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Kayman and Siegel: Non-Competes
**A WAYWARD NOTION IN NEW YORK'S
COMMON LAW:**

**THE UNIQUE EMPLOYEE RATIONALE FOR
ENFORCING NON-COMPETES**

*Steven M. Kayman and John Siegal**

Although employee covenants not to compete are disfavored by “powerful public policy considerations [that] militate against enforcement of restrictive covenants,”¹ the New York Court of Appeals has repeatedly noted that non-competes nevertheless “*may* be enforceable where the employee’s services were special or unique.”² Despite the frequent repetition of this dictum, the unique employee rationale has almost never been invoked by New York courts as the actual basis for enforcing a non-compete. Instead, in nearly every New York case, enforcement has turned on whether the restrictive covenant was necessary to protect the employer’s confidential information and, if that question was answered in the

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¹ *Maltby v. Harlow Meyer Savage, Inc.*, 166 Misc. 2d 481, 485, 633 N.Y.S.2d 926, 929 (Sup. Ct. New York County 1995), *aff’d*, 223 A.D.2d 516, 637 N.Y.S.2d 110 (1st Dep’t 1996) (citing *Columbia Ribbon & Carbon Mfg. Co.*, 42 N.Y.2d 496, 499, 369 N.E.2d 4, 6, 398 N.Y.S.2d 1004, 1006 (1977); *see also Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 272, 196 N.E.2d 245, 247, 246 N.Y.S.2d 600, 604 (1963) (noting courts have “displayed a much stricter attitude with respect to covenants” that sanction “the loss of a man’s livelihood.”).

² *American Broadcasting Cos., Inc. v. Wolf*, 52 N.Y.2d 394, 403 n.6, 420 N.E.2d 363, 367 n.6, 438 N.Y.S.2d 482, 486 n.6 (1981) (emphasis added) (citing *Reed, Roberts Assocs. v. Strauman*, 40 N.Y.2d 303, 308, 353 N.E.2d 590, 593, 386 N.Y.S.2d 677, 680 (1976)); *see also Purchasing Assocs.*, 13 N.Y.2d at 273, 196 N.E.2d at 248, 246 N.Y.S.2d at 604.

affirmative, an assessment of the reasonableness of the restraint as to factors such as geography and duration.³

New York's unique employee rationale for non-compete cases, a theory few other states recognize, was given new life by New York Supreme Court Justice Herman Cahn, who sits in the Commercial Division in Manhattan, in *MTV Networks, Inc. v. Fox Kids Worldwide, Inc.*⁴ Justice Cahn barred Richard Cronin, the President of MTV Network's "TV Land" and "Nick-at-Nite" cable networks, from working for Fox Kids TV until the end of his MTVN [hereinafter "MTVN"] non-compete contract because, among other reasons, he was a "unique employee with unique skills and knowledge."⁵ Given the continued articulation of the unique employee rationale in New York non-compete cases, Justice Cahn's decision was solidly grounded, and we believe it was the correct result on the facts presented as well. We also believe, however, that the unique employee rationale should be disaffirmed, not re-invigorated, and that the court need not have relied on it as a basis for its decision.

As the court expressly found in *MTV v. Fox*, the usual trade secret analysis under New York non-compete law provided ample basis for enjoining Cronin from working for the competition for the six remaining months of his non-compete period.⁶ In addition, Cronin's non-compete operated only *during* the term of his

³ See, e.g., *H & R Recruiters, Inc. v. Kirkpatrick*, 243 A.D.2d 680, 681, 663 N.Y.S.2d 865, 866 (2d Dep't 1997) (quoting *Howard Sys. Int'l, Inc. v. IMI Sys.*, 192 A.D.2d 371, 373, 596 N.Y.S.2d 48, 49 (1st Dep't 1993)) (enforcing covenants only if "reasonably limited temporally and geographically . . . and then only to the extent necessary to protect the employer from unfair competition which stems from the employee's use or disclosure of trade secrets or confidential customer lists . . ."); see also *Cliff v. R.R.S. Inc.*, 207 A.D.2d 17, 19, 620 N.Y.S.2d 190, 192 (3rd Dep't 1994) (citing *Mohawk Maintenance Co. v. Kessler*, 52 N.Y.2d 276, 283-84, 419 N.E.2d 324, 328, 437 N.Y.S.2d 646, 650 (1981) (further citations omitted) (noting that an express covenant . . . will be enforced if "'reasonable' in geographic scope and duration.").

