ECONOMIC POLICY NETWORK

Policy Paper 13

STRATEGIES FOR PROMOTING INDUSTRIAL PROPERTY LICENSING IN NEPAL

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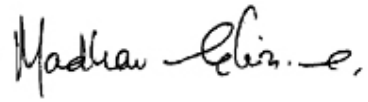
Inputs from various stakeholders during interactions at the CNI, Advisory Committee meeting, and the workshop organized by the EPN Focal Unit have been incorporated in the report.

Foreword

Economic Policy Network (EPN) is an undertaking of the Government of Nepal since August 2004 with an Asian Development Bank (ADB) technical assistance (TA) to develop and institutionalize an open, responsive and result oriented economic policy formulation process based on sound economic analysis and dialogues with the partnership of public and private sector, academia, and independent professionals, to support and consolidate the Government's economic policy reforms on poverty reduction strategy. The initial focus has been in the areas of macroeconomic management, trade, investment, employment, infrastructure, tourism, agriculture, and regional development through four thematic advisory committees chaired by the secretaries of the respective implementing ministries, and guided by a high-level steering committee. The present study is an outcome of the initiative under the Advisory Committee for Economic Policy on International Trade, Investment, and Employment chaired by the Secretary of the Ministry of Industry, Commerce, and Supplies.

The study reviews concepts of industrial property (IP) and analyzes the IP regime in Nepal and based on the analysis, makes recommendations to promote IP licensing in Nepal. The recommendations made in the report are the outcome of consensus reached among major stakeholders through various consultations and the EPN workshop. I hope the findings and recommendations will be helpful for policy makers for future reforms.

I would like to thank the Confederation of Nepalese Industries (CNI) for leading the study, and Mr. Sajjan Bar Singh Thapa for carrying out the study on their behalf. I also thank all those who have provided inputs for the report during the interactions at CNI, the advisory committee meetings, and the EPN workshop. The work of the Advisory Committee for Economic Policy on International Trade, Investment, and Employment is to be commended for selecting the issue and for following through with the study. I would also like to appreciate the entire EPN team for their hard work. I also thank the former Steering Committee chairperson (former Member of National Planning Commission) Dr. Champak Prasad Pokharel, for his guidance during his tenure. Last but not least, I would like to thank the ADB for supporting this initiative.



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EXECUTIVE SUMMARY

One of the basic ways for commercial exploitation of one's intellectual property is licensing. It is a very effective and efficient tool of forming business relationships and transferring technology. Industrial property licensing (IPL), a principal way to commercially exploit one's industrial property, have basically two major functions: it is a tool for exploiting one's industrial property and second, it provides required environment for technology transfer and enrichment of the marketplace. IPL's basic features are the grant of an intellectual property right. It is usually in the form of a contract. It involves a consideration of other subject matters. A license may be express, implied or statutory. IPL can be non-exclusive, sole and exclusive. Defining the right granted, rights to improvement, payment, degree of exclusivity, degree of protection, state of development, future development, warranties, limitations of liability & indemnities, dispute settlement and termination are important license provisions in which special attention have to be given. Several legal instruments for IPL are there for different forms of industrial property. Major forms of legal instrument for IPL are patent license, trademark license, design license etc. Industrial Property law of Nepal very briefly states about IPL. It does not have specific provision for IPL except mere recommendation of permitted use provision for trademark and design through register user mechanism in section 21 (d) of Patent, Design and Trademark Act 1965. The law does not provide licensing provision for patent. Since there is no other form of industrial property recognized in our legal system, there is no licensing provision available for other forms of industrial property such as confidential know-how, layout design of integrated circuit etc. This will adversely effect in technology transfer and foreign investment.

CONSTRAINTS

Since Nepalese industrial property law does not provide clear provision on its license we have barriers in vivid form in IPL. It may differ from the nature & form of the particular industrial property.

Patent

I. DOI not administrator

In the patent law there is no licensing mechanism for patent in Nepal. The patent office of Nepal, i.e. Department of Industry, will not be able to administer the patent licensing.

II. Patent license only in contract

Due to lack of patent licensing under the law the patent license will work through the general contract.

III. Technology transfer will not be transparent

When patent license is not registered in patent office, particular patent will not be transparent to the general public and patent office as well. Then technology transfer will not be transparent in the sense of public domain and patent office control.

IV. Public do not have access to the patent resulting the negative impact of the patent, which is dissemination of knowledge

V. Patent will be exploited for more than its term of protection

In the absence of provision of recording the licensing in DOI and its procedure, the patent can be exploited for more than its term of protection granted, by the parties involved in patent license, which are licensor and licensee.

VI. Government is loosing corporate tax from particular agreement

When patent licensing is not administered by the concern patent office, Government will loose corporate tax from particular patent license.

VII. High brain-drain rate and Low local R & D

When individual inventor is not able to exploit his invention in fullest trend through the licensing or exploit it by himself it would result in reduced R & D. The individual and local research and development activities will be low, because in the process of exploitation of the patent and its licensing process licensor cannot bargain with the licensee.

VIII. Compulsory license cannot be provided

No compulsory license can be granted under Nepalese patent law because licensing administration is not controlled by the concerned patent office.

TRADEMARK

I. Only identification of origin function is considered.

In Nepalese TM law, provision provided in Sec. 16 & 21 (d), do not consider modern function of trademark, advertisement and goodwill creation functions, as it does not permit registered user provision. Quality control concept is hidden within the concept of permitted user. It considers only source identification function.

II. The registered user provision in Sec.16 and 21 (d) of the PD&TM Act 1965 is not a pure licensing provision for trademark in Nepal.

III. There is no opportunity for bargain between the proprietor and user.

IV. Creates market monopoly or anticompetitive market.

V. Effect according to origin

Nepalese trademark licensing provision in the Act results various effect in several conditions. If a trademark is foreign, there are two effects:

(l) less possibility for foreign investment in joint venture and possibility of foreign direct investment. If a trade mark is local, it also has two effects: local goodwill can not give up to foreign investor which will result reduce joint venture investment and because local trade mark owner cannot give up his mark to others, either to the second party or to the foreign investor, instead it has to be sold, exploitation of the and goodwill can not be carried out in full.

