

# CLIENT ALERT

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## **FREEDOM TO OPERATE OPINIONS: WHAT ARE THEY, AND WHY ARE THEY IMPORTANT?**

**技术的自由实施 (FTO) 尽职调查意见书：是什么？为什么重要？**

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### **What is a freedom to operate opinion, and why is it important?**

**什么是技术的自由实施尽职调查意见书，其重要性是什么？**

A freedom to operate opinion (FTO) is a legal opinion from a qualified intellectual property attorney that concludes a proposed commercial product or process may be made, used, sold, or offered for sale without infringing another party's intellectual property rights. Although there is no legal requirement for a company to obtain an FTO opinion before taking a new product, process, or service to market, obtaining one can be very beneficial as a preemptive measure to aid in defending a company in patent litigation against assertions of willful infringement and exposure to treble damages. By minimizing litigation risks, an FTO opinion can also minimize potential investors' concerns about the marketability of the company's product, process, or service.

技术的自由实施尽职调查意见书是由一名有资质的知识产权律师出具的法律意见，得出是否能够在不侵犯另一方知识产权的情况下制造、使用、出售或要约出售一个商业产品或流程工艺的结论。尽管在法律上没有要求公司在将新产品、工艺或服务推向市场之前必须获得技术的自由实施尽职调查意见书，但是其可以作为一项提前采取的措施，帮助公司在今后可能出现的专利侵权诉讼中应对对方提出的故意侵权以及获得三倍赔偿的主张。一份技术的自由实施尽职调查意见书不仅最大限度地降低诉讼风险，其还可以最大限度地降低潜在投资者对于公司产品、工艺以及服务适销性的担忧。

### **How to obtain a freedom to operate opinion?**

**如何获取一份技术的自由实施尽职调查意见书？**

An intellectual property attorney can conduct the FTO search and analyze the results. The FTO analysis typically includes search results for issued patents and published patent applications that cover technologies similar to the company's technology and an assessment of any patent infringement litigation risk those patent matters may present. Often the analysis can clear many of these patents as posing little or no risk of litigation. In some instances, the search may uncover patents that appear to cover the company's product where certain product elements can limit the company's freedom to operate.

知识产权律师可以进行自由实施检索并分析结果。自由实施分析通常包括对涵盖与公司技术相似的技术的已授权专利和已发布的专利申请进行检索，以及对这些专利可能带来的任何专利侵权诉讼风险的评估。通常分析之后可以排除其中的许多专利，因为它们几乎没有或不存在诉讼风险。然而在某些情况下，检索可能会发现有可能会涵盖公司产品的专利，其中的某些产品元素可能会限制公司的运营自由。

At Dickinson Wright, we often also conduct searches for design patents, trademarks, copyrights, and competitor products to evaluate trade dress rights. If we find anything of concern, we may conduct a litigation search to determine how litigious a third-party patent holder has been concerning and protecting its intellectual property rights. After the searches, and provided your attorney concludes that you are clear to proceed with launching your product, process, or service, your attorney will prepare the FTO. Essentially, the FTO opinion can give a company the green light to bring a product, a process, or a service to market and shield it against a later judicial finding of willful infringement and exposure to enhanced damages arising from acts of willful infringement.

迪克森律所也经常为客户进行设计专利，商标，版权和竞争对手产品检索，以评估商业外观权利。如果我们发现任何值得关注的问题，我们可能会进行诉讼检索，以确定第三方专利持有人一直关注和保护其知识产权的可诉讼性。在检索过后，如果我们的律师得出结论认为您可以继续推出您的产品，流程或服务，我们的律师则将准备自由实施尽职调查意见书。从本质上来说，自由实施尽职调查意见书可以为公司将产品，流程或服务推向市场开绿灯，并保护其免受日后因故意侵权而做出的司法裁决，并且避免因故意侵权行为而遭受更大的经济损失。

### **What if we find a potential patent limiting the company's freedom to operate?**

**如果我们发现一项限制公司运营自由的潜在专利怎么办？**

If the freedom to operate analysis uncovers one or more high-risk patents, the company's research and development team can be informed of the issues involved and can be advised of what needs to be avoided and/or modified of its own product, process, or service to avoid infringing the patent(s). In other words, when faced with a potential issue, your attorney can work directly with your team to help identify and navigate potential paths around a third party's patent(s).

如果在自由实施分析后发现一项或多项高风险专利，公司的研发团队将被告知所涉及的问题，以及需要如何修改自己的产品，工艺或服务以避免侵犯专利。换句话说，当面临潜在问题时，我们的律师可以直接与您的团队合作，帮助识别和确定避免侵犯第三方专利的潜在路径。

### **When to pursue a freedom to operate opinion?**

**什么时候需要一份自由实施尽职调查意见书**

There are several stages in which a company may wish to pursue an FTO: 公司可以在以下几个阶段考虑获取一份自由实施尽职调查意见书

- Before launching products in markets that are particularly crowded, competitive, or litigious; 在推出一个在市场上特别热销，具有竞争性，以及诉讼风险较高的产品之前；
- Before raising a financing round in which investors will be

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putting significant sums of money at risk; and  
在进行一轮融资，投资者们将投入一笔大额资金并俱风险之前；

- If the company would suffer severe financial harm if patent litigation resulted in an injunction of its product, process, or service. 如果专利诉讼将导致对其产品，流程或服务的禁令，公司将遭受严重的财务损失的情况。

For more information, please reach out to one of our [intellectual property attorneys](#) today.

如果您有任何问题或需要，请咨询我们律所的专利律师。

## ABOUT THE AUTHOR



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