⁴ 1998 WL 57480 (Sup. Ct. New York County Feb. 4, 1998).

⁵ *MTV v. Fox*, 1998 WL 57480, at *6 (referring to Cronin as the "public face" of MTVN representing the network at many public functions).

⁶ *Id.* (noting that the testimony of top officials at MTVN established that Cronin not only "had access to confidential information, especially in the area of [the company's] plans for competing with . . . Fox Kids," he also had "detailed knowledge of MTVN's budget process.").

employment agreement following his termination for cause for accepting a job with Fox, not *after* the term of his employment ended.⁷ This presented a different situation than the usual employment covenant not to compete and surely influenced the court's decision to enforce the non-compete.⁸

Indeed, Cronin's covenant would have been enforced under the laws of other states,⁹ nearly all of which are not saddled with New York's unique employee rationale and instead appropriately seek "not to prevent the competitive use of the unique personal qualities of the employee — either during or after the employment — but to prevent competitive use, for a time, of information or relationships which pertain peculiarly to the employer and which the employee acquired in the course of the employment."¹⁰

⁷ *Id.* at *1. The non-compete clause in Cronin's employment contract provided:

[Y]our employment hereunder is on an exclusive basis and that during the shorter of (x) the period remaining in the Employment Term on any given date and (y) one (1) year after the termination of your employment . . . you will not engage in any other business activity which is in conflict with your duties and obligations hereunder. You agree that during the Non-Compete Period you shall not directly or indirectly engage in or participate as an officer, employee, director, agent of or consultant for any business directly competitive with that of MTVN

Id.

⁸ *Id.* at *5 (explaining that this was not just an ordinary "non-compete" case but rather it was a claim by MTVN "that Cronin should be held to the original term of the agreement only."); *cf.* *American Broadcasting Co., Inc. v. Wolf*, 52 N.Y.2d 394, 403, n. 6, 420 N.E.2d 363, 367, 438 N.Y.S.2d 482, 487 (1981) (explaining "no New York case has been found where enforcement has been granted following termination of the employment contract, solely on the basis of the uniqueness of the services.").

⁹ *See Solari Indust., Inc. v. Malady*, 264 A.2d 53, 56 (N.J. 1970) (further citations omitted) (stating "[t]hough noncompetitive agreements were at one time flatly outlawed it is now well recognized that they do have a proper place and are enforceable under appropriate circumstances" notably "where [they] simply protect[] the legitimate interests of the employer, impose[] no undue hardship on the employee, and [are] not injurious to the public.").

¹⁰ Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 647 (1960) (referring to the application of the unique employee rationale to covenants not to compete in employment agreements as "a natural

The MTV v. Fox Decision

Richard Cronin was a long-time employee of MTV Networks.¹¹ He became a member of Nickelodeon's "executive team" in July 1987, and he inked a new three-year contract to serve as President of the "TV Land" network, a new nostalgia programming service, in July 1995.¹² He also supervised the successful "Nick-at-Nite" network.¹³

In a description that would fit nearly any divisional president or senior corporate executive, Justice Cahn summarized Cronin's responsibilities as a member of the "executive team" by explaining that "the 'executive team' . . . reviews operations, budgets and strategic plans for the network."¹⁴ Substantially all the operating information and plans are made available to and considered by the 'executive team.'¹⁵ To this nearly generic description, Justice Cahn added that "Cronin was also a spokesperson for Nick-at-Nite and TV Land, filling the role of master of ceremonies for Nick-at-Nite and TV Land's annual 'up front' presentations to advertisers. [MTVN's] witnesses testified that he was considered its 'public face.'¹⁶

On the basis of these two factors, Cronin's knowledge of MTVN's most closely-held business plans and his external role as corporate spokesman and point-person with advertisers, Justice

confusion that arises from the analogy with restraints incident to sales [of businesses]").

