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CURRENT CASES

COPYRIGHT INFRINGEMENT OF COMPUTER PROGRAMS: PRELIMINARY RELIEF GRANTED AGAINST AN ALLEGED INFRINGER, USING THE ITERATIVE TEST FOR SUBSTANTIAL SIMILARITY. *E.F. Johnson Co. v. Uniden Corporation of America*, 623 F. Supp. 1485 (D. Minn. 1985).

The District Court for the District of Minnesota issued a preliminary injunction against an alleged infringer of a copyrighted computer program for a logic trunked radio system developed for mobile radios. In granting this preliminary relief, the court surveyed the state of the law in the area, identified the proper tests to be applied, and concluded that the requested relief was appropriate even though the microcodes for the two programs were written in different assembly language for different types of microprocessors. The court found especially significant the presence of precisely the same superfluous instructions and precisely the same errors contained within the two programs.

Plaintiff E.F. Johnson Co. (EFJ) is a Minnesota corporation engaged in the business of manufacturing and selling two-way land-based communications systems. After three years of research and development, EFJ introduced its logic trunked radio system (LTR)¹ into the marketplace in 1980, and has periodically improved and modified the system since that time. The “heart” of the LTR is the computer software contained both in the mobile radios and the repeaters.² The copyrighted software in EFJ’s radios is mounted on a

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1. The LTR system developed by EFJ utilizes a “trunking” or pooling of frequency channels, permitting the system to afford all system users automatic access to all channels for maximum efficiency. Rather than assign each user a discrete channel, the trunked system, through the use of sophisticated computer software, patches together unutilized airwave “spaces” to create an uninterrupted channel of communication. The net result is that the system can accommodate more users than it has frequency channels available. 623 F. Supp. 1485, 1489 (D. Minn. 1985).

2. The EFJ system is composed of two elements: (1) repeaters, which control access to the system and receive and retransmit signals from mobile radio units; and (2) mobile radio and control units. The system works as follows: Each mobile radio is assigned to a repeater. Repeaters are analogous to radio station transmitters. The mobile radios send signals — high speed digital data bursts at sub-audible frequencies — to the repeater, which identifies the sending unit and which retransmits and amplifies the signal so that it can be received by the appropriate mobile unit. 623 F. Supp. at 1489.

Read Only Memory (ROM) microchip and is processed by an Intel microprocessor. At the time of this action, EFJ commanded a significant position in the national market for LTR systems, despite competing with much larger companies such as General Electric and Motorola.³

In April of 1985, Defendant Uniden Corporation of America (Uniden)⁴ introduced a mobile radio which was compatible with EFJ's system. In order to develop its radio and software program, Uniden had disassembled⁵ the EFJ software and had studied the program flow charts, as well as EFJ's hardware and service manuals. The software developed by Uniden was stored on an Erasable Program Read Only Memory (EPROM) microchip, and was processed by a Hitachi microprocessor. Uniden's mobile radio was distributed in the United States and retailed at 31-39% less than the EFJ mobile radio.

EFJ's engineers analyzed the Uniden radio and found it to be compatible with its LTR repeaters. They then analyzed the software used by Uniden by "dumping" the machine code and "uploading" it into a computer to make a comparison with the copyrighted EFJ program. The EFJ engineers were convinced that the two programs were identical, and that Uniden had copied the EFJ software.⁶ EFJ then filed suit for copyright infringement⁷ and a violation of the Minnesota Uniform Trade Secrets Act⁸ and moved for a preliminary injunction on the copyright infringement count.⁹

The district court set out the controlling test for the Eighth Circuit to determine whether preliminary injunctive relief is appropriate.¹⁰ Four factors are to be considered: (1) the threat of irreparable harm to the movant; (2) a balancing of the respective harms among the litigants; (3) the probability that the movant will succeed

3. 623 F. Supp. at 1489-90. EFJ's annual sales volume of trunked radios is approximately \$25 million factory net, \$40 million retail. Approximately 30 percent of EFJ's total sales are of mobile trunked radios. The national retail market for mobile trunked radios is on the order of \$200 - \$250 million per year.

