

## REVIEW ARTICLE

## ANALYSIS OF THE APPLICATION OF NON-COMPETE FOR INTERNET MARKETERS

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## ABSTRACT

Internet marketer as a new form of employment occupation, rapid growth in the short term. At present, the competitiveness of enterprises and Internet marketers are closely tied, to which enterprises often protect business interests through agreements non-compete. For the new social relationship established by enterprises and Internet marketers, only according to China's current "Company Law" and "Labor Contract Law" and other legal provisions involving non-competition, in the subject identification, protection object, applicable standards and other content are applicable dilemma. Because the enterprise competition is different, the principle of non-competition should be in line with the development of the market, break through the restriction of obligation subject to the narrow determination of workers, the protection object cannot be limited to trade secrets. However, after all, the non-competition restriction serves to maintain the market order, in order to avoid the conflict of rights to destroy the competition ecology, it is necessary to coordinate the interests of the subject as the premise of the application of the non-competition restriction, to coordinate the results for the purpose of restriction, and to innovate the restriction system in the applicable conditions.

## KEYWORDS

Internet Marketer, Non-Compete, Internet Economy

## 1. INTRODUCTION

## 1.1 Whether the Internet Marketer is the Subject of Non-Compete Obligations

As a means to protect competition in the market of products and services by limiting competition in the labor market, non-compete in China is mainly divided into non-compete during employment and non-compete after leaving employment, such as the provisions of Article 148 of the Company Law on non-compete of directors and senior managers; non-compete after leaving employment is mainly agreed non-compete, such as the provisions of Article 23 and Article 24 of the Labor Contract Law on non-compete of workers with confidentiality obligations. Article 23 and Article 24 of the Labor Contract Law provide for the non-competition of workers who are under the obligation of confidentiality.

Most Internet marketers are not directors or senior managers in the company, the work content mainly live with goods rarely involves trade secrets, the work nature of the technical content is not high, and does not involve the mastery and appropriation of intellectual property rights. Internet marketers as a new form of employment using a combination of online and offline labor, compared with traditional labor, labor time, location and labor organization form more flexible, personal subordination is weak. Internet marketers and enterprises are often signed between the contract is not necessarily a labor contract, which renders the brokerage contract, service cooperation contract for more. If the two sides did not establish a labor relationship, whether the Internet marketer is eligible for non-compete subject becomes another issue worth discussing.

## 1.2 Whether the Object of Protection of Non-Compete is only Trade Secrets

In China, although there is no public data to support this, it can be observed from practice that non-compete agreements are spreading from the Internet industry to traditional industries, from executives to junior employees and even interns (Ning and Gong, 2022). The current provisions of the Labor Contract Law on non-competition relate to the subject matter, time, territory, and duration of the application of non-competition. The controversial issue since its formulation is whether the non-competition should be linked to trade secrets, i.e. whether the existence of trade secrets in the employer and the worker's knowledge of or access to the trade secrets is a prerequisite for signing a post-employment non-competition agreement. "In fact, the insurable interest of the non-compete agreement is broader than trade secrets, the non-compete agreement does not take trade secrets as the only prerequisite, and trade secrets are not protected only through the non-compete agreement." Internet companies, in an effort to further expand their economic interests, intentionally invest considerable labor costs to drive traffic to Internet marketers and the live streams they work in. This investment is often borne by the company (Shen, 2021). Therefore, companies sign non-compete agreements with Internet marketers out of economic input and bundled interests, and if trade secrets are still used as the only applicable criteria for non-compete, it is difficult to protect healthy competition under the Internet economic industry, which also means that most companies that hire and commission Internet marketers are unable to use non-compete to protect the interests of good faith (Liu, 2021).

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## 2. COORDINATION OF THE APPLICATION OF NON-COMPETE

### 2.1 Harmonization of Interests as a Prerequisite for Application

Many companies in the Internet economy agree with Internet marketers on requirements such as "exclusivity" and "exclusivity" to achieve the purpose of non-competition. To prevent the generalization of the application of non-compete, it is necessary to set the corresponding applicable prerequisites for the coordinated implementation of non-compete. (Xiong and Wang, 2021) Internet marketer's non-compete should break through the original requirements of the worker as the subject of the obligation, and should be the aim of the enterprise to establish the scope of application by binding the enterprise to claim the purpose of the agreement non-compete. As there are conflicts and contradictions of various types of proper relations in dealing with non-competition ties, the legal subjects are required to comply with the principles of honesty and credit, voluntary equality and equal value and compensation, etc., regarding the non-competition clause whether it appears in general contracts or labor contracts, which will coordinate the interests of various subjects as the premise of applying non-competition restrictions, which is conducive to maintaining the overall balance of the subject's status rights (Chang, 2021; Zhou, 2022).