¹¹ *MTV v. Fox*, 1998 WL 57480, at *1. Cronin worked for MTVN since 1984, 13 years prior to the commencement of this action. *Id.*

¹² *Id.*; see also Don Jeffrey, *Viacom Sees Strong MTV Gains in 2nd Quarter*, *Billboards*, Aug. 16, 1997, at 50 (discussing "nostalgia television channel TV Land"); Frank Rose, *The Love Song of E. Bronfman Jr. (Hollywood mogul)*, *Esquire*, June 1, 1997, at 54 (noting that "TV Land [is] a nostalgia network.").

¹³ *MTV v. Fox*, 1998 WL 57480, at *1 (explaining that "Nick-at-Nite [was] a sister network to TV Land specializing in 'classic' situation comedies.").

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 6 (stating that Cronin represented MTVN at public presentations in which the network presented "its plans and hopes for the coming seasons to advertisers and media buyers in [an] attempt[] to sell advertising.").

Cahn found that Cronin was a “unique” employee.¹⁷ However, the evidentiary basis for Justice Cahn’s finding that Richard Cronin was “unique” had little to do with any intrinsic qualities unique to Cronin. Rather, it was “Cronin[’s] . . . access to confidential information, especially in the area of MTVN’s plans for competing with, among others, Fox Kids”¹⁸ that led Justice Cahn to conclude “that Cronin is a uniquely talented executive who . . . was a key player in setting goals and devising strategies for the network, including . . . methods of dealing with competitors, and suggestions for seizing opportunities before competitors, expressly including Fox Kids, [and who took] advantage of them.”¹⁹

Justice Cahn also found that, because Cronin was master of ceremonies at “TV Land’s” annual advertising presentation, he was the network’s unique “public face.”²⁰ This element of uniqueness was likewise supported by evidence that predominantly fit another of the bases recognized in most states, but usually not in New York, for specifically enforcing non-competes — namely, the need to protect the customer relationships and business contacts that Cronin developed while employed by MTVN.²¹ This evidence included Cronin’s role as the master of ceremonies at MTVN’s “up front” sales presentations, making him the network’s key contact with advertisers, advertising media buyers and cable systems operators.²² Justice Cahn noted that the evidence also showed that “[Cronin] had regular contact with the trade press, with whom he

¹⁷ *Id.* (stating that there ample evidence to find that Cronin qualified as a “unique employee” and thus was “subject to a restrictive covenant which may otherwise be enforceable.”).

¹⁸ *Id.* at *6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See, e.g.,* Gale Peterson, *Recent Developments in Trade Secret Law in an Information Age*, 507 PRAC. L. INST. PAT. 441 (1998) (noting Illinois “ha[s] developed a substantial body of law protecting customer relations); *see also* Ellen M. Martin, Tracy E. Diamond, *Workplace Claims: Wrongful Termination, Collateral Torts, Privacy, Restrictions on Right to Compete, and Investigations*, 571 PRAC. L. INST. LITIG. 695 (1997) (stating that “New Jersey courts seem somewhat more receptive to non-compete covenants than do New York courts.”).

²² *MTV v. Fox*, 1998 WL 57480, at *6.

has excellent relations, and appeared at industry conventions regularly, where personal relationships are invaluable.”²³

Surely, Cronin was a key figure at MTVN. But the evidence of his crucial role was that he had custody of MTVN’s most vital trade secrets, which should have independently supported specific enforcement of the non-compete without any finding that he was unique.²⁴ Aware of the trade secrets basis for specifically enforcing Cronin’s non-compete, Justice Cahn did not rest his preliminary injunction solely on the ground that Cronin was a unique employee.²⁵ Instead, he held that “[t]he evidence amply demonstrate[d] that Cronin qualifies as a unique employee, *and is in possession of confidential information*, and is, therefore, subject to a restrictive covenant which may otherwise be [un]enforceable.”²⁶

Other than reaching that conclusion, however, Justice Cahn relied not on Cronin’s uniqueness but on his possession of and access to MTVN trade secret information that would permit Cronin to unfairly compete with MTVN if he were to work for Fox during the contractual non-compete period.²⁷

This emphasis on unfair competition and misuse of trade secrets was apparent from the outset of the litigation. Together with the claim for breach of contract, MTVN’s complaint contained causes of action against Cronin for breach of fiduciary duty and unauthorized use of trade secrets, and against Fox Kids and its

²³ *Id.*

²⁴ *Id.* at *9 (stating there was much testimony concerning “Cronin’s possession of trade secrets and MTVN documents at his home while he was negotiating with Fox Kids.”).