DESIGN

I. No perfect design licensing
II. No bargain opportunity between the proprietor and user.
III. Nepalese design law does not accept the owner plus user right on a single design.
IV. Effect according to origin

Nepalese design licensing provision in the Act creates multi effect in various applications. If a design is foreign, there are two effects: less possibility for foreign investment in joint venture and possibility of foreign direct investment. If a design is local one, it also has two effects: local goodwill in design can not be given to foreign investor it is resulting in reduced joint venture and because local design owner can not give up his design in lease to others, either to the second party or to the foreign investor; rather should sell it, local can not exploit the design and goodwill in such design.

IMPROVEMENT

For the sake of overcoming this complexity and enhancing the industrial property licensing in Nepal several factures should be improved in Nepalese industrial property mechanism.

I. National policies on trade & economy have to be clear towards intellectual property and compatible IP policy should be developed with changed international scenario.

II. Legal provisions on intellectual property have to be compatible with both national as well as international IP system and TRIPS.

III. Concrete industrial property protection mechanisms have to be developed under the framework of the intellectual property law.

IV. IV. Systematic licensing provisions have to be incorporated within the framework of the industrial property law that will be compatible with both domestic interest as well as international commitment in the field of IPR protection and trade.

Additional provisions have to be incorporated in law relating to patent, design and trademark and other industrial property as well. That should have to have basic integrities for licensing of the industrial property:

a. Patent licensing provision has to add in patent law
b. Basic requirement of license needs to be defined
c. Registration procedure and administration of licensing

d. Particular form of patent license should be proposed with basic requirements
e. Compulsory licensing provision in Patent should be provided

3.1. Improvement policy

I. Defining IP policy in view of the National Trade and Economic Policy.

II. Making industrial property protection law concrete in line with national interest and policy with respect to industrial property licensing.

III. Finding loopholes of industrial property licensing mechanism.

IV. To provide industrial property licensing provision in industrial property law and make it compatible with the current need of trade and national policy towards national interest and the interest of the common public as well. It also has to be compatible with international system of licensing and international commitment for it.

V. Industrial property licensing provisions have to be provided within general as well as compulsory licensing provision.

3.2. Activities

I. Create complete licensing provision of patent by amending the Patent, Design and Trademark Act, 1965 in additional to the provision of transferring the title of patent.
II. Amend Patent Design and Trademark Act, Sec. 16 in order to incorporate the provision of registered user in trademark and design and also include mandatory registration of the license agreement.
III. Amend Sec. 21 of the Patent, Design and Trademark Act, 1965 so that the licensor need not surrender its ownership of its trademark or design, on IPL registration
IV. Incorporate additional provisions under the miscellaneous section for better administration of IPL by the DOI.

3.3. Indicators of achievement

The important indicator of the achievement of IPL is the statistics of the registered industrial property and license agreements recorded in the DOI. The increase in the registration of IPL at the Department of Industries is the indicator of achievement.

3.4. Responsible agencies

Department of Industry and other concerned ministries of the government are sole responsible agencies to manage the required legal mechanism for IPL under the concerned industrial property law. Besides these the guidance and inputs of Industrialists, professionals including academicians and other civil society members are also responsible for a perfect IPL.

Chapter I
Introduction

1.1 Industrial Property Licensing (IPL)

It is essential that those who are engaged in any business or industrial activity and in the technological and cultural development of the country should have the knowledge of the basic principles of the various branches of intellectual property law. Intellectual property (IP) is in fact a legal recognition to the creator's brainchild through which one can exploit the creative ideas. Commercial exploitation of one's intellectual property is possible in various ways. One of the basic ways is licensing. Licensing is a very effective and efficient way of forming business relationships and transferring technology. It is considered to be the best alternative to importation of technology. Through reverse technology transfer, one can also export adopted and improved technology.[1] A license is an agreement involving the transfer of rights from one party ("the licensor") to the other ("the licensee"). These rights commonly control the use (for copying, manufacture, sale etc.) of IP. It gives the licensee the permission to execute something, which the agreement recognises as the exclusive right of the owner of intellectual property. It is also immunity from being sued from the owner of the IP for the infringement of intellectual property rights, which are covered by the license.[2]A license can cover more than one type of intellectual property. An intellectual property license will last together with the exclusive rights of the licensor. A license is considered perfect if it is fair on both sides.

IPL is thus a principal way to commercially exploit one's industrial property, as it is a major faculty of intellectual property system. IPL basically has two major functions. The first is that it is a tool for exploiting one's industrial property, which is private right. The second is that it provides an enabling environment for technology transfer and enrichment of the marketplace that is public right in nature. As a general principle, licensing of intellectual property rights is pro-competitive. It provides wider public access to the benefits of the licensed intellectual property and contributes to the development and utilisation of new technologies.[3] IPL, therefore, is a mechanism for generating benefits to individuals as well as the public.

1.2 Industrial Property and ownership

Since IPL plays a vital role in the commercial exploitation of IP as well as dissemination of knowledge, several facts have to be scrutinised for complete IPL. Identification of industrial property through the classification of IP, identification and establishment of ownership in the identified industrial property and finding the limitations on the ownership are the bases for licensing industrial property.

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[1] Book by National Law School of Bangalore (NLSB) for Post Graduate Diploma in IP, p. 116

[2] Pearson, Hilary E & Miller, Clifford G, Commercial Exploitation of Intellectual Property, 1st ed., Blackstone Press Ltd. London, 1990, p. 318

[3]Ibid. , P. 328-9

1.2.1 Identification of Industrial Property

Human knowledge is not limited. As intellectual property is associated with human creative knowledge, it is becoming very wide in the field of legal jurisprudence. The fact can be observed very easily in the various forms of existing IPR. Volatility, as a feature of intellectual property, has dynamic nature in development of its form. It is important to know which kind of intellectual property is one's creative knowledge and its creation.

1.2.2 Identification and establishment of ownership

In the process of licensing industrial property, finding the ownership of particular classified industrial property is the next step after its identification. Determination of ownership is an important stage in IPL, where nature, form and kind of ownership have to be established.

