3 per cent interim royalty (5 per cent for Parke, Davis), such interim royalties to be in effect for 3 years (the earlier agreements with Merck, Pfizer and Upjohn stipulated that in the event of an interference proceeding,[30] interim royalty payments would be suspended and allowed to accrue until a patent was actually issued; the CIBA and Parke, Davis agreements called for interim royalties for 3 years after the date of the agreement itself); and, finally, all of the agreements (except with Upjohn) restricted sales to finished dosage forms only.[31]

The purpose of restricting sales to finished forms only is clearly to prevent any shipment of bulk powder being made available to non-licensed competitors (chiefly the smaller firms who take the bulk chemical, tablet and bottle it, and sell it under their own brand name, or more frequently, under the generic name) who might make use of such an 'uncontrolled' supply to introduce price competition into the market. It is by no means unusual in the drug trade to find licensing agreements predicated upon the basis of patent applications rather than issued patents, but it is somewhat unusual to have interim royalties paid on the basis of applications alone. Counsel for the companies pointed out that there was nothing illegal about interim royalties, since one firm might very well pay another a royalty in order to use a secret process for which no patent was sought. In such circumstances, the consideration for the royalty would be the disclosure of an otherwise unknown process. Schering's agreements with Pfizer, Upjohn, Merck and perhaps some of the others, could not be so felicitously construed, since all firms had been doing intensive research in the field and were roughly on the same footing.

It was generally agreed, however, by Schering and its licensees, that it would be impossible to enforce the restrictions on the form in which the good is sold, until a valid patent had been issued.[32] Nevertheless, a pattern of action which can be described as voluntary compliance was observed until Syntex began making its shipments of bulk prednisone, at which time Pfizer and Merck violated the letter of their agreements with Schering by following suit. The initial effort at voluntary compliance may conceivably have been a gesture of goodwill toward Schering, or it may have been a collectively acceptable way of dealing with the problems posed by highly profitable prices (which could bear a great deal of shading) coupled

[30] The prednisone and prednisolone interferences were declared in December 1956 and December 1957 respectively, ibid., Part 14, p. 8093.

[31] Licensing agreements submitted to the Subcommittee, ibid., Part 15, pp. 8361–4.

[32] Testimony of F. C. Brown, ibid., Part 14, pp. 7926–8; testimony of J. T. Connor, Part 14, p. 8094.