4. Uniden Corporation of America is an Indiana corporation and a subsidiary of Uniden Corporation of Japan. Uniden imports and distributes electronic equipment including land-based communications systems. 623 F. Supp. at 1487.

5. 623 F. Supp. at 1490. Disassembly of a computer program is accomplished by translating the machine or object code into humanly readable assembly language.

6. *Id.*

7. 17 U.S.C. § 501 *et seq.* (1978).

8. MINN. STAT. ANN. § 325 C.01-.07 (West 1981).

9. 623 F. Supp. at 1491.

10. 623 F. Supp. at 1490, *citing* Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109 (8th Cir. 1981).

on the merits; and (4) the public interest.¹¹ The court recognized that of the four factors, the probability of success on the merits is the predominant factor in a copyright infringement case,¹² and thereafter devoted the majority of the decision to this area.

In order to satisfy this predominant factor and thereby establish its likelihood of success on the merits, EFJ needed to prove: (1) ownership of the copyright, and (2) copying, or infringement of the copyrighted work by the defendant.¹³ The court found that EFJ had demonstrated that the copyright was registered in EFJ's name, and therefore presumptively valid, thus satisfying the ownership requirement.¹⁴ Additionally, the court found that adequate notice of the copyright was included in every EFJ radio. The court then stated that since direct evidence of copying is often unavailable, copying can be inferred where it is proved that the defendant had "access" to the copyrighted work, and that the accused work is "substantially similar" to the copyrighted work.¹⁵

"Access" was easily found, since Uniden had admitted removing and analyzing the EFJ program.¹⁶

Judge MacLaughlin then examined the critical "substantial similarity" element, and noted that the traditional "ordinary observer" test¹⁷ has proven problematical in computer software infringement cases because the copyrighted material is stored on a computer chip or disc and is well-hidden from public view.¹⁸ He then identified a more contemporary test for use in establishing substantial similarity in a computer software context, the "iterative" test.¹⁹ The iterative approach requires proof (1) that the defendant "used" the copyrighted work in preparing the alleged copy, which may be established by proof of access and similarity sufficient to reasonably infer use of the copyrighted work; and (2) that the defendant's work is an iterative or exact duplication of substantial

11. 623 F. Supp. at 1490-91.

12. *Id.* at 1491, citing 3 NIMMER, NIMMER ON COPYRIGHT, § 14.06[A] n.6.1 ("in most cases it is the third, reasonable likelihood of success, factor which is determinative").

13. 623 F. Supp. at 1491-92.

14. *Id.* at 1492.

15. *Id.*

16. *Id.*

17. *Id.* The substantial similarity test has been stated as "whether the work is recognizable by an *ordinary observer* as having been taken from the copyrighted source," citing *Wihtol v. Crow*, 309 F.2d 777, 780 (8th Cir. 1962). (Emphasis added).

18. 623 F. Supp. at 1493.

19. *Id.* This "iterative" test is extensively discussed in Note, *Copyright Infringement of Computer Programs: A Modification of the Substantial Similarity Test*, 68 MINN. L. REV. 1264, 1294-1300 (1984), which is cited with approval in the instant opinion.

portions of the copyrighted work. Under the "iterative" approach, the fact finder's focus shifts from the ordinary observer's "total concept and feel" of the two works to an analysis of the "quantitative and qualitative evidence of the similarities" as gauged by the court's evaluation of expert testimony.²⁰ The court concluded that under either the traditional "ordinary observer" test or the more contemporary "iterative" test, Uniden's program was substantially similar to EFJ's copyrighted program.²¹

In analyzing the indicia of similarity between the programs, the district court recognized that certain aspects of the design were required to be the same, such as the "Barker code".²² Yet in designing its sampling method for comparing incoming data, Uniden used precisely the same sampling rate as did EFJ, when the Hitachi microprocessor utilized by Uniden was capable of a much higher and therefore more efficient sampling rate than the Intel microprocessor used by EFJ. Additionally, the sample error table and the error threshold used to determine synchronization in Uniden's program were identical to those found in the EFJ program, when more logical and efficient methods were available to the Uniden engineers.²³

Other point-by-point similarities were identified in the opinion²⁴, including an identical H-Matrix²⁵, and the presence in both programs of an identical inverse H-Matrix which was included in the EFJ program by mistake. Another striking similarity was the

20. 623 F. Supp. at 1493.

