

EARTHWEB, INC. v. SCHLACK

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 1999
71 F. SUPP. 2D 299, AFF'D, 2205 F.3D 1322

<http://www.nysd.uscourts.gov/courtweb/pdf/D02NYSC/99-06890.PDF>

FACTS EarthWeb provides online products and services to business professionals in the information technology (“IT”) industry. EarthWeb operates through a family of websites offering information, products, and services for IT professionals to use for facilitating tasks and solving technology problems in a business setting. EarthWeb obtains this content primarily through licensing agreements with third parties.

Schlack began his employment with EarthWeb in its New York City office on October 19, 1998. His title at EarthWeb was Vice President, Worldwide Content, and was responsible for the content of all of EarthWeb’s websites.

Schlack’s employment contract stated that he was an employee at will and included a section titled “Limited Agreement Not To Compete.” That section provides:

(c) For a period of twelve (12) months after the termination of Schlack's employment with EarthWeb, Schlack shall not, directly or indirectly:

(1) work as an employee*** or in any other *** capacity for any person or entity that directly competes with EarthWeb. For the purpose of this section, the term "directly competing" is defined as a person or entity or division on an entity that is

(i) an on-line service for Information Professionals whose primary business is to provide Information Technology Professionals with a directory of third party technology, software, and/or developer resources; and/or an online reference library, and or

(ii) an online store, the primary purpose of which is to sell or distribute third party software or products used for Internet site or software development.

On September 22, 1999, Schlack tendered his letter of resignation to EarthWeb. Schlack revealed at this time that he had accepted a position with ITworld.com, a subsidiary of IDG. EarthWeb brought this action to enforce the non-compete agreement in Schlack's employment agreement.

DECISION EarthWeb's motion for a preliminary injunction is denied.

OPINION Pauley III, J. EarthWeb describes Schlack as one of its most important officers, while Schlack claims that EarthWeb has inflated the nature of his duties and responsibilities. Schlack also argues that the position waiting for him at IDG is so different that he would have no occasion to divulge any trade secrets belonging to EarthWeb. ***

***Schlack *** contends that whatever he knows about EarthWeb's strategic planning is likely to become obsolete rather quickly because the company's websites are constantly changing.

At the moment, ITworld.com does not exist; the website is scheduled to be launched in January 2000. According to its president and CEO, William Reinstein, ITworld.com will consolidate four online publications of IDG—Computerworld, Network World, InfoWorld and CIO—and three additional wholly-owned websites. When operational, ITworld.com will be a single website for IT professionals that contains news, product information and editorial opinions written primarily by an internal staff of more than 275 journalists.

Thus, in contrast to EarthWeb's emphasis on obtaining the products and services of third parties through acquisitions and licensing agreements and then making those materials readily accessible on its websites, ITworld.com will rely on original content for over 70% of its website's

material. Content such as product reviews and technical research will be created in-house by ITworld.com's staff.

Schlack contends that ITworld.com will also be distinguishable from EarthWeb in the type of audience it targets. While both EarthWeb and ITworld.com are intended to appeal to IT professionals, Schlack argues that the products and services offered by EarthWeb are aimed at programmers and technicians, while ITworld.com will focus on upper level executives, such as technology managers and chief information officers. EarthWeb disputes this assertion, and claims that it offers "a wide range of technology-related content" tailored to, ***, IT managers and chief information officers. ***

Given the dynamics of the Internet, such comparisons may be ephemeral. This underscores the difficulty in assessing the characteristics of ITworld.com, an embryonic business entity that will compete in a nascent industry which is evolving and re-inventing itself with breathtaking speed.

Even if the terms of EarthWeb's restrictive covenant reached Schlack's prospective employment at ITworld.com, EarthWeb would still have to establish that the restraint is reasonable and necessary to protect its legitimate interests. In New York, non-compete covenants will be enforced only if reasonably limited in scope and duration, and only "to the extent necessary (1) to prevent an employee's solicitation or disclosure of trade secrets, (2) to prevent an employee's release of confidential information regarding the employer's customers, or (3) in those cases where the employee's services to the employer are deemed special or unique." [Citations.]

The policy underlying this strict approach rests on notions of employee mobility and free enterprise. "Once the term of an employment agreement has expired, the general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition." [Citation.] "Important, too, are the 'powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood.'" [Citation.] On the other hand, "the employer is entitled to protection from unfair or illegal conduct that causes economic injury." [Citations.]

Applying these principles here, EarthWeb's restrictive covenant would fail to pass muster even if Schlack's position at ITworld.com fell within the provision's relatively narrow parameters.

As a threshold matter, this Court finds that the one-year duration of EarthWeb's restrictive covenant is too long given the dynamic nature of this industry, its lack of geographical borders, and Schlack's former cutting-edge position with EarthWeb where his success depended on keeping abreast of daily changes in content on the Internet. By comparison, the court in DoubleClick enjoined the defendants for only a

six-month period. The DoubleClick court observed that “given the speed with which the Internet advertising industry apparently changes, defendants’ knowledge of DoubleClick’s operation will likely lose value to such a degree that the purpose of a preliminary injunction will have evaporated before the year is up.” [Citation.] Similar considerations predominate here, making a one-year restrictive covenant unreasonably long. While courts may “blue pencil” such provisions to make them shorter and hence enforceable, [citation], this Court would decline to exercise its discretion to do so in this case because, as discussed above, the employment agreement as a whole overreaches. [Citation.]

Contrary to EarthWeb’s contention, Schlack’s services are not “unique and extraordinary.” Such characteristics have traditionally been associated with “various categories of employment where the services are dependent on an employee’s special talents; such categories include musicians, professional athletes, actors and the like.” [Citations.] However, in order to justify an enforcement of a restrictive covenant,

more must . . . be shown to establish such a quality than that the employee excels at his work or that his perfor-

mance is of high value to his employer. It must also appear that his services are of such character as to make his replacement impossible or that the loss of such services would cause the employer irreparable injury.

[Citations.] EarthWeb has not shown that the nature of Schlack’s services are unique or that he cultivated the type of special client relationships that the Second Circuit found worthy of protection in [citation].

INTERPRETATION Non-compete clauses in employment agreements can only be enforced to the extent necessary to protect the employer’s legitimate interests and only if reasonably limited in duration and geographic scope.

ETHICAL QUESTION Is it unethical for Schlack to use what he has learned at EarthWeb to benefit his new employer? Explain.

CRITICAL THINKING QUESTION How should courts balance the protection of employers with the freedom of employees to change jobs? Explain.