Paul Goldstein, Copyright's Highway: From Gutenberg to the Celestial Jukebox, 208 (rev. ed. 2003). Do you agree?

A critical question for market failure theory is whether holding the challenged use fair would frustrate development of a viable market for that use. In *Sony*, the copyright owners' expert had admitted that "time-shifting without librarying would result in 'not a great deal of harm.'" *Sony*, 480 F. Supp. at 467. With the passage of time, the evolution of both copying technologies and new business models based on copying have allowed copyright owners to present more concrete arguments about economic harm. Concurrently, market failure theory has moved from the pages of academic law reviews into court decisions.

The development of new markets and distribution methods raises a now familiar question: Which markets does copyright law reserve for the copyright owner? Put differently, what kinds of economic harm are cognizable under §107? Consider the following case.

A&M Records, Inc. v. Napster, Inc.

239 F.3d 1004 (9th Cir. 2001)

[Review the materials on peer-to-peer file-sharing in Chapter 6.C, pages 489-503, *supra*.]

BEEZER, J.: . . . Napster contends that its users do not directly infringe plaintiffs' copyrights because the users are engaged in fair use of the material. . . .

. . . The district court determined that Napster users engage in commercial use of the copyrighted materials largely because (1) "a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester" and (2) "Napster users get for free something they would ordinarily have to buy." . . . The district court's findings are not clearly erroneous.

Direct economic benefit is not required to demonstrate a commercial use. Rather, repeated and exploitative copying of copyrighted works, even if the copies are not offered for sale, may constitute a commercial use. . . . In the record before us, commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies. . . .

We also note that the definition of a financially motivated transaction for the purposes of criminal copyright actions includes trading infringing copies of a work for other items, "including the receipt of other copyrighted works." *See* No Electronic Theft Act ("NET Act"), Pub. L. No. 105-147, 18 U.S.C. §101 (defining "Financial Gain"). . . .

[Regarding the second and third fair use factors, the court noted that the works at issue were highly creative and that Napster users copied entire works.]

. . . [T]he district court concluded that Napster harms the market in "at least" two ways: it reduces audio CD sales among college students and it "raises barriers to plaintiffs' entry into the market for the digital downloading of music." . . . The district court relied on evidence plaintiffs submitted to show that Napster use harms the market for their copyrighted musical compositions and sound recordings. In a separate memorandum and order regarding the parties' objections to the expert reports, the district court examined each report, finding some more appropriate and probative than others. . . . Notably, plaintiffs' expert, Dr. E. Deborah Jay, conducted a survey (the "Jay Report") using a random sample of college and university

students to track their reasons for using Napster and the impact Napster had on their music purchases. . . . The court recognized that the Jay Report focused on just one segment of the Napster user population and found "evidence of lost sales attributable to college use to be probative of irreparable harm for purposes of the preliminary injunction motion." . . .

Plaintiffs also offered a study conducted by Michael Fine, Chief Executive Officer of Soundscan, (the "Fine Report") to determine the effect of online sharing of MP3 files in order to show irreparable harm. Fine found that online file sharing had resulted in a loss of "album" sales within college markets. After reviewing defendant's objections to the Fine Report and expressing some concerns regarding the methodology and findings, the district court refused to exclude the Fine Report insofar as plaintiffs offered it to show irreparable harm. . . .

As for defendant's experts, plaintiffs objected to the report of Dr. Peter S. Fader, in which the expert concluded that Napster is *beneficial* to the music industry because MP3 music file-sharing stimulates more audio CD sales than it displaces. . . . The district court found problems in Dr. Fader's minimal role in overseeing the administration of the survey and the lack of objective data in his report. The court decided the generality of the report rendered it "of dubious reliability and value." The court did not exclude the report, however, but chose "not to rely on Fader's findings in determining the issues of fair use and irreparable harm." . . .

We, therefore, conclude that the district court made sound findings related to Napster's deleterious effect on the present and future digital download market. Moreover, lack of harm to an established market cannot deprive the copyright holder of the right to develop alternative markets for the works. . . . [T]he record supports the district court's finding that the "record company plaintiffs have already expended considerable funds and effort to commence Internet sales and licensing for digital downloads." . . . Having digital downloads available for free on the Napster system necessarily harms the copyright holders' attempts to charge for the same downloads. . . .