21. *Id.*

22. *Id.* at 1493-94. A "Barker code" is a pattern of ones and zeros alternated in a prepatterned sequence, and both the sending and receiving units must identify the Barker code to establish communication. In order to make its radios compatible, Uniden was required to and did copy this aspect of the EFJ program.

The program within the system then compares incoming streams of data with the Barker word to determine whether the transmission is in fact the proper Barker word. This is done by way of a matching and synchronization system known as the shifting correlation scheme for detection.

23. 623 F. Supp. at 1494-95.

24. *Id.* at 1495-97. In addition to those similarities mentioned in the text accompanying notes 25 and 26, *infra*, the similarities and evidences of copying identified by the court included: (1) both programs contained an error in the "select call prohibit" feature, which caused transmission to be blocked to *all* dispatchers aligned with a particular repeater, instead of blocking only transmissions to the dispatcher who is transmitting to another user (this error was subsequently corrected in later versions of the EFJ code); (2) both programs contained an unnecessary line of code, a "counter," set arbitrarily by EFJ at 20 code cycles; (3) 38 of 44 subroutines found in the two codes were identical; and (4) large segments of Uniden's manual prepared for use with its radios were lifted verbatim from an EFJ manual.

25. An H-Matrix is used in the LTR system to detect errors in transmission, once communication has been established by matching of Barker codes. This H-Matrix can be configured in any of 32 different ways. 623 F. Supp. at 1495.

presence of three superfluous and completely unnecessary instructions, which were inadvertently left in the EFJ code. These same superfluous instructions were present in the Uniden program, and the court stated that the existence of identical unnecessary instructions in both codes is strong proof of substantial similarity.²⁶

Uniden argued that a line-by-line comparison of the EFJ and Uniden codes, translated into Hitachi language, demonstrated that the two codes were dissimilar. The court found this argument unconvincing, stating that a literal translation of EFJ's Intel instructions into Hitachi's language necessarily involved a skewing of the program which made a line-by-line comparison meaningless.²⁷ Other defenses asserted by Uniden were based on the premise that the EFJ software was not copyrightable. These claims were similarly rejected by Judge MacLaughlin.²⁸

After the court's determination that EFJ had successfully demonstrated the predominant factor of probability of success on the merits, Judge MacLaughlin easily found the remaining three factors necessary for a preliminary injunction: (1) irreparable injury is generally presumed in copyright infringement cases for the purposes of a preliminary injunction motion once the moving party has established a case of copyright infringement, and even if there were no such presumption, EFJ had established that continuing infringement of EFJ's copyrighted program would jeopardize its competitive position in the marketplace;²⁹ (2) the balance of harms favored EFJ, in that the only harm which Uniden would suffer would be the lost profits on its infringing radios, which the court characterized as "not a weighty equitable consideration";³⁰ and (3) the public interest would be served by the preliminary injunction in order to promote the goals of the copyright laws — "to encourage

26. 623 F. Supp. at 1496. The court cited a comparable district court opinion in which "totally functionless" instructions appeared in both the copyrighted and infringing codes: "[t]he only conceivable explanation is that [the defendant] copied this non-functional feature from the [plaintiff's] source code." SAS Inst., Inc. v. S & H Computer Sys., Inc., 605 F. Supp. 816, 824 (M.D. Tenn. 1985).

27. 623 F. Supp. at 1497.

