COPYRIGHT, DESIGNS AND PATENTS ACT 1988

IN THE MATTER OF an application by
E-UK Controls Limited to settle the terms
of a licence of right available under
paragraph 19(2) of Schedule 1 to the
Copyright, Designs and Patents Act 1988
in respect of copyrights owned by
Schneider Limited

DECISION

1. E-UK Controls Limited ("E-UK") have applied to the comptroller under section 247 of the Copyright Designs and Patents Act 1988 ("the Act") for settlement of the terms of a licence available as of right by virtue of paragraph 19(2) of Schedule 1 to the Act in respect of copyright subsisting in drawings of a range of electrical control buttons. The copyright is owned by the respondent, Schneider Limited ("Schneider"), which is part of Groupe Schneider, a multinational group specialising in the design and manufacture of electrical components.

2. E-UK filed their application and draft licence on 11 February 1997. Schneider filed a notice of objection on 27 March 1997. The pleadings and evidence rounds proceeded smoothly - on that I must congratulate both parties, since it is an increasingly rare occurrence - and the matter came before me on 16 January 1998. Mr Tom Mitcheson, instructed by Bristows Cooke & Carpmael, appeared as counsel for E-UK, and Mr Iain Purvis, instructed by Wansborough Willey Hargrave, appeared for Schneider.

The commercial background

3. I think it will help if I start by summarising the commercial background to this application. I have called the goods in question “control buttons” for convenience, though some of them are

not strictly “buttons”. They are for mounting on control panels, and consist of what one might call the button head, which projects through the front of the control panel, and a fixing flange and contact block on the back of the panel. I have been shown examples of buttons from a number of manufacturers, and whilst the scope for variation in design is constrained by the fact that they all have to do the same job and meet the same standard specifications, there is obviously room for some individuality. Schneider claim copyright in drawings on which their designs are based, and it is that copyright to which this licence relates. The drawings are identified in a schedule agreed by both sides.

4. Schneider's control buttons are manufactured by its parent company in France. They are bought from the parent company by Schneider, who then sell them on in the UK to distributors. There are a fair number of competing products on the market, but in the UK at least Schneider are dominant, having perhaps 60% of the market. Schneider also sells a wide range of other electrical products.

5. A company in India called Teknic makes control buttons which I think can fairly be described as Schneider look-alikes. (In describing them in this way I am not implying any criticism, because I assume Teknic are perfectly entitled to do what they are doing in India.) E-UK is a one man company set up in May 1996 specifically to import Teknic's control buttons into the UK and sell them on to distributors. Its sales so far have been low, in part because of Schneider's vigilance in enforcing its copyright, and so far it has been trading at a loss, but it hopes to be able to move into profit once it can trade more confidently with this licence behind it. E-UK does not trade in any other goods.

The legal context

6. I can summarise the legislative provisions on which this application is based very briefly. The right of third parties to a licence in respect of the copyright which forms the subject of this application derives from paragraph 19(2) of Schedule 1 and section 237 of the Act. The copyright, and hence the licence, will automatically lapse on 31 July 1999. Under section 247(1) a person requiring a licence which is available as of right may apply to the comptroller

to settle the terms of the licence, which is what E-UK have done here. Under section 247(4):

> "In settling the terms of a licence the comptroller shall have regard to such factors as may be prescribed by the Secretary of State by order made by statutory instrument."

However, no order has been made, so no such factors have been prescribed.

7. This is only the third application under section 247 of the Act to get as far as being settled by the comptroller. The two previous cases, to which I shall be referring throughout this decision, were *Roger Bance and R Bance & Co. Ltd.'s Licence of Right (Copyright) Application, [1996] RPC 667 ("Bance")*, and *Pioneer Oil Tools Ltd.'s Licence of Right (Copyright) Application, [1997] RPC 573 ("Pioneer")*. However, there is a long history of applications to the comptroller to settle the terms of licences of right in respect of patents, and the question arises as to the extent to which the case law built up in respect of patents is relevant to copyright and design right. The Hearing Officer in *Pioneer* expressly addressed this, saying:

> "Of course there has been a good deal of case law developed in the field of licences of right available under the Patents Act 1977 ("the 1977 Act"). There will be understandable efforts to draw from that patent case law principles which might also be applied in this new area of design right and copyright licences of right. However, I think it would be appropriate, in this early case, to note that such efforts should be undertaken with care. The 1977 Act contains provisions setting out public policy considerations which the Comptroller is obliged to take into account in settling the terms of patent licences of right. By contrast, there are no such provisions contained in the Act under which the present proceedings are launched. For that reason, it seems to me, although there will be aspects of the case law on patent licences of right which will clearly also apply in design right or copyright licence of right cases, there may be other aspects which are not necessarily applicable in proceedings such as these."

I will adopt the same approach in the present case.

8. I am pleased to say that many of the clauses of the draft licence have been agreed between the parties, and I shall therefore consider only those in respect of which there is dispute. As always in licence of right proceedings, the major point of difference is the matter of the royalty, which is at clause 3.3 of the draft licence. I shall therefore consider that first.

The royalty rates offered

9. The parties are agreed that the royalty should be expressed as a percentage, and they have also agreed what it should be a percentage of - the so-called Net Sales Price of any relevant articles sold by the licensee. However, they are some way apart on the royalty rate itself. E-UK have proposed a rate of 2%. Schneider initially argued for a rate of 30%, and have since reduced this to a proposed rate of 15%.

The basis for assessing royalty rate

10. Before looking at the arguments and evidence in detail, I need to establish the basis on which I should assess the royalty rate. In patent cases, the comptroller was obliged by section 50(1)(b) of the Patents Act 1977 to exercise his power to settle a licence of right in such a way as to ensure that the person beneficially entitled to the patent received reasonable remuneration having regard to the nature of the invention. It became well established in patent case law that this meant the royalty should be what would be agreed between a willing licensor and a willing licensee. There are many precedents which establish this. To take just one example, in *Smith Kline & French Laboratories Ltd's (Cimetidine) Patents [1990] RPC 203* at page 236 Lloyd L J says:

> "What, then, was "reasonable remuneration" for SK&F in the present case, having regard to the nature of the invention? I take it to be settled that by reasonable remuneration one means the royalty that would be agreed between a willing patentee and a willing licensee, having regard to the other terms of the proposed licence."

11. Now there is no "reasonable remuneration" clause in the Copyright, Designs and Patents Act 1988 or any statutory instrument made under it, and indeed the statute law is totally silent

about the basis on which the royalty in copyright and design right licences of right should be settled. However the "willing licensor - willing licensee" principle seems to have been accepted by the parties and the Hearing Officers in both *Bance* and *Pioneer*, and in the present case both parties have accepted it too. I am therefore content to settle the royalty on that basis.

