his employer or other principal.

Thus, a post-employment covenant not to compete will generally be enforceable as long as the restraint is no greater than is necessary to protect the employer's legitimate interest, and the employer's irrelevant to post-employment covenants not to compete.

Applying those arguments to the employment context, we can see that the following justifications for the policy favoring free alienability of real property also justify a policy favoring free alienability of human capital: (1) an artificial reduction in the supply of employees available on the market drives up the cost to other employers of employees who are not subject to noncompete; (2) employees who are the subject of restraints will be discouraged from developing human capital, since they cannot market their skills to the highest bidder; and (3) noncompete agreements remove a certain number of employees from the market.

12. See Robinson, supra n. 11, at 568.
14. Courts generally find the employer to have a legitimate interest where
need for the restraint is not outweighed by hardship to the employee and the likely injury to the public. To make this determination, courts consider such factors as the reasonableness of the covenant’s geographic scope, duration, and the range of activities it prohibits.\textsuperscript{15}

The determination whether to enforce such an agreement is made on a case-by-case basis, and courts’ conclusions as to what constitute a “reasonable” restraint varies widely. Territorial restrictions will generally not be enforced outside the employer’s business area,\textsuperscript{16} and even territorial restrictions within the employer’s business area may be held unreasonable to the extent that they cover regions where the employee did not personally do business.\textsuperscript{17} A territorial restriction that includes only the employer’s normal market area will generally be enforced.\textsuperscript{18}

Temporal restrictions likewise receive varying treatment. Some jurisdictions hold that a restrictive covenant with a duration of three years or longer is presumptively unreasonable.\textsuperscript{19} A covenant not to
compete for one to two years will usually be enforced. In rapidly moving fields such as information technology, where trade information becomes obsolete within a matter of months, "a one-year hiatus from the workforce is several generations, if not an eternity." Accordingly, courts have been less willing to enforce noncompetes under such circumstances.22

Similarly, the range of activities prohibited by the noncompete must be reasonable. In BDO Seidman v. Hirshberg,23 for instance, a New York court held that a restrictive covenant contained in an accountant's employment agreement was overbroad to the extent that it prohibited the accountant from providing services to (1) his personal clients,24 and (2) those clients he had not served to any significant extent while employed at the firm.25 In American Building Services, Inc. v. Cohen,26 an Ohio court found that a noncompetition agreement prohibiting a business manager from working for a competitor was overbroad, but that a restriction on disclosing the former employer's confidential business information would be enforceable. In Delli-Gatti v. Mansfield,27 on the other hand, a Georgia court found that a restrictive covenant prohibiting a physician from practicing all forms of medicine was reasonable in scope, although the physician's specialty was pediatrics.

Some states have statutory restrictions on the enforceability of

20. Balasco v. Gulf Auto Holding, Inc., 707 S.2d 858, 860 (Fla. Dist. App. 1998) (holding that three-year noncompete was enforceable for two years only); The Jewett Orthopaedic Clinic, P.A. v. White, 629 S.2d 922, 927 (Fla. Dist. App. 1993) (holding that a two-year restriction was reasonable); Augusta Eye Ctr., P.C. v. Duplessie, 506 S.E.2d 242 (Ga. App. 1998); Delli-Gatti, 477 S.E.2d at 137 (holding that a one-year restriction was reasonable); Saxton, 470 S.E.2d at 808-908 (holding that a two-year restriction was reasonable); Dominy, 451 S.E.2d at 474 (holding that a two-year restriction was reasonable); Vascular & General Surgical Assoc., Ltd. v. Loiterman, 599 N.E.2d 1246, 1253 (Ill. App. 1992) (holding that a two-year restriction was reasonable).


22. Id. at 313; see also Doubleclick Inc. v. Henderson, 1997 WL 731413 at *8 (N.Y. Sup Ct. Nov. 7, 1997) (enjoining former employee from establishing competing internet company for six months after termination of employment).


24. Id at 1225; contra Prairie Eye Ctr., Ltd. v. Butler, 713 N.E.2d 610, 615 (Ill. App. 1999) (holding that an employer demonstrated sufficient protectable interest in patients of ophthalmologist, with whom ophthalmologist had preexisting professional relationship, to justify enforcement of noncompete even as to those patients, and not just to those patients he acquired while working for employer).

25. BDO Seidman, 712 N.E.2d at 1225.


27. 477 S.E.2d at 137.
post-employment covenants not to compete, most of which track the common law with relatively minor modifications.\textsuperscript{28} The most significant exception is California, which prohibits any "contract by which anyone is restrained from engaging in a lawful profession, trade or business,"\textsuperscript{29} thereby rendering post-employment noncompetes void as a matter of law.

Finally, courts disagree on the issue of whether a post-employment covenant not to compete containing unreasonable restrictions on an employee's future employment may be modified by the court to impose reasonable restrictions, or must be stricken in its entirety. The majority rule is that the court has discretion to limit an unreasonable covenant's geographical area, period of enforceability, and/or scope of activity to make it reasonable.\textsuperscript{30} A minority of jurisdictions holds that a post-employment noncompetition clause must stand or fall in its entirety; it may not be judicially reformed to

\begin{quote}
28. The Florida statute is typical:

Contracts in restraint of trade invalid; exceptions. –
(1) Every contract by which anyone is restrained from exercising a lawful profession, trade or business of any kind, otherwise than is provided by subsections (2) and (3) hereof, is to that extent void.
(2)(a) One who sells the good will of a business, or any shareholder of a corporation selling or otherwise disposing of all of his shares in said corporation, may agree with the buyer, and one who is employed as an agent, or independent contractor, or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area, so long as the buyer or any person deriving title to the good will from him, and so long as such employer, continues to carry on a like business therein. Said agreements may, in the discretion of a court of competent jurisdiction be enforced by injunction.
(3) Partners may, upon or in anticipation of a dissolution of the partnership, agree that all or some of them will not carry on a similar business within a reasonably limited time and area.


\end{quote}

If a covenant not to compete is held enforceable, the next issue becomes the appropriate remedy for its breach. From the employer’s perspective, specific performance of the covenant not to compete has two advantages: (1) it gives the employer greater leverage over a breaching employee because ordinary contract damages will frequently be smaller than the gain the employee will realize if she breaches; and (2) specific performance avoids the valuation problem that would otherwise face an employer seeking damages for breach of a covenant not to compete.\footnote{32}{Restatement (Second) of Contracts § 367(2) (1981).} Most courts follow the Restatement on the issue of remedy as well as enforcement: “[A] promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result . . . will be to leave the employee without other reasonable means of making a living.”\footnote{33}{Restatement (Second) of Contracts § 367 cmt. c (1981).} As a general matter:

an injunction will not be ordered if the remedy in damages would be adequate. Damages are likely to be adequate to protect the employer’s interest unless the employee’s services are unique or extraordinary, either because of special skill that he possesses or because of special knowledge that he has acquired of the employer’s business. Even if damages are not adequate, however, an injunction will not be granted if its probable result will be to leave the employee without other reasonable means of making a living.\footnote{34}{Restatement (Second) of Contracts § 367(2) (1981).}
Timing, as well as the merits of the employer’s claim, becomes an issue with regard to the specific performance of a post-employment covenant not to compete. As a practical matter, an employer that fails to obtain a temporary restraining order or preliminary injunction on an expedited basis is likely to find that its claim for equitable relief is moot by the time the case comes to trial. Courts have responded in two ways when the employer’s entitlement to an injunction is established after the time period in the noncompete agreement has ended. Some courts grant an award of damages; others enjoin the employee from competing with the former employer under the terms of the noncompete agreement for a period beginning on the date judgment is entered. Conversely, an employee who is preliminarily enjoined from competing against his employer and then prevails at trial or on appeal is entitled to damages for the wrongly issued injunction.

The bottom line is that enforcement of post-employment covenants not to compete is determined on a case-by-case basis, and can be difficult to predict ex ante. Determinations of what constitute “reasonable” restrictions in terms of geography, time, and scope of activity vary widely. Some courts will reform an overbroad restrictive covenant to make it enforceable; others will not. If a covenant not to compete is enforced, the court must determine whether specific performance of the covenant not to compete should be ordered, or whether damages would be an adequate remedy.