28. *Id.* at 1498-1503. Uniden raised three defenses which were discussed by the court and ultimately rejected as being without merit. These defenses were: (1) that EFJ had not contributed a "literary work" and that therefore the program was not copyrightable; (2) that the EFJ program was not copyrightable because it was derived in large part from pre-existing work in the public domain; and (3) that the very nature of the EFJ idea or program limited the number of ways that this idea could be expressed, and that when the idea thus constrains possible methods of its expressions, the idea and expression merge so that any attempted copyright of the merged expression is void *ab initio*.

29. 623 F. Supp. at 1503.

30. *Id.* at 1503-04.

individual effort and creativity by granting valuable enforceable rights."³¹ The court then issued the injunction, ordering that Uniden and all those acting in concert with Uniden were enjoined and restrained from all marketing, selling or other comparable activities with respect to its LTR-compatible radio programs. Uniden was also ordered to notify all relevant persons, including its employees, attorneys, and those in active concert or participation with Uniden of the terms of the injunction and their duty to abide by it.³²

E.F. Johnson Co. v. Uniden Corporation of America offers an excellent guide to practitioners in the computer field as to the evidentiary facts which must be demonstrated in order to secure preliminary relief in a computer software copyright infringement matter. *E.F. Johnson* provides a logical blueprint for use in copyright infringement litigation, and should serve as persuasive precedent. The courts and the attorneys who practice in computer law realize that the subject area is quite technical and complex, and preliminary relief is generally denied because of this complexity and the use of conflicting expert testimony.

Now, however, preliminary relief is clearly available to a plaintiff who is able to demonstrate in a quantitative and qualitative manner that his copyrighted software is substantially similar to that of the alleged infringer, as well as prove the remaining requirements for such relief. From a purely economic point of view, the advantage of procuring this relief cannot be overemphasized. An infringing competitor can severely undercut and dilute the plaintiff's market, resulting in potentially disastrous effects upon the business of a plaintiff protected by copyright. Of course, this is not meant to indicate that healthy competition is to be discouraged, but only that wrongful, infringing competition is disfavored. As a result of a preliminary injunction, a plaintiff such as EFJ is better able to hold its position in the marketplace. In EFJ's case, the Uniden software was introduced in April of 1985; the complaint was filed in June; the hearing was held in September, and the injunction was ordered in December. Thus, only eight months passed from the introduction of the Uniden radio to the injunction, a much more satisfactory result for a plaintiff than having to wait for a full-blown trial on the merits.

A plaintiff must be well prepared, however, and present his evidence clearly and persuasively in a "mini-trial" setting. *E.F. Johnson* shows some of the technical hoops that must be jumped through

31. *Id.* at 1504.

32. *Id.* at 1505.

in order to successfully convince the judge hearing the motion that the defendant did indeed copy the plaintiff's copyrighted program, and that preliminary relief should be granted. *E.F. Johnson* indicates that the court will consider superfluous and unnecessary instructions and errors in a program to be of significant value in proving copying or infringement. Counsel for software companies would be wise to instruct their clients to include these types of harmless "fingerprints" or clues in the copyrighted software, as they are an invaluable aid in an infringement action.

It is unclear whether the district court has adopted the "iterative" test for substantial similarity in computer software cases, since it rested its finding of substantial similarity on both the iterative test and the ordinary observer test. Nevertheless, the court has clearly approved the iterative approach in a computer software context, both by its extended discussion of the test and by its actual use of the iterative test in the point-by-point comparison of the two programs. The use of this iterative test in such circumstances is a step forward that other courts should make, because of the inherent difficulties in applying the ordinary observer test to a tiny computer chip. The iterative test's emphasis on exact duplication of substantial portions of the copyrighted work make the point-by-point analysis of the two programs especially revealing and practicable.

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CONTRACTS IN RESTRAINT OF TRADE—VALIDITY OF EMPLOYEE COVENANT— TERMINATION CONTRACT RESTRAINING FORMER EMPLOYEE FROM INTERFERING WITH EMPLOYER'S BUSINESS BY "RAIDING" ITS EMPLOYEES IS ENFORCEABLE. *Loral Corporation v. Moyes*, 174 Cal. App. 3d 268, 219 Cal. Rptr. 836 (1985).