12. There is one aspect of this principle on which the present parties are not agreed, though, and that is whether I should take into account the alleged fact that the market is of limited size and accordingly any sales made by the licensee would probably be at the expense of sales made by the licensor. Mr Purvis argued that I should take this into account because, in the real world, willing licensors and licensees most certainly would. Indeed, if I did not, he argued, it would make a mockery of the whole willing licensor-licensee principle. Mr Mitcheson, on the other hand, said that to do so would be quite contrary to the willing licensor-licensee principle because it would effectively be taking account of the fact that the licensor is unwilling to grant a licence.

13. Now this is an issue on which there are clear precedents in the patent law; for patent licences of right, the status of the patentee as manufacturer cannot be taken into account. Mr Purvis was aware of this, but drew my attention to a passage in "The Modern Law of Copyright and Designs" by Laddie, Prescott and Vitoria, Second Edition, Volume 1, page 1293 which says:

> "All that is being licensed is the design right. The fact, if it be one, that the licensor is a manufacturer wishing to protect his own manufacturing capacity may be relevant."

adding in a footnote that the considerations relating to remuneration may be different from the Crown use case which gave rise to the patent precedents. I have therefore looked carefully at the precedents to decide whether they should apply to copyright and design right licences. In the present case, the respondent is not itself the manufacturer; that position is held by the French parent company. However, the respondent is trading in the products and stand to lose trade as a direct result of the existence of a licence, so its position is analogous.

14. The point was first fully considered by the Court of Appeal in the Crown use case, *Patchett's Patent [1967] RPC 237*. Diplock L J pointed out that money paid under the Crown user provisions of what was then the Patents Act 1949 was not to compensate the patentee for infringement by the Crown of his monopoly rights because there was no infringement - the Crown had a right to use the invention. He went on to stress that the value of the patent to the realm, which is the consideration for the patent rights granted to the inventor, did not depend on the identity of the person who put the invention to use. Thus what constituted “reasonable remuneration” for the inventor could not depend on whether or not the patentee chose to manufacture the invention himself. He summarised the position by saying that the willing licensor-licensee approach was the correct one:

> “. . . provided that it is borne in mind that the only subject-matter of the payment is the use of the invention. The learned judge took the view that a patentee who was himself a manufacturer, and had invested money in providing facilities for manufacturing the invention himself, would be more reluctant to grant a licence to another person which would reduce the demand for the products of his own manufacture, and would be likely to insist on a royalty which included either a return upon his investment in any manufacturing facilities which would be unused as a result of his failing to obtain the order himself, or the cost of converting his unused facilities to some other manufacturing use. But any such element in the royalty, like a claim based on loss of profits, is by way of compensation for not obtaining the order although the measure of such compensation is different. It is a sum included in the royalty which is claimed by him not in his capacity as a willing licensor of the patented invention but as one who, like an exclusive or other licensee, has invested money in preparing to manufacture it. In my view no regard should be had to any circumstance of this kind in assessing the payment to be made by the Crown to the patentee under section 46 of the Act.”

15. This approach was then adopted for patent licence of right cases too by the Court of Appeal in *Allen & Hanburys Limited (Salbutamol) Patent [1987] RPC 327*. Dillon L J pointed out that in *Patchett* they had held that the patentee was only entitled to compensation *qua* patentee or inventor, not to compensation *qua* manufacturer and went on to say:

> "In these circumstances and as, once the [licence of right] entry has been made, licences under the patent are to be available as of right, I find the analogy of *Patchett's* case compelling. I would hold, therefore . . . that the position of the patentees as manufacturers is not to be taken into account in fixing the royalty under a Licence of Right under section 46(3)(a)."

16. I have considered Mr Purvis' submission that the considerations in copyright and design right licences of right are different, but - to borrow the words of Dillon L J - I find the analogies with *Patchett* and *Salbutamol* compelling. If, in real negotiations, Schneider were giving up a monopoly right to enable E-UK to put control buttons on the market which would detract from Schneider's own sales, I have no doubt, as Mr Purvis argued, that the parties would take this loss of sales into account. However, just as in *Patchett* and *Salbutamol*, the licensor here is not giving up a monopoly right: Schneider do not have a monopoly right in law because anyone is now free to make their control buttons. Their entitlement to a royalty or some other remuneration stems solely from their rights as copyright owner, not from their position as manufacturer (or, more strictly in the present context, their position as a trader in the goods in question).

17. I must then determine the royalty rate that would have been agreed for these control buttons between a willing licensor and willing licensee, but discounting the licensor's position as a trader. In patent licence of right cases, two main approaches have been used - "comparable licences" and "profits available". Under the first, the rate is determined by looking at the rates used in comparable licences, ideally ones agreed between genuinely willing parties. Under the second, the profits available to the proposed licensee are calculated, and these are then split between the parties. Both approaches were considered in *Bance* and *Pioneer*, and I was addressed on both in the present case. I shall look at comparable licences first.

Comparable licences

18. This is the approach on which Mr Mitcheson urged me to concentrate. This was not on the basis of any specific licences put forward in evidence because there are none. Rather, he

based his arguments on rates settled by the comptroller in previous licence of right cases, and in particular the rates settled in *Bance* and *Pioneer* and the "going rate" for mechanical patent licences of right. I should perhaps say here that Mr Mitcheson tried to distinguish between the "going rate" approach and the "comparable licence" approach. I agree there are differences between them, but in my view they are based on the same principle. The "going rate" is simply a way of looking at a large number of loosely-comparable licences.

19. The "going rate" for mechanical patents is often quoted as being in the range 5-7%. The rates in *Bance* and *Pioneer* were of the same order of magnitude, 5% (except for spare parts) and 9% respectively. Mr Mitcheson argued that the rates in *Bance* and *Pioneer* had confirmed 5-7% as a sound starting point, but that in the particular circumstances of the present case there should be a reduction for several reasons:

> a) These control buttons have been around for over 20 years and are therefore old technology.
>
> b) The technology in *Bance* was less complex than in *Pioneer*, making the products less expensive, and that is why the royalty rate was lower. As the technology inherent in the control buttons is even less complex than in *Bance*, the royalty in the present case should be even lower still.
>
> c) Much of the control button design was constrained by industry standards, so there was little original design.
>
> d) The short period for which the licence would run should reduce the interest rate.

He also argued that because patents give a broader monopoly than design copyright, and patents are concerned with advances in the art whereas design copyright is not, one would expect the rate to be lower for design copyright than for patents.