II

Covenants Not to Compete in the Entertainment Industry

Employee noncompete agreements are commonly used for certain types of performers in the entertainment industry, although such agreements are rare for on-air or on-stage talent. Free-lance and single-project work, rather than long-term employment, is the industry norm, and noncompetes would effectively prevent most performers from obtaining employment on a regular basis. However,

37. Hubbard Broad., Inc. v. Loescher, 291 N.W.2d 616 (Minn. 1980).
there are exceptions to this rule. News broadcasters,\textsuperscript{39} radio disc jockeys and other personalities, Las Vegas performers,\textsuperscript{40} professional wrestlers,\textsuperscript{41} and exotic dancers\textsuperscript{42} are commonly subject to post-employment noncompete agreements.

What these professions have in common is that the employee, unlike many professional entertainers, is portraying a persona that is to a large extent equated with the employee himself. That is, when Vivien Leigh plays Scarlett O'Hara, she portrays a character who is unquestionably different from herself. When Walter Cronkite presents the evening news, on the other hand, he is to some extent "playing" himself – presenting a persona that may or may not have much in common with the off-screen Walter Cronkite, but which viewers equate with the man himself. Frequently, the on-air or on-stage persona is developed to a large extent by the hiring entity, which invests both in the creation of the persona and in advertising it to the public at large.\textsuperscript{43}

Recall that the general purpose of post-employment covenants not to compete is to allow employers optimal investment in product development, employee training, and customer relations by giving employers assurances that they will be able to reap the rewards of those investments.\textsuperscript{44} The application to the broadcasting industry is patent. Broadcasters invest in developing and advertising "products" – in this case, newscasters – for the markets they serve. In order to provide their broadcasting employees with firm-specific human capital, they provide those employees with information about the local area, access to local and regional news contacts, and local

\textsuperscript{39} An informal survey conducted in 1989 indicated that 76% of television stations "always" include noncompete agreements in written employment contracts with their on-air talent, and that most of the remaining stations "sometimes" require such covenants. Jon H. Sylvester, \textit{Validity of Post-Employment Non-Compete Covenants in Broadcast News Employment Contracts}, 11 Hastings Commun. & Ent. L.J. 423, 454-55 (1989).

\textsuperscript{40} Walt Belcher, \textit{Tampa Bay's King of Comedy}, Tampa Tribune 21 (June 9, 2000).

\textsuperscript{41} Sandra A. Papile, \textit{Can't Tell Federations Without a Scorecard}, N.J. Star-Ledger 42 (Oct. 21, 1999).

\textsuperscript{42} \textit{See} \textit{Diamond Talent, Inc. v. Smith}, 653 So. 2d 290 (Ala. 1995).

\textsuperscript{43} I do not mean, by making this distinction, to minimize the marketing value of creating an identifiable public image for performers who play roles other than "themselves." Unquestionably, the images of performers such as Marilyn Monroe and Tippi Hedron were largely created by the studios for which those performers worked. In those cases, as is true of the noncompetes that are the subject of this paper, the investments in creating the persona were made by individuals or entities with whom the performers had an ongoing business relationship, and who could expect to reap the rewards of their investments in developing those personae.

advertising exposure, in addition to general job training. They develop customer relations with viewers by advertising campaigns promoting the on-air talent.\footnote{Such promotional campaigns can be expensive, even in mid-size markets. See \textit{Beckman v. Cox Broad. Corp.}, 296 S.E.2d 566, 568 n. 2 (Ga. 1982) (Atlanta television station spent over $750,000 promoting weatherman.); \textit{Midwest Television, Inc. v. Oloffson}, 699 N.E.2d 230, 234 (Ill. App. 1998) (Peoria, Illinois radio station spent $378,330 for television commercials promoting disc jockey.).}

A newscaster who becomes successful while working for station WXYZ and then accepts employment with WXYZ’s local competitor effectively robs WXYZ not only of its investment in employee training, but also of its investments in product development and customer relations, by taking the “product” WXYZ has created to the competitor. Without some assurance that the newscaster will remain with WXYZ, WXYZ may be unwilling to invest in promoting the broadcaster.

An additional consideration, peculiar to the entertainment industry, is the high risks and high rewards that characterize on-air employment. For any given performer in whom an employer invests, there is a significant risk that the investment will not pay off. For the few performers who do succeed, however, the monetary return on the investment is significant. Thus, an employer faced with the prospect of investing in several performers, few of whom will produce a return on its investment, has a natural incentive to take steps to ensure that the few performers who do succeed will not “take the money and run” as soon as the employer’s investment begins to pay off. From the employer’s perspective, a post-employment noncompete agreement is necessary to protect the employer’s investment in developing and marketing the employee’s performance.\footnote{Sylvester, \textit{supra} n. 39.}

From the employee’s perspective, there are both costs and benefits associated with entering into covenants not to compete with the employer after the term of employment has ended. The cost the employee incurs is the inability to broadcast in the local market for a certain period of time after her employment contract has terminated. Thus, she is put to a forced choice between (1) leaving the geographic area to ply her trade, or (2) taking employment in another field until the noncompete agreement expires.

The benefit the employee gains is the employer’s investment in developing and marketing her as a newscaster. The employee, as well as the employer, benefits from the station’s promotion of her and from the exposure she receives in the local market. The employee
benefits from the news contacts she gains through her job. The employer’s investment in the newscaster contributes significantly to the value of the newscaster’s human capital.47

Exactly how these costs and benefits play out in any given case will depend on the employee’s own personal circumstances. Consider the following example:

Toledo, Ohio is a mid-sized broadcasting market, with a population of about 300,000 in the metropolitan area. Toledo is located approximately 60 miles from Detroit, Michigan, 100 miles from Cleveland, Ohio, 120 miles from Columbus, Ohio, 200 miles from Cincinnati, Ohio, and 100 miles from Ft. Wayne, Indiana. The only community of any size within a fifty-mile radius of Toledo is Bowling Green, Ohio, with a population of about 28,000.

A Toledo television station, WTOL, hires two newscasters, Bing and Bob, and asks them to sign standard noncompete agreements providing that they will not work as on-air news talent for any competing station within a fifty-mile radius for one year after the termination of their contracts with WTOL.

Bing is a young up-and-coming newscaster who is originally from Los Angeles. After earning his broadcasting degree, he interviewed all over the country, and took the job in Toledo partly because it was the largest market and best-paying job available to him, and partly because he believed the Toledo job offered the best chance for advancement to a larger market. Bing views Toledo as a stepping-stone. He has no established ties to Toledo, and he is willing to relocate anywhere to further his career.

When Bing moved to Toledo for the broadcasting job, he knew little about the community. Bing relied heavily on the information he learned from more experienced members of the WTOL news team, as well as the contacts he made through them, to improve his own newsgathering ability. Bing recognizes that success in the entertainment industry is chancy, and that his success in the market depends heavily on the amount of promotion WTOL gives him.

Bob, on the other hand, is a Toledo native who has lived and worked in the area for over twenty years. Prior to taking the newscasting job with WTOL, Bob worked as a print news reporter. He knows everything there is to know about Toledo, and has a well-

47. "[I]f the [performer] does not have enough personal assets to engage in effective self-promotion – a common phenomenon with artists who have yet to develop a reputation – the [hiring entity] may be the only entity capable of investing in the [performer]." Sterk, supra n. 44.
developed array of news contacts. Bob does not view Toledo as a stepping-stone to a larger market; he intends to spend the rest of his life in Toledo. His family, friends, and other ties are local. Since Bob’s name is already familiar to Toledo residents because of his experience with the local newspaper, he believes that his success as a newscaster will have less to do with WTOL’s promotional campaigns than with his own ability to do the job.

It is predictable that Bing and Bob will have vastly different responses to the broadcast station’s demand that they enter into noncompete agreements. For Bing, the ex ante cost of signing a noncompete is small, since he expects for his next job to be in a geographic area outside the region covered by the noncompete. For Bob, on the other hand, signing a noncompete agreement will effectively bar him from engaging in his chosen profession for the duration of the noncompete, since he does not want to move to another area. Similarly, the two newscasters are likely to perceive the benefits associated with signing the noncompete differently. For Bing, signing the noncompete gives WTOL the assurance it needs to invest in promoting him fully, a state of affairs which Bing wants to encourage. For Bob, the only perceived benefit of signing the noncompete is that it enables him to get the job, since he attaches little value to the station’s promotional efforts in his behalf.

