
UNIT 1 GENERAL OVERVIEW OF INTELLECTUAL PROPERTY

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1.1 INTRODUCTION

We encounter intellectual property at every step of our lives today. The design on the bed sheet and the pillow covers, the bed and other items of furniture in the house, the cereals for break fast, the pasteurised milk in tetrapack, the soft drinks and their bottles, the television, the personal computer, the gas stove, the microwave, the refrigerator, the vehicles, the weighing machine, the books, the films, the music cassettes, the tiles, the paints, and practically everything we use is the product of human ingenuity, knowledge and skill, besides labour and capital and falls under some kind of intellectual property that had to be respected before the item could be lawfully manufactured.

Objectives

After studying this unit, you should be able to:

- appreciate the concept of intellectual property vis-à-vis physical property;
- learn the different categories of intellectual property;
- appreciate the rationale behind IP, and the underlying premises;
- understand how a balance is sought to be achieved between the rights of the owner of IP on the one hand and the rights of other individuals and the society in general on the other; and
- know the position of IP under the Constitution of India.

1.2 THE CONCEPT OF INTELLECTUAL PROPERTY

The concept of intellectual property (IP) will be understood better if we understand what is meant by the term property. To a lay person property means some material object belonging to a particular person. The concept of ownership is critical to the concept of property. Ownership means the right to possess, use and dispose of the property and exclude the others. If a society does not recognise ownership, it will have no concept of property. In the legal sense, property refers to the bundle of rights that the law confers on a person by virtue of the ownership and possession of an object.

However, a material object under one's possession may not amount to much as property if it does not become a resource to satisfy some human want or need. Man by

exertion of his intellect, either in the form of ideas or technology, converts a natural resource into something of utility, making it an item of property.

Two factors significantly influence the value of an object as property. The first is scarcity, which refers to its availability in relation to the need. The scarcer is a thing in relation to the demand for it, the higher is its value. The second important factor influencing the value of an object is the knowledge of its use or uses. The higher the value of an object, the more zealously is it guarded as a 'property'.

What rights constitute the bundle of rights that are termed as property? These rights deal with various aspects of the relationship between persons and their property, such as: ownership and possession; use and enjoyment of the fruits of its application; exclusion of others from use and application of the property; and transfer of rights in the property.

The property can relate to a tangible thing e.g. land or buildings, or to an intangible thing e.g. a copyright. In the former case they are referred to as tangible or corporeal property, in the latter case they are known as intangible or incorporeal property.

Tangible property has a big advantage over intangible property: the fact of possession of a physical object by the owner ensures that any other person is excluded from using it. It is not so with the creations of the mind, say, an invention or a book which can be reproduced otherwise.

This brings us to the concept of intellectual property. It is simply the property created by the application of human mind. It is non-physical (intangible) and it derives its value from idea(s).

There is no uniform definition of IP. The domain of IP is expanding fast as knowledge and information become key drivers of techno-economic growth and of societal progress in general.

IP is a dynamic area; as science & technology make rapid advances, and as competition for markets becomes ever more fierce, human ingenuity is throwing up ever new ideas and newer products. Newer areas are emerging with claims for recognition as IP. They have to be accommodated as IP either in one of the existing categories or in new categories that have to be created. Thus while copyright originally was concerned with works of literature and artistic works gradually its scope expanded to cover works of drama, music, photography, cinematography, audio-visual recordings, performances, broadcasts and now computer programmes.

Among the successful new categories to be recognised as entitled to the status of IP are: 'Geographical Indications' which combine in themselves appellations of origin and indication of source and accord special treatment to wines and spirits; lay out design (topography) of integrated circuits, which has been recognised as an independent form of IP under the Agreement on Trade Related Aspects of the Intellectual Property Rights (TRIPS Agreement) of the World Trade Organisation (WTO). Genetic resources, and traditional knowledge and folklore have made strong claims for protection as IP. Galloping advances in the realm of internet and convergence may be the harbinger of new forms of IP.

SAQ 1

Indicate if the following statements are true (T) or False (F):

- a) The concept of property is indissolubly linked with the concept of ownership.
 - b) Exclusion of others from enjoying the fruits of application and use of IP is a principal objective of IPR.
-

1.3 DIFFERENT CATEGORIES OF IP INSTRUMENTS

IP has been generally divided into two main branches viz., (a) Industrial Property, and (b) Copyright.

