obliquely through the middle of the CD cover, swayed His Honour, on the evidence before him, against granting Sony and Michael Jackson the interim orders they sought. In return, Apple House Music would feature the disclaimers represented in the revised artwork and undertook to disclose to Sony's and Michael Jackson's legal advisers all marketing and promotional material prior to its release.

Appeal

Sony and Michael Jackson sought and obtained from Einfeld J leave to appeal. Between 18 August and 29 September 1993, when the matter came before the Full Court of the Federal Court comprising Lockhart, Sheppard and French JJ, Apple House Music further revised its proposed artwork by adding a more prominent disclaimer, again in the form of a diagonal representation of the word UNAUTHORISED, on the back cover of the CD's. In addition, the third version of the artwork included, on the back cover, disclaimers mirroring those added previously to the front cover, at the top and bottom of the cover in white text on red background.

The Full Court came to the view that Einfeld J had not erred in applying the principles to an interlocutory hearing seeking injunctive relief and dismissed the appeal noting however the undertaking furnished to the Court by Counsel for Apple House Music to feature the enhanced disclaimers as represented in the further revised artwork. The Full Court noted that it may be that evidence would be led at the final hearing of attitudes and of reactions of various persons who may be concerned in the purchase of the CD's which may show that notwithstanding the disclaimers, there is nevertheless established misleading or deceptive conduct.

Following the appeal, Apple House Music again revised its artwork for the covers of the CD's in question. It gave even greater prominence to the disclaimer in the form of an UNAUTHORISED "stamp" on the back cover of the CD's to mirror that appearing on the revised artwork for the front cover. However, Apple House did not use this fourth round of artwork when it released its CD's, reverting to the third round artwork.

The parties are presently completing the discovery process in preparation for the final hearing.

Jim Dwyer and Andrew Wiseman, Allen Allen and Hemsley.

Performers Protection - the gap exposed

Stephen Peach expounds upon the problems of and possible solutions to *"unauthorised"* sound recordings.

The recent release, by the Adelaide based firm Apple House Music, of unauthorised sound recordings of many well known recording artists has exposed a significant gap in the performers' protection provisions of the *Copyright Act 1968 (Part XIA)*.

All of the recordings released to date are recordings of non-Australian artists. In relation to such artists Part XIA provides, in effect, that the following criteria need to be satisfied before the relevant artists can take action under the Act to restrain dealings in, and the exploitation of such unauthorised recordings. In short:

(a) the recording must be a performance given on or after 1 January 1992; and
(b) the performance must have been given by an artist who is a citizen, protected person or resident of a country specified in the Regulations made under the Act (the most important omission being the United States of America); and
(c) the performance must have been given in such a country (again, the most important omission is the United States of America).

Most, if not all, of the recordings released by Apple House Music would appear to be recordings of performances given prior to 1 January 1992 or performances given by citizens, protected persons or residents of non-scheduled countries or performances given in non-scheduled countries or a combination of these. The recordings were "unauthorised" in the sense that the release of the recordings was not authorised by either the artist or the artist's record company. That fact is explicitly stated on the covers of all records released by Apple House Music.

Unauthorised recordings by many well known artists such as Madonna, Prince, U2, Michael Jackson and Queen have been released on to the market without the recording artist receiving any recording royalties. Statutory mechanical royalties are paid, but these only represent a small proportion of the amount that these artists would typically receive upon the release of an authorised album.

The release of these recordings is a cause for both concern and embarrassment, not only in Australia, but internationally. In most territories of the world, including the United States of America, the release of such recordings can be restrained. In some territories, copyright legislation is relied upon whilst in other territories reliance is placed upon various unfair competition laws. It is a matter of great concern that a country that has, until recently, been at the forefront of copyright and intellectual property protection should be unable to adequately restrain the release of these unauthorised recordings, particularly in circumstances where firms such as Apple House Music are commercially exploiting the intellectual property of the artist without the artists' consent and without paying any, or any adequate, compensation. The concern has been acknowledged by the Commonwealth Government and the matter is under review by the Minister for Justice, The Honourable Mr Duncan Kerr.

The protection gap could be effectively closed if the following amendments were to be made to Part XIA of the Act.

(a) The requirements for protection should be made disjunctive, not conjunctive. In other words, it would be sufficient if the performance was given in a scheduled country or given by a citizen, protected person or resident of a scheduled country. It would not be necessary for both requirements to be fulfilled. This would bring the Act in line with the corresponding UK Act, the *Copyright, Designs and Patents Act 1988;*
(b) Dealings in unauthorised recordings, whenever made, should be restricted. As presently drafted, the recording must be of a performance (in relation to non-Australian artists) given after 1 January 1992. There seems no reason why the date of the performance should be a relevant factor provided that dealings in, or exploitation of, the recordings is not made retrospectively illegal;
(c) The United States of America should be scheduled. The argument against scheduling the USA is that it is not a signatory to the Rome Convention. However, the USA is able to restrict dealings in unauthorised recordings through a variety of unfair competition laws and, as such, is able to provide de facto performers' protection. In those circumstances, there seems no practical justification for refusing to acknowledge the fact and extending performers' protection under our Act to the United States of America; and
(d) Those who obtain the exclusive recording services of the artists should be entitled to maintain a separate action under the performers' protection provisions in circumstances where the performer does not consent to the recording of the performance. This approach has also been adopted in the UK legislation and acknowledges the reality that many artists look to the record company to safeguard their interests. In those circumstances, there seems little justification for not giving those companies the express right to maintain an action against those who exploit the unauthorised recordings.

Stephen Peach is a partner of the firm Gilbert & Tobin in Sydney.