20. Mr Purvis urged me to reject the "going rate" approach. He pointed out that Jacob J had

rejected it in *Gerber Garment Technology Inc v Lectra Systems Ltd [1995] RPC 383* at page 419:

> "Reference was made to the rates fixed by the Comptroller in a number of compulsory licence and licence of right applications. These have been of the order of 5% in the case of non-medical inventions. I find little value in this sort of comparison. One has to know the circumstances of each case. There is an enormous difference, for instance, between the case where a man wants a licence to exploit a hitherto unused invention and the case where the invention is fully developed with a large and active market."

Consequently, Mr Purvis argued, to use the comparable licence approach I would need evidence of specific comparable licences. In *Bance* and *Pioneer* the rates had been assessed in the light of the specific facts in each case. They had not established a norm and the products with which they were concerned were not comparable to the control buttons which form the subject of the present licence.

21. I have to say I sympathise with Mr Purvis here. I am uneasy about the very foundation of Mr Mitcheson's arguments because I am uneasy about working from the mechanical patent norm. Even in a patent licence of right, the norm tended to be used only when all else had failed, for the very reason identified by Jacob J. By the same token, any norm for design copyright or design right should be invoked only if there is nothing better. Further, I agree with Mr Purvis that case law has not yet established a norm for design copyright and design right. Two cases, which is all we have had so far, do not establish a norm as they might both be "out of the ordinary", and I do not think we can rely confidently on the patent norm because the circumstances are significantly different. True, patents give a broader monopoly and should be concerned with technical advances, but the right to copy a design that has become established in the marketplace can also be very valuable. I notice that the Hearing Officer in *Pioneer* shared my reluctance to argue from the mechanical patent norm, and that the Hearing Officer in *Bance* looked for other evidence to support the contention that he should use it as a starting point. All this reinforces my view that I should only use it if all else fails.

22. I must also say that I am not convinced by the arguments for reducing the rate that Mr Mitcheson put forward. On a), although the technology has been around for many years, it is acknowledged that Schneider are the market leaders in the field and there remains considerable demand for their products. It is clear therefore that industry still regards the products as important, and hence there is no indication that their value has been abated. On b), I would need more evidence before being satisfied that the more complex the technology the higher the royalty should be. Certainly one cannot prove this hypothesis by looking at just two cases. On c), the buttons I was shown clearly demonstrate that there is quite a lot of scope for variation in design notwithstanding the need to meet standards. Finally, I am at a loss to see the relevance of d), and I certainly cannot recall this affecting the rate in patent cases.

23. In short, I do not feel that the concept of "going rate" assists me in the present case.

Profits available - the principles

24. The profits available approach is the one that Mr Purvis urged me to adopt. He said it reflects the real world because it gives a fair reflection of the value of the intellectual property rights. It is, he said, the approach a willing licensor and licensee would use because the first issue in negotiating a deal is: what it is worth to the person buying it?

25. As discussed by the Hearing Officer in *Pioneer* at page 581, the profits available approach was frowned upon in patent licences of right. Nevertheless, it was used in a number of cases, such as *Cabot Safety Corp.'s Patent [1992] RPC 39* and, in slightly different circumstances, *Gerber v Lectra* quoted above. In *Bance* the Hearing Officer used it as a cross check of figures derived via other routes, though Mr Purvis suggested he might have been more enthusiastic about profits available had *Cabot* and *Gerber* been drawn to his attention. In *Pioneer* the Hearing Officer went a little further and concluded at page 581 that the profits available approach was less unsuitable in design copyright and design right cases. I endorse that conclusion. Whilst evidence of comparable willingly-agreed licences will probably always form a strong starting point if it is available, if it is not available the profits available approach seems to me, as Mr Purvis submitted, an acceptable alternative.

26. However, Mr Purvis introduced a new angle on the profits available approach. Normally what one looks at are the profits available to the licensee, but Mr Purvis went further than this. He pointed out that E-UK will sell the control buttons to a distributor, making a certain profit for themselves, and that the distributor will then sell them on for a further profit. In giving a licence to E-UK, Schneider are effectively also giving a licence to all the distributors to whom E-UK sell. If Schneider are entitled to a share of the profits available, that ought to include a share of the distributor's profits too, not just E-UK's.

27. If this argument is sound, it could have a major impact on royalty rates. It is common practice for some products to pass through several hands before reaching the end user, and to apply this principle to its logical conclusion, each such stage would have to be included. Theoretically it would require the licensee to hand over a share of other people's profits, profits on which the licensee cannot actually get its hands and which may well be a lot larger than its own. In practice I suppose the licensee would have to put up its prices by an amount equal to the notional royalty on the profits of others further down the chain, but this could seriously affect its competitiveness.

28. I have come to the conclusion, however, that the argument is totally unsound. In putting it forward Mr Purvis has, I believe, lost sight of the basic principle he is supposed to be applying, that is, the willing licensor-licensee principle. The question is, would profits further down the line be taken into account in negotiations between willing parties? I am sure the answer is no. From the licensee's perspective, no willing licensee would ever agree to hand over a share of money that is not its to hand over. Equally, from the licensor's perspective, this is money it would never expect to get its hands on however it exploited its intellectual property rights. After all, Schneider itself appear to sell on to distributors in the same way as E-UK, and it will not be extracting from its own distributors any share of <u>their</u> profits.

29. Mr Purvis observed that the effect of ignoring profits made further down the line would be that the royalty received by the licensor would depend on whether the licensee sold direct to the end user or via a distributor. That is not necessarily so. A distributor takes the costs of selling to end users off the shoulders of the licensee. If the licensee sells direct, its own costs

will increase and that will be reflected in the royalty rate that willing parties would agree.

30. I will concede that there is one situation in which Mr Purvis' argument might have some force. Mr Purvis suggested that the price to the distributor could be manipulated to minimise the royalty payable. That could indeed happen if the relation between the licensee and distributor were not at arm's length, ie if the licensee had some financial interest in the distributor. If that were the situation I accept it is something that might well be taken into account by parties negotiating willingly. However that does not appear to be the case here, and indeed the parties have agreed a clause in the licence to deal with the definition of Net Sales Price in the case of sales that are not at arm's length. I will not, therefore, take any account of profits made further down the line when considering the profits available.