Industrial property consists of rights relating to inventions, trade marks, industrial designs and geographical indications.

Copyright protects rights related to creation of human mind in the fields of literature, scientific, music, art and audio-visual works, etc. Related rights protect performances of performing artists, phonograms and broadcasts. Related rights and neighbouring rights are terms used interchangeably.

The TRIPS Agreement of the WTO recognises seven categories of intellectual property rights (IPRs), which had already been enshrined in various treaties administered by the World Intellectual Property Organization (WIPO) since the late 19th century:

- i) Copyright and Related Rights
- ii) Trade marks, Trade names and Service marks
- iii) Geographical Indications
- iv) Industrial Designs
- v) Patents
- vi) Layout Designs of Integrated Circuits
- vii) Undisclosed Information

Copyright is granted in respect of original literary, musical, artistic or audio-visual works – the creations of authors, playwrights, composers, artists, film makers. The rights under copyright include: rights of reproduction, communication to the public, adaptation and translation of work. Copyright is now spoken together with the *related* or *neighbouring rights* as one category. Though originality in expression is a requirement for copyright, the quality of the works is not an issue at all. It is to be noted that though the copyright subsists in works which are the creation of ideas, it is not the idea that the copyright protects, but merely the expression of the idea as fixed in a particular form. If an author thinks up the plot of a story, it is not the idea of the plot that is entitled for protection under a copyright but only the written form of the story flowing from the idea. Any other person can come up with a differently written story on the same idea and have a valid claim for a copyright over it. If a painter has a copyright in a painting which depicts sunrise no one else can legally copy that painting without his / her permission. However, there is no copyright in the idea of sunrise and anybody is free to paint sunrise as per his / her own imagination, and everyone will be entitled to copyright in one's own creation. The copyright is in the painting, not in the idea of sunrise. Copyright is an inherent right that commences since the completion of the work as an expression of the idea. Copyright comes with the doctrine of 'fair use', which includes use of the work for purposes of criticism, comment, news reporting, teaching and education, scholarship and research. Fair use does not constitute infringement. We may also remember that unlike patents or registered designs, copyright confers no monopoly rights. In fact if two persons can produce precisely similar work demonstrably working independently of each other, each one will have the legal right to his / her own creation. It should be reiterated that registration is not required for a work to be protected. A copyright work is protected from its creation.

Trade marks and service marks are distinctive symbols, signs, logos that help the consumer to distinguish between competing goods or services and are a major part of the goodwill a company enjoys in the trade. A trade name is the name of an enterprise, which also individualises the enterprise in the minds of the customers. They are

therefore protected as IP. Thus a trade mark is a sign that individualises the goods of a given enterprise and distinguishes them from the goods of its competitors. You may be quite familiar with the distinctive marks of Pepsi-Cola and Coca-Cola Companies. Similarly in passenger cars a characteristic star in front, or a characteristic treelike T, enclosed in an ellipse and displayed in the front and the rear of a vehicle immediately proclaims that the first vehicle is from the Mercedes and the second one is from the Tatas stable. Trade marks invariably come to symbolise quality of goods or services in the customer's mind. However, there is no requirement in law that trade mark has to meet any quality standards. If quality is not maintained, customers will shift to another brand. A trade mark is required to be distinctive and not deceptive. If you market goods of fake leather under the trade mark 'Realeather' you will be taken in by a deceptive trademark.

A geographical indication (GI) is a sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due solely to the place of origin e.g. its specific climate, soil or method of production. Such goods enjoy an advantage over competing goods solely because of their geographical origin, which thus becomes a kind of IP and is protected. A GI is different from a trade mark. A trade mark is a sign that distinguishes the product and services of an enterprise from those of another. The owner of a trade mark is entitled to exclude others from using the trade mark. A GI merely tells that a product is produced in a certain place and has certain characteristics which are due to the place of production like specific soil, or climate or method of production. It can be used by all producers who make their products in a place designated by the GI and share the same qualities. Some best known examples of GI are: Champagne (special kind of sparkling wine originating in the French region of that name; Kolhapuri chappals from Kolhapur, India). The Paris Convention for the Protection of Industrial Property uses two terms in the context of geographical indication: appellation of origin and indication of source. Indication of source on a product merely indicates that the product originates in the place indicated. Appellation of origin indicates not only the place of origin but also the essential quality link between the product and the area of its origin. Protection of GI can be done in many ways: through a sui generis legislation or through decrees, or through registration or through reliance on tort of 'passing off' (which basically says that unfair trade practices should not be used). GI can also be protected by collective marks belonging to a group of traders or producers or a certification trade mark that does not belong to any one; the understanding for its registration is that anyone who meets the specified conditions can use it.