The broadcast station’s level of investment, and therefore its protectable interest, in the two newscasters is also likely to be different for the same reasons. Bing will not initially bring any “customers” – or rating points to the station because he is unknown in the local area. Whatever market value Bing develops over the next several months will depend to a certain extent on the name recognition the station’s promotional campaign provides him. Bob, on the other hand, is likely to bring viewers to the newscast as soon as his presence at the station is known, because his name is already familiar to Toledo residents. The point is that individual newscasters may be very differently situated with regard to noncompete agreements in their employment contracts, even if those agreements are phrased identically.

There are very few reported cases addressing the enforceability of post-employment covenants not to compete for on-air talent in the entertainment industry. In determining whether to enforce such agreements, courts consider the same factors that are considered with regard to the enforcement of covenants not to compete in other contexts.

First, a covenant not to compete will be enforced only if
enforcement is necessary to protect the employer's legitimate business interests. Traditionally, those protectable interests have been limited to confidential business information, near-permanent customer relations, and "unique" services. Since the protection of confidential business information is rarely an issue when on-air talent moves from one broadcasting station to another, broadcast stations have generally relied on claims that enforcement of a noncompete agreement is necessary to protect its promotional investment in near-permanent customer relations, i.e., ratings points, or that the on-air

**48.** Professors Closius and Schaffer have argued that only employer trade secrets should be protected:

Although trade secrets and confidential information are properly included within the scope of the principal's protectable interests, an agent's exposure to customers or possession of unique skills is not. The agent's attributes are therefore irrelevant in determining the scope of protectable information.

An agent's relationship with customers is a function of individual personality and particular market skills unless the information at the core of the relationship qualifies as a trade secret or confidential information. Similarly, an agent's heightened level of expertise or competence is a skill belonging to the agent if it is not attributable to trade secrets or confidential information. Including either quality within the ambit of a protectable interest insulates the principal from a former agent's legitimate competition.


**49.** Courts use a two-part test to determine whether an employee's defection to a competitor damages the employer's interest in near-permanent customer relations. The first part of the test has seven factors: (1) the number of years the employer needs to develop its clientele; (2) the money invested to develop a clientele; (3) the difficulty involved in developing the clientele; (4) the extent of personal customer contact by the employee; (5) the employer's degree of knowledge of its customers; (6) the time the customers have been associated with the employer; and (7) the continuity of relationships between the employer. The second part of the test requires the court to consider whether the employee would have had contact with the customers but for his job with the employer. *McRand, Inc. v. Van Beelen*, 486 N.E.2d 1306, 1311-13 (Ill. App. 1985). The mere fact of customer contact is not sufficient. Rather, the employer must show that the employee's contact with customers was of such a nature that the customer could be expected to move with the employee. As one court put it:

Take the elevator operator. Who more regularly and frequently contacts his employer's customers? Yet who ever heard of a tenant moving from the Union Commerce Building to the Terminal Tower or Caxton Building because an elevator operator did? * * * If the deans of the Harvard and Yale law schools exchanged chairs it might be very unflattering to see how few, if any, of their students would try to
talent's services are unique. In recent years courts have generally rejected the uniqueness argument, recognizing that the employer cannot claim a protectable interest in having the performer continue to work for it, and that the real injury to the employer is the fact that the employer's competitor is profiting from the employer's investment.

In *West Group Broadcasting, Ltd. v. Bell*, for instance, radio station KXDG hired the employee to work as a radio announcer hosting an evening country music program, and created and promoted the name and persona of “Hurricane Hannah” for the employee. After seven months on the job, the employee resigned and took a job with a competing radio station in the same area, in violation of a 180-day noncompete agreement in her employment contract with KXDG. At the new station, the employee co-hosted a morning contemporary music program, and used the name “Robin Kane.” On those facts, the court refused to enforce the noncompetition clause, holding that the employer had not

follow them.


50. The uniqueness argument has its genesis in the English case of *Lumley v. Wagner*, 42 Eng. Rep. 687 (1852), which involved a suit to enforce a personal services contract. Wagner, an opera singer, had contracted to sing at Lumley’s opera house for a period of three months, and then repudiated the contract. The court refused specifically to enforce the contract to perform at Lumley’s theater, but enjoined Wagner from performing elsewhere during the term of the contract.

The theory underlying the holding is that where the services of the performer are unique, it is impossible to ascertain the damages to the employer that result from the performer's breach of her contract to perform, and enforcement of an implied negative covenant not to compete discourages breach by removing the financial inducement for the employee to breach. See *Harry Rogers Theatrical Enters. v. Comstock*, 232 N.Y.S. 1 (N.Y. App. Div. 1928); see generally Edward Yorio, In Defense of Money Damages for Breach of Contract, 82 Colum. L. Rev. 1365, 1375-76 (1982). In other words, the purpose behind the doctrine is to induce the employee to honor the employment agreement. So understood, the doctrine has limited applicability in the context of post-employment covenants not to compete, since by definition the employee is not presently in an employment relationship with the employer. It is not legitimate for the former employer to claim damages resulting from its employee’s resignation where that resignation was not wrongful.


52. 942 S.W.2d 934 (Mo. App. 1997).

53. Id. at 935.

54. Id. at 936.
demonstrated a protectable business interest:

Although West created "Hurricane Hannah" as Bell's radio personality and used its resources to promote "Hurricane Hannah" as part of KXDG's image, there is no evidence that at KSYN Bell ever used or attempted to capitalize on that personality or name recognition. 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.

Since an employer cannot use a noncompete clause to insulate itself from ordinary competition, and the employee was not misappropriating the investment KXDG had made in promoting her as "Hurricane Hannah," enforcement of the covenant not to compete was denied.

Bell is distinguishable from other cases, such as Midwest Television, Inc. v. Oloffson, T.K. Communications, Inc. v. Herman, and Beckman v. Cox Broadcasting Corp. in which courts found that employers had interests in protecting their promotional investments in employees when the employees had moved to rival stations and attempted to capitalize on the reputations they had developed under their former employers.

Another issue that may be raised with regard to protection of the employer's interest in promoting the talent is the likelihood that a radio announcer will be able to induce listeners to switch stations, merely on the strength of his ability as an announcer. Enforcement of a noncompete agreement was denied in KWEL, Inc. v. Prassel, where the employee's on-air job at his new radio station consisted solely of giving the time, temperature, and station identification. The court found it unlikely that any listeners would switch stations based

55. Id. at 938.
57. Bell, 942 S.W.2d at 939.
58. 699 N.E.2d 230, 234 (Ill. App. 1998). "[W]e consider whether Oloffson would have had exposure to Midwest's listeners and advertisers but for his job with the station. We conclude that he would not. No advertisers or listeners came with him to Peoria in 1987. Only through Midwest did he develop extensive contacts with both local listeners and advertisers." Id. at 234.
60. 296 S.E.2d 566, 569 (Ga. 1982).
on the quality of the hourly station identification.\textsuperscript{62}

In \textit{Bell}, on the other hand, the fact that the employee had switched from country/western to a contemporary music format was a significant factor in the court's refusal to enforce the noncompete. The "different musical genres" argument was rejected in \textit{Cullman Broadcasting Company, Inc. v. Bosley},\textsuperscript{63} where the employee, like \textit{Bell}, switched from a country/western station to a popular music station. The court rejected Bosley's argument that the two radio stations would necessarily have different groups of listeners, holding that "the diversity between fans of country and western music and fans of popular music is not so generally recognized and established as to constitute common knowledge."\textsuperscript{64} In the absence of a specific showing that the broadcasting station had not lost listeners, the station was entitled to a presumption that Bosley's defection had caused it harm.\textsuperscript{65}

A second requisite for the enforcement of a covenant not to compete is that the restraint be reasonable as to duration. In \textit{Richmond Brothers v. Westinghouse Broadcasting Company},\textsuperscript{66} a five-year covenant not to compete was held to be unreasonably long. The employee in \textit{Richmond Brothers} had honored the noncompete for three years, and then taken a job that violated the noncompete.\textsuperscript{67} After three years, the court held, "the restrictive covenant . . . is no longer reasonably necessary for the protection of the plaintiff's business."\textsuperscript{68} Covenants not to compete lasting from six months to a year have been found reasonable in duration.\textsuperscript{69}