Assessment of profits available

31. As both parties acknowledged, what I ought to be looking at are the profits available to the licensee. However, Schneider has based most of its case on the profits available to itself, the future licensor, arguing that the profits available to the licensee can be deduced from this. I shall return to this later, but will start by looking more directly at the licensee's position. The problem here is that there is very little evidence to go on, and what little there is is distorted by the start-up problems faced by E-UK as a new company. Mr Mitcheson directed my attention to an exhibit to the evidence presented on E-UK's behalf by their Managing Director, Mr McCarthy. In this exhibit, Mr McCarthy presents a table purporting to be a budget plan for the first two years of trading. Mr Mitcheson argued that the budget plan indicated a projected net loss of 16.3% during the first year, and a net profit of 4.9% in the second year. Taking the two years together, the net loss was 5%, so there would be no profit until year 3. He argued that start-up costs and the difficulty of breaking into the market would be taken into account in negotiations between a willing licensor and licensee, and suggested basing the profits available on the budget figures for the end of the second year. These, he suggested, pointed to a net profit available of the order of 5%. Using the 25:75 split between the licensor and licensee agreed by the parties in *Gerber v Lectra*, this gave a royalty of 1-2%.

32. As Mr Purvis noted, however, there is a serious problem with this budget plan. The line headed "product sales" shows a steady increase month on month for twelve months, reaching £18,000 in the twelfth month, then returns to £1,000 for the thirteenth month before rising steadily again to £18,000 at the end of the second year. This suggests the figure for each month is a cumulative figure for the year to date, and yet all twelve figures are totalled at the end of each twelve month period. This makes nonsense of the whole plan. Without a satisfactory explanation of this discrepancy, I can attach no weight to the plan at all. I would also observe that in his evidence Mr McCarthy says sales in the first year of trading totalled £8,607 and purchases £8,937. The first year of trading is said to have been from September 1996 to August 1997. I am not entirely sure whether the budget plan runs from May 1996, when E-UK was set up, or September 1996, but either way it shows both sales and purchases way in excess of these figures. This suggests the plan is highly speculative and reinforces my view that it is an unsafe basis from which to work. I therefore reject Mr Mitcheson's calculations.

33. We do have a profit and loss account for E-UK for the seven month period from 31 May to 28 December 1996 which Mr Purvis argued shows a gross profit (ie value of sales made less cost of goods bought in) on turnover of some 34%. However, the sales and purchases figures of £8607 and £8,937 for the first year of trading represent a loss, not a 34% profit. It was suggested that E-UK had to build up stock in its first year of trading and so not all the goods bought in that year were sold by the end of it. This would explain the apparent loss for the first twelve months but not the apparent 34% profit for the first seven months, so I cannot deduce from these figures what the “steady state” gross profit would really be.

34. Even if I had a usable figure for gross profit, though, it would not be sufficient to assess the royalty. Running a business and making sales costs money, and this money has to be deducted from the gross profit before any measure of the real profits available to the licensee can be obtained. However, from the figures in E-UK's accounts I cannot form any sensible assessment of the likely costs of running E-UK's business over the period of the licence. For example, the accounts for the first seven months show legal costs alone exceeding total sales. Clearly legal costs will have continued, but they cannot go on at that level if the company is to

survive, and yet I have nothing to point me to what allowance I ought to make for them. Further, they show purchases but no transportation costs, and yet in the first year of trading the latter are said to have amounted to £1,474, which is 16% of the £8,937 for purchases. Again, the costs include a management charge to another company owned by Mr McCarthy which has not been set on an arm's length basis. Mr McCarthy claimed the costs had been artificially reduced from £2,000 to £500 a month because of the losses being made by E-UK, but that leaves me with no guidance as to what the proper level of this overhead ought to be. All in all, having studied E-UK's accounts carefully I have come to the conclusion that I cannot gather any reliable guidance from them.

35. E-UK have presented little other evidence from which the profits available to them can be determined. They say that this is in part because they have been unable to carry out business as Schneider have been frightening their customers off by warnings of copyright infringement, though since there are some sales figures in their accounts this cannot be entirely true. Mr Purvis criticised this lack of evidence, suggesting E-UK could at least have disclosed how much Teknic is charging them. I have some sympathy with Mr Purvis here. Even though I know E-UK regard this information as highly sensitive, they could have sought arrangements for its disclosure just to Schneider's legal representatives. However, that still would not have been sufficient to arrive at a royalty rate, and bearing in mind that E-UK were basing their arguments primarily on the "going rate" approach anyway, I am reluctant to read anything into the absence of such evidence.

Deducing profits available from licensor's profits

36. I have to conclude therefore that there is no direct evidence on which to base a calculation of profits available to the licensee. As I indicated earlier, however, Mr Purvis invited me to deduce these profits indirectly by looking at the profits available to Schneider, and I will now consider this alternative approach.

37. First I must comment on the reliability of the evidence on which Mr Purvis chiefly relies. It comes from a Product Marketing Manager at Schneider, a Mr Andrews. In the first round of

evidence he provided a statutory declaration stating that Schneider made an average gross profit of 60% on these control buttons, which rose to 88% if one added on the profit made by the parent company in France. It was these figures which justified Schneider's original demand for a 30% royalty. When the other side challenged this on the grounds that profit margins of this magnitude were unthinkable in a competitive market, Mr Andrews provided a further statutory declaration in Schneider's evidence in reply, stating that his figures had been based on Schneider's listed selling prices. These are the maximum prices at which a distributor - ie the next person down the line from Schneider - would sell to the end customer. What Mr Andrews had done was to compare <u>these</u> prices with what Schneider paid its French parent for the goods in the first place. Based on the average prices which <u>Schneider</u> actually received for its goods, its gross profit was, he conceded, about 30% (ignoring any profit by the French parent).

38. Mr Mitcheson invited me to treat Mr Andrews' percentages with caution given that he had changed them so substantially, and I agree. The reliability of a witness who could present such a misleading picture in his first statutory declaration must be open to doubt, even though his reliability was not put to the test on cross examination. However, the change in the percentages is wholly consistent with a misrepresentation of what the figures given in the evidence signify rather than an error in the figures themselves, and the figures themselves, now they have been explained, are consistent with the 30% now claimed. Whilst I cannot rule out the possibility that there are other undisclosed factors which might affect the interpretation of the figures, I have nothing else to go on and shall proceed on the assumption that the 30% is right.

39. There is, though, another problem. Mr Mitcheson argued that the purchases which Schneider makes from its parent company in France are not at arm's length and so the prices it pays may be distorted by other considerations such as the need to minimise tax, directly affecting the profit figure in Schneider's accounts. I accept that this could be the case, though of course it could warrant an adjustment either up or down. From the little evidence that is available, though, I can see nothing to suggest there is actually any gross distortion of the profit figures. If Mr Andrews' evidence is to be believed, the French parent company makes a gross profit on these control buttons of around 28%, which is close to the 30% said to be made in the

UK by Schneider. This does not suggest any attempt is being made to make one company substantially more profitable than the other, so I shall stay with 30% as the best estimate I have of Schneider's gross profit.

