

Contents

[Praxis](#)

[The Licensing Journal, Contractual Freedom to Operate: A Surgical Approach, \(Sept. 1, 2026\)](#)

[The Licensing Journal, Praxis](#)

The Licensing Journal

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[The Licensing Journal, Contractual Freedom to Operate: A Surgical Approach, \(Sept. 1, 2026\)](#)

Contract Corner

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While a freedom-to-operate (FTO) analysis often centers on patent or trademark searches, contractual commitments can establish the practical boundaries—or maze—of a company's degrees of freedom. Organizations with a checklist of high-level issues to be addressed during contract discussion and negotiation (such as liability, compliance, and data protection) should consider adding FTO to that list. With a more holistic perspective of the FTO landscape and with business and technical teams' input, commercial counsel can find creative ways to complete the puzzle.

The Competitive Edge

Where there is growing buzz around a new offering, to protect its perceived value, contracting parties often push for limitations on competition or other exclusivity commitments. One key consideration is the scope of the restrictions, both in terms of the restricted markets and the restricted entities, as the inclusion of affiliates can have unintended "grow legs" consequences and complexity (whereas the omission of affiliates can open the door for circumvention).

A potential approach is to limit the restriction to the party and its subsidiaries (i.e., the affiliates it actually controls). Similarly, if the agreement relates to a particular technology, the restriction could include relevant licensees (e.g., resellers but not end users) of the applicable intellectual property (IP).

The situation is also in flux. Many non-compete provisions expire after a limited period and, as we've previously discussed, [\[1\]](#) these types of provisions can be changed or terminated. If the concern is operational flexibility but there is no plan to actually enter the relevant market during the restricted period, the team may be willing to accept the limitation.

But more complex organizations and businesses would need to carefully determine whether such limitations are practical, and the language of this type of provision can vary. For example, if a company knows it will not launch a new competitive product until after the restricted period ends, it may be willing to agree to the non-compete or exclusivity; however, the provision may include restrictions on prelaunch activities, thereby lengthening the actual time

to market.

Moreover, the description of the restricted market may be vague, increasing the likelihood of costly disputes, difficult business decisions, or red flags for future investors or acquirers during a due diligence process.

Keep in mind that restrictions on competition can be placed more subtly in other restrictive covenants. For example, some non-solicitation provisions go beyond hiring employees to include solicitation of third-party relationships. Similarly, some confidentiality provisions specifically identify, and restrict the use of, information related to third parties such as suppliers, distributors, or end customers.

IP at the Core

Even where contracting parties agree on ownership of background IP (e.g., each party retains the IP it brings to the table) and foreground IP (e.g., the customer owns any new, non-platform IP created specifically for it under the agreement), there could be uncertainty or risk associated with improvements. As we have previously examined,[\[2\]](#) “improvements” can be shaped in different ways, including as to what counts as the “base” technology being improved.

If a vendor has ownership of or license rights to improvements or customizations it makes based on valuable customer input, the customer may try to prohibit use of those innovations for the benefit of its competitors. The vendor should consider, with technical and operational precision, which configurations and other aspects are unique to the customer (and thus would not need to be used for third parties).

If the customizations are to the vendor’s platform or core models, the vendor may argue that it needs to own all associated IP, in which case the customer might be willing to operate under that structure if the vendor agrees to keep such customizations confidential (i.e., not disclose them to other customers). In any scenario where the vendor agrees to limitations on the use of improvements, the vendor could reserve the right to generate similar configurations or outputs based on a third party’s independent inputs.

Relatedly, as we previously explained,[\[3\]](#) residuals and feedback can be an important part of striking the IP and competitive balance. For example, some improvements or know-how may be a natural, and more generalized, part of the continuing development of the vendor’s technology, methodologies, and expertise. Yet customers should be on alert for language that could undermine (or even override) the otherwise carefully drafted IP and confidentiality provisions.

Are You/They Locked In?

One, perhaps less obvious, FTO consideration is the level of reliance on particular counterparties. As we have noted,[\[4\]](#) a key question today is whether a business and its product offerings are sustainable.

Business activities are not truly “free” unless implementation is, and will remain, practical. As such, if access to a particular technology or service is critical, the dependent party should build in surviving rights that can be operationalized. For example, does the party have the expertise and resources in place to maintain and operate the source code and underlying models if it receives post-termination access to those materials?

On the flip side, it’s important to analyze which restrictions survive, and for how long. It may depend on which party is terminating and why, and it may depend on which rights survive.

Post-Op

One main takeaway is that several provisions (e.g., IP, confidentiality, feedback, non-competition, non-solicitation, termination), potentially across multiple agreements, must be coordinated and tailored in light of the particular circumstances, including the parties' respective objectives and concerns related to FTO. While many commercial contracts and relationships are relatively straightforward, some have nuanced FTO-related implications metastasizing throughout, pivoting on a knife's edge.

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Footnotes

- ¹ See "Keeping Options Open When Going Exclusive," at <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2024/09/keeping-options-open-when-going-exclusive>
- ² See "Structuring Rights to AI/ML Outputs, Insights, and Improvements When Customer Data Is Foundational," at <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2024/09/structuring-rights-to-ai-ml-outputs-insights-and-improvements-when-customer-data-is-foundational>
- ³ See "Residuals Clauses vs. Feedback Licenses – Getting the Balance Right in IP Agreements," at <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2025/08/residuals-clauses-vs-feedback-licenses-getting-the-balance-right-in-ip-agreements>
- ⁴ See "Building Exit Rights and Portability into AI Deals," at <https://www.morganlewis.com/blogs/sourcingatmorganlewis/2026/02/building-exit-rights-and-portability-into-ai-deals>

<https://prod.resource.cch.com/resource/scion/document/default/paa0149194674b22a4bddba205f74cd1ee358?cfu=Legal&cpid=WKUS-Legal-Cheetah&uAppCtx=cheetah>