\textsuperscript{62} Id. at 822.
\textsuperscript{63} 373 S.2d 830, 832 (Ala. 1979).
\textsuperscript{64} Id. (No evidence had been admitted at trial concerning the type of music aired by each station; the trial court took judicial notice of that information. Nor was any evidence presented as to whether any listeners had followed Bosley to his new station. The Alabama Supreme Court expressed displeasure with the inadequacy of the evidence presented, and ultimately based its determination that the noncompete was enforceable largely on the absence of evidence that it should not be enforced. The court did not expressly discuss the burden of proof issue.).
\textsuperscript{65} Id. at 832.
\textsuperscript{67} Id. at 306.
\textsuperscript{68} Id. at 307-08.
\textsuperscript{69} Oloffson, 699 N.E.2d at 234 (one year); New River Media Group, Inc. v. Knighton, 429 S.E.2d (Va. 1993) (one year); Pino v. Spanish Broad. Sys. of Fla., Inc., 564 So. 2d 186 (Fla. Dist. App. 1990) (one year); Beckman, 296 S.E.2d at 566, 569 (six months); Bosley, 373 S.2d at 836-38 (one year); Clooney v. WCPO Television Div. of Scripps Howard Broad. Co., 300 N.E.2d 256 (Ohio App. 1973) (one year); Skyland Broad. Corp. v. Hamby, 141 N.E.2d 783 (Ohio Com. Pl. 1957) (8 months).
Next, a covenant not to compete will be enforced only if it is reasonable as to geographic scope. In the context of broadcasting noncompetes, the broadcasting range of the station at which the employee worked provides a general rule of thumb as to geographic reasonableness. A restriction that covers the station's broadcast market will generally be held to be a reasonable geographic restriction. Geographic restrictions outside of the broadcasting range of the station at which the employee worked are generally held to be unreasonable.

The scope of activities prohibited in a covenant not to compete must be reasonable as well. In the broadcasting industry, disputes over the enforcement of noncompetes arise when the noncompetition clause prohibits the employee from working for a competitor in a wide range of capacities outside the employee's job duties at the original broadcasting station, or in "any" capacity. In Capital Cities Communications, Inc. v. Sheehan, a Connecticut court denied enforcement of a noncompetition clause prohibiting a newscaster from making "any on-the-air appearances" for a competing station. The court reasoned that the clause was too broad because it was not limited to the broadcasting of news, even though the employee had been hired as a news anchor at his new station. In Bosley, on the other hand, the Alabama Supreme Court made a factual inquiry into the employee's actual duties with his new employer to determine whether a contractual restriction prohibiting the employee from taking "any" employment with a competitor was overbroad:

The trial court found that the covenant was too broad because it restrained the employee "from any type of

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70. Oloffson, 699 N.E.2d at 235 (100 mile radius of broadcasting tower); Knighton, 429 S.E.2d at 26 (60 mile radius); Pino, 564 S.2d at 187 (two counties); Beckman, 296 S.E.2d at 567 (35 mile radius); Bosley, 393 S.2d at 836 (one county); Clooney, N.E.2d at 237 (100 mile radius); Hamby, 141 N.E.2d at 784 (35 mile radius).

71. Bennett v. Storz Broad. Co., 134 N.W.2d 892, 899 (Minn. 1965) (holding that a noncompete prohibiting employee from working within 35-mile radius of any station owned by broadcasting company was unreasonable, where company owned several stations nationwide); WAKE Broadcasters, Inc. v. Crawford, 114 S.E.2d 26, 27 (Ga. 1960) (holding that a noncompete prohibiting employee from working within 50-mile radius of any station owned by broadcasting company was unreasonable, where company owned several stations nationwide). In Storz Broad. Co. v. Courtney, 178 So. 2d 40, 42 (Fla. Dist. App. 1965), which involved a noncompete clause identical to the one at issue in Bennett, the Florida Court of Appeals invalidated the noncompete clause by finding that it did not survive the termination of the employment contract.


73. Id.
employment or in any activity in connection with any radio station, television station or CATV system.” The court reasoned that the covenant prevented the employee from being “employed or connected in any manner with any of these type facilities in any capacity, including that of janitor.” The potential invalidity of this covenant on grounds of overbreadth does not compel the conclusion that it is overbroad as applied. If the employer was trying to prevent its former employee from working as a janitor with a competitor, we might be faced with the prospect of striking down an unreasonable limitation or restriction. In this case, however, the employer is seeking to restrain a radio announcer from announcing on a rival radio station.\textsuperscript{74}

The court enforced the restrictive covenant, although the employer was limited to a damages remedy.\textsuperscript{75}

The noncompete covenant at issue in \textit{Murray v. Lowndes County Broadcasting Company}\textsuperscript{76} prohibited the employee, a radio announcer, from taking a job as an “announcer, disc jockey, advertisement selling, station manager or director” for any competing radio station in the broadcasting market area for a period of two years after his employment ended.\textsuperscript{77} The employee was hired by a competing station as a general manager, in violation of the noncompete, and the employee argued that the restrictive covenant was overbroad to the extent that it prohibited him from working for a radio station in any capacity other than as on-air talent.\textsuperscript{78} The court rejected that argument, finding there was “evidence that Murray had participated in the development of a format and mode of operation for WJEM, a country music station, and that the station would be harmed if these plans and procedures were revealed to WGAF, also a country music station in the same county.”\textsuperscript{79} The court enforced the restrictive covenant and enjoined the employee from working for the competing station as a general manager.\textsuperscript{80}

Finally, if the noncompete is to be enforced, the employer’s legitimate interest in protecting its investment cannot be outweighed by the hardship to the employee and the harm to the public. In \textit{Nigra

\textsuperscript{74} 373 S.2d at 835.
\textsuperscript{75} Id. at 837-38.
\textsuperscript{76} 284 S.E.2d 10 (Ga. 1981).
\textsuperscript{77} Id. at 10.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 11.
v. Young Broadcasting of Albany, the court refused to enforce a one-year covenant not to compete on the ground that the employer's interest was outweighed by the harm to the employee, where the employee was a native of the area with family ties that effectively prevented her from moving, and the effect of the noncompete would be to prevent her from working in her profession.

Thus, the judicial enforcement of post-employment covenants not to compete in the broadcasting industry, as is the case with noncompetes generally, is difficult to predict in any given case. Courts are divided on the issue of what constitutes a protectable interest of the employer. With regard to the duration of the restrictive covenant, some courts find that an employee's marketability will not be substantially diminished by a year-long enforced absence from the airwaves; others seem to follow a rule derived from the concept that in some fields of endeavor, "a one-year hiatus from the workforce is several generations, if not an eternity." Regarding the scope of the restrictive covenant, some courts will enforce a noncompete only to the extent that it covers the same type of broadcasting in the same type of market; others will enforce a noncompete to the extent that it restricts the employee from performing any on-air functions, and others will enforce even a noncompete that prohibits the employee from providing services that are ancillary to on-air broadcasting.

The unpredictability of enforcement in the case of broadcasting noncompetes is exacerbated by the fact that most broadcasting employment contracts contain clauses mandating the arbitration of all claims arising under the contract. Arbitrators make their decisions on the basis of a limited evidentiary record, and the right of appeal is extremely limited. Since arbitration decisions do not have precedential value, the written opinions explaining the reasoning underlying their judgments are frequently sketchy or nonexistent, and there are no standard reporters for such decisions, creating a high risk of inconsistent decisions.