. . . We next address Napster's identified uses of sampling and space-shifting. . . .

The district court determined that sampling remains a commercial use even if some users eventually purchase the music. We find no error in the district court's determination. Plaintiffs have established that they are likely to succeed in proving that even authorized temporary downloading of individual songs for sampling purposes is commercial in nature. . . . The record supports a finding that free promotional downloads are highly regulated by the record company plaintiffs and that the companies collect royalties for song samples available on retail Internet sites. . . . Evidence relied on by the district court demonstrates that the free downloads provided by the record companies consist of thirty-to-sixty second samples or are full songs programmed to "time out," that is, exist only for a short time on the downloader's computer. . . . In comparison, Napster users download a full, free and permanent copy of the recording. . . . The determination by the district court as to the commercial purpose and character of sampling is not clearly erroneous. . . .

Napster further argues that the district court erred in rejecting its evidence that the users' downloading of "samples" increases or tends to increase audio CD sales. The district court, however, correctly noted that "any potential enhancement of plaintiffs' sales . . . would not tip the fair use analysis conclusively in favor of defendant." . . . We agree that increased sales of copyrighted material attributable to unauthorized use should not deprive the copyright holder of the right to license the material. . . . Nor does positive impact in one market, here the audio CD market, deprive the copyright holder of the right to develop identified alternative markets, here the digital download market. . . .

Napster also maintains that space-shifting is a fair use. Space-shifting occurs when a Napster user downloads MP3 music files in order to listen to music he already owns on audio CD. . . .

We conclude that the district court did not err when it refused to apply the "shifting" analys[i]s of *Sony*. . . . *Sony* [is] inapposite because the methods of shifting in th[at] case[] did not also simultaneously involve distribution of the copyrighted material to the general public; the time or space-shifting of copyrighted material exposed the material only to the original user. . . .

NOTES AND QUESTIONS

1. Is the *Napster* court's fair use holding consistent with *Sony*? In particular, are the cases consistent in their definition of what constitutes a commercial use? Are they consistent in their view of what economic harm is relevant and what evidence should be considered in assessing economic harm?

2. Should *Napster* be understood as a case about market failure? It would indeed be difficult for Napster's numerous users to seek out the copyright owners of both the sound recordings and the underlying musical works to request permission to exchange songs. Does this argue for upholding Napster's fair use defense?

3. Should the activities of Napster users be considered "productive" in some sense? Why, or why not? If you conclude that these activities are productive, are there other factors that nonetheless weigh more heavily?

4. Would the *Napster* court have reached a different conclusion if Napster had shown that a substantial number of music copyright owners did not object to users distributing music through the Napster system? Would the court have concluded differently if Napster had shown that the music industry was attempting to suppress file-sharing technology rather than to develop business models allowing for widespread electronic distribution?

5. Review the Note on Copyright's Default Rules and the Google Book Search Project, *supra* Chapter 3. Are the copies that Google makes when it scans material into its system likely to be considered fair use? What about the short excerpts that it returns in search results? Should it matter to the fair use inquiry if a work is an orphan work?

Neither *Sony* nor *Napster* involved the types of uses that are traditionally viewed as implicating large positive externalities, like research and education. When, if ever, should courts excuse copying as fair when it occurs during the course of research or education? How, if at all, should the existence of permission systems affect the analysis? Consider the following case.

American Geophysical Union v. Texaco, Inc.

60 F.3d 913 (2d Cir. 1995)

[The plaintiffs were 83 publishers of scientific and technical journals. They brought a class action against Texaco, alleging that unauthorized copying of articles from their publications by Texaco's research scientists infringed their copyrights. Texaco subscribed to a number of journals. For example, it had had three subscriptions to the *Journal of Catalysis* (*Catalysis)* since 1988. It maintained a library of publications, and the library would route journals to interested scientists. The parties stipulated that, rather than inquire into the copying of all of Texaco's 400-500 researchers, they would select one researcher randomly as representative.