40. I turn now to Mr Purvis' argument that this 30% justifies a royalty of 15% in the present licence. This argument ran as follows:

a) The two companies will be selling the same products in the same market against the same competition. They will therefore have similar pressures on prices. The licensee will need to undercut the licensor because it cannot rely on the licensor's established name to make sales, but countering that, it is presumably buying the goods more cheaply from India. Thus all in all, it can be expected to make much the same sort of profit as the licensor.

b) For a company like E-UK which is just starting up, net profit is very difficult to assess. Firstly it is distorted by start-up costs. The period over which these are amortised is arbitrary, and yet choice of different periods can significantly alter the net profits. Further, they lead to the absurd situation in which the royalty would be set at a low level if a company applied for a licence before it had amortised its start-up costs but at a higher level if it applied later. Secondly, the effect of fixed costs on net profit levels is unpredictable for a new company because it depends very much on how many sales are actually made. Because of these factors, gross profit provides a much more reliable basis from which to work than net profit.

c) In patent cases, the most common split of profits between the two parties had been 50:50. True in *Gerber v Lectra* it had been 75:25, with the licensee getting the larger share, but that was only because this split had been agreed by the parties in advance. In the present case, higher royalties were justified because of the enormous benefit in replicating the design of the market leader, because of the appeal to customers of a design which has become so well established, and because sales by the licensee will take sales away from the licensor. All these factors would be taken into account by parties negotiating willingly, and accordingly they justified a 50:50 split. Thus the 30% gross profits ought to mean a 15% royalty.

41. I will start with the first step in this argument, namely, that E-UK can expect to make the same sort of profit as Schneider. Mr Mitcheson disagreed with this. He argued that the two companies were in totally different positions - one a large, well-established multinational, the other a tiny company struggling to get off the ground - and that accordingly there was no reason to suppose their potential profit levels would be the same. I agree with Mr Mitcheson so far as net profits are concerned. Indeed, as he observed, in *Pioneer* where the circumstances were somewhat similar the Hearing Officer came to the same conclusion. However Mr Purvis' argument relies on gross, not net, profits, and I would expect these to be less heavily influenced by the size of the company.

42. There are, of course, factors which could lead to a significant difference in gross profits and Mr Purvis has, in my view, correctly identified the two most likely ones. On the one hand, it is common ground that E-UK will need to undercut Schneider, and this will tend to reduce the gross profit available to it. On the other hand, I presume that even allowing for transport charges the price at which E-UK can obtain its supplies from India is sufficiently low to allow it to undercut Schneider and still make a decent profit. If that were not the case, I cannot imagine Mr McCarthy would ever have wanted to set up E-UK in the first place - there must have been a sufficiently attractive business opportunity to justify the risk and hassle of trying to break into an established, competitive market. These two factors, then, will work in opposite directions. In the absence of specific figures, Mr Purvis' working assumption that they will more or less balance each other out seems a fair one, so I am prepared to assume that the gross profit available to E-UK is around 30%.

43. Now to the remaining steps in Mr Purvis' argument. I agree that it is not easy to make a reliable estimate of the net profits available to a new company. Nevertheless, it can be done, and indeed, as Mr Mitcheson pointed out, was done in *Pioneer* (at page 588). In the present instance I am hampered by lack of reliable information on E-UK's likely costs, but this does not mean I can simply ignore these costs and pretend that it is the gross profit which is available for

splitting between the two sides, which is what Mr Purvis is inviting me to do when he argues for a 50:50 split of the gross profit figure. When a 50:50 split has been used in the past, it has been applied to <u>net</u> profits. I cannot for one moment believe that parties negotiating a licence willingly would agree to use the same split, or anything remotely approaching it, on <u>gross</u> profits. This means that the royalty rate should not be 15%, as Mr Purvis submitted, but something very substantially below this.

44. To follow Mr Purvis' line of argument further, I need to derive from the assumed 30% gross profit some estimate of the likely net profit that E-UK will make. Since I have to do this without having figures for E-UK's costs, I will start by looking at the relation between Schneider's gross and net profit for these control buttons.

45. I have in evidence the accounts for Schneider for 1996. They show a turnover of £262,924,000 and a net profit before tax of £9,063,000. As Mr Mitcheson observed, this represents a net profit of just over 3.4%. The figures include sums for “acquisitions” which probably ought to be excluded, but the amounts are small and make very little difference to the end result. Now Schneider, of course, trade in other goods as well as those which are to be the subject of the present licence. However, from the same accounts it would appear that the gross profit on all their trading operations is 30%, which is exactly the gross profit they say they make on control buttons. I believe I can therefore reasonably assume that control buttons are typical of their products and that 3.4% is a fair estimate of the net profit Schneider gain from them.

46. 3.4% is very much less than 30%. Is the difference between net and gross profits likely to be as great for E-UK? I think not. In Schneider's 1996 accounts, the two main expenses are distribution costs, amounting to some £9 million or 3½% of turnover, and “administrative expenses” amounting to some £60 million or 23% of turnover. As a small company, E-UK may well have proportionately higher distribution costs because it lacks economies of scale, but I would expect it to have, proportionately, much lower administrative costs because it has no large bureaucracy to support. Since it is largely the administrative costs which bring Schneider's figure right down from 30% to 3.4%, I believe E-UK will have the potential to

make a net profit of significantly more than 3.4%. I accept that it will have start-up costs, but even taking these into account I feel it would be reasonable to assume it could make 10% or so net profit. This is, I believe, a much more convincing figure to split between the parties than Mr Purvis' 30%.

47. I must now turn to the question of how to split this profit. I am aware that in older patent cases the profits were often split 50:50, and I am also aware that this was the split used in *Bance*. However, a number of other recent cases, of which *Gerber v Lectra* and *Pioneer* are examples, have used 75:25. I suspect the latter is rather closer to the split that would be made in real life, because I have difficulty believing that a willing licensee would really give up as much as 50% of its potential profit. As a compromise, I am going to use a split of **b**:**a**, which brings the royalty down to just over 3%.