1.2.3 Identification of limitation

Determining the limitations in ownership and its exploitation is another important stage in IPL.
These things have to be completed before assigning one's IP to the second person.

1.3 Features of Industrial Property Licensing

1.3.1 A license is the grant of an intellectual property right

A license is the first and the foremost grant of an intellectual property right from the licensor to the licensee. It is the essence of each separate rights, whether a patent, trademark, design or other, that will shape the substance of a particular license agreement.

1.3.2 Industrial property licenses are usually in the form of a contract

IP licenses are usually in the form of an agreement, which is the subject matter of the law of contract. A license is merely a grant of the right to use current intellectual property. For the license to have commercial significance, the actual terms and conditions of the grant must usually be specified in an agreement between the parties. Thus, while it is the grant of intellectual property right that enables its licensed use by the licensee, it is the contract that spells out how parties will carry out the agreement to their mutual benefit.

1.3.3 Industrial property licenses involve a consideration of other subject-matters

Although intellectual property licenses are usually viewed in terms of the inter-relationship between intellectual property and contract rights, other types of concerns, like taxation, product liability, competition law etc. are also involved.

1.4 Kinds of license

A license may be express, implied or statutory.

An express license is the one in which the permission is given in express terms. It is not valid unless it is written in the form of a document embodying the terms and conditions and registered in the authorised office.

In an implied license, the permission is not given in express terms but is implied from the circumstances. Implied license usually arises in connection with the purchase of articles embodying IPR and sold with or without restrictions i.e. Trademark license for use also imply commercial publication or brochure of the licensed product.

Licenses may be implied from conduct, or from variety of circumstances, indicating acquiescence or creating estoppels. As to shop rights or licenses implied in relationship of employer and employee. License to manufacture and sell patent is an example of an implied license.

Kinds of IPL:

I. Non-exclusive

Non-exclusive license is the kind in which the licensor grants any number of licenses to work on his IP. It means that the licensor can compete with the licensee and grant as many other licenses as it wishes[4]. In non-exclusive license, limitations may arise regarding persons, time, place, manufacture, use, or sell. It may be a license that is exclusive only within a specific geographic territory or a license that is exclusive only within a given field of expertise or a license that is exclusive for several months or years, but less than the entire term of the license agreement.

II. Sole

A sole license is the type under which the rights are exercisable only by the licensor and the licensee.[5] It prevents people, other than the owner, from using his IP.

III. Exclusive

An exclusive license means that no person, apart from the licensee can exercise the licensed rights in the territory covered by the license.[6] Only a single licensee can use the rights under exclusive license. An exclusive license excludes all other persons, including the owner, from the right to his IP. It is something more than a mere license but less than an assignment.

[4] Ibid, p. 322
[5] Ibid, p. 322
[6] Ibid, p. 321

1.5 Important license provisions [7]

There are some important provisions, which should be included even in the simplest license.

1.5.1. Subject matter

Defining the subject matter is not difficult when the license covers only a single piece of industrial property. However, when a technology is being licensed this may include several patents, confidential manufacturing information, copyright plant drawings and disclosure of future improvements. It then becomes very important to define accurately the subject matter that is being licensed in the particular IPL.

1.5.2. Right granted

It is important that the license is clear about which rights are granted; otherwise it will be assumed that all rights are covered. Particular attention must be paid to this point when the license covers multiple industrial property rights i.e. reproduction, distribution, manufacturing, marketing, selling, etc.

1.5.3. Rights to improvement

Practical use of the licensed technology usually leads to improvements in technology and the way it is used. It is in the interests of both parties to make the best use of technology, as this is likely to produce increased returns. There should be provisions for a two-way flow of information between the licensor and the licensee, with rights for each to use improvements developed by the other.

1.5.4. Payment

The various forms of payment and the factors that determine their choice are vital in any licensing. The amount of payment is also one of the most difficult factors in practice of licensing agreement. A perfect license should include the said factors in a clear and detailed manner.

1.5.5. Degree of exclusivity

It is obvious that an exclusive license is more valuable than a nonexclusive one because it guarantees freedom from direct competition. The license payment may also be affected by the presence of active, non-infringing competitors in the same market. Thus, the notion of the degree of exclusivity of the license is important in licensing.

1.5.6. Degree of protection

Degree of protection in one's industrial property provided by law is another important factor in licensing. The kind and nature of the particular industrial property is also important. Both the parties must be familiar with this fact so that they can reach a

[7] Ibid, p. 324

consensus for other factors such as considering the payment level for the IP, i.e. in patent pending and sublicensing the truth of patent pending or exclusive licensor's source in sublicensing needs to be clearly pointed out.

1.5.7. State of development

Being familiar with the state of development of the particular IP is also a vital point in IP licensing. This fact is strongly applicable in patent licensing before the completion of invention and after the provisional application of patent with provisional specification. Provisional application is provided in India but not in Nepal. A technology, which is already running successfully, creates less risk to the licensee than the one, which is in its early stage of development.

1.5.8. Future development

In most Industries, the technology used must be regularly upgraded in order to remain competitive. When upgrading is carried out by the licensor, a licensee should be prepared to pay more in order to utilise the upgraded technology.

1.5.9. Warranties, limitations of liability and indemnities

The person giving the license should state that something is true about the content of the license. He/she has to give the warranty for any negative consequence that might occur, and take the liability if any damage takes place. So the person who gives the warranty has to suffer if the statement turns out to be incorrect. Limitations of liability and indemnities will be considered on the basis of the particular warranty provision provided in the license.

1.5.10. Dispute settlement

Parties to IPL should seriously consider the dispute settle mechanism in case of dispute. Either it should be referred to arbitration or taken to the general jurisdiction of the court. The main advantage of dispute settlement through arbitration is that an arbitrator with experience in the particular field will be involved in the particular process. This enables the solution of dispute in a practical way. When the nature of license is cross border, or trans-boundary, it is important to clearly spell out the governing laws and dispute resolving mechanism in the agreement in case of dispute.

1.5.11. Termination

For a number of reasons, one or both parties may want the license to terminate before the expiry period. Therefore, conditions for termination & procedures for doing so have to be clearly mentioned.