81. 67 N.Y.S.2d 848, 849 (N.Y. Sup. Ct. 1998). It also appears from the trial court's opinion that the employer never presented evidence that it had made promotional investments in the employee, and attempted to rely solely on the argument that the employee's services were unique. As discussed above, the "unique services" argument has little relevance once the employment contract has ended. See supra n. 50.
82. Beckman, 296 S.E.2d at 569.
83. See supra n. 22.
84. See generally Bell, 942 S.W.2d 934; Richmond Bros., 256 N.E.2d 304.
86. Murray, 284 S.E.2d 10.
87. See Dan Trigoboff, WFAA-TV Noncompete Upheld, 129 Broad. & Cable 80.
An individual newscaster who desires to change employment in the face of a covenant not to compete has several options: (1) he can take a job that violates the noncompete agreement, and hope that the court or arbitrator will refuse to enforce the covenant; 88 (2) he can bring a preemptive suit for a declaratory judgment that the noncompete is invalid; 89 (3) he can move to a different geographic market; (4) he can negotiate with the original employer for a release from the noncompete; 90 or (5) he can “wait out” the period of the noncompete by taking employment with a rival station that does not conflict with the noncompete. 91

III

Legislation Prohibiting the Enforcement of Broadcast Industry Noncompetes

Faced with the widespread use of covenants not to compete for television newscasters and radio personalities, and perceived overreaching by broadcasting stations in insisting on such covenants, the American Federation of Television and Radio and Television Artists (“AFTRA”), which represents television newscasters and radio announcers, has begun attacking the enforceability of such provisions in state legislatures. AFTRA began its legislative efforts in the Commonwealth of Massachusetts, where separate bills to make noncompete clauses unenforceable in the broadcasting industry were introduced in 1992, 92 1994, 93 1995, 94 and 1997. 95 On August 7, 1998, the legislature enacted the 1997 bill, which provides that:

Any contract or agreement which creates or establishes the terms of employment for an employee or individual in the
broadcasting industry, including, television stations, television networks, radio stations, radio networks, or any entities affiliated with the foregoing, and which restricts the right of such employee or individual to obtain employment in a specified geographic area for a specified period of time after termination of employment of the employee by the employer or by termination of the employment relationship by mutual agreement of the employer and the employee or by termination of the employment relationship by the expiration of the contract or agreement, shall be void and unenforceable with respect to such provision.\footnote{96}

Buoyed by its success in Massachusetts, AFTRA pushed for the introduction of similar legislation in other states. On June 4, 1999, Maine passed a statute providing that:

A broadcasting industry contract provision that requires an employee or prospective employee to refrain from obtaining employment in a specified geographic area for a specified period of time following expiration of the contract or upon termination of employment without fault of the employee is presumed to be unreasonable.\footnote{97}

As of this writing, legislation prohibiting covenants not to compete in the broadcasting industry has been introduced in Connecticut,\footnote{98} Illinois,\footnote{99} Maryland,\footnote{100} Missouri,\footnote{101} New Jersey,\footnote{102} Rhode Island,\footnote{103} Washington,\footnote{104} and West Virginia.\footnote{105}

\footnote{98} The proposed Connecticut statute generally allows the enforcement of reasonable noncompetes, but provides that:  

No court or other forum in this state shall enforce a noncompete agreement entered into on or after the effective date of this section against an employee in the broadcasting industry, which agreement restricts the right of such employee to obtain employment in such industry within a specified geographic area for a specified period of time following termination of employment or expiration of an employment contract or agreement.  

\footnote{100} Md. H. 1283, 414th Gen. Assembly (introduced Feb. 17, 2000).  
\footnote{101} Mo. Sen. 1025, 90th Gen. Assembly (introduced Feb. 17, 2000).  
\footnote{102} N.J. Sen. 1297, 209th Legis. (introduced May 18, 2000).  
\footnote{103} R.I. H. 7794 (introduced Feb. 3, 2000).
The effect of this legislation is to impose, by statute, a nonnegotiable contract term allowing free alienation of the employee's human capital after the term of employment has ended. In the absence of such legislation, free post-employment alienability of the employee's services is a legal default rule. The parties are free to bargain around that rule as they see fit to further their interests, so long as the restrictive covenants into which they enter are not overbroad to the point that they violate public policy. With such legislation in place, the parties are no longer free to contract around the legal default rule.

The question raised by this legislation, therefore, is whether the legislature should interfere with the enforceability of freely negotiated covenants not to compete in the broadcasting industry. Note that this is a vastly different question from the question whether noncompetes are a good idea in the broadcasting industry context. I take no position on that issue. When a state legislature interferes with the parties' private contractual relationships, the question becomes whether, and to what extent, the legislature should intervene to prohibit the enforcement of covenants not to compete over the objection of parties who have sought to enter into them, not whether the parties should have entered into such agreements in the first place.

IV
Policy Considerations in Evaluating Legislative Prohibitions on Noncompetes

Covenants not to compete in the broadcast industry exist, as discussed above, in order to protect the employer's investment in promoting and developing the on-air talent. Such promotional investments can benefit both the station, which earns increased revenues if it is able to attract a larger audience, and the performers themselves, who gain from increased exposure. At the same time, such covenants restrict the employee's ability to earn a living once the term of employment has ended, thereby interfering with the transfer of the employee's human capital to its highest valued use, and insulating the employer from competition.

Because free alienation of entitlements is necessary in order to move goods and services to their highest valued uses, it is generally
supposed that unencumbered market trades should be allowed unless a valid reason exists to restrict such trades.106 Law and economics scholars argue that in the absence of transactions costs, the parties to a transaction will bargain for an economically efficient allocation of resources.107 The legislative imposition of mandatory contract terms – such as free alienability of human capital after the term of employment has ended – to which the parties would not agree if left to their own devices makes both parties worse off.108

The standard neoclassical argument has two steps. First, the fact that the parties did not bargain for the term in question when left to their own devices indicates that the cost of the term must exceed its benefit.109 Otherwise, the parties would have agreed to the term on their own. Thus, if the noncompete clause is worth $10,000 to the employer, and the employee values the right to compete in the same market at $20,000, the parties will not agree to a noncompete and no mandated term is necessary. The parties will enter into a noncompete only when the employer ascribes greater value to the noncompete clause than the employee values the right to compete that she is giving up. Accordingly, the only time the legislation has any practical effect is when it prevents an economically efficient transaction. Second, imposing an inefficient mandatory contract term operates as an effective tax on the parties’ transaction with two effects: 1) the employee’s wage falls by an amount between the benefit and the cost of the contract term; and 2) employment levels drop.110

Stated slightly differently, there are two logical possibilities: either the contract term at issue is welfare enhancing, or it is not. If the contract term benefits the parties, we expect them to bargain for it voluntarily, and legislative imposition of the term is not necessary. If the contract term does not benefit the parties, it should not be

106. See e.g. Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931, 932 (1985).
imposed on the parties unless unusual circumstances exist. In determining whether to impose a contract term on parties who would otherwise bargain for something else, the question becomes whether there is a reason to suspect market failure or any other reason to justify interference with the parties’ desires. Such interference may be justified, for instance, if there is a reason to believe that broadcast employees systematically may agree to noncompetes that are not in their interests, or if enforcing noncompetes imposes uncompensated detrimental effects on third parties to the transaction.

A. Externalities: Anticompetitive Effects

One reason for blocking a voluntary market transaction may be that the transaction in question will create significant externalities—unreimbursed costs to third parties. The transaction is prohibited not to protect the employee, but to ensure that other individuals outside the transaction are not adversely affected.

Examples of legal prohibitions on behavior with third-party effects are legion. Vote-selling and bribing legislators is illegal not because we are concerned about harm to individuals who are willing to buy and sell votes, but because we are concerned about harm to society at large. Employees cannot waive their rights to be free of race or sex discrimination, largely because of the effects such a waiver would have on other people in the workplace. An employer cannot fire an employee for refusing to commit a crime or for testifying truthfully in court, because of the effects of such conduct on society generally.

Covenants not to compete have effects on third parties, and courts have sometimes refused to enforce them on the basis of their anticompetitive effects. In the broadcasting environment, third-

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111. Calabresi & Melamed, supra n. 107, at 1111.
112. Sterk, supra n. 44, at 405-06; see also Newberger, Loeb & Co., Inc. v. Gross, 562 F.2d 1057, 1082 (2d Cir. 1977) ("Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act. When a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired. Moreover, employee noncompetition clauses can tie up industry expertise and experience and thereby forestall new entry. In certain cases, postemployment restraints do serve legitimate business purposes: they prevent a departing employee from expropriating his employer's secrets and clientele. Consequently, we have held that a per se ban on all such restrictive covenants would not be warranted.

If section 1 of the Sherman Act were to be applied, two lines of inquiry seem relevant. First, there is the question of facial overbreadth: will the restrictive covenant operate in
party audiences have an interest in maximizing their choices regarding on-air talent. If a competing station in the same market in which she has been broadcasting hires a newscaster or radio personality, the very fact of that hire indicates that audience members want to watch and/or listen to that personality. Enforcing a noncompete means that the audience will be deprived of a "product" that they prefer. Enforcing a noncompete also impairs the ability of other stations in the same broadcast market to compete by prohibiting the hiring of on-air talent they would like to hire. All other things being equal, broadcast noncompetes create externalities in the form of anticompetitive effects by limiting audience choice and insulating the station from competition in its market area.