²⁵ *Id.* (noting “[i]t is clear there are trade secrets which Cronin possesses, and MTVN is entitled to have protected.”).

²⁶ *Id.* at *6 (emphasis added) (citing *Maltby v. Harlow Meyer Savage, Inc.*, 166 Misc. 2d 481, 484, 633 N.Y.S.2d 926, 929 (Sup. Ct. New York County 1995), *aff’d*, 223 A.D.2d 516, 637 N.Y.S.2d 110 (1st Dep’t 1996).

²⁷ *Id.* at *1. The term of Cronin’s MTVN non-compete was co-terminous with the term of his employment contract through June 1998. *Id.* That contract was terminated when he signed a contract with Fox in October 1997, and much of the dispute turned on whether MTVN terminated Cronin for cause or rather, as he and Fox claimed, he was not properly terminated for cause and therefore had grounds for resigning. *Id.* at *3-4. The non-compete issue was whether Cronin could work for Fox before July 1998, not whether he would continue working for MTVN. *Id.* at *1.

parent, News Corporation, for aiding and abetting breach of fiduciary duty, tortious interference with contract and unfair competition.²⁸ Justice Cahn's analysis of the case reflected the emphasis of MTVN's complaint:

It is clear that there are trade secrets which Cronin possesses, and MTVN is entitled to have protected. It is true that much of such confidential information is eventually released to the public through the media and trade publications. In that sense, the cable television industry does not have trade secrets akin to formulas and models held secret indefinitely. Yet until strategic plans and budgeting, etc. are implemented or released to the public, they are trade secrets.²⁹

So, given the emphasis on trade secrets as a basis for specifically enforcing Cronin's non-compete, why did the court venture into the murky waters of whether Cronin was a unique employee? What makes one business executive unique when another is not? And why should "unique" employees be more readily enjoined from competing than "ordinary" employees? The answers are buried deep in New York's common law governing employee non-compete agreements.

The Roots of the Unique Employee Rationale

While often noting in dicta that "injunctive relief *may* be available where an employee's services are unique or extraordinary and the covenant is reasonable,"³⁰ the New York Court of Appeals has never approved specific performance of a non-compete on that basis, although lower state courts and federal courts applying New York law do invoke the unique employee rationale on occasion when enforcing post-employment non-competition covenants.³¹

²⁸ *Id.* at *5.

²⁹ *Id.* at *9.

³⁰ *Reed, Roberts Assocs. v. Strauman*, 40 N.Y.2d 303, 303, 308 N.E.2d 590, 593, 386 N.Y.S. 677, 680 (1976); *see also* *American Broadcasting Cos., Inc. v. Wolf*, 52 N.Y.2d 394, 403 n.6, 420 N.E.2d 363, 367 n.6, 438 N.Y.S.2d 482, 487 n.6 (1981) (emphasis added).

³¹ *See, e.g., Innovative Networks, Inc. v. Satellite Airlines Ticketing Ctrs, Inc.*, 871 F. Supp. 709, 729 n. 18 (S.D.N.Y. 1995) (citing *Columbia Ribbon & Carbon Mfg. Co.*, 42 N.Y.2d 496, 499, 369 N.E.2d 4, 6, 398 N.Y.S.2d 1004, 1006-07 (1977)) (enforcing restrictive covenant even though no trade secrets

The oft-cited, but rarely followed unique employee rationale appears to have arrived in court of appeals jurisprudence concerning non-compete agreements in the 1910 case, *McCall Co. v. Wright*.³² During a lengthy discussion in that decision of cases decided by the Appellate Division, First Department, mostly concerning musical and theatrical performers,³³ the New York

were involved when employee's "services [were] truly 'special, unique or extraordinary and not merely of high value to his employer.'"); *see also* *Contempo Communications, Inc. v. MJM Creative Servs., Inc.*, 182 A.D.2d 351, 354, 582 N.Y.S.2d 667, 669 (1st Dep't 1992) (citing *Strauman*, 40 N.Y.2d 303, 308, 353 N.E.2d 590, 593, 386 N.Y.S.2d 677, 680 (1976) (upholding restrictive covenant when defendant employees were held to be of a "special, unique and extraordinary" nature to plaintiff corporation); *Giller v. Harcourt Brace & Co.*, 166 Misc. 2d 599, 601, 634 N.Y.S.2d 646, 648 (Sup. Ct. Kings County 1995) (finding that third-year law student had formed "special, unique and extraordinary relationships" with fellow students as plaintiff's bar review representative and would thus be held to restrictive covenant).