1.6 Legal instruments for Industrial Property Licensing

1.6.1 Patent license

A patent is an invention that is novel, non-obvious in comparison to the prior art and which constitutes a genuine creative advance, and is capable of industrial application. An invention that satisfies these requirements may be granted a patent. It enables the proprietor to exploit the patented invention on an exclusive basis for a fixed period of time. Patent license is the very basic tool for exploiting the exclusive right granted by the patent. It is the consent of the proprietor, under specified terms and conditions not to exercise its negative right under the patent with respect to a third party, which forms the basis of a patent license. Under a patent license, the licensee promises that if he/she makes uses or sells a product or process in accordance with the patent claims, he/she will not be sued by the proprietor. In exchange for this promise, the licensee usually undertakes to pay consideration to the proprietor, typically in the form of royalties based on some measure of the use of the patent by the licensee. Thus the foundation of a patent license is the permission by the inventor or the owner of the patent to a third party to exploit the invention for commercial or technological purposes.

The patent owner may exploit his technology on his own by setting up industrial units to utilize his patented process or product. However, in many cases the patentee does not possess the capital or experience required to accommodate his own inventions. In such a case, he may assign all or part of his exclusive rights, or more strategically, license his rights to another (licensee) who possesses the crucial factors for commercialisation.

In the absence of agreement to contrary, joint owner of patent may not give valid license without consent of co-owners and without being accountable to them. The license itself is not a warranty of patent validity. License may be for limited time or for whole term of the patent. Unless duration is expressly limited, license is for term of patent. In any license of the patent, it is not lawful to insert certain restrictive conditions regarding the purchase or use of non-patented articles i.e. entailing license. Any contract for license to use the patent may be terminated by the licensee of the patent, at any time, after the patent has ceased to be in force.

1.6.2 Motive for patent license

There are various reasons of motivation for entering into patent license. The inventor may not have the financial or technical resources to commercialise the invention or may wish to take advantage of the expertise and resources of the licensee to further develop his/her invention. Whatever the motivation for its grant, the license protects the licensee from competition from third parties for a limited period of time. At the same time, it shields the licensee from being sued on grounds of infringement.

1.6.3 Form of Patent license

A patent license may be either exclusive or non exclusive. Under an exclusive license the licensee is guaranteed that neither others nor the proprietor itself will exploit the invention within a defined territory. The guarantee of exclusivity serves as the inducement for the

licensee to make certain investments and expend substantial efforts in exploiting the invention.

A non-exclusive license furnishes no such guarantee of exclusivity, and it is essentially a covenant not to sue on the part of proprietor.

1.6.4 Trademark license

In the past, trademark licensing was not permitted by law because licensing was viewed as incompatible with the sole function of trademark, namely the identification of the source of goods. Use of the mark by a licensee, being a person other than the proprietor of the mark, was deemed deceptive, since the licensed use no longer designated the source of goods. Later, the trademark was understood as serving a related function, the assurance of a consistent expectation of quality in respect of the goods. With the recognition of the quality function of a trademark, trademark licensing was permitted, subject to some provision of quality control over the license.

Under the trademark license, the trademark owner gives permission for its trademark to be used on goods or services, manufactured or sold, offered by the licensee. The licensed trademarks should be registered in each country of use.

Licensing of registered marks is subject to several conditions[8]

- The owner of the mark must be able to control the quality of the mark by the licensee.
- The quality of goods or services supplied by the licensee under the mark must be specified and controlled.
- There must be a trade connection between the owner of the mark and the licensee or his goods or services.

1.6.5 Design license

Industrial designs include industrial drawings and industrial models. Industrial drawings are any combination of figures, lines or colours incorporated to an industrial product as an ornament giving it a peculiar identity of its own. Industrial models are tri-dimensional models that serve as special appearance, provided they do not imply technical effects. It is the feature of shape, configuration, pattern or ornaments applied to an article by any industrial process, which in the finished article appeal to and are judged by the eyes. Once granted a registered design it can be transferred and exploited through license. Voluntary licenses, whether bare, sole or exclusive, can readily be granted. A compulsory license of a registered design could be granted on one broad ground, that the design is not being used for certain duration in the country to such an extent as is reasonable in the circumstances of the case.

[8] Ibid, p. 321

Chapter II

INDUSTRIAL PROPERTY LICENSING IN NEPAL

2.1. INDUSTRIAL PROPERTY LICENSING IN NEPAL

Industrial Property Law of Nepal states very briefly about IPL. It does not have specific provision for IPL except mere recommendation of permitted use provision for trademark and design through register user mechanism in section 21(D) of Patent, Design and Trade mark Act 1965. The law does not provide licensing provision for patent. Since there is no other form of industrial property recognised in our legal system, there is no licensing provision available for other forms of industrial property such as confidential know-how, layout design of integrated circuit, etc.

2.1.1. Patent

Nepalese Patent Law does not provide clear mechanism for patent licensing in Nepal. It has provided only the provision of transfer of patent right. If any patentee transfers any patent registered in his/her name after relinquishing his title thereto the transferee shall submit an application to the Patent Design & Trademark Section, Department of Industries, for removing the name of the owner from the patent register and then register the name of transferee therein.[9] Since there is no patent licensing provision in patent law; it is very difficult to point out particular mechanism for patent licensing in Nepal. Person with registered patent can go to the patent office of Nepal, i.e. Department of Industries (DOI), only for the transfer of his/her registered patent right but not for license. In the absence of patent license provision in the Act, one may not go through patent license process under the present patent law in Nepal. So, patent license mechanism goes through the law of contract and shall be the subject of contract law rather than solely of intellectual property law.

National economic and trade policy during the time of enactment of Patent, Design and Trademark Act, 2022, including then foreign investment, needs to be analysed in order to get the proper understanding of the present available form of the patent transaction provision in Nepal.