When an employee makes the decision to leave his employer to join a competitor or to start a competing enterprise, the possibility exists that the employee will engage in employee raiding. Because the problem of employee raiding can result in considerable damage to a business, employers and their counsel have questioned whether there are measures available by which to alleviate this danger.

In *Loral Corporation v. Moyes*,¹ a case of first impression, a California court of appeal has answered the question in the affirmative, holding a termination contract that prohibited an executive from "raiding" his former employees after he had resigned was not an illegal restraint of trade and was enforceable.²

Defendant Robert Moyes served as the president of the TerraCom Division of Conic Corporation (Conic), a wholly owned subsidiary of Loral Corporation (Loral), for several years prior to 1979. TerraCom was an electronics manufacturer which sought to develop a commercial digital microwave radio. Moyes also served as a member of Conic's Board of Directors. On March 29, 1979, Moyes and directors of Loral and Conic signed a handwritten agreement terminating Moyes' employment,³ and on May 4, 1979, Moyes signed a more formal agreement.⁴ The agreement contained provisions resolving salary, fringe benefits and stock obligations owed to Moyes, as well as an agreement by Moyes that he would "preserve the confidentiality of all trade secrets and other confidential information" and that he would not:

now or in the future disrupt, damage, impair, or interfere with the business of Conic Corporation, or its TerraCom Division whether by way of interfering with or raiding its employees, dis-

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1. 174 Cal. App. 3d 268, 219 Cal. Rptr. 836 (1985).

2. California provides by statute that any contract in restraint of trade is invalid. CAL. BUS. & PROF. CODE § 16600 (West 1964). See also *infra* note 18.

3. The court found it unnecessary to elaborate on the reasons for Moyes' termination since it determined this information did not relate to the validity of the trial court's judgment of nonsuit on the complaint.

4. 174 Cal. App. 3d at 273, 219 Cal. Rptr. at 839.

rupting its relationships with customers, agents, representatives or vendors or otherwise. You are not however, restricted from being employed by or engaged in a competing business.⁵

Moyes subsequently became employed by Aydin Corporation (Aydin) as president of its newly formed microwave division.⁶ Thereafter, Moyes offered employment with Aydin to two key TerraCom employees, the first immediately after Moyes' departure and while the employee was still employed by TerraCom, and the second within several months of Moyes' departure and within a week of the employee's departure from TerraCom. Both employees accepted the offers of employment and went to work for Aydin. Further, a TerraCom investigation revealed that a large number of its key employees had interviewed with Moyes and had been offered jobs with Aydin.⁷

Loral and Conic⁸ filed suit against Moyes alleging, among other things, that Moyes breached the termination agreement by inducing its employees to work for Aydin.⁹

The trial court granted Moyes' motion for judgment of nonsuit after plaintiffs' opening statement¹⁰ on the ground the restriction against "raiding" Conic's employees was an unlawful restraint of competition, stating "the contract in its entirety is null and void *ab initio*."¹¹ The court of appeal reversed the judgment of nonsuit and remanded the matter for trial.¹²

The court of appeal found unpersuasive defendant's contention

5. *Id.* at 274, 219 Cal. Rptr. at 840.

6. *Id.*

7. *Id.*

8. Hereafter, Loral and Conic will collectively be referred to as "plaintiffs".

9. Plaintiffs' complaint also set forth a cause of action for misuse of trade secrets in which plaintiffs alleged the abilities and salaries of their employees constituted trade secrets. 174 Cal. App. 3d at 280, n.6, 219 Cal. Rptr. at 844, n.6. In addition, Moyes filed a cross-complaint apparently alleging the termination agreement was induced by fraud. *Id.* at 271, 219 Cal. Rptr. at 838.

10. A nonsuit will be granted after the plaintiff's opening statement when it is clear the facts if proved will not constitute a cause of action. CAL. CODE OF CIV. PROC. § 581c (West 1986).