³² 198 N.Y. 143, 91 N.E. 516 (1910).

³³ By the time of the Court of Appeals decision in *McCall*, the Appellate Division, First Department, had already decided a string of "unique" employee cases that mostly arose out of show business. Most of these cases held that the defendant employees had not been proven to be unique and irreplaceable, *see* *Kessler & Co. v. Chappelle*, 73 A.D. 447, 449, 77 N.Y.S. 285, 286 (1st Dep't 1902) (denying motion to continue injunctive relief against defendant champagne salesman noting "others occup[ied] the same relations to the firm, and are performing similar duties" and thus salesman's "services were not special, unique, or extraordinary"); *see also* *Dockstader v. Reed*, 121 A.D. 846, 848, 106 N.Y.S. 795, 796-97 (1st Dep't 1907) (further citations omitted) (denying injunctive relief against defendant minstrel troupe singer even though singer claimed "his services were unique and . . . he could not be replaced"); *Hammerstein v. Mann*, 137 A.D. 580, 581, 122 N.Y.S. 276, 277 (1st Dep't 1910) (reversing injunctive relief in favor of operatic impressario even though defendant opera singer, by her own admission in employment contract, stated that she "acknowledg[ed] [that] her vocal and dramatic abilities [were] unique"), but several did find the performers to be unique, *see* *Edwards v. Fitzgerald*, N.Y.L.J., Jan. 16, 1895 (finding that actress had such "grace, beauty, and artistic methods [that] she ha[d] become a special attraction") (cited in *Hammerstein*, 137 A.D. at 583, 122 N.Y.S. at 278); *see also* *Shubert v. Angeles*, 80 A.D. 625, 625, 80 N.Y.S. 146, 147 (1st Dep't 1903) (granting injunctive relief in favor of employer stating defendant comedienne "was employed because of her special talent as a mimic or imitator of other actresses and [] actors" and "her appear[ance] in a rival company . . . would seriously affect the plaintiff's play and [its] receipts"); *Ziegfeld v. Norworth*, 140 A.D. 414, 125 N.Y.S. 504 (1st Dep't 1910) (leading lady around whom live theatrical production had been built and billed).

Court of Appeals quoted a treatise on equity jurisprudence to the effect that a cause of action warranting injunctive enforcement of a non-competition covenant is appropriate “where . . . ‘a contract stipulates for special, unique, or extraordinary services or acts . . . to be rendered or done by a party having special, unique, and extraordinary qualifications, as for example, by an eminent actor, singer, artist, and the like.’”³⁴

McCall was not such a case, however, and the court’s denial of defendant’s demurrer did not turn on his alleged status as a unique employee. Rather, *McCall* was a trade secrets case, and the court’s recognition that the restrictive covenant could be enforced as a matter of law was based on the potential unfair competition engendered by the defendant’s potential use of plaintiff’s trade secrets.³⁵ Although the court of appeals decision did not say so explicitly, the decision below in the appellate division expressly stated that *McCall* was a trade secrets case and not a unique employee case. In distinguishing its earlier unique employee cases, the First Department held:

In all of these cases, however, the complaint has proceeded upon the claim that the defendant’s services to the plaintiff were so special, unique, and extraordinary that his place could not be filled, and, hence, that the plaintiff, if deprived of such services, would lose the benefit of his contract of employment. In the present case, the plaintiff does not rest his prayer for relief upon this ground, but upon the ground that by entering the employ of a competitor, in violation of his agreement, defendant threatens to injure plaintiff by building up a competing business upon the foundation of the special knowledge and skill acquired during his employment by the plaintiff. This position is based, not upon the claim that defendant’s services to plaintiff were special, unique, and extraordinary (although that fact is alleged), because it is not denied that defendant’s place can be filled, but upon the proposition that defendant’s qualifications for injuring plaintiff by

³⁴ *McCall*, 198 N.Y. at 155, 91 N.E. at 519 (quoting *Johnston Co. v. Hunt*, 21 N.Y.S. 314, 315 (Sup. Ct. New York County 1892) (further citations omitted) (quoting 3 POMEROY, EQUITY JURISPRUDENCE § 1343 (2nd ed. 1892)).