48. Finally I need to consider whether there are any special factors which warrant an adjustment to this figure. There are two possibilities:

a) Mr Purvis argued that because sales by E-UK may be at the expense of sales by Schneider, in real negotiations Schneider would demand a higher royalty to compensate for this, particularly if they have fixed overheads to carry. However, I have already ruled that I cannot take account of Schneider's position as a trader in the goods in question, so I can make no adjustment on this account.

b) The technology is, according to Mr Mitcheson, old, simple and of limited originality and this would lower the royalty in negotiations between willing parties. Mr Purvis puts the emphasis differently - the product is well liked by customers and a market leader, and would therefore command a higher royalty. As I indicated previously, I believe Mr Purvis is closer to the truth, but I am cautious about making any substantial adjustment to the royalty on this account, because the advantages to be gained from having a product which is well established and a market leader will already be reflected in the profit margin which Schneider themselves can make and which formed the basis for my assessment of the royalty. Having said that, I believe the attractiveness of being able to copy the market leader would have put some upward pressure on royalty in negotiations between willing parties, and I will therefore make a small uplift on this account.

49. After allowing for this uplift, I have concluded that the proper royalty rate in the present case should be 4%. The route by which I have arrived at this figure has required me to make rather more assumptions than I would like, but in the absence of better evidence I cannot avoid this.

50. I shall now turn to the other matters on which the parties are divided, referring to the numbered clauses in the draft licence.

Credit notes (clause 1.4)

51. The applicants want to define the Net Sales Price as the invoice price "net of any credit notes raised for returned goods". Mr Mitcheson explained that the purpose of this clause was to avoid double payment of royalties in the case of products delivered and paid for but returned because the wrong item had been ordered or supplied. In these circumstances a credit note would be issued, and the returned item resold. Without the exclusion of credit notes, the item would incur royalties twice. Mr Purvis saw it differently, arguing that the returned goods were likely to be defective goods, which would not be resold, and that the Licensors were entitled to a royalty on such goods. I do not see it that way. The existence of a credit note negates a sale. I see no reason for a royalty to be paid on a transaction which has been annulled, and decide that the clause should remain.

Frequency of statements and payment of royalties (clause 3.4)

52. There are two matters in dispute in this clause. Firstly, the applicant proposes providing statements on a quarterly basis. The respondent insists on them being served monthly. I consider this to be an unnecessary burden on a small company, especially given the small

amounts of money that will actually be involved, and will require the statements to be served on a quarterly basis.

53. Secondly, the applicants propose that the statement setting out the royalties due shall be served within 30 days of the end of the month after the end of each calendar quarter, that within 7 days of the receipt of the statement, the licensor shall send to the licensee an invoice showing the amount of royalty payable together with any VAT applicable thereto, and the licensee shall pay to the licensor the amount of royalties due within 21 days of receipt of the invoice. Mr Purvis put it to me that this is inordinately complicated, and I agree. He also complained it would delay payments for up to 5 months from the point when they were incurred. (He is wrong - the delay could be up to 6 months!) Mr Mitcheson countered this by explaining that E-UK would only be paid by its customers one month after the date of the invoice, and stressing the cash flow problems it faced because of the need to pay for its goods before it had received money for selling them. I have only limited sympathy for Mr Mitcheson. What he says may be true, but the applicant is still seeking a gap of between 2 and 5 months between the time it receives the money from its customers and the time it has to pay the royalty, depending on quite when in the quarter any given sale is made, and I consider that excessive. I therefore order that the statement shall be served within 30 days of the end of each calendar quarter and that the payment shall accompany each statement.

Payment of back royalties (clause 2.3.2)

54. The applicant has included a clause obliging it to pay sums due to the licensor from the commencement date to the last day of the "month of signing" within 2 months of the date of signing. The respondent considers this period too long; it says the applicant has already had plenty of time to calculate the outstanding royalties. I agree; a month should be sufficient, especially given the low level of sales so far. However, there are two other problems with the wording of this clause. Firstly, because this is an imposed licence there will be no "signing". The key date will have to be the date of this decision. Secondly, because I have decided that royalties are to be paid quarterly, it would make more sense for the back royalties to be calculated up to the end of the last calendar quarter - ie 31 December 1997 - and that is what I

order.

Inspection of records (clause 3.8)

55. This was an area of particular contention. The basic problem is that the licensor, quite understandably, wants to be able to go through the licensee's books to check it is not being cheated, but does not want to go to the expense of employing an independent auditor to do this. The licensee on the other hand, and again quite understandably, does not want to disclose commercially-confidential information to a competitor. In particular, Mr Mitcheson said, it does not want to disclose its customer list, nor does it want to disclose its profit margins because that might enable Schneider to undercut it and put it out of business. After some discussion at the hearing, Mr Mitcheson seemed to accept that E-UK could not keep its selling prices and sales figures confidential, but that it could keep its profit margin confidential by not disclosing the prices it paid for its stock.

56. This is certainly not the first time there has been difficulty of this nature in a licence of right case, though usually the parties have managed to come to some sort of compromise. They have been unable to do so here. I was referred to the "inspection of records" clauses in *Bance* and *Pioneer*, but they are of little help because the parties' requirements for confidentiality were not the same. The present draft licence already includes an agreed clause (which is, as it happens, borrowed from *Bance*) allowing the licensee to remove from the records such information as would enable the person inspecting such records to ascertain the identities of customers of the licensee unless such person shall undertake in writing to keep such identities confidential and in particular not to disclose the same to the licensor. Further, the licensor is only supposed to be inspecting records which enable the royalty to be verified, and there is no need for such records to include information from which gross profits can be determined. However, I understood Mr Mitcheson to be saying that in a small company it is very difficult to keep information like this separate from other accounting information.

57. The respondent has proposed that their own auditor should be able to go in, inspect the books and copy whatever they like, subject to the agreed clause mentioned above. The

applicant has proposed the use of an independent auditor, appointed at the licensor's expense. They also want the person inspecting the records to be able to take copies only if a written confidentiality undertaking is given, and for the independent auditor to be chosen by the President of the Institute of Chartered Accountants in England and Wales in the event that the parties fail to agree on someone themselves. At the hearing, in an attempt to arrive at a compromise, Mr Mitcheson proposed that the licensee should only have to reveal the number of products sold and their part numbers, but Mr Purvis felt that did not give the licensor a sufficient check and I agree.

58. To provide a compromise which I believe should meet the legitimate concerns of both sides, I will make provision for the licensor to use its own auditor to inspect the licensee's records to the extent reasonably necessary to permit verification of the royalty due but, to avoid any doubt, stating that the licensee may withhold not only the identities of its customers but also all information about what it costs E-UK to obtain its control buttons from its supplier. However, if E-UK books are so organised that it cannot withhold this information without also withholding information that the auditor ought legitimately to see, I will allow it to insist on an independent auditor but require it to pay 50% of the reasonable costs of that auditor. The licensee can avoid the need for this in the future by organising its books appropriately, but I recognise that it may be too late to do this for past sales. The 50% costs split is intended to balance the interests of both sides. It will deter E-UK from insisting on an independent auditor unless this is really necessary, whilst recognising the fact that using an independent auditor will save Schneider some work which its own auditor would otherwise have had to do.