The question, then, becomes whether a statutory regime that allows the enforcement of reasonable noncompetes is likely to be different in any relevant sense from a regime that does not allow such noncompetes. That is, the question becomes whether allowing enforcement of noncompetes is likely to permit the creation of any value to compensate for the anticompetitive effects that such a regime engenders.

In some contexts, such as copyright, patent, and trademark, we accept the anticompetitive effects of granting the creator monopoly rights in a marketable product because we realize that if initial investments in product development are not protected, companies will not make them. Granting temporary monopoly protection to creators of new products and methodologies actually enlarges, rather than reduces, customer choice, because it induces firms to invest optimally in product development.

Most law and economics scholars argue for broad enforcement of post-employment covenants not to compete on similar grounds. If a firm does not have some assurance that its investment in employee development and promotion will be protected, it will either be less inclined to invest in that employee, or will find a way to extract its development costs from the employee in the form of lower wages or otherwise. To the extent that broadcast noncompetes encourage circumstances where no valid business interest of the ex-employer is at stake? Restraints on postemployment competition that serve no legitimate purpose at the time they are adopted would be per se invalid. Second, even if the clause is not overbroad per se, it might still be scrutinized for unreasonableness: are the restrictions so burdensome that their anticompetitive purposes and effects outweigh their justifications? Restraints that fail this balancing test might be struck down under a rule of reason.

113. For examples, see Gillian Lester, Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis, forthcoming 76 Ind. L.J. 49, 59-60 & nn. 50-51 (2001), and articles cited therein (draft on file with author).
employer investment in human capital, they probably do not have anticompetitive effects that would warrant a categorical prohibition on enforcement.

However, support among academics for broad enforcement of post-employment noncompetes has been far from universal. Some commentators have argued that noncompetes do not allow the creation of extra value that outweighs their anticompetitive effects, because employers would make the same investments in employees even if those investments were not protected by noncompetes. For instance, Professors Gilson and Hyde attribute some of Silicon Valley's success to the fact that California does not enforce noncompetes, so that when highly skilled employees move between firms taking ideas and innovations with them, the rapid diffusion of information more than compensates for the investment disincentives that arise when noncompetes are not enforceable.\footnote{114. Ronald J. Gilson, The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete, 74 N.Y.U. L. Rev. 575, 608-09 (1999); Alan Hyde, Silicon Valley's High-Velocity Labor Market, 11 J. Applied Corp. Fin. 28-29 (1998).} A similar situation exists in the broadcasting industry. Notwithstanding California's refusal to enforce noncompetes, California broadcast stations continue to develop and promote their on-air talent. If employers would make the same investment in employee promotion and training in the absence of a noncompete, allowing a noncompete does not create any additional value. In that case, the noncompete imposes anticompetitive costs on society without offering a countervailing benefit, and should not be enforced.

The potential for anticompetitive effects thus raises two separate questions pertinent to statutes prohibiting post-employment covenants not to compete in the broadcasting industry. The first question is whether post-employment noncompete covenants should be prohibited in all cases, with a ban on enforcement in the broadcasting industry merely a first step on the road to a universal prohibition. The second question, assuming that noncompetes should be enforceable in at least some cases, is whether there is something special about the broadcasting industry that makes it a context in which noncompetes should not be enforced.

Consider the following hypothetical: In Year 1, TrainCo hires Bing to work for two years at an annual salary of $30,000 and invests $5,000 in Bing's training.\footnote{115. The hypothetical is taken from Lester, supra n. 113, at 62-63.} Bing's marginal product during Year 1 equals $30,000, which is below TrainCo's $35,000 outlay. In Year 2,
Bing’s marginal product rises to $35,000. During the two-year period, TrainCo has spent $65,000 on salary and training, and Bing’s marginal product has been $65,000. If Bing remains with TrainCo for two years, TrainCo will recapture its investment in Bing’s training, and extra value will have been created.

TrainCo’s problem is that PoachCo is willing to pay $35,000 to lure Bing away after Year 1. If TrainCo loses Bing at that point, it will have invested $35,000 and received only $30,000 worth of benefit. A regular pattern of such poaching, if TrainCo is always on the losing end, will undermine TrainCo’s inducement to invest in training.116

Suppose, on the other hand, that during Year 1, PoachCo hired Bob on terms identical to the terms under which TrainCo hired Bing. Bing and Bob switch companies in Year 2. In that case, each firm has invested $65,000 in salary and training, and each firm has received $65,000 worth of benefit, although the individual employees change places. When all firms are both trainers and poachers, we are less concerned about systematic underinvestment in training.117

The hypothetical implies that noncompetes should be preferentially enforced in those contexts in which monodirectional employee poaching – systematic poaching by Firm A at the expense of Firm B – is likely to present significant disincentives to an employer’s investments in employee development. If we want to nibble away at the traditional common-law rule allowing enforcement of noncompetes, the best candidates for a bar on enforcement are those work environments in which all firms provide comparable levels of employee training, so that poaching is not likely to be a problem.

How does this principle apply in the broadcast employment context? The broadcasting industry is characterized by high risks and high rewards: few employees succeed, but those who do succeed produce exceptionally high value both for themselves and for the stations that employ them. The high risk/high reward nature of the broadcasting industry creates an environment in which poaching is

116. Peter Cappelli, The New Deal at Work: Managing the Market-Driven Workforce 182-87, 199-200 (1999) (providing several examples of companies that reduced their levels of employee training in response to widespread poaching by competitors); see also Anthony P. Carnevale & Donna Desrochers, Training in the Dilbert Economy, 53 Training & Dev. 32 (1999).

117. Of course, the firms will face a classic prisoners’ dilemma even in this case. An individually rational firm has an incentive to avail itself of the training opportunities provided by other employers, while underinvesting in training so that other firms cannot free ride on its own efforts. See Laura Dresser & Joel Rogers, Sectoral Strategies of Labor Market Reform: Emerging Evidence form the U.S., in Vocational and Adult Education In Europe 269 (Fons van Wieringen ed., 1999).
likely to be a significant problem.

Suppose Station A hires Bing at a salary of $30,000 and invests $70,000 in advertising and promoting him, for a total expenditure of $100,000. Station B hires Bob on similar terms. At the end of a year, Bing is attracting a small audience, and his marginal product is only $80,000. Bob has high ratings and is now worth $250,000. Station A has a strong incentive to poach Bob. But Station B does not have a corollary incentive to poach Bing. All of the poaching will go in one direction. The poaching opportunity makes the broadcasting industry an unsuitable context in which to take initial steps towards a categorical ban on the enforcement of noncompetes. Nor does there appear to be any reason to suspect that the anticompetitive effects of noncompetes will be unusually grave in the broadcasting industry. The risk of anticompetitive effects is not a sufficient justification for a categorical ban on broadcasting industry covenants not to compete.

B. Market Failure: Systematic Overreaching and Employee Myopia

A second situation in which we may wish to restrict or prohibit free market trades is when there is reason to suspect market failure, or to believe that broadcast employees may systematically agree to noncompetes that are not in their interests.

Systematic overreaching by broadcasting companies may be one such circumstance. Just as courts refuse to enforce contracts of adhesion in individual circumstances, it is reasonable for the legislature to step in collectively wherever a significant power differential renders the employer capable of imposing a standard “take it or leave it” contract containing terms to which employees would not agree if they were capable of bargaining freely over the terms and conditions of their employment. Systemic overreaching may be a justification for the legislature to restrict the enforceability of broadcast noncompetes if two conditions are met. First, there must be a significant power differential between broadcast stations and their employees, such that the latter are not able to bargain effectively over the terms and conditions of their employment.

118. See generally Sterk, supra n. 44, at 408-09.

Second, there must be some reason to believe that noncompetes are not in the interest of broadcast employees generally.

The broadcast employee will argue that both conditions are met. First, with regard to power differentials, broadcast stations generally have monopsony power in any given market, and the number of applicants for any given on-air position creates a buyers' market in hiring on-air talent. Furthermore, argues the employee, there are numerous reasons for suspecting that broadcast employees will systemically agree to noncompetes that are not in their interest. Part of the reason for this is that broadcast employees behave like human beings, not "homo economicus," and their rationality is bounded in predictable ways.