³⁵ *Id.* at 151, 91 N.E. at 518 (enforcing restrictive covenant that prevented an employee “who had entered the employment and learned the business of an employer from carrying the benefit of the information and trade secrets thus acquired into the employment and maintenance of a competing business.”).

advancing the interests of a competitor are special, unique, and extraordinary.³⁶

Thus, the unique employee rationale entered court of appeals jurisprudence in a case in which the plaintiff's allegation that the employee was unique was not a factor in either of the appellate decisions. Rather, the case turned entirely on the employee's possession and potential misuse of the plaintiff's trade secrets,³⁷ and the passage in the court of appeals decision concerning unique employees, which has been carried down to this day, was included only to distinguish the unique employee cases while the court permitted the claim to go forward on trade secrets grounds.

The next time the court of appeals considered the subject, in 1923, it flatly stated that "equity will not enforce [restrictive covenants] specifically except to protect plaintiff's trade secrets."³⁸ In that case and since, the court has always dismissed the unique employee rationale as applied to the facts of each particular case presented.³⁹ Distinguishing its own holding in *McCall* and a decision of an Oregon court,⁴⁰ the court simply stated that:

³⁶ *McCall Co. v. Wright*, 133 A.D. 62, 66, 117 N.Y.S. 775, 778 (1st Dep't 1909).

³⁷ *McCall*, 198 N.Y. 143, 156, 91 N.E. 512, 520 (noting that the question in a case such as this is whether "the services are of such a unique, special and extraordinary character to warrant an injunction.").

³⁸ *Kaumagraph Co. v. Stampagraph Co., Inc.*, 235 N.Y. 1, 9, 138 N.E. 485, 488 (1923); *see also Clark Paper & Mfg. Co. v. Stenacher*, 236 N.Y. 312, 321, 140 N.E. 708, 712 (1923) (citing *Magnolia Metal Co. v. Price*, 65 A.D. 276, 279, 72 N.Y.S. 792, 795 (1st Dep't 1901) (noting "where a court has enforced a negative covenant by an employee not to work for a long period of time . . . the element of trade secrets or unfair dealing has been controlling and important.").

³⁹ *Kaumagraph*, 235 N.Y. at 9, 138 N.E. at 488 (denying equitable relief noting "[t]he surrender for an unlimited time of the right to use the skill, knowledge, and experience which a workman brings to the services of his employer as a condition of such employment has never been enforced by injunction."); *see also Clark Paper*, 236 N.Y. at 321, 140 N.E. at 712 (noting "[e]ach case must depend upon its own facts and circumstances."); *Frederick Bros. Artists Corp. v. Yates*, 296 N.Y. 820, 72 N.E.2d 13 (1947); *Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600 (1963); *Reed, Roberts Assocs., Inc. v. Strauman*, 40 N.Y.2d 303, 308, 353 N.E.2d 590, 593, 386 N.Y.S.2d 677, 680 (1976); *American Broadcasting Cos., Inc. v. Wolf*, 52 N.Y.2d 394, 403, 420 N.E.2d 363, 367, 438 N.Y.S.2d 482, 486 (1981).

⁴⁰ *Cort v. Lassard*, 22 P. 1054 (Or. 1889).

While his services were valuable and his withdrawal injurious to plaintiff's interests, such services are not found to be so peculiar or distinctive as to be indispensable, and the preventive remedy of injunction will not be applied to prevent a breach of contract on the ground that the services contracted for were special, unique, and extraordinary.⁴¹

The court has consistently applied this approach since, repeatedly distinguishing the unique employee rationale on the facts, and hewing to the position that:

In the cases where a court has enforced a negative covenant by an employee not to work for another for a long period of time and about the nature of whose work there is nothing special or particularly valuable, the element of trade secrets or unfair dealing has been controlling and important⁴²

Thus, even though the court of appeals has never applied the unique employee rationale, its persistent appearance in the court's non-compete decisions — albeit as dicta — has given that rationale the appearance of vibrancy, and plaintiffs' lawyers have seized on it to present courts with additional, though redundant or even irrelevant, grounds for enforcing non-competes.⁴³ As a result, the rationale for finding an employee unique for non-compete purposes has gotten lost over the years, making possible a decision that a television executive is a unique employee.