2.1.2. Trademark

Concept of trademark has been presented in the form of identification of the origin of the product. Nepalese trademark law does not accept the modern function of trademark that is advertisement and goodwill creation because it does not concretise the use of trademark by the person other than the proprietor or authorised owner. If a person desires to allow others to make use of the trademark registered in his/her name, both parties must submit a joint application to the department.[10] The department may approve the same.[11] In case approval is granted, the title of the concerned trademark will be transferred to the person who has been permitted to use such trademark.[12] A person can only use a trademark registered in the name

[9] Sec. 9, Patent Design and Trade mark Act, 1965
[10] Sec. 21D 1., Patent Design and Trade mark Act, 1965
[11] Sec. 21D 2., Patent Design and Trade mark Act, 1965
[12] Sec. 21D 3., Patent Design and Trade mark Act, 1965

of any other person, with the written permission of the registrant.[13] But, in the absence of the trademark rule, this provision will be applicable through the miscellaneous provision provided in Sec. 21. (D) of the Act.

So, Nepalese trade mark licensing provision does not allow the use of someone else's trade mark without the approval of the Department, no matter whether permission is granted by the registered proprietor. Dual right and control over the single mark within the single territory is not considered in Nepal in the sense of proprietorship and permitted user. In this sense, Nepalese trade mark law does not have the concept of registered user but it is only a concept of permitted user. Trademark law in India is comparatively different from that of Nepal. India has both permitted user as well as registered user concepts. Indian Trade Mark Act 1999 permits the use of a registered trademark by any person, other than the registered proprietor, in respect of any or all of the goods or services in respect of which the trade mark is registered.[14]

Collateral (warranty) Aspect of Trade Mark Licensing

I. Product liability

A matter of increasing concern to the trademark licensor is potential civil liability due to injury caused by defective products made and sold under the licensed trademark. Such liability is popularly called 'product liability'.[15] This is in the nature of manufacturing agreement wherein the quality and other specifications have to be maintained. Quality control is an essential element of any trademark license and no license should permit unfettered use of its trademark without some degree of control or supervision over the quality of goods and services.

II. Liability based on control

The licensor's liability rests on its control over the manufacture of licensed product. There are two facts to be noted which is the relationship, if any, between quality control for the purpose of the trade mark laws, and control over the process and manufacture of the product for the purpose of product liability.

III. Tests for control

One way to view the quantum of control required for establishing the necessary link between the licensor and licensee for the purpose of tortuous liability is to consider the overall license arrangement. The following factors have been deemed supportive of finding of actual control:[16]

a. Regulating the licensee's hours of operations;
b. Going beyond the specification of standards by laying down methods for preparing or providing the goods or services;
c. Detailing methods of operation;

[13] Sec. 16.2, Patent Design and Trade mark Act, 1965
[14] Sec.48, The Indian Trade Mark Act, 1999
[15] Wilcox, Neil J., Trade Mark Licensing, Sweet & Maxwell, London, 1995, p. 270
[16] Wilcox, Neil J., Trade Mark Licensing, Sweet & Maxwell, London, 1995, p. 271

d. Designating the stock to be carried;
e. Specifying the suppliers.

2.1.3. Design

Registered design can be assigned to the second person through written permission.[17] A joint application for that purpose has to be submitted to the competent authority, i.e. DOI, and the authority may approve the same. The title to the concern design will be transferred to the person who has been permitted to make use of such design.[18] Licensing provision for registered design is the same as the trademark in Nepal.

2.2. TECHNOLOGY TRANSFER AND FORIGN INVESTMENT

Technology transfer and intellectual property licensing is inter-disciplinary; it mixes technology, business and law and deals with cutting edge innovations, creative business arrangements and intricate legal issues. At the transfer of technology level, it also raises issues of international relations and politics. Due to globalization, a new factor has become crucial in international competitiveness. This new factor of production is a set of assets as "knowledge" and "innovation" which now determine international competitiveness. This asset is sometimes called "technology". The terms denote a set of tangible assets, which can be used by their owner and like any other type of assets, may be susceptible to obsolescence, misappropriation and duplication.

The commercial and economic significance of IPRs have also made them a focal point of debate around the world. The debate centres on how the grant of these rights affects the developing and the developed nations; of particular importance is how to balance the divergent interests of the technology rich developed countries and the less prosperous countries that typically import technology to facilitate economic growth and development.

Multinational enterprises make multifaceted decisions regarding the means by which they can serve foreign markets. Firms may choose simply to export at arm's length to a particular country or region. Alternatively, they may decide to undertake foreign direct investment (FDI), which requires selecting where to invest, what kind of facilities to invest in, whether to purchase existing operations or construct new plants (so-called Greenfield investments), which production techniques to pursue, and how large an equity position to take with potential local partners. Firms may prefer a joint venture with some defined share of input costs, technology, product, or service, thus leading to complicated issues of bargaining over license fees and royalty payments. Those decisions are jointly determined and, for any firm, the outcome depends on compelling factors regarding local markets and regulations. IPRs clearly play an important role in those processes, though their importance varies by industry and market structure.[19] Since the extent of IPR protection in a host country affects the composition of FDI, it receives; the weak regime deters foreign investment in high-technology sectors, where IPR play an important role. The relation between IPR protection and FDI is quite complex. On one hand, a weak IPR regime increases the probability of imitation, which makes a host country a less attractive location for foreign investors. On the other hand, strong protection may shift the preference of Multinational

[17] Sec. 16 Patent Design and Trade mark Act, 1965
[18] Sec. 21D, Patent Design and Trade mark Act, 1965
[19] Intellectual Property & Development, World Bank & Oxford University Press, p.43

Corporation from FDI towards licensing because the rate of return in joint venture investment will be high.[20]

The license mode of technology transfer is precise in technology targeting as it allows the licensee a higher control over the acquired technology to be used, adapted or developed. Therefore it can fit neatly into the industrial policy of the governments.

2.2.1. Forms of technology- based transactions licensing arrangements[21]

The most basic form of technology transfer is the licensing agreement, which may cover patents, trade secrets, copyrights, and/or trademarks. A license conveys to the licensee the right to use the licensed intellectual property right for the specific purposes described in the agreement without fear of being sued for infringement or misappropriation by the owner of the right. In effect, a license is a contractual exception to the otherwise exclusive rights of the owner. In some cases, the license will extend to subsequent improvements or enhancements to the original licensed subject matter.