An industrial design is the ornamental or aesthetic aspect of an article; it may consist of three dimensional features such as shape or surface, or of two-dimensional features such as patterns, lines or colour. The design serves as a tool for product differentiation and lures customers by enhanced visual appeal. Industrial designs are applied to a wide variety of products of industry or handicraft: from watches, jewellery, fashion and other luxury items to industrial and medical implements; from houseware, furniture, electrical appliances to vehicles and architectural structures; from practical goods and textile designs to leisure items such as toys.

An industrial design is distinguished from trade mark primarily because it is constituted by the appearance of a product, which is not necessarily distinctive, whereas a trade mark is necessarily to be distinctive to serve as a sign for product differentiation. The functions of, and the justification for protecting industrial designs and trade marks are quite different. Designs must relate to the appearance of the object which is not determined by technical or functional necessity. Designs enhance the visual appeal and add to the commercial value of the product; they also facilitate the marketing and commercialisation of the product. For registration a design needs to be new and original, though the notion of these qualities may vary from country to country. In certain conditions, an industrial design can be protected under copyright law or the law against unfair competition.

A patent is a statutory right granted for a limited period to an inventor in respect of an invention to exclude any other person from manufacturing, using or selling the patented product or from using the patented process, without due permission. Under the TRIPS Agreement of the WTO, inventions in all fields of technology, whether products or processes are patentable if they meet the three criteria of novelty, involving an inventive step and being capable of industrial application. Patents are one of the oldest forms of IP protection.

Layout design (topography) of integrated circuits is a relatively new area in IP which has appeared with computer technology and has acquired importance as the technology makes rapid advances. The programming instructions on a computer chip are implemented through a circuitry printed on semiconductor layers. The design of circuitry on the chip requires great investment of knowledge, skills and capital and this needs to be protected as IP. The right in topography aims to prevent copying of the layout design but reverse engineering to come up with improved design is regarded as fair. It may also be noted that while for claiming a patent an invention is required to meet the criteria both of novelty and inventive step, a layout design is only required to be original. Protection of layout design confers no monopoly right; independent development of a design, identical with a protected design is permitted.

Undisclosed information gets recognition as a kind of IP that needs to be protected under the TRIPS Agreement. Earlier to it, the WIPO treaty (1967) and the Paris Convention recognised unfair competition as a part of IP. Unfair competition includes all acts contrary to honest practices in industrial or commercial matters; undisclosed information restricts honest practices to protection of trade secrets. The TRIPS Agreement (Article 40) does refer to the control of Anti-Competitive Practices in Contractual Licences; the Agreement also empowers member-States to make in their national legislation suitable provisions to prevent abuse of IPRs.

The intellectual property thus vests in a creation of human mind involving knowledge, labour and skill. It is the result of sustained intellectual application and efforts of inventors, authors and other creative persons, including first adapters and is a powerful factor of production and wealth generation in a modern economy. The IP is a significant factor in gaining competitive advantage over rivals in the trade and industry as the entire idea of IP is to protect the owner against its unlawful use by any person or party offering same or similar products or services.

IPRs, as their exercise has evolved in practice, can secure for the owner a broad range of advantages depending on the national law; for example, IPRs can effectively block imports or exports of relevant goods, or they can be used to divide markets, or restrict movement of goods produced by an enterprise from one territory to another. To fully comprehend the consequences of a national legislation in matters of IPR, it is important to grasp the purpose the law seeks to serve by creating these private rights in property. The chain of production to distribution of goods involves the following major steps: manufacture; first sale by the manufacturer; subsequent sales; exports/imports; use, other dealings. It is for the state to decide in which steps it should intervene to grant exclusive rights to the owner to ensure just reward for creative activity and best techno-economic returns for the State and the society.