Talent or Experience: What Makes an Employee Unique?

Recall that the unique employee rationale emerged in New York from cases concerning show business personnel.⁴⁴ It then made its court of appeals debut in 1910 when the court, distinguishing prior

⁴¹ *Kaumagraph*, 235 N.Y. at 9, 138 N.E. at 488 (further citations omitted).

⁴² *Clark Paper*, 236 N.Y. at 321, 140 N.E. at 711; see also *Frederick Bros. Artists Corp.*, 296 N.Y. 820, 72 N.E.2d 13; *Purchasing Assocs.*, 13 N.Y.2d 267, 196 N.E.2d 245, 246 N.Y.S.2d 600; *Strauman*, 40 N.Y.2d at 308, 353 N.E.2d at 593, 386 N.Y.S.2d at 680; *American Broadcasting Cos.*, 52 N.Y.2d at 403, 420 N.E.2d at 367, 438 N.Y.S.2d at 486.

⁴³ See *Maltby v. Harlow Meyer Savage, Inc.*, 166 Misc. 2d 481, 633 N.Y.S.2d 926 (Sup. Ct. New York County 1995), *aff'd*, 223 A.D.2d 516, 637 N.Y.S.2d 110 (1st Dep't 1996).

⁴⁴ See *supra* note 33 and accompanying text.

appellate division unique employee cases in deciding a trade secrets case, quoted a treatise to the effect that, as a matter of law, a restrictive covenant could be enforced against “a party having special, unique, and extraordinary qualifications, as for example, by an eminent actor, singer, artist, and the like.”⁴⁵ Thereafter, in four different cases through 1976, the court repeatedly rejected the notion that businesspeople were unique employees.⁴⁶

In 1981, seventy-one years after the *McCall* case, the court revisited the uniqueness rationale in connection with ABC’s claim that sportscaster Warner Wolf breached a good-faith negotiation provision of an expired employment agreement.⁴⁷ In surveying the law governing specific performance of restrictive covenants in employment agreements, the *Wolf* court recognized that the policy underlying enforcement of non-competes is to protect employers against certain specific forms of unfair competition, not simply to lend the imprimatur of state authority to employers’ economically understandable, though legally tenuous, desires to retain the services of particularly talented or skilled employees.⁴⁸

Thus, in *Wolf*, the court recognized that non-competes may be enforced if “necessary to protect the trade secrets, customer lists or good will of the employer’s business.”⁴⁹ But the *Wolf* court made no definitive commitment to the unique employee rationale. It noted only in conditional language that noncompetes “*may*” be enforceable during the term of an employment agreement “*perhaps* when that employer is exposed to special harm because of the unique nature of the employee’s services.”⁵⁰ The court also cautioned that “no New York case has been found where enforcement has been granted, following termination of the employment contract, solely on the basis of the uniqueness of the services,”⁵¹ an historical lesson that may have left the door open to

⁴⁵ *McCall Co. v. Wright*, 198 N.Y. 143, 155, 91 N.E. 516, 519 (1910).

⁴⁶ See *supra* note 39 and accompanying text.

⁴⁷ *American Broadcasting Cos.*, 52 N.Y.2d at 397, 420 N.E.2d at 364, 438 N.Y.S.2d at 483.

⁴⁸ *Id.* at 404-05, 420 N.E.2d at 368, 438 N.Y.S.2d at 487.

⁴⁹ *Id.* at 403, 420 N.E.2d at 367, 438 N.Y.S.2d at 486.

⁵⁰ *Id.* (emphasis added) (citing *Reed, Roberts Assocs. v. Strauman*, 40 N.Y.2d 303, 308, 353 N.E.2d 590, 593, 386 N.Y.S.2d 677, 680 (1976) (further citations omitted)).

⁵¹ *Id.* at 403 n.6, 420 N.E.2d at 367 n.6., 438 N.Y.S.2d at 486 n.6.

holding that, at least during the term of an employment agreement, uniqueness alone might be enough to support an injunction.

