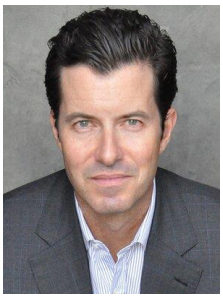
The Show Must Go On: Noncompete Uncertainty In Film, TV

By **Christopher Chatham and Douglas Smith** (July 16, 2024)



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Entertainment is as fierce as Wall Street when it comes to retaining the best executives and creatives. While studios have long sought to have their top talent under contract, professionals in the entertainment space continue to seek greater freedom for where and for whom they pursue their interests.

Now, with the Federal Trade Commission's April vote to ban nearly all noncompetition agreements — a powerful tool for protecting against the loss of talent, but one that limits options for creatives and executives — industry leaders may increasingly turn to other tools to protect their interests.

On July 3, the U.S. District Court for the Northern District of Texas issued an opinion in Ryan LLC v. FTC that blocks the FTC from enforcing its noncompete ban against the plaintiff in that case and the U.S. Chamber of Commerce. The court is poised to issue an opinion on the merits of the challenge to the FTC rule by Aug. 30.

Although the fate of the rule is uncertain, it is important for studio heads and content owners alike to understand their rights — and their options — going forward.

The Current State of the Entertainment Industry

The entertainment industry is at a critical moment. Millennials prefer social media video and short-form content to traditional TV and movies, and that gap expands further for Gen Z, who prefer video games to traditional media.[1]

As streaming and social media become central parts of the average consumer's media diet, media executives and top talent will inevitably seek to ensure their businesses are participating in the trend.

Noncompetes in the Entertainment Industry and the FTC's New Ban

When enforceable, noncompetes prevent employees from quickly switching to rivals or launching a competitor.

The assurance that employees will likely remain employed for many years also gives employers a strong incentive to invest in the employees' development. But noncompetes stifle an employee's freedom to pursue potentially more lucrative opportunities within their field.

On the other hand, employers are rightly concerned about seeing their sensitive information and future plans walk out the door and into the hands of the competition. Although separate nondisclosure agreements and trade secret laws prevent blatant information theft and sharing, a new hire inevitably brings a wealth of information on their prior employer's current and future projects that no production company or studio would want to be shared with competitors.

In short, noncompetes mitigate the risk that important information ends up with competitors but at the cost of employee mobility and wages.

Now the FTC has taken action to ban noncompetes nationally in an effort to benefit workers across the country. The FTC claims the ban will cover an estimated 30 million U.S. employees under competitive restrictions.

Although the FTC rule bans all noncompetes for lower-level executives and employees, it still allows for the enforcement of existing noncompetes against senior policymaking executives making over $151,164 per year because of their presumed ability to negotiate favorable terms. All new noncompetes for these executives, however, will not be enforceable. The rule is supported by the Screen Actors Guild.

Because the fate of FTC's rule is uncertain, studio heads and content owners will likely be concerned about what they could lose should the rule take effect, and creatives may be free to move despite prior agreements.

The Ryan v. FTC case, and other lawsuits challenging the rule, claim the FTC exceeded its authority in adopting the ban, and the dispute over the rule's validity will likely take years to resolve.

While the cases are pending, it is possible — even likely — a court will enter an injunction preventing the rule from taking effect until the case is over. Additionally, the FTC vote, which passed by a single vote along party lines, could also be reversed by a future FTC under a different administration.

Despite these uncertainties, everyone — creatives, talent, studio executives and other professionals in the entertainment industry — should assume that signed noncompetes will no longer be enforceable until the courts say otherwise.

We can expect the rule will likely go into effect in September unless enjoined. Once effective, those in the entertainment industry should not fear enforcement of their prior agreements when seeking better opportunities, even with direct competitors.

In passing the new rule, the FTC suggested that nonsolicits could still be allowed as long as they are not so broad that they effectively prevent the employee from working elsewhere. Customer nonsolicits continue to be banned under California law, however.

Other options for keeping employees may include retention bonuses and fixed-term employment agreements, in which executives are locked up as employees for a set number of years.

The FTC specifically said it does not consider fixed-term agreements to be prohibited under the rule, and in recent years, we've seen industry players successfully enforce these kinds of employment agreements in court against streaming giant Netflix,[2] even in notoriously noncompete-hostile California, where such restrictions have long been banned.

What's Next?

Both executives and creatives dictate the temperament in our industry, which seems more fraught than ever. After the long and enduring writers strike in 2023 that cost the industry billions of dollars, the new shift away from noncompetes seems to be yet another challenge

with unclear ramifications.

For example, the television industry is in the midst of a massive shift away from traditional media and toward social media as a primary source of entertainment. Artists will invariably see this trend and seek to jump to more forward-thinking distributors and platforms that are pursuing the new model, i.e., FAST channels, or free ad-supported television, such as Pluto TV and Roku.[3]

With noncompetes no longer a factor, many studios could not only see their top talent leave but also see their market position threatened as creatives and professionals flock to studios willing to pursue the emerging media format. Whether the FTC's action will speed up the fall of traditional media remains to be seen.

In light of this development, studios, creatives and content owners must continue to carefully assess the agreements applicable to them. Although there may not be a means of prohibiting those individuals from working for competitors, there are options for protecting the information they carry with them.

Creatives should understand that their noncompetes are not enforceable against them, and not feel restricted by the agreements previously signed; however, they should know that other agreements and laws may apply if they make a switch, and strict adherence is necessary to avoid liability not only for themselves but also their new employer.

Either way, the move away from noncompetes marks another turn in the ever-changing landscape of entertainment and media.

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[1] https://variety.com/vip-special-reports/social-video-paid-streaming-race-to-replace-tv-special-report-1236042698/.

[2] https://www.courts.ca.gov/opinions/nonpub/B304022.PDF.

[3] https://www.hollywoodreporter.com/business/digital/fast-streaming-content-sellers-better-deal-options-1235507296/.