One such bound on rationality is employee myopia. People frequently overemphasize the short term, and discount future gains and losses in ways that do not maximize their long-term interests. Under this theory, the employee who is presented with a covenant not to compete at the beginning of the employment relationship may disregard or minimize the cost of not being able to work in broadcasting at some unspecified, future date, and may sign a noncompete that is not in his long-term interest. The problem is particularly acute in the broadcasting industry, where the combination of high unemployment and the chance for high rewards is such that many applicants will "sell their souls" for a chance at an on-air position.

Closely related is the tendency of employees to factor out events that have low probability from their decision making processes. A newscaster who is signing a contract with a broadcast station may agree to a noncompete because she believes that it is unlikely to ever have any effect: she expects that either she will remain with the station for her entire career, or she will leave only when she moves to a market in a different geographic area. Five or ten years into the contract, that same newscaster may have developed ties to the local market such that she is unwilling to move geographically, but may wish to change her employment to a different station.

Conditions in the broadcasting industry, argues the employee, are such that the employer has the power to extract virtually any concession it wants from an employee, who is willing to agree to

anything with little concern for costs the agreement may impose in the future. Therefore, it is proper for the legislature to impose mandatory contract terms on the employment relationship.

Upon closer inspection, however, it is not clear that the employee’s argument has merit. First, with regard to power differentials, the broadcasting industry is heavily unionized. Most broadcasting employees are represented by a strong union, such as AFTRA, that is able to protect their interests. The bargaining situation resembles bilateral monopoly more closely than a case of a monopsonist employer dealing with atomistic employees. The union serves as a check on employee myopia and the employee’s tendency to disregard low-probability events as well.

With regard to the substantive terms of noncompetes, the fact that the union has not objected to such clauses in collective bargaining negotiations indicates that broadcast companies are able, in at least some instances, to offer inducements to enter into noncompetes that are of greater value to the employee than the right to market his human capital freely after his contract of employment has ended. Furthermore, it is reasonable to suppose that many employees would regard the quid pro quo they receive in the form of development and promotion as more than adequate compensation for a temporary limitation on their ability to work in a single market for a period of time. With a noncompete, the employee can induce the station to invest optimally in promoting her, and additional value will be created. The fact of the noncompete means that the employee must share that additional value with the station. Without a noncompete, the employee will be free to sell her services anywhere, but the station will have less incentive to invest in promoting her, and less value may be created. There is a trade-off between increased

122. Distributional goals, as well as efficiency goals, sometimes dictate the use of rules of inalienability. Calabresi & Melamed, supra n. 107, at 1114. Although the Coase theorem predicts that, in the absence of transactions costs, the parties will bargain to efficient outcomes regardless of the initial assignment of entitlements, the initial assignment of entitlements directly affects who is richer and who is poorer.

One of the hallmarks of a legal change based on distributional motives is that the decision maker sees the situation as zero sum: the parties to the transaction are dividing a pie of fixed size. Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, 41 Md. L. Rev. 563 (1982). The theory underlying the enforcement of noncompetes, however, is premised on the notion that the existence of the noncompete enlarges the size of the pie: the noncompete is necessary to protect the employer’s business investments. In that case, the dispute between the parties is not over how to divide a pie of fixed size, but over how to divide the extra value that was created through the investments the employer made in reliance on the protection afforded by the noncompete.
promotional investment, and the employee's obligation to share the fruits of that investment with the station that made that investment. Stated slightly differently, the employee's choice may be between accepting moderate wages under the noncompete, or being free to market herself anywhere but having little value to market. An employee who can induce her radio or television station to invest in promoting her may be better off in the long run, even if she must share some of the gains accrued as a result of that promotion.

Remember Bing and Bob in Toledo. When Bing arrives in Toledo, he is dependent upon the station's investment in him; without that investment, he cannot do his job. Bing does not consider a year-long prohibition on working in Toledo to be a significant cost, since he is willing to move to other markets. Furthermore, even if Bing ultimately desires to take another job in Toledo with WTOL's competitor at a higher salary, limiting Bing's ability to switch jobs in the same market as necessary to protect WTOL's interests does not strike us as unfair or unconscionable, since WTOL is largely responsible for creating the value that Bing takes with him to the competing station. In short, there is no reason to suppose that broadcasting stations are likely to be guilty of systematic overreaching in a way that would justify a categorical refusal to enforce noncompetes.

C. Market Failure: Employee Ignorance

A second possible justification for a categorical prohibition on noncompetes in the broadcasting industry on grounds of market failure recognizes that an employee may agree to a contract term not because he prefers the term, but because he is unaware of its existence or believes it is not enforceable. One of the most striking examples of employee ignorance comes from a recent study, which demonstrated that most workers mistakenly believe the law affords employees protection against unjust discharge, even when those workers are presented with contract terms specifying at-will employment. Employment lawyers report that many employees sign noncompete agreements in the mistaken belief that such agreements are not enforceable.

However, this is unlikely to be the case in the broadcasting

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industry. Noncompetes have been enforced in a number of high profile cases, and have garnered sufficient media attention that radio and television personalities should know that arbitrators and courts enforce reasonable covenants not to compete. Since broadcasting employees are likely to be aware of the legal ramifications of the noncompete agreements into which they enter, employee ignorance does not justify a blanket prohibition on broadcast industry noncompetes.

D. Fairness Norms

An additional characteristic of human beings, acting in their capacity as human beings, rather than as “homo economicus,” is that they care about being treated fairly. People are often willing to sacrifice their material self interest in order to promote outcomes that they perceive as fair and to punish behavior they perceive as unfair.

There are circumstances in which law prohibits voluntary market transactions, such as usurious lending, price gouging, and ticket scalping, simply because such transactions are perceived as “unfair.” Economists criticize these laws as inefficient and anomalous. Ordinarily, the price of a good is a function of supply and demand: the market sets the price at the point where the supply equals the demand. That is not the case with certain goods such as building supplies immediately after a disaster and Superbowl tickets. In either case, excess demand for the good creates an opportunity for suppliers to raise prices far higher than the amount that is actually charged. Similarly, in the lending context, lenders generally either accept or reject an application for a loan at a given rate of interest, rather than approving a loan at a significantly higher interest rate. Professors Jolls, Sunstein, and Thayer have argued that laws prohibiting voluntary economic transactions such as usury, price gouging, and

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125. See e.g. Dan Trigoboff, WFAA-TV Noncompete Upheld, Broad. & Cable, (Sept. 20, 1999); Bill Carter, NBC and Lou Dobbs Plan Joint Newsletter and Radio Show, N.Y. Times Abstracts, (Oct. 4, 1999); Dan Trigoboff, Sitting it out in Denver, Broad. & Cable (March 22, 1999).

126. Human Behavior, supra n. 108, at 10; Behavioral Approach, supra n. 109, at 1489-97; Behavioral Law & Economics, supra n. 120, at 121-22.

127. Behavioral Approach, supra n. 109, at 1510 and statutes cited therein. Laws like these that restrict purely economic transactions are distinguishable from laws prohibiting the sale of goods such as babies, body parts, and votes, because (1) transactions such as lending and selling generally are legal at lower prices, and (2) allowing practices such as usury, price gouging, and ticket scalping do not impose significant uncompensated costs on third parties to the economic transaction.

128. Id. at 1511.
ticket scalping arise because those practices violate our notions of fairness by imposing terms of trade that depart significantly from the "reference transaction" – that is, the terms of trade that are ordinarily applied.\textsuperscript{129}

Reference to fairness norms may underlie a legislative prohibition on noncompete agreements, even where those agreements are economically efficient, if noncompetes are perceived as unfair. Such covenants not to compete have been attacked on substantive grounds as a "form of industrial peonage without redeeming virtue in the American economic order" because they prevent the employee from working in his chosen profession without a period of time, and thereby discourage the employee from switching employers.\textsuperscript{130} In the broadcasting industry specifically, radio and television personalities who oppose the enforcement of noncompetes claim that it is unfair to give them a forced choice between working for their original station, leaving the geographic area, or temporarily leaving the field of broadcasting, particularly if a competing station has offered them employment on terms significantly better than the terms in their original contracts.\textsuperscript{131}

Two characteristics of fairness norms are worth noting. First, where fairness norms are invoked, the salient issue is whether the challenged transaction is perceived as fair, not whether it actually is fair, and human actors might not have thought through the implications of their views.\textsuperscript{132} Few supporters of minimum wage legislation, for instance, have considered the negative effects such legislation may have on employment levels. Second, fairness norms are generally determined by reference to the customary terms and conditions of similar market transactions. Laws restricting market trades in these contexts often mimic, as much as constrain, the behavior of the firms they regulate.\textsuperscript{133}

It is clear that the second of these criteria does not fit in the

\textsuperscript{129} Id. at 1510-13; see also Daniel Kahneman, Jack L. Knetcsh & Richard Thaler, \textit{Fairness as a Constraint on Profit Seeking: Entitlements in the Market}, 76 Am. Econ. Rev. 728, 735 (1986).