A point to appreciate here is that IP is concerned with the human capacity to produce something new and offer it for public use. The property does not lie in the thing so produced and offered but in the owner's rights over the creation of his/her intellect. This intellectual property is intangible, and though in each case it is associated with a tangible object, it is independent of the object itself. Again, what IP protects is the use or value of ideas and not the abstract ideas themselves; there are no rights, hence no property, over the ideas per se.

SAQ 2

The three main categories of IP are:

- a) patent, trade mark, copyright
- b) trade mark, industrial design, geographical indication
- c) computer programmes, layout designs of integrated circuit, rights of broad casting
- d) patents, industrial design, undisclosed information

Tick the right answer.

 Spend
2 min.

SAQ 3

Does the inventor of a new product get the IP rights over the product? If not, what do the rights pertain to?

1.4 RATIONALE BEHIND INTELLECTUAL PROPERTY

Just as one goes back to the concept of ‘property’ to appreciate better the meaning of intellectual property, one may look to the justifications advanced for protection of tangible property to appreciate the justification for IP. Within the capitalist system such justification comes from two angles: the labour justification and the personality justification.

The labour justification was propounded by Locke who viewed the labour of an individual as belonging to the individual and when one takes from the State what Nature has provided to it – some ‘goods’ akin to ‘commons’ – and mixes one’s labour with it, one creates property for one self. Labour adds value to the goods and converts ‘commons’ into property. The creation of social value both by converting commons into goods and adding more value to goods by investment of labour deserves to be rewarded to encourage people to be innovative as also to perform better.

In moving from the tangible property to the intellectual property, both the views – rewarding innovation as well as rewarding value creation – have relevance. The society has to encourage people to strive to be innovative and come up with creative solutions to generate wealth and welfare as also to add value to existing goods and services.

Locke’s idea of occurrence of commons in abundance in the primitive stage is apt in the consideration of intellectual property because ideas are always around us in abundance; this is the public domain. The IPRs do not appropriate the ‘public domain’ – the ‘commons’ are nobody’s private property. The IP law takes care of it by ensuring that no protection is given to either the everyday ideas, or highly extraordinary ideas like advances in mathematics. The IP law takes care that nobody unduly appropriates ‘public domain’ by ensuring that the rights are available only for a limited period after which the intellectual creation comes to the public domain.

Here we draw attention to a rather subtle parallel between the fields of tangible property and the intangible intellectual property. In the field of tangible property the rights of slaves as generators of property were not recognised. Even now the labour of housewife fetches no remuneration, and remains unrecognised as generator of wealth. Similarly, in the realm of IP the traditional knowledge and folklore, is yet to gain solid recognition as IP, and enjoys no commensurate protection as the creation of knowledge, skills and ideas, developed and perfected by local communities over centuries. This only confirms the view that property laws, whether for the tangible property or the intellectual property reflect power relations in society.

The justification for IP from the ‘personality’ angle regards property as a mechanism of expression of one’s persona. Hegel is the main proponent of this view: property is

the embodiment of personality. Thus property is a very personal and private thing and needs to be protected. In the case of the intellectual property, however, this justification may apply in varying degrees to subject matters of different categories of IP. While products of art, music and literature and trade marks may reflect the personality of their creator to a remarkable degree, the inventions or engineering designs may not really support the personality thesis.

A major recognition for the personality justification of property is seen in the moral rights under the copyright law. These are deemed to be the inalienable rights of the author to safeguard the integrity of the work against any change that would damage the author's reputation or the message of the work.

Clearly a completely satisfactory rationale for intellectual property protection is not available either from the labour angle or the personality angle. Different categories of IP would appear to derive different degrees of justification from different angles. Patents and industrial designs would be better supported from the labour point of view; copyrights and trade marks would find better justification from the personality angle. The entire domain of the IP, however, is served better when both the views are taken together as justification for the protection of property.

Underlying Premises

From the foregoing discussions, it is seen that the IPRs are based on three underlying premises:

1. Creative activity culminating in IP can be increased by measures aimed to encourage it. Also, it will not be generated in economically adequate quantity for public use without economic incentives.
2. Grant of legal monopoly powers, even if for a limited period is the only way to ensure adequate economic benefits as just reward for the creation of IP.
3. The provisions of the global IP regime ensure just economic returns to the creation of IP while safeguarding the interest of other entrepreneurs and the society in general.


