

# New Jersey Law Journal

VOL. CLXXIII – NO. 3 – INDEX 230

JULY 21, 2003

ESTABLISHED 1878

## Intellectual Property

# We'll Miss You, Mister Rogers

By Roy H. Wepner

So many people are going to miss Mister Rogers, his neighbors and his neighborhood. The recent death of Fred Rogers has predictably evoked numerous tributes to his contribution to children's television and beyond. What many people have forgotten is that he made an important contribution to the development of intellectual property law.

Indeed, his testimony was quoted at length in a landmark U.S. Supreme Court decision which ensured that we would be able to watch TV programs, movies and the like whenever we choose to do so with the assistance of our VCRs (or any technologically advanced successors to the VCR).

To appreciate the story, it is necessary to go back to an era that seems today to have been virtually prehistoric: the introduction of the VCR. Believe it or not, there was a time when if you wanted to watch a particular TV program, you had to be in front of your TV at the time the program was broadcast. Also, there was no simple and inexpensive way to watch movies in your home. Instead, you went to the theater when the movie was released or, if you missed it, you waited for it to come along on TV — and then you watched it when it was broadcast.

---

*Wepner is a partner at Lerner, David, Littenberg, Krumholz & Mentlik of Westfield.*

The introduction of the video cassette recorder changed all that. If we had to be at work, school or wherever when an important TV show or sporting event was being broadcast, we could now tape the program and watch it at our leisure.

But the owners of copyrights on certain television programs did not appreciate VCRs as much as the rest of us did. They contended that VCRs would be improperly used to make copies of copyrighted material — that is, to commit copyright infringement. Accordingly, in 1976, they filed suit against Sony Corp., the manufacturer of one popular early VCR, in the U.S. District Court for the Central District of California, where the copyright owners lost the case. See 480 F. Supp. 429 (C.D. Cal. 1979).

The copyright owners appealed to the Ninth U.S. Circuit Court of Appeals. That court reversed the district court's judgment, held Sony liable for contributory infringement, and ordered the district court to fashion appropriate relief. See 659 F.2d 963 (9th Cir. 1981).

Sony sought review at the U.S. Supreme Court. The Court agreed to hear the case, and issued its decision on Jan. 17, 1984. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

The Supreme Court's decision, written by Justice John Paul Stevens, is of interest for many reasons, not the least of which is the fact that the Court referred to the devices at issue as

"VTRs," standing for video tape recorders. But to me, the most interesting aspect of the decision was its reference to and reliance upon the testimony of Fred Rogers.

An important focus of the Court's opinion was whether the devices were capable of commercially significant noninfringing uses. In reviewing the evidence of record, the Court first discussed an educational TV station in Los Angeles, which had a published guide that expressly authorized home taping as to a significant portion of its programming. The next evidence the Supreme Court turned to was as follows:

Second is the testimony of Fred Rogers, president of the corporation that produces and owns the copyright on "Mister Rogers' Neighborhood." The program is carried by more public television stations than any other program. Its audience numbers over 3,000,000 families a day. He testified that he had absolutely no objection to home taping for non-commercial use and expressed the opinion that it is a real service to families to be able to record children's programs and to show them at appropriate times.

If there are millions of owners of VTR's [sic!] who make copies of televised sports events, religious broadcasts and educational pro-

grams such as “Mister Rogers’ Neighborhood,” and if the proprietors of those programs welcome the practice, the business of supplying the equipment that makes such copying feasible should not be stifled simply because the equipment is used by some individuals to make unauthorized reproductions of respondents’ works. The respondents do not represent a class composed of all copyright holders. Yet a finding of contributory infringement would inevitably frustrate the interests of broadcasters in reaching the portion of their audience that is available only through time-shifting.

In a footnote, the Court quoted the actual testimony of Mister Rogers. It is worth reading that testimony today, if for no other reason than you can practically hear his inimitable “voice” discussing the subject much as you would imagine him doing on his celebrated TV show:

Some public stations, as well as commercial stations, program the “Neighborhood” at hours when some children cannot use it. I think that it’s a real service to families to be able to record such programs and show them at appropriate times. I have always felt that the advent of all this new technology that allows people to tape the “Neighborhood” off-the-air, and I’m speaking for the “Neighborhood” because that’s what I produce, that they then become much more active in the programming of their family’s television life. Very frankly, I am opposed to people being programmed by others. My whole approach in broadcasting has always been “You are an important person just the way you are. You can make healthy decisions.” Maybe I’m going on too long but I just feel

that anything that allows a person to be more active in the control of his or her life, in a healthy way, is important.

We all know how the case turned out, particularly if we have been taping TV shows, movies and sporting events for as long as we can remember. To be sure, the Supreme Court did reverse the Ninth Circuit’s decision and thus ruled in favor of Sony, but it did so by only a razor-thin 5-4 majority. Ironically, the dissenting justices included Harry Blackmun and Thurgood Marshall, who — at least in other arenas — gave Fred Rogers a run for his money when it came to espousing personal freedom.

So the next time your child or grandchild wants to watch a rerun of “Mister Rogers’ Neighborhood,” tape it instead and save it for later. In fact, just for the heck of it, tape the next episode of “Everybody Loves Raymond” or “Law & Order” or what have you, and watch it the next night. And remember Fred Rogers, who helped make it possible in his own unique way. ■