\textsuperscript{131} Cf. Nigra, 676 N.Y.S.2d at 849 ("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.").

\textsuperscript{132} Behavioral Aproach, \textit{supra} n. 109, at 1513.

\textsuperscript{133} Id.
context of broadcasting noncompetes. Covenants not to compete are a regular feature of employment contracts in the television news and radio broadcasting industries. The first criterion—perceived fairness—may be invoked as propaganda, but it is not clear that perceived fairness is or should be a proper basis upon which to base a legislative prohibition on the enforcement of broadcast noncompetes.

Recall that the purpose of legislation invalidating broadcast noncompetes is to protect employees who enter into noncompete agreements that are not in their best interests. Recall also that individuals frequently are willing to sacrifice their self-interest to avoid outcomes that they perceive as unfair. We have already established that there is no reason to believe that noncompetes in the broadcasting industry will categorically operate to the detriment of on-air talent. Individual performers faced with the prospect of entering into a noncompete have, to the extent that they are able to negotiate the terms and conditions of their employment, two choices: either they agree to the noncompete, or they do not. Individual performers may perceive noncompete agreements as unfair, regardless of whether such agreements actually work to their detriment. It is, therefore, reasonable to suppose that performers who are able to do so are at least as likely to refuse to enter into noncompete agreements that would benefit them, as they are to enter into noncompete agreements that are not in their best interests. At the same time, it is beyond cavil that many performers consider covenants not to compete to be unfair, and enter into them only because they believe they have no real option to turn them down. Therefore, an appeal to fairness norms becomes the best justification thus far for a statutory prohibition on broadcast noncompetes.

E. Reducing Transaction Costs

Neoclassical law and economics posits that since the parties will bargain to an efficient outcome regardless of the initial allocation of entitlements in the absence of transaction costs, the goal of the legal system ought to be to minimize transaction costs so that the parties can bargain to the most efficient outcome. Under the conventional approach, the legal system should seek the default rule that best

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134. Since AFTRA collective bargaining agreements do not categorically prohibit noncompete agreements, negotiation of noncompetes is left to the individual broadcast station and performer. Collective bargaining agreements in the entertainment industry are unusual union contracts in that they set minimum wages and working conditions, but allow individual bargaining above that floor. Paul C. Weiler, *Entertainment, Media, and the Law* 754-55 (1997).
mimics the market, on the ground that the predominant market rule is the rule that employers and employees consider to be most efficient. This is particularly true when the industry is heavily unionized, because the union is better able to protect the interests of workers as a whole than workers acting individually.

Courts, as discussed above, enforce noncompetes inconsistently.\textsuperscript{135} A blanket prohibition on covenants not to compete would provide a clear, predictable rule and save litigation costs.

Such a prohibition would probably not, however, provide the most efficient outcome. First, a prohibition on noncompetes does not mimic the market rule, which is posited to be the rule the parties would generally seek. Second, because a prohibition on noncompetes provides a \textit{mandatory} contract term, rather than a \textit{default} rule around which the parties can bargain, it is impossible for the market to correct the rule if the legislature guesses wrong.

Third, issues of institutional competence are raised when a contract term is imposed by the legislature, rather than by the parties in their own negotiations. There are at least two ways for AFTRA to achieve a ban on the enforcement of covenants not to compete in the broadcast industry: it can lobby fifty state legislatures or it can negotiate for a ban on noncompetes in its collective bargaining agreements with employers.\textsuperscript{136} The latter option is preferable, for several reasons. A statutory prohibition creates error costs that a contract provision does not, since the contract is easier to change downstream if the prohibition turns out to be unwise. Even if the prohibition is one we think the contracting parties should want if they were fully informed, invoking the machinery of the legislative process to create a statutory ban on noncompetes imposes unnecessary costs on society to achieve a result that can and should be accomplished less expensively through private contract negotiations. The resulting legislation becomes a single exception to a general rule allowing the enforcement of post-employment noncompetes that cannot be

\textsuperscript{135} See supra Parts II & III.

\textsuperscript{136} AFTRA enters into separate collective bargaining agreements with individual stations, but its agreements with network affiliates are standard. See e.g. National Code of Fair Practice for Network Television Broadcasting (1994-1997). Multiemployer bargaining is also common. An examination of AFTRA’s website indicates that slightly over 35\% of its contracts are with ABC, CBS, or NBC affiliates. The vast majority of the stations with which AFTRA has contracts are affiliated with one of a dozen entities: the three major networks, A.H. Belo, AMFM, Inc., Chris Craft, Clear Channel, Cox Broadcasting, Fox, Gannett, Hearst/Argyle, and Westwood One. <http://www.aftra.com> (accessed Nov. 8, 2000). As a practical matter, AFTRA’s contracts with those dozen entities will set the standard for the industry.
justified on any principled basis. In addition, exposing a prohibition on noncompetes to the collective bargaining process makes the tradeoffs associated with such a prohibition patent, and allows the affected parties to tailor the terms of such a prohibition to achieve a result that they themselves want, rather than a result the legislature sees fit to impose on them. 137 Negotiating noncompetes through the collective bargaining process, rather than imposing them by legislative fiat, is less costly, produces a more coherent statutory scheme, and gives stations and on-air talent the freedom to design a rule that suits their needs. In short, imposing a statutory prohibition on covenants not to compete in the broadcasting industry does not appear to be a good way to minimize transactions costs and smooth the way to an efficient outcome for broadcast stations and employees.

V

Conclusion

Covenants not to compete in the broadcasting industry serve the purpose of encouraging optimal levels of employer investment in developing and promoting on-air talent by providing the employer with assurances that their investments will not be lost to competing stations after the employee's term of employment has ended. To the extent that such covenants encourage increased investment in broadcast personnel, they create extra value that can be shared between the station and the employee. At the same time, those covenants restrict the alienation of human capital and reduce competition.

In recent years, state legislatures have begun to curtail the enforceability of covenants not to compete in the broadcasting industry, notwithstanding the fact that such covenants are enforceable in other industries to the extent that they are reasonable. I have argued that no principled reason exists to treat the broadcasting industry differently from other industries with respect to the enforceability of covenants not to compete. The industry is not characterized by systematic overreaching on the part of employers. There is no reason to suppose that on-air personalities misunderstand their rights and sign noncompetes in the mistaken belief that they are

137. A number of possibilities come to mind. The broadcasters and the union could agree to allow noncompetes only for highly compensated on-air talent; they could agree to limit the duration of noncompetes to three or six months; they could require stations to match competitors' offers before invoking a noncompete; and/or they could establish fee schedules that would allow employees to "buy out" their noncompetes if they move to competing stations.
not enforceable. There is no reason to suppose that allowing noncompetes disserves employee interests in the long run. No significant uncompensated costs are imposed on third parties. To the extent that current market practices are an indicator, it appears that a prohibition on noncompetes is not the outcome that broadcast stations and employees would choose if they were allowed freely to negotiate their own contracts. Furthermore, broadcasting is heavily unionized, and AFTRA is capable of representing its members' interests.

Allowing the parties to freely negotiate whether, and to what extent, covenants not to compete will be enforced in the context of collective bargaining negotiations has several advantages over a legislative solution. The contract approach is more flexible to develop and administer, can be tailored to fit the parties' needs, and imposes fewer error costs. For these reasons, I believe that a statutory prohibition on covenants not to compete in the broadcast industry is an unwise policy choice. The entities that employ and represent television newscasters and radio personalities would produce better results if they concentrated their efforts on negotiating a sensible treatment of noncompetes in the collective bargaining agreements that govern their relations.
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