11. The trial court also entered judgment on the cross-complaint determining the termination agreement had not been induced by fraud, and granting restitution to Moyes of certain shares of stock as described in the termination agreement. 174 Cal. App. 3d at 280, 219 Cal. Rptr. at 845.

12. 174 Cal. App. 3d at 271, 219 Cal. Rptr. at 838. As a consequence of the court's reversal of the nonsuit, the court of appeal also vacated the trial court judgment on the cross-complaint insofar as Moyes was granted restitution, but otherwise affirmed the judgment on the cross-complaint. *Id.* at 280-81, 219 Cal. Rptr. at 845. It was unnecessary for the court to address plaintiffs' cause of action for misuse of trade secrets since plaintiffs dismissed this cause of action. *Id.*

that the contract was void since under the law of unfair competition there is nothing generally illegal about soliciting a competitor's employees not under contract, and that a contract prohibiting the same is thus invalid. Defendant relied on *Hollingsworth Solderless Terminal Co. v. Turley*,¹³ in which a federal court of appeals, applying California law, stated that an employer may not prohibit by contract conduct not subject to judicial restraint under the law of unfair competition.¹⁴

The court of appeal rejected defendant's proposition, noting that to the extent cases have found solicitation of a competitor's employees not to be actionable, none have involved an agreement not to interfere with former coworkers.¹⁵ Moreover, the court found *Hollingsworth* inapposite, explaining there was no noninterference agreement in the case nor was the court's ruling concerning the new employer's interference with employees concerned with California Business and Professions Code section 16600.¹⁶ Rather, the court in *Hollingsworth* applied section 16600 to a former employee's promises of nondisclosure and nonsolicitation as the California state courts have done.¹⁷

Defendant's major contention in support of the trial court judgment was that the termination contract was void under Business and Professions Code section 16600.¹⁸ Because no California court had previously applied section 16600 to a noninterference agreement, the court initially looked to the law of unfair competition for guidance which, absent the termination contract, would have regulated Moyes' conduct.¹⁹

The court observed that the law of unfair competition prohibits former employees from disclosing an employer's trade secrets and confidential information even in the absence of a contract.²⁰ Employers may validly supplement the law of the marketplace by entering into nondisclosure and nonsolicitation agreements with their

13. 622 F.2d 1324, 1338 (9th Cir. 1980).

14. 174 Cal. App. 3d at 277, 219 Cal. Rptr. at 842.

15. *Id.* Rather, the cases upon which defendant relied concerned the existence of tort liability under the law of unfair competition. 174 Cal. App. 3d at 276-77, 219 Cal. Rptr. at 841-42.

16. *Id.*

17. *Id.* at 278, 219 Cal. Rptr. at 842-43.

18. Section 16600 provides that "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." CAL. BUS. & PROF. CODE § 16600 (West 1964).

19. 174 Cal. App. 3d at 275, 219 Cal. Rptr. at 840.

20. *Id.*

employees.²¹ Restrictions placed on an employee in a nondisclosure agreement, however, are enforceable only to the extent a judicial determination of the existence of a trade secret is made.²² In contrast, when permissible solicitation of an employer's customers is at issue, a contract may prohibit *more* than the law of unfair competition otherwise would.²³ Thus, the court concluded, contractual restrictions may have more impact in a nonsolicitation case than in a nondisclosure case.²⁴

In further considering defendant's contention the contract was invalid under section 16600, the *Loral* court next reviewed established case law as to the impact of the statute on similar contractual restrictions. The court first observed that contracts prohibiting a former employee from obtaining new employment with a competitor are invalid under section 16600.²⁵ Reasonably limited restrictions that tend to promote rather than to restrain trade and business, however, have been upheld.²⁶ For example, section 16600 does not invalidate an employee's agreement not to disclose his former employer's confidential customer lists or other trade secrets, or not to solicit those customers.²⁷ Thus, the court summarized, while agreements which penalize a former employee for obtaining employment with a competitor are clearly invalid in California, agreements which seek merely to delimit *how* a former employee can compete are not necessarily invalid.²⁸

Consequently, the determinative question for the court was "whether a noninterference agreement not to solicit former co-workers to leave the employer is more like a noncompetition agreement which is invalid, or a nondisclosure or nonsolicitation agreement which may be valid."²⁹

The court answered its question by looking to two Georgia cases which upheld noninterference promises as not in restraint of trade.