I. Research & development arrangement

Research and development arrangements contemplate a coordinated effort by the parties to make fundamental changes or improvements in specified core technologies. The research may be conducted under an agreement, which ensures one party to fund the research work of another party in return for the rights to use the resultant technology in various applications. If the parties have complementary technical skills and assets, the development program may include cross-licensing agreements and sharing of scientific and engineering personnel.

II. Purchasing & manufacturing arrangement

Another common and important type of technology transaction involves the purchase and manufacture of technology-based goods. For example, a firm may be able to realize greater efficiencies in production by utilizing low-cost manufacturers, often overseas, to manufacture its products. The firm may achieve these cost savings by granting a license to the manufacturer to manufacture the products and agreeing to repurchase them at a fixed price, perhaps at some multiple of the manufacturer's actual cost. The license must include an agreement related to technical assistance since the manufacturer must be trained in a manner, which guarantees that its products are similar in quality to those that would otherwise be produced by the licensor.

III. Distribution arrangement

A technology transfer often occurs in the distribution arrangement covering the marketing of goods and services embodying the licensed technology. One basic form of distribution relationship would involve a sale of goods by the manufacturing entity to the distributing entity for resale by the distributor, combined with a license covering all the

[20] Intellectual Property & Development, World Bank & Oxford University Press, p. 134
[21] Intellectual property in Global Market, Kluwer Law International, p.24-25

patents, trade secrets and trademarks required in order for the distributor to market and service the products. This type of arrangement will allow the manufacturer to take advantage of the sales network of the distributor. In turn, the distributor gains access to new products without incurring the costs of internal development.

IV. Joint venture arrangement

Rather than relying on one or more of the contractual arrangements as referred above, the parties may choose to create a formal, commonly owned joint venture company to conduct some or all of the activities relating to the technology. For example, a joint venture may be formed to conduct additional research and development projects, as well as to manufacture and distribute the various derivative products. A joint venture arrangement serves a number of purposes and, obviously, tends to bring the interests of the parties into much closer alignment than would be the case if the technology transfer simply consisted of a license agreement between two essentially unrelated parties.

2.3 PROBLEMS OF INDUSTRIAL PROPERTY LICENSING (BARRIERS)

Since the Nepalese Industrial Property Law does not contain clear provision of license, we have problems of various types. These problems may differ in nature and form of the particular industrial property.

2.3.1. PATENT

I. DOI not an administrator

In the patent law there is no licensing mechanism for patents in Nepal. The patent office of Nepal, i.e. DOI, is not able to administer patent licensing. In such a condition patents that are granted will not be transparent and clear.

II. Patent license only in contract

Due to the lack of patent licensing under the law, patent license will work only through general contract, and it is not compulsory to be registered at the patent office.

III. Technology transfer will not be transparent

Technology transfer will become effective if patent licensing system is developed. But, if patent license is carried out through general contract, no formal procedure is required under the DOI. It allows the exploitation of IP without the registration of patent license. When patent license is not registered in patent office, particular patent will not be transparent to the general public and patent office as well. Then technology transfer will not be transparent in the sense of public domain and patent office control.

IV. Public does not have access to patent resulting in the negative impact of the patent, which is dissemination of knowledge

When patent licensing is not transparent and there is absence of administrative support and control from the concerned patent office of the country, it is possible that patents will be used

without registration. Similarly the patent license can also be used without registration. This will result in the public's inaccessibility to patent, which hampers the main function of patent, which is to disseminate knowledge in the proper sense.

V. Patent will be exploited for more than its term of protection

When patent licensing and its exploitation is not transparent, unfair exploitation of particular patent is possible. In the absence of the provision of recording licensing and its procedures in DOI, the patent can be exploited for more than its term of protection granted, by the parties involved in patent license.

VI. loss of corporate tax

When patent licensing is not registered and administered by the concerned patent office, Government will lose corporate tax from particular patent license.

VIII. High brain-drain rate and Low local R & D

Since there is no patent licensing mechanism available under the Nepalese Patent Law, exploitation of a patent is possible in two ways - either assigning it to the second party or giving it through the general contract. In both of these conditions individual inventors will be affected and possibility of brain drain will be high because the individuals will not have strong bargaining power.

When individual inventor is not able to exploit his invention in the fullest trend through licensing or by himself, it would result in reduced R & D. The individual and local research and development activities will be low, because in the process of exploitation of the patent and its licensing process the licensor cannot bargain with the licensee.

VIII. Compulsory license cannot be provided

Since compulsory licensing is the major tool for keeping the interest of the general public in patent system balanced, it is important provision thereto. But no compulsory license can be granted under the Nepalese patent law because licensing administration is not controlled by the concerned patent office.

2.3.2. TRADEMARK

I. Only identification of origin function is considered.

In the Nepalese Trademark Law, provisions provided in Sec. 16 & 21(D) do not consider the modern function of trademark, such as advertisement and goodwill creation functions as it does not permit registered user provision. Quality control concept is hidden within the concept of permitted user. It considers only the source identification function.

II. The registered user provision in Sec.16 and 21(D) of the Patent Design and Trademark Act 1965 is not a pure licensing provision for trademark in Nepal.

III. There is no opportunity to bargain between the proprietor and the user.

Since there is no trademark licensing provision in the real sense in Nepal, one cannot get the bargaining power with the user of the trademark in the fullest form. It will thus affect the domestic trademark to a great extent.

Nepalese TM law does not accept the owner plus user right on a single Mark. It may be because of the possibility that it may mislead and create confusion of origin and source of the product provided in the market.

IV. Creates market monopoly or anticompetitive market.

Lack of the registered user provision in Nepali trademark law helps to create market monopoly or anticompetitive market practice. It will also create extreme monopoly in trademark, because it does not facilitate competition through licensing.

V. Effect according to origin

Nepalese trademark licensing provision has various effects in several conditions.

Foreign TM

If a trademark is foreign, there are two effects:

a. Less possibility of foreign investment in joint venture.
b. Possibility of foreign direct investment

Domestic TM

If a trademark is domestic, it also has two effects:

a. Local goodwill cannot give up to foreign investor, which will result in reduced joint venture investment.
b. Because local trademark owner cannot provide his mark to others, either to the second party or to the foreign investor, exploitation of the goodwill cannot be carried out in the fullest sense.

