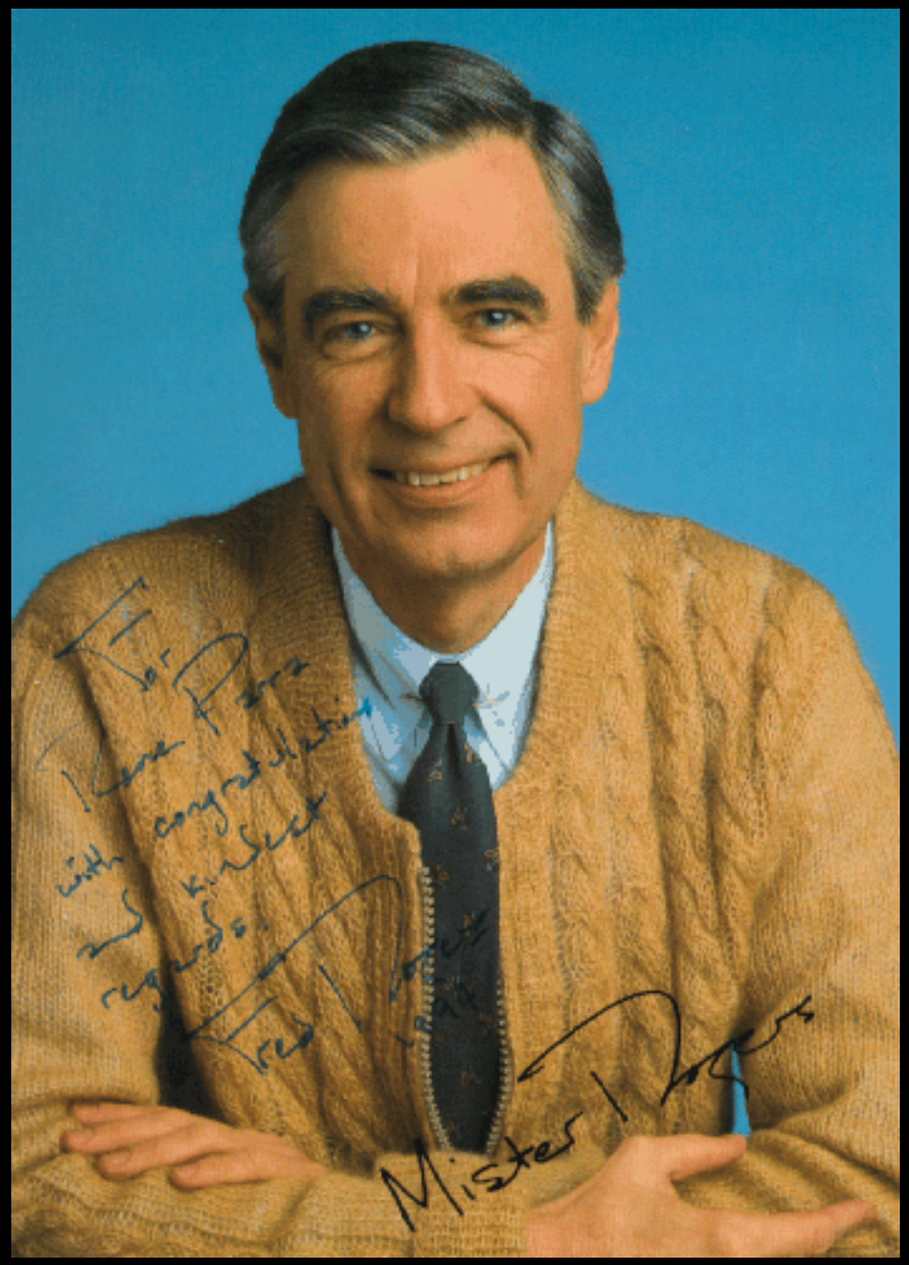
Fair Use and Market Failure

Copyright Law – Professor Grimmelmann
Class 26 – November 25, 2008

fair use: three days, three clusters

- first cluster: creating a specific new work substantially similar to the copyrighted one
- second cluster: using a copyrighted work as an input to a process that produces something valuable but very different
- third cluster (today): using a copyrighted work in ways that don't harm the market

Sony v. Universal



Run the four factors . . .

Sony v. Universal

- does the section on authorized time shifting bear on the fair use analysis?
- what's this debate about "productive" and "consumptive" uses about?
- what changes in the analysis of archiving? of TiVo? of a Cablevision box? an iPod?

American Geophysical Union v. Texaco

Who is Donald H. Chickering, and what's his story?

Run the four factors . . .

AGU v. Texaco

- what *is* the market for journal articles? does it include single-article reprints?
- is there a circularity problem here? how does the fair use holding affect the markets the fourth factor says to measure?
- is there a principled way to decide what markets the copyright owner is entitled to control and which ones she isn't?

Michigan Document Services

- what's the relationship between MDS, professors, students, and the university?
- run the factors. which ones are surprising?
- how would the situation change if MDS gave students devices to make copies?
- any thoughts about pure licensing markets?

the role of custom

- what are the Classroom Guidelines? what legal force do they have?
- if teachers exceed them, and have for years, does that mean anything? should it?
- why might customs change over time? how could copyright owners affect the customs?
- does custom matter? should it?

Napster

- run the factors …
- is the analysis here consistent with Sony's treatment of commercial use?
- what do you think about the analysis of the effect on the market … in 2001? in 2008?
- I had to give you at least one easy case.

next time

digital restrictions management