Based in large measure on that highly conditional dictum in *Wolf*,⁵² the unique employee rationale lives on. In finding Richard Cronin to be a unique employee who could be restrained from competing with MTVN at least for the remaining term of his employment agreement,⁵³ Justice Cahn cited his own decision in *Maltby v. Harlow Meyer Savage, Inc.*,⁵⁴ which in turn relied on Justice Ira Gammerman's unreported decision in *Harlow Meyer Savage, Inc. v. Saez*.⁵⁵

In both cases, Harlow Meyer Savage, a brokerage firm, successfully argued that "plaintiffs are unique employees because they have developed relationships with clients over the course of their terms of employment . . . largely at [the company's] expense and encouragement."⁵⁶ Because New York, unlike most other states,⁵⁷ does not ordinarily recognize customer relationships as an interest that can be protected by a restrictive covenant, these cases appear to be using the unique employee rationale as a backdoor way to justify the protection of customer goodwill.

Thus, the unique employee rationale has come full circle. Originally intended to apply narrowly to unique talents, especially in the show business world, and not to apply more broadly to business people and the knowledge and contacts they develop on the job, commercial division judges in Manhattan, at least, are now accepting a business person's possession of an employer's customer relationships and confidential trade secret information as proof of the employee's uniqueness.⁵⁸

So, while the unique employee rationale may appear to be breathing new life, it has in fact ceased to exist as an independent rationale for specifically enforcing a contractual covenant not to compete. In cases brought against departing business employees,

⁵² *Id.*

⁵³ *MTV Networks, Inc. v. Fox Kids Worldwide, Inc.*, 1998 WL 57480, at *6 (Sup. Ct. New York County Feb. 4, 1998).

⁵⁴ 166 Misc. 2d 481, 633 N.Y.S.2d 926 (Sup. Ct. New York County 1995), *aff'd*, 223 A.D.2d 516, 637 N.Y.S.2d 110 (1st Dep't 1996).

⁵⁵ No. 95-101852 (Sup. Ct. New York County Feb. 27, 1995).

⁵⁶ *Maltby*, 166 Misc. 2d at 484, 633 N.Y.S.2d at 929.

⁵⁷ *Id.* at 486, 633 N.Y.S.2d at 930.

⁵⁸ *See Maltby*, 166 Misc. 2d at 481, 633 N.Y.S.2d at 926.

those covenants are enforced when necessary to protect trade secrets, confidential customer lists and, in certain cases, customer relations as well.⁵⁹ The uniqueness rationale is but a vestige, an alternative linguistic formulation perhaps, with no apparent doctrinal significance. The unique employee rationale may, of course, still govern disputes concerning artistic talent whose uniqueness derives not from trade secrets or customer relations developed on the job but from individual creativity and ingenuity for which the employer bargained.

We believe that it was for this reason, the original reason the unique employee rationale entered New York's common law, that the *Wolf* court recognized the possibility that in certain circumstances the unique employee rationale might remain independently viable during the term of an employee's contract.⁶⁰ But that is a very different setting from a business dispute over an executive like Richard Cronin, whose value derives from his experience, knowledge and contacts on the job, which can be adequately protected by restrictive covenants targeted to and enforced because of potential unfair competition resulting from misuse of trade secrets or confidential customer lists.

Conclusion

Non-Compete Law Should Focus on the Employer's Legitimate Interests, Not the Employee's Uniqueness

In non-compete cases involving businesspeople, the harm to the employer should be measured by the risk that the departing employee will engage in unfair competition by misusing confidential, trade secret information or customer lists belonging to the employer, not whether that employee is "unique," whatever that may mean. Application of the unique employee rationale in business disputes is not sound public policy, and the paucity of decisions enforcing a restrictive covenant on unique employee grounds shows that judges, and perhaps lawyers, know it.

⁵⁹ *Id.* at 484, 633 N.Y.S.2d at 929.

⁶⁰ *American Broadcasting Cos., Inc. v. Wolf*, 52 N.Y.2d 394, 402, 420 N.E.2d 363, 367, 438 N.Y.S.2d 482, 486 (1981).

It is time for the courts to leave this vestigial dictum behind, and focus instead on reasonably balancing the proof of risk to the employer's trade secrets and confidential customer lists that non-compete law legitimately protects against the showing of hardship that would be imposed on the employee by enforcing a non-compete.