59. One final point of dispute remains. The applicants have proposed that the audit should be undertaken after a week's prior written notice; the respondents want to give only 48 hours notice. I have received no strong argument from the respondents in favour of 48 hours, and the period of notice in *Bance* was one week, as was pointed out by Mr Mitcheson. I will make the notice period one week.

Advertisement (proposed new clause)

60. The respondent has asked for a clause to be added to the licence as follows:

> "The licensee shall not refer on its products or packaging or in its literature or marketing material directly or indirectly to the existence of the licence, nor promote any of its products by reference to the licence or to the licensor's products."

Mr Purvis argued that this clause reflects the requirement of section 254 of the Act. This section reads:

> (1) A person who has a licence in respect of a design by virtue of section 237 or 238 (licences of right) shall not, without the consent of the design right holder -
>
> (a) apply to goods which he is marketing, or proposes to market, in reliance on that licence a trade description indicating that he is the licensee of the design right owner, or
>
> (b) use any such trade description in an advertisement in relation to such goods.
>
> (2) A contravention of subsection (1) is actionable by the design right owner.
>
> (3) In this section "trade description", the reference to applying a trade description to goods and "advertisement" have the same meaning as in the Trade Descriptions Act 1968.

Mr Purvis also argued that a clause of a similar nature was included in the licence ordered in *Pioneer*.

61. The presence of the clause implies that the licensor would be able to add breach of contract to an action for breach of statutory duty under the Act in the event of failure to abide with the terms of section 254. Mr Mitcheson argued that the clause is broader than the terms of the Act and could therefore, unreasonably, prevent E-UK telling its distributors that it does have a licence, and that insofar as it only restates the statutory rights of the licensor it is unnecessary. He also pointed out that the clause was not raised in pleadings, and was only requested at the

very late stage of the hearing.

62. I agree with Mr Mitcheson. I recognise that a similar clause was permitted by the Hearing Officer in *Pioneer*, but the issue was not fully argued before him and the clause in question was not the same as that now requested by the respondent. The proposed clause goes too far, and if it were restricted to the terms of the Act it would be unnecessary. It has also has been submitted too late. I refuse to include it.

Other details

63. There are a couple of other details to note. Firstly, the draft licence under consideration is worded as though it were an agreed licence between the parties. It will, of course, be an imposed licence and I have therefore modified the introduction and ending to reflect this. Secondly, the version of the draft licence handed up by Mr Mitcheson at the hearing gives a new address for E-UK. We have not been notified formally of any change of address, but I have assumed the one handed up at the hearing is right.

Conclusion

64. In conclusion, I order that the licence be on the terms annexed to (but forming part of) this decision.

65. Neither party has sought an award of costs. It is customary in licence of right proceedings to make no award for costs unless there are some very special circumstances. I see nothing unusual here and therefore decline to make an order for costs.

66. Under section 249 of the Act any appeal from this decision lies to the Appeal Tribunal constituted under section 28 of the Registered Designs Act 1949. Since this decision is not on a matter of procedure, under the rules of that Tribunal any appeal must be filed within six weeks.

Dated this 6th day of February 1998

P HAYWARD

Superintending Examiner, acting for the comptroller

THE PATENT OFFICE

LICENCE OF RIGHT

THIS LICENCE is made between

(1) **SCHNEIDER LIMITED** (Company No. 1407228) whose registered office is at Stafford Park 5, Telford, Shropshire TF3 3BL ("Licensor") and

(2) **E-UK CONTROLS LIMITED** (Company No. 3205967) whose registered office is at Mellow Farm, Heath Hill, Dockenfield, Farnham, Surrey GU10 4HH ("Licensee").

WHEREAS:

(A) The Licensor asserts that copyright subsists in the relevant Drawings (as defined below) and that it is the owner of that copyright in the United Kingdom.

(B) The Licensor's copyright became subject to Licences as of Right on 1 August 1994 under paragraph 19, Schedule 1 of the Copyright Designs and Patents Act 1988.

(C) E-UK Controls Limited seeks a Licence and has applied to the Comptroller-General of Patents, Designs and Trade Marks to settle its terms.

the Comptroller orders that a Licence be granted on the following terms:

1. Definitions

In this Licence:

1.1 **"relevant Drawings"** means any and all drawings set out in the Schedule to this Licence which were made prior to 1st August 1989 (each referred to separately as a "relevant Drawing").

1.2 **"relevant Articles"** means any articles which are or comprise a reproduction of a relevant Drawing or a substantial part thereof.

1.3 **"excluded Articles"** shall mean the following and each of them:

(a) articles which are the manufacture or merchandise of the Licensor; and

(b) articles which are not manufactured in whole or in part prior to 1st August 1999.

1.4 **"Net Sales Price"** means the invoice price net of any Value Added Tax or other sales tax, carriage charges and credit notes raised for returned goods for sales or other disposals as set out in Clause 3.2 of the relevant Articles or any components thereof. In the case of sales other than in arm's length transactions the invoice price shall be deemed the average Net Sales Price of the relevant Articles or any components thereof which have been sold in arm's length transactions during the reporting period referred to in Clause 3.4 during which sales other than in arm's length transactions took place. If there have been no arm's length sales the price shall be that of the subsequent resale price in the first arm's length transaction.

1.5 **"the Act"** means the Copyright Designs and Patents Act 1988 including any amendment thereto or re-enactment thereof.

1.6 **"Invoice price"** means the list price less the agreed discount provided such discount is agreed on an arm's length basis.

2. **Licence**

2.1 The Licensor hereby licences the Licensee to do all such acts as would otherwise constitute an infringement of the copyright pursuant to the Act in the relevant Drawings and each of them.

2.2 The Licensee shall have the right to grant sub-licences under the foregoing licence to third party sub-contractors provided that all such goods as are manufactured or dealt in or by any such sub-licensee are recorded in the records which the Licensee shall cause to be kept pursuant to Clause 3.7 hereof.

2.3 This Licence:

2.3.1 shall have effect from the date on which the application to the Comptroller to settle a licence of right was made, *viz* 11 February 1997 ("the Commencement Date"), and shall continue until 31 July 1999; and

2.3.2 within 1 month from the date of the Comptroller's decision settling the terms of this Licence the Licensee shall:

(a) pay to the Licensor all such sums as would be due to the Licensor under this Licence from the Commencement Date to 31 December 1997; and

(b) serve upon the Licensor a statement setting out the manner in which such royalties have been calculated.