1.5 RIGHTS OF THE OWNER OF THE IP, OTHER INDIVIDUALS AND THE SOCIETY – STRIKING A BALANCE

It will be well to remember here that whatever be the justification for the protection of intellectual property, there can be no absolute rights in IP because all individual rights are subject to the recognition of, and respect for, the rights of other individuals and the rights of the society. It is the role of the State and the purpose of the law to harmonise conflicting claims and achieve a balance. Besides, the State, through the instrumentality of law, strives to reach definite goals in keeping with the aspirations of the society. The property rights are therefore generally tempered with considerations of distributive justice. Protection of individual property is important but it is equally important in a democratic polity that the State create conditions and necessary structures for people to have wide-spread access to opportunities. It is this balancing responsibility of the State which is reflected in the Indian Law: while private property is strongly respected and legally protected, it is no more a fundamental right.

In a competitive world while creativity and continuous innovation is absolutely necessary to remain on the scene, it is also equally important to ensure that one's ideas, products and designs are not copied without authorisation. Similarly one must learn how to acquire lawfully another persons ideas, products and designs for further reproduction and use in one's own business.

Essentially IPRs are defined in the negative and meant to stop others from copying or counterfeiting of the protected application, or expression of an idea without due permission. In the case of patents even a person who arrives at the same invention independently of the owner of the right is prohibited to exploit it without a licence from the owner of the right. In other forms of the IP e.g. for copyright or trade mark, absolute monopoly of the owner of the right may be suitably diluted. However, it should be clear that the grant of IPRs is to be seen in the context of rights of others, which are not to be ignored, and the public interest which remains paramount. The Intellectual Property Rights also confer no privilege on the products of the person owning the right in trade.

In the field of intellectual property, the rights of the individual owner are sought to be balanced with the rights of others, including the wider public interest, by several means like limiting the period during which exclusive IPRs are available to a reasonable degree; making preservation of life, environment, peace, morality as paramount conditions in granting IPRs – if the IPR would have an adverse impact on any of these, it is not granted; providing for compulsory licensing, or even revocation of patent, under certain circumstances e.g. if the owner abuses the right simply to block others with the result that the benefits of the IP do not flow to the public at reasonable cost, etc.

 Spend
3 min.

SAQ 4

How does the IP law seek to strike a balance between the rights of the IP owner, and the rights of other individuals and the society?

1.6 ENFORCEMENT OF IPRs

While most contracts lay down clearly and in detail the rights and obligations of contracting parties, any disputes that arise in connection with the contract can be resolved on the basis of provisions in the contract itself. What is different with IPR is the fact that it is aimed at excluding others from doing certain things as regards the IP even without the existence of a formal contract between them and the owner of the right. The effectiveness of IPRs is clearly dependent on how speedily they can be enforced with reasonable cost.

As requirement of space for storage of information and means and cost of copying tumble down with the advance of information and communication technologies, the scale and incidence of copying/reproduction have greatly increased. Piracy and counterfeiting are the scourge of the world trade. In books, films, music, computer programmes, pharmaceuticals and consumer goods, infringement of IPR on commercial scale is rampant.

While national laws provide legal remedies for violations of IPRs, the TRIPS Agreement lays down the provisions which must be included in the national IP laws and regulations of all member countries of the WTO to enable effective enforcement of IPRs. The remedies are meant to deter incidence of future infringement without harming legitimate trade, while safeguarding against the abuse of IPRs.

The TRIPS Agreement prescribes a number of requirements for a due process in IP law like fair and equitable procedures, not being unduly complicated or costly and not entailing unreasonable time limits or unwarranted delays, right to be heard and give evidence, right to written decision, judicial review, etc. including indemnification of defendant against abuse of enforcement procedures. The remedies that the Courts may grant can be both injunctive and compensatory relief. The defendant may be asked to deliver up the infringing material for destruction as a requirement of justice.

1.7 IP AND THE CONSTITUTION OF INDIA

The Constitution of India makes no specific mention of intellectual property. Property in the Constitution generally means tangible property. However, IP as a form of property can be put under Article 300A which deals with property and be entitled to a legal right.