Internet marketers are restricted in their freedom of work and choice of employment on and off the job due to non-compete restrictions. In economic terms, Internet marketers will therefore have reduced or even lost the opportunity to earn additional income. Internet marketer's non-compete object for the enterprise between the flow of traffic as well as labor costs, to balance the Internet marketer in the non-compete agreement after the sacrifice of the right to benefit and the expected benefits, the enterprise should pay a reasonable cost price for this. The difference between the early and the enterprise to establish labor relations or cooperative relations before, the marketer itself has obvious outstanding marketing advantages; the enterprise does not need to invest costs for incubation training, and the marketer based on work services for the enterprise to bring traffic and economic benefits. The application of a non-compete without cost to the company is clearly not fair and reasonable. In order to coordinate the implementation of non-compete, we need to take into account the degree of discovery and cultivation of Internet marketers, the planning, opportunities, attraction costs, and other multiple factors, if companies do have Internet marketers in the work experience, skills to provide greater help, create or provide conditions to achieve a stable flow of marketers, and the cost of this is indeed put, according to the principle of equal consideration, Internet marketers need to be loyal and good faith To protect the competitive advantage and business interests of the enterprise, to achieve a balance of rights and interests of the non-compete.

### 2.2 Results Coordination as the Applicable Purpose

Coordinated application of the implementation of the non-compete should start from the overall benefit of society, to serve the construction of a free and orderly market environment as a result of the orientation, enterprises and Internet marketers in the implementation of non-compete in the process of conflict of rights, should be a comprehensive social costs, social benefits, to establish the scope of the effectiveness of rights, scientific evaluation of the subjective will and objective behavior of the subjects in the legal relationship to eliminate the state of conflict of rights. Although the labor rights and freedom of choice of employment of Internet marketers belong to the rights in the constitutional sense, but the scope of their exercise involves the same kind of competition of enterprises, even if there is no intentional damage to the interests of enterprises subjectively, objectively there is not necessarily a division of the flow of enterprises, weakening the effect of enterprise marketing and other infringement of the results of the protective interests, but because of the competing interests and related factors, is bound to constitute the competitive interests of enterprises damage. In the evaluation of the specific application of competition restrictions should be noted in the comprehensive results of benefits, if the Internet marketer in cooperation with enterprises or engaged in the labor process there are short-term business, short-term cooperation "opportunism" behavior performance, or contrary to the principle of honesty and credit wantonly "jump ship" or sign a relevant cooperation or labor contract with a competing entity of the original enterprise, which will lead to detrimental to the interests of enterprises and the long-term development of the market economy. But there are also relevant enterprises due to arrears of remuneration, deprivation of development opportunities and other ways to infringe on the rights and interests of Internet marketers, and marketers have no choice but to jump ship or establish cooperation or labor relations with other enterprises, which is still considered a violation of non-compete obligations, the enterprise abuse of non-compete agreements, weakening

the fair position and rights of marketers. The result will break the balance of rights and interests between enterprises and Internet marketers, which does not contribute to the normal development of social and economic. Therefore, in judging whether the parties can apply non-compete, it is necessary to consider the dynamic balance of rights and interests of each subject in the new economic form from the perspective of the possible results of the rights and interests of the subject and the impact on the market order, to maintain healthy competition in the Internet economy (Chen and Li, 2023; Chen, 2022).

### 2.3 Exploring Applicable Conditions and Achieving System Harmonization

In coordinating the non-compete relationship between companies and Internet marketers, attention needs to be paid to whether the company's protectable interests and the marketer's interest in freedom of choice of employment outweigh the protected interests when choosing one over the other. Because the Internet marketers can embody the most critical market competitive advantage - traffic, and their own personality attributes are inseparable, the law should not be the default between this type of professional people and enterprises there must be legal non-compete rights and obligations, but from the enterprise's human capital investment and protective interests, requiring enterprises in the agreement with the marketer to develop In this regard, the law should not imply that there must be legal non-competition rights and obligations between such professionals and enterprises.