In *Lane v. Taylor*,³⁰ an employer sued its former employee for breach of an employment agreement that prohibited her from hiring

21. *Id.* at 276, 219 Cal. Rptr. at 841.

22. *Id.* at 275, 219 Cal. Rptr. at 841.

23. *Id.*

24. *Id.*

25. 174 Cal. App. 3d at 275-76, 219 Cal. Rptr. at 841.

26. 174 Cal. App. 3d at 276, 219 Cal. Rptr. at 841.

27. *Id.*

28. *Id.*

29. *Id.*

30. 174 Ga. App. 356, 330 S.E.2d 112 (1985).

employees or otherwise causing them to work for another employer for a period of one year after her termination.³¹ In reversing a summary judgment for the former employee, the Georgia court concluded the limited restriction on “pirating” of employees was reasonable³² and needed to protect legitimate business interests.³³

The *Loral* court also reviewed *Harrison v. Sarah Coventry, Inc.*,³⁴ which had been cited by the *Lane* court. In *Harrison*, an employer sued former employees for violating an employment contract by which they agreed that during employment and for two years post-termination they would not disclose the identity of the employer’s customers nor attempt to induce them to leave the company.³⁵ The *Harrison* court distinguished cases involving noncompetition agreements without territorial limitations, and concluded there was no restraint of trade because the former employees were free to work for a competitor as long as they did not interfere with their former employer’s contractual relationships or divulge the names of former co-workers.³⁶

The *Loral* court, thus, adopted the reasoning of the Georgia courts, holding that “the potential impact on trade must be considered before invalidating a noninterference agreement.”³⁷

In the instant case, Moyes was restrained from “disrupting, damaging, impairing or interfering with” Conic’s business by raiding its employees.³⁸ The court found such a restriction no more of a

31. The agreement also provided that defendant Taylor would neither solicit her former employer’s customers nor disclose confidential information. 174 Cal. App. 3d at 278, 219 Cal. Rptr. at 843.

32. *Id.* The *Loral* court characterized the noninterference provision in *Lane* as “reasonable” based on the fact it was limited to one year in duration and restricted only the actions of the defendant former employee.

33. *Id.* The court in *Lane* also held the provision of the employment agreement barring solicitation of customers void because it was not limited in area. *Id.*

34. 228 Ga. 169, 184 S.E.2d 448 (1971).

35. 174 Cal. App. 3d at 278, 219 Cal. Rptr. at 843.

36. *Id.*

37. *Id.* In relying on the Georgia cases, the court apparently found of no significance the fact that in those cases the courts were concerned with the validity of restrictive covenants in employment contracts, whereas the instant case derived from an alleged breach of a termination contract entered into several years beyond Moyes’ initial employment with Conic and simultaneous with his termination. While the *Loral* contract carefully provided significant consideration for Moyes’ agreement not to interfere with Conic’s business, the equality of bargaining power as between the parties in such a situation is clearly distinguishable from that which existed in the Georgia cases, particularly in view of Moyes’ cross-complaint allegation that the agreement was induced by fraud. Even had the court discussed the issue, however, it is doubtful such consideration would have impacted on the outcome of the case since, ultimately, the agreement did not place Moyes in the position of giving up his ability to compete with Conic.