2.3.3. DESIGN

Design licensing provision in Nepal is almost the same as trademark licensing. Patent Design and trademark Act 1965, Section 16 and 21 deals with this aspect, which have similar vivid problems relating to design licensing.

V. No perfect design licensing

One cannot give his design in license under the provision of Patent, Design and Trademark Act 1965. Section 16 and 21 of the Act cannot be stated as pure licensing provisions.

VI. No bargaining opportunity between the proprietor and the user.

Since there is no design licensing provision in the Act, one cannot get the bargaining power with the user of the design in broad sense. It will primarily affect domestic design.

VII. Nepalese design law does not accept the owner plus user right on a single design.
VIII. Effect according to origin

Nepalese trademark licensing provision is having its vivid effect in various conditions.

A. Foreign design

If a design is foreign, there are two effects:

a. Less possibility of foreign investment in joint venture.

Joint venture investment will be less possible, because foreign investor will have no opportunity to work on the same design at a moment within the same territory by license.

b. Possibility of foreign direct investment

Because foreign investor will have no opportunity to work on the same design within the same territory by lease they have to get the design registered in their name, which means investment will be direct.

V. Domestic design

If a design is local, it also has two effects:

a. Local goodwill in design cannot be given to foreign investor, which will result in reduced joint venture.
b. Because local design owner cannot give up his design in lease to others, either to the second party or to the foreign investor; rather should sell it, local cannot exploit the design and goodwill in such design.

2.4 POSSIBILITIES IN ENHANCING INDUSTRIAL PROPERTY LICENSING (IMPROVEMENT)

Industrial property licensing in Nepal is complex in nature, as it does not provide concrete form of licensing mechanism within its legal framework. For the sake of overcoming this complexity and enhancing industrial property licensing, several factors need to be improved in the Nepalese industrial property mechanism.

V. National policies on trade and economics should be clear about intellectual property and compatible with changed international scenario.
VI. Legal provisions on intellectual property should be compatible with both national as well as international policies upon the IP system and TRIPS.

VII. Concrete industrial property protection mechanisms have to be developed under the framework of the intellectual property law.

VIII. Systematic licensing provisions should be incorporated within the framework of the industrial property law that will be compatible with both domestic interest as well as international commitment in the field of IPR protection and trade.

IX. Intellectual property should included in the curriculum of High School and College level

X. Awareness program about the importance of Intellectual Property should be carried out through out the country. The focus should be to all kinds of businesses and entrepreneurs.

Additional provisions have to be incorporated in law relating to patent, design and trademark and other industrial property as well. That should have the basic integrities for the licensing of industrial property:

Patent licensing provision should be added in the patent law, which should provide:

- Basic requirements of license.
- Registration procedures and administration of licensing
- Proposal of particular form of patent license with basic requirements
- Tax aspects
- Provision of compulsory licensing

Chapter III

Conclusion and recommendations

3.1. Constraints

IPL provision in the Nepalese Industrial Property Law does not give an ideal licence mechanism. Since there is no provision for licensing of patent in the Nepalese patent law, it is a major constraint for patent licensing. It provides only the transfer of title of a patent.

In the field of trademark law, provision of licensing is quite complicated because it does not permit the exploitation of a trademark by the owner by permitting others to use the mark without transferring his/her title on the particular trademark. Sec.16 and 21 of the Nepalese Patent, Design and Trademark Act 1965 provides the concept of permitted user, not the registered user. The constraint in trademark licensing is that it does not provide actual licensing mechanism for trademark licensing.

Design licensing provision in the Nepalese design law is also critical in the sense that one cannot exploit his/her registered design in the actual way that intellectual property principle provides by means of licensing. Inapplicability of registered user practice in Nepal is a major constraint in the field of design licensing in Nepal.

With respect to other forms of industrial property, the Nepalese Industrial Property Law does not provide even its concepts, such as confidential know-how, geographical indication, integrated circuit etc.

3.2. Improvement policy

I. Defining IP policy in view of the National Trade and Economic Policy.

II. Making industrial property protection law concrete in line with national interest and policy with respect to industrial property licensing.

III. Finding loopholes of industrial property licensing mechanism.

IV. To provide industrial property licensing provision in industrial property law and make it compatible with the current need of trade and national policy towards national interest and the interest of the common public as well. It also has to be compatible with international system of licensing and international commitment for it.

V. Industrial property licensing provisions have to be provided within general as well as compulsory licensing provision.

3.3. Activities

V. Create complete licensing provision of patent by amending the Patent, Design and Trademark Act, 1965 in additional to the provision of transferring the title of patent.

VI. Amend Patent Design and Trademark Act, Sec. 16 in order to incorporate the provision of registered user in trademark and design and also include mandatory registration of the license agreement.

VII. Amend Sec. 21 of the Patent, Design and Trademark Act, 1965 so that the licensor need not mandatorily surrender its ownership on its trademark or design.

VIII. Incorporate additional provisions under the miscellaneous section for better administration of IPL by the DOI.

3.4. Indicators of achievement

The important indicator of the achievement of IPL is the statistics of the registered industrial property and license agreements recorded in the DOI. The increase in the registration of IPL at the Department of Industries is the indicator of achievement.

3.5. Responsible agencies

Department of Industry and other concerned ministries of the government are sole responsible agencies to manage the required legal mechanism for IPL under the concerned industrial property law. Besides these the guidance and inputs of Industrialists, professionals including academicians and other civil society members are also responsible for a perfect IPL.

Chapter IV

Way Forward for Promotion of IP Licensing

The industrial policy in its framework should recognize the importance of research and development in industries and it should promote creation of intellectual property and its utilization. As the industrial policies are broad goals of the Government the recognition of creation of intellectual property and its utilization will encourage entrepreneurs to create and use intellectual property. This will enhance the knowledge and awareness about the intellectual property and its importance will rapidly spread in the country. Addressing intellectual property in the industrial policy will simultaneously achieve various goals namely awareness building, importance of intellectual property in business, creation of intellectual property and utilization.