At the same time, it should not be overlooked that, with the close competitive relationship and the wide range of competing subjects in the Internet economy, the non-competition restriction is a big constraint on the freedom of labour and freedom of choice of employment of Internet marketers. In order to prevent a generalised application of non-competition restrictions and an overload of non-competition obligations, the conditions for the application of competition restrictions should be further correctly understood. For the establishment, performance and dissolution of the legal relationship between the two parties on the competing interests and the rights of the subject, this paper tries to discuss the conditions for initiating the application of non-competition restrictions in different stages of the original contractual relationship: (1) Unlike the non-competition restrictions with trade secrets as the protective interests of the enterprise, the Internet economy under the flow of traffic as the core competitive advantage, between enterprises mainly to the number of visits, fans, discussions and other relevant traffic on the enterprise platform The comparative analysis of data as the main criteria for determining the interests of enterprises (Yang and Zhang, 2022; Xu and Zhu, 2020). Therefore, if an Internet marketer establishes a contractual or labor relationship with another enterprise during the normal performance of the contract or labor relationship, it will lead to the division of traffic between enterprises within a specific period, and the unfair competition for competing enterprises to obtain "free ride" profits. However, after the termination of the original partnership or labor relations between the enterprise and the Internet marketer, the enterprise based on the initial legal relationship to obtain the traffic and related economic output rights and interests terminated following the law, the Internet marketer can choose other enterprises in accordance with the freedom of labor, during which there is no longer an overlap and division of traffic. (Zhou and Yang, 2019) (2) The parties in the performance of the contract, based on the subject to exercise the right to terminate the legal relationship in advance of the end requires Specific analysis. If the Internet marketer unilaterally exercises the right to rescind on their own initiative, the company, as the rescinded party, will not have fully realized their contractual objectives and their protectable interests and competitive advantage will be harmed by the Internet marketer's early withdrawal from the original contractual relationship. The non-competition restriction can therefore act as a reasonable restraint and minimize the possibility of the Internet marketer causing damage to the company in bad faith. (3) Autonomous business needs, the unilateral exercise of the right to terminate or by unilateral agreement between the two parties to terminate, is the result of a rational weighing of the interests involved. It is reasonable to bear the consequences of the termination of the contract, the survival and development of a comprehensive marketing division and the balance of rights and interests of the enterprise's independent operation, should not limit the Internet marketer's other labor relations or cooperative contractual relationships established. (4) In addition, if the Internet marketer passively exercises the right of unilateral release due to the existence of illegal or breach of contract by the company and therefore loses the non-competition advantage, it can be considered as a reasonable price for the company to violate the principles of honesty, credit and voluntary equality. In this case, even if the company is the party being released, it may not continue to claim the non-competition obligation against the Internet marketer.

In this regard, the author believes that, for Internet marketers, a new occupational group, the design of the system of non-compete should be designed for the characteristics of the specific economic market, in cooperation or labor contract performance period can be based on common development by agreement in the form of an express contract reasonable agreement on non-compete. After the termination of the contract, the enterprise party to take the initiative to exercise the right to unilateral or agreed to release and Internet marketers passively exercise the right to release, should be prudent or even avoid the application of non-compete.

### 3. CONCLUSION

The Internet economy has been one of the most essential parts of China's market economy. In order to stabilize the development of new forms of economy and employment, it is necessary in order to propose targeted and time-sensitive countermeasures to the problems of market competition and survival and development of Internet marketers that have been or will be exposed. In order to guarantee the good and fast development of the Internet economy, prevent the application of non-competition restrictions from proliferating, and avoid the relevant institutional norms from falling into the dilemma of application, we should analyze the principle of application of non-competition restriction with the scientific development concept in view of the existing problems, and treat the right relationship and social market relationship involved in non-competition restriction carefully. Combined with the principle of equal consideration, we should take the reconciliation of conflict of interest as a prerequisite for the application of non-compete. To clarify the purpose of the application of non-competition restriction, to maintain an orderly and fair market environment as the evaluation standard for non-competition restriction, to analyze the behavior performance, the consciousness of the actor, and to coordinate treatment of the results of the act and the consequences arising from it. In the specific system, we should clarify the current legal relationship between enterprises and Internet marketers complex and diverse, to express contracts to establish non-competition legal relationship, and specifically combined with the performance of the underlying contract, release, termination of the form of flexible set of applicable basis conditions.

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