38. 174 Cal. App. 3d at 279, 219 Cal. Rptr. at 843.

significant restraint on Moyes engaging in his profession than would be a restraint on solicitation of customers or on the disclosure of confidential information.³⁹ In fact, the court emphasized, the "May 4th agreement expressly permits Moyes to be employed by or engage in a competing business."⁴⁰

Defendant Moyes attempted to distinguish the Georgia cases on the ground they involved noninterference agreements of limited duration whereas the instant agreement was of unlimited duration, a restriction defendant argued was more onerous and more likely to restrain trade.⁴¹

The court rejected defendant's argument, however, finding that duration alone of a restrictive agreement is not determinative of its enforceability.⁴² Rather, the court concluded, enforceability depends upon a covenant's reasonableness, evaluated in terms of the employer, the employee, and the public.⁴³

Applying its test of reasonableness, the court upheld the termination contract, concluding the noninterference restriction had no overall negative impact on trade or business.⁴⁴ The court posited plaintiffs' purpose in imposing the noninterference restriction on Moyes was to enable Conic to maintain a stable work force and to remain in business.⁴⁵ Thus, the court determined the restriction impacted on Moyes' business practices in a small way in order to promote Conic's business.⁴⁶ Further, the court found, contrary to Moyes' contention, the restriction only slightly affected Conic's remaining employees inasmuch as they were not prevented from seeking employment with Aydin nor from contacting Moyes, but lost only the option of being contacted by Moyes.⁴⁷

Nonetheless, the court strictly limited its holding to the facts of

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* The court also observed that the California Legislature has allowed business sellers to promise noncompetition to their buyers without time limitation other than for the period "so long as the buyer, or any person deriving title to the goodwill or shares from him, carries on a like business therein." CAL. BUS. & PROF. CODE § 16601 (West 1964). Courts faced with noncompetition contracts without this limitation have upheld the contracts by reading the statutory limitation into them. *Id.*

44. 174 Cal. App. 3d. at 280, 219 Cal. Rptr. at 844.

45. *Id.*

46. *Id.*

47. As the court observed, equity will not enjoin a former employee from receiving and considering applications from employees of his former employer even though the circumstances be such that he should be enjoined from soliciting their applications. *Id.*, citing *Aetna Bldg. Maintenance Co. v. West*, 39 Cal. 2d 198, 204 (1952).

the instant case, determining only that the noninterference contract was not void under section 16600 when applied to Moyes' conduct in violating the contract within one year of its execution.⁴⁸ The court expressly declined to determine whether the noninterference agreement, unlimited in duration, would unreasonably and illegally restrain trade if applied to "other conduct at another time."⁴⁹

A broad reading of section 16600 suggests an employer cannot require an employee to agree to limit his ability to compete in any way. Nonetheless, the court in *Loral* held that section 16600 did not obtain in the context of a noninterference agreement because the contract specifically provided Moyes was free to compete. Thus, the court distinguished between allowing Moyes personally to go out and work for a competitor, and allowing him to disrupt Conic's business by raiding other key employees.

The problem of employee raiding is of critical importance to employers. The activity can be costly to an employer in terms of recruiting and training replacement employees and in the adverse impact significant employee losses may have on an employer's performance. Of more concern, however, employee raiding carries with it the danger that departing employees or their new employers will appropriate valuable trade secrets and confidential information for their own benefit.

Ultimately, an employer may best protect against the loss of valued employees by paying them well, showing appreciation for their work, and rewarding innovation. Even in the best work environment, however, it will be inevitable that employees will move on. Thus, in order to prevent employee raiding by former employees, an employer may be wise to utilize a specific noninterference agreement in its employment and termination contracts. As the narrow holding in *Loral* suggests, however, whether a particular contract will in fact stand up in court will depend on the facts of each case.

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48. 174 Cal. App. 3d at 274, 219 Cal. Rptr. at 840.

49. 174 Cal. App. 3d at 279, 219 Cal. Rptr. at 844. The court also rejected defendant's contention that plaintiffs' action was subject to nonsuit because the complaint failed to allege full performance on their part of the contract. The court found plaintiffs' obligations were conditioned upon Moyes' observation of his own promises, which Moyes almost immediately violated. Thus, plaintiffs' performance was excused by Moyes' breach of the termination contract. Although this was not stated in plaintiffs' complaint, it was implied by plaintiffs' opening statement. *Id.* at 280, 219 Cal. Rptr. at 844.