Intellectual property is an asset to any business, if it is utilized properly will garner economic benefit. It has been widely used in the developed world and the domestic and international laws have recognized intellectual property as valuable property. Some business community in Nepal have already accepted it and others will also accept it if the proper information of creation & utilization and the intellectual property's potential growth and worth is imparted. There are various ways in which the creation of Intellectual property is disseminated. As an example the Government can create a research fund to carry out research activities. The mode of using the fund can be method of matching the fund from the public or private or the detail of the use can be prescribed. Other way of initiating research and development can be tax holiday to business or individual who is able to secure invention or other useful know-how through research. Another way would be to waive the intellectual property licensing fee at the time of registration of license agreement to business those who fall under medium or small industries. As an incentive, prescribed business could be give income tax deduction on the royalty fee payment paid to the licensor to promote use of technology and know-how.

Even the best policy and law could remain docile if the proper implementation of the policy and law remains in vacuum. In order to properly implement the law and policy, the enforcing entity needs to be structured in the similar manner. In this regard the implementing institution under the prevailing law the Department of Industries needs to be strengthened in parallel. The Department at present functions as line agency of Ministry of Industries, Commerce and Supplies with different responsibility. Industrial Property Section is one section among various other function that the Department of Industries perform. Its resource in terms of both financial as well as human is scarce. The technical manpower such as patent examiner, required for the prosecution of intellectual property is not available. The Department of Industries requires financial and the human resource to carry out awareness and other activities to promote intellectual property.

The figures of domestic patent application filed at the Department of Industries portraits the picture that the Nepali entrepreneurs are not aware of the importance of inventions and there are no expenditure in research and development. This is due to lack of awareness about the intellectual property among the businesses in Nepal. The Department of Industries have the responsibility of carrying out the awareness program but due to above stated reason of financial difficulty it has been functioning as mere registry acting as custodian. Its pro active functional responsibility has not been achieved. As mentioned above the Department does not

have its own resource, they have to function from the yearly budget from HMG. The resources that the Department collects through industrial property fees such as registrations, amendments and recordation's directly goes to state exchequer. In this circumstances concept of creating Intellectual Property Authority could be suggested.

An intellectual property authority as autonomous body would be able to promote intellectual property since it will not have other responsibilities. The resources generated from different fees can be used in awareness building and betterment of intellectual property. Financial autonomy would provide the authority to plan and spend in the prioritized area of intellectual property. At present one of the least used forms of industrial property in Nepal is patent. If we look the importance of patent and inventions in the industrial sector it is a key in the industrialization process. So these types of key intellectual property areas could be identified and prioritize in awareness. In the Authority the present system of transfer of staffs would cease and the time and energy invested by the officer and the institution would not go in waste.

The other plausible way to maximize licensing strategy would be to create and data base system of patent by Government or in public private partnership. This data base will keep the records of patents of all kinds and display the status of the patent. The interested business and individuals may be able to access the benefit of the patent and decided accordingly regarding its use. This data base information will give the potential user to use it if the patent is in public domain, or license the use in their respective business if the patent is still under the control of owner or develop a new patent from the existing patent information. The data base will provide information of patent and know-how to the businesses in Nepal then an interested business people can bring the technology through licensing process. The data base can work as mediator for the owner of industrial property and investor to come to licensing agreement for the use of intellectual property. This system will help foster, generate and use of intellectual property as a whole and be beneficial in promoting licensing strategies in Nepal.

Annex 1: Policy Action Matrix

CONSTRAINTS	POLICY IMPROVEMENT	ACTIVITIES	INDICATORS	TIME FRAME	RESPONSIBLE AGENCY
Patent * DOI not administer * Patent license only in contract * Technology transfer will not be transparent * Public does not have access to the patent resulting the negative impact of the patent which is dissemination of knowledge * Patent will be exploited for more than its term of protection * Government is loosing corporate tax from particular agreement * High brain-drain rate and Low local R & D * Compulsory license can not be provided	* DOI should be administer * Patent license should be a formal document under the DOI * Technology transfer should be made transparent * Public should be able to access the registered patent which disseminates the knowledge * Exploitation should be monitored by DOI * Registration fee can be collected by DOI * Brain-drain rate can lowered by regulating patent licensing * Compulsory license provision should be in place	**Amendment to PDT Act** * Making the DOI as monitoring agency * Making the DOI as administrative agency in patent license * Registration of patent license provision *Information about expiration of the patent term * do * Provision of registration of license with registration fee * Provision of IPL agreement registration * Incorporation of compulsory license provision	The statistic of the registered patent and license relating thereto recorded in DOI.	Within the fixed period as required	* Department of Industry and other concerned ministry of the government * Industrialist, professionals including academicians and other civil society
Trademark * Only identification of origin function is considered. * In sense registered user provision in Sec.16 and 21.d of the PD&TM Act 1965 is not a pure licensing provision for trademark in Nepal. * There is no opportunity for bargain between the proprietor and user. * Creates market monopoly or anticompetitive market * Effect according to origin	* Trademark licensing provision should provide permitted user * do * do * do * do	* Permitted user provision should made in Sec.16 and 21 * Compulsory ownership transfer provision in Sec. 21 should be amended * do * Permitted user provision should be made in Sec. 16 & 21 * Compulsory ownership transfer provision in Sec. 21 should be amended	The statistic of the registered trademark and license relating thereto recorded in DOI.	Within the fixed period as required	* Department of Industry and other concerned ministry of the government * Industrialist, professionals including academicians and other civil society
Design * No perfect design licensing * No bargain opportunity between the proprietor and user * Nepalese design law does not accept the owner plus user right on a single design * Effect according to origin	* Design licensing provision should provide for permitted user * do * do * do	*Permitted user provision should be made in Sec.16 and 21 * do * do * Compulsory ownership transfer provision in Sec. 21 should be avoided	The statistic of the registered design and license relating thereto recorded in DOI.	Within the fixed period as required	* Department of Industry and other concerned ministry of the government * Industrialist, professionals including academicians and other civil society

ANNEX 2: Number of IP Registered in Nepal

Total number of Industrial Property registered in HMG Department of Industries Nepal till date:

1.	Patents –	58
2.	Trademarks –	24,106
3.	Designs -	64