Experts have spotted possibilities of a conflict between the IP, specially the copyright, and the constitutionally guaranteed freedom of speech and expression. The Courts have zealously upheld this fundamental freedom. In a case of any restriction on speech and expression, the perspective of the rights of viewers and listeners, is likely to get precedence over the perspective of the rights of broadcasters. Any rights (monopolies) that undermine the right to freedom of speech and expression may face a challenge.

1.8 SUMMARY



- The concept of intellectual property follows the concept of physical property which is inalienably linked to the concept of ownership of an article and means the right to possess, use and dispose of the article (property).
- Intellectual property is the creation of human intellect and is intangible (incorporeal) whereas the physical property is tangible (corporeal).
- Property means a bundle of rights in relation to the object owned. They concern ownership and possession; use and enjoyment of the fruits of application of the property; and the exclusion of others from such use and enjoyment, and the transfer of rights in the property.
- The TRIPS Agreement under the WTO recognises seven categories of IP viz. (i) copyright and related rights, (ii) trademarks and service marks, (iii) geographical indication (iv) industrial designs, (v) patents, (vi) layout designs of integrated circuits, (vii) undisclosed information. However, the domain of IP is expanding and soon new claimants may arise due to rapid advances in science and technology.
- The rationale behind IP flows from the labour angle or the personality angle. The former sees labour as belonging to the individual who creates new goods by mixing his/her labour with the 'commons' or adds value to the goods with investment of labour. Either way he/she is to be encouraged and rewarded. The 'personality' view regards the creation of intellect as an expression of the creator's persona, and thus a very personal thing that needs to be regarded and protected as property. Neither of the two angles can satisfactorily serve as justification for all categories of IP. While inventions may have little that will qualify them as expression of the inventor's persona, a literary or artistic or musical composition is likely to bear the stamp of the author in a substantial measure. Thus the rationale for IP has to be sought both in the labour angle and the personality angle together, rather than in any of them singly.
- The State, and through it the global IP regime, seeks to strike a balance between the interests of the creator of the IP and the interests of the other entrepreneurs and the Society in general. The means that ensure this balance are: grant of monopoly/exclusive rights generally for a limited period, after which the intellectual creation comes into the public domain; provision for compulsory licensing and even revocation of licence under certain conditions in the case of patents, and making preservation of life, environment, peace, morality as of paramount consideration while granting IPRs.

- The TRIPS Agreement of the WTO prescribes enforcement measures to be incorporated in national laws for ensuring effective, speedy and cheap remedies against violation of IPRs. The process is to be fair and equitable and conscious of time and cost. While ensuring justice, it should create no barriers for world trade nor should it lead to abuse of enforcement. The remedies can be injunctive and compensatory; the courts can also order infringing material to be delivered up for destruction, if necessary, to meet the ends of justice.
- The Constitution of India makes no specific mention of IP. However, there is nothing in the constitution that would bar treatment of IP under property clauses. A possible area of conflict may arise between copyright and the freedom of speech and expression, which is a right constitutionally guaranteed and zealously upheld by the judiciary.

1.9 TERMINAL QUESTIONS

Spend 15 min.

1. Discuss the evolutionary challenges being faced in the field of IP due to rapid advances in science and technology. How are these challenges being met?
2. How many categories of IPRs are recognised in the TRIPS Agreement? Briefly discuss each one of them.
3. Discuss the rationale behind the concept of intellectual property. What are the underlying premises of the global IP regime?
4. How does the present IP system strike a balance between the rights of an inventor and the rights of other individuals and the Society in general?

1.10 ANSWERS AND HINTS

Self Assessment Questions

1. a) T
b) F; it is true only for a limited period not as a general, unqualified statement.
2. a)
3. No; the Intellectual Property Rights do not cover the product as such but whatever the creator's intellectual contribution is to make it a reality.
4. By several devices designed to ensure that the owner's rights are not unqualified monopoly to continue indefinitely. Thus, no IP is recognised if its subject matter goes against the preservation of life & environment and peace & morality. The term of the IPR is limited to a reasonable period after which the intellectual creation comes to the public domain. There are statutory provisions for compulsory licensing in favour of a third party, and even for revocation of right, under certain conditions, which include availability of patented goods at a reasonably affordable price to the general public.

Terminal Questions

1. Refer 1.2
2. Refer 1.3
3. Refer 1.4
4. Refer 1.5