2.4 Nothing in this Licence shall be construed as a licence to the Licensee under any other rights of the Licensor.

3. Royalty

3.1 The Licensee will pay to the Licensor a royalty in accordance with the provisions of this clause.

3.2 Royalties shall fall due upon the first to happen of any of the following events in relation to any relevant Articles which are not excluded Articles namely: sale, export or other disposal whether temporary or permanent (including disposal on sale or return terms), first hire or loan (whether or not for reward) or use by or at the request of the Licensee (including use for display or advertisement purposes).

3.3 Royalties shall be calculated at the rate of 4% (four per cent) of the Net Sales Price of any relevant Articles which are not excluded Articles sold by the Licensee.

3.4 Within 30 days after the first days of January, April, July and October of each year the Licensee shall serve upon the Licensor a Statement setting out the amount of royalties due under this Licence during the preceding calendar quarter, and shall accompany such Statement with payment of that amount in pounds sterling.

3.5 Forthwith upon payment of the royalties the Licensor shall provide or procure the provision of a receipt for such royalties, such receipt to be suitable (if appropriate) for the purposes of VAT or otherwise so as to enable the Licensee to recover or offset such taxes as the Licensee may be entitled to at law.

3.6 The Licensee shall:

3.6.1 reasonably co-operate with the Licensor (at the expense and request of the Licensor) so as to assist the Licensor in receiving royalty payments gross of tax where this is permitted by the law, and

3.6.2 shall furnish the Licensor with certificates of any tax withheld in such form as the Licensor may reasonably require.

3.7 The Licensee shall cause to be kept full and accurate records from which the accuracy of the statements produced under Clause 3.4 hereof may be verified and from which dealings by the Licensee in excluded Articles may be ascertained. Such records shall be kept by the Licensee until three years after the rights of the Licensor to inspect the same have expired.

3.8 Subject to Clause 3.9 below, the Licensor may appoint an accountant or auditor or other like agent to inspect and take copies of such records during normal working hours on a weekday (not being a Bank Holiday) on giving 1 week's prior written notice to the extent reasonably necessary to permit verification of the statement provided for in Clause 3.4 of this Licence provided that

3.8.1 no such inspection may be required by the Licensor within 3 months after any previous such inspection; and

3.8.2 the Licensee may remove from such records such information as would enable the person inspecting such records to ascertain (a) the identities of customers of the Licensee and (b) what it has cost the Licensee to obtain relevant articles from its suppliers.

3.9 The Licensee may insist that any or all such inspections are carried out by an independent auditor or other like agent who shall undertake in writing to keep confidential, and in particular not to disclose to the Licensor, all information of the type specified in Clause 3.8.2, provided that

3.9.1 without prejudice to any obligation that may arise under Clause 3.10, the Licensee shall pay 50% of the reasonable charges of such independent auditor or other like agent; and

3.9.2 if the parties are unable to agree on the choice of independent auditor or other like agent, they shall request the President of the Institute of Chartered Accountants in England and Wales to appoint an independent auditor.

3.10 The Licensee shall reimburse the Licensor for reasonable costs of such inspection as referred to in Clause 3.8 above if such inspection shall disclose any understatement in any statement of royalties due or any underpayment of royalties.

3.11 Each year on the anniversary of the commencement of the Licence and on 1 December 1999, the Licensee shall provide to the Licensor at the Licensee's expense a statement by a firm of chartered accountants with offices in England Wales or Scotland that in their opinion all sums due under this Licence by way of royalty have been correctly determined and paid in accordance with this Licence and if such opinion cannot be given identifying the relevant errors.

4. Termination

4.1 For the avoidance of doubt, the Licensee's obligations to pay royalties under Clause 3 hereof shall not apply in respect of events of the kind specified in Clause 3.2 arising after 1st August 1999.

4.2 Except as otherwise provided for herein, this Licence may only be varied or determined by the consent of both the Licensor and the Licensee or with the leave of the Comptroller or the Court.

4.3 The Licensor may determine this Licence with immediate effect by written notice to the Licensee upon the occurrence of any of the following events:

4.3.1 the failure by the Licensee to remedy any breach of this Licence, if the breach is capable of remedy, within one month starting on the day after receipt of written notice referring to this clause and specifying a breach hereof which has actually been committed by the Licensee; and

4.3.2 the liquidation or winding-up (other than for purposes of reconstruction or amalgamation) of the Licensee or the appointment of a liquidator or receiver to the assets of the Licensee.

4.4 For the purposes of Clause 4.3, failure to pay any money by the due date may be remedied by the late payment of such money together with interest calculated at a compound rate of interest being 3 per cent per annum above the base rate for the time being of the Royal Bank of Scotland plc.

4.5 For the purposes of Clause 4.3, in the case of any dispute as to moneys which are due, failure to pay any money claimed may be remedied by submitting the same to a Court of competent jurisdiction and (subject to any appeal) abiding by any judgment or decision therein in respect of such dispute.

4.6 Within 1 month after termination for whatever cause, the Licensee shall serve upon the Licensor a statement ("the Closing Statement") setting out the royalties due in respect of the period prior to termination and shall accompany the same with the sum therein shown to be due or a cheque therefor.

4.7 Notwithstanding the termination of this Licence, the right of inspection afforded by Clause 3.8 shall subsist until 2 months after the service of the Closing Statement.

5. Service

5.1 Service upon Licensee shall be to Licensees' address at:
Mellow Farm
Heath Hill
Dockenfield
Farnham
Surrey GU10 4HH

or to such other address in the United Kingdom as the Licensee shall give by notice in writing to the Licensor.

5.2 Service upon the Licensor shall be to the Licensor's address at:
Stafford Park 5
Telford
Shropshire TF3 3BL

or to such other address in the United Kingdom as the Licensor shall give by notice in writing to the Licensee.

5.3 Service may be by registered first class post from within the United Kingdom in which case it shall be deemed for the purposes of this Licence to have been received on the third working day after posting or by acknowledged facsimile transmission in which case it shall be deemed to have been received on the date of the acknowledgement.

6. Waiver

Either party's failure at any time or from time to time to exercise any of its rights under this Licence will not be deemed to be a waiver of any such rights nor will it in any way prevent such party from subsequently asserting or exercising any such rights.

7. Governing Law and Jurisdiction

This Licence is governed by and shall be construed in accordance with English law and the parties hereby submit to the non-exclusive jurisdiction of the English Courts.