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J. Fandom Stud. (forthcoming)

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“I’m a Lawyer, Not an Ethnographer, Jim”: Textual Poachers and Fair Use
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Henry Jenkins’ *Textual Poachers* had a formative influence on my work. My first law review article, *Legal Fictions*, relied on *Textual Poachers* to help explain fan fiction, and to argue for its merits to audiences largely unaware of the rich traditions of media fandom (Tushnet 1997). *Legal Fictions* used the features Jenkins found in fanworks to argue that fanworks should be protected as fair use against claims that they infringed the copyrights in the “original” works. The scare quotes are there because of course all works draw on existing material; Gene Rodenberry famously pitched *Star Trek* as “*Wagon Train* in space.” Only modern copyright regimes require authors to hide their antecedents and claim that genius means invention out of nothing, instead of invention through clever deployment of existing materials. *Legal Fictions*, like numerous other law review articles that followed it, drew on *Textual Poachers* for its powerfully sympathetic ethnographic account of fandom.¹

When a work is inspirational and productive, it will also draw criticism—and here I am speaking both of *Star Trek* and of *Textual Poachers*. Jenkins’ book is generally understood to be sympathetic to and rehabilitative of fans and their creations, in contrast to an older tradition that tended to see fan cultures as degraded and duped by capitalism. For that reason, he did not dwell on problematic aspects of fandom and fanworks, including their potential to perpetuate heterosexist romance tropes, anti-gay attitudes (even among some female slash fans), and racist exclusions from representation, all while fans congratulate themselves for their edginess. Subsequent work has complicated his accounts, though generally without arguing that media fan cultures are worse than “mainstream” cultures or that they deserve suppression. Instead, those building on Jenkins have often emphasized the complexity of fannish culture, and the diversity within it, for good and ill. Fandom is made of people, and people are sometimes awful to each other.

This additional work is important for people engaged with fan studies and fandom. It prevents triumphalism from obscuring continuing needs and failures within fandom, especially for groups that still remain underrepresented and misrepresented. But I would like to argue that positivity—especially engaged, reflective positive commentary of the kind that *Textual Poachers* represents—has an important place in fandom studies as long as powerful cultural arbiters, including people among our legal decisionmakers, look down on fans. While we should not hide our problems, neither should we forget that we still often need to defend our very right to exist. From my perspective, *Textual Poachers* is not (just) directed at explaining fans to academics. It is also useful for talking to people outside fandom and academia. For them, the explanations of the good that fandom does can be more important than the caveats that are also true and also worth discussing.

Because both cultural norms and law affect fans’ ability to make and enjoy the things we love, the positive work of *Textual Poachers* still needs to be done, and redone. The general public does not value fandom in the way that Jenkins does, though pockets of acceptance and even

¹ A search of Westlaw reveals 36 legal articles citing *Textual Poachers*, a fairly large number for a work outside the legal canon.

respect are growing. For example, the online journal *As Others See Us: Fanfic in the Media* tracks references to fan fiction in mainstream media.² What it reports is alternately depressing, encouraging, and baffling. Fanworks are routinely misunderstood, treated as a practice invented in the last few years, and denigrated, with “fan fiction” a common synonym for “poor writing.” They also receive sympathetic treatment from some mainstream reporters, so the news is not all bad—but we are at best in a transition period. I would suggest that media fandom’s popular association with adolescent girls is going to extend that transition, since teenage girls suffer a lot of disrespect in mass media. Fans still seem excessive, overinvested, not politely consuming but also not creating culturally valued artifacts. Though fans are people with passions and interests, they are too often treated as figures of fun rather than as ordinary or representative citizens. Given such degraded creators, the works fans create start out with a disadvantage.

And then there’s this guy, willing to say outright in a law review article that the concerns that animate fanworks are simply unworthy of consideration:

The Harry Potter series of books ... are works of pure fancy. These books certainly deal with issues of human nature— addressing subjects like the struggle between good and evil, self-awareness, and coming of age—but they are set in a parallel universe. They make no explicit attempt to address important social or political topics, and as such they should be free from subsequent use [for purposes of fair use analysis].

Genre fiction (horror, mystery, romance) is typically about the plot of the story or about the main character’s experience within the setting developed in the story. These works deal with human nature but generally lack social commentary. Romance novels, for example, deal with love, lust, romance, and human relationships. These works, however, are largely divorced from the issues and problems of the real world.

(Cobenz 2009: 302)

In some sense, I hardly know where to start with these claims. But then I do: start with *Textual Poachers*, which explains exactly why “love, lust, romance, and human relationships,” and other topics addressed in fan fiction, are definitely not “divorced from the issues and problems of the real world.”

This is just one law review article, not a pronouncement from a judge or a legislator. But it makes a legal argument against fan freedom and for copyright owners’ rights to suppress fanworks they do not like. When the risk we are trying to minimize is not only contempt but a threat of a lawsuit, how should we talk to policymakers, who have also generally marinated in this climate of widespread cultural disrespect for media fandom and feminized pursuits?

Copyright law favors critical uses of existing works, regarding them as likely to be fair uses. Thus, *Textual Poachers’* explanation of how fans engage critically when they create provides important tools to defend fanworks in legal settings. Jenkins himself has recognized the copyright implications of his work. Writing on his blog a number of years ago, before more recent fair use-friendly court cases, he explained:

² Available at: <http://as-others-see-us.dreamwidth.org/>.

I regard all or at least most fan fiction to involve some form of criticism of the original texts upon which it is based — criticism as in interpretation and commentary if not necessary criticism as in negative statements made about them....

Fan stories are in no simple sense just “extensions” or “continuations” or “extra episodes” of the original series.... Just as a literary essay uses text to respond to text, fan fiction uses fiction to respond to fiction. That said, it is not hard to find all kinds of argumentation about interpretation woven through most fan produced stories. A good fan story references key events or bits of dialogue to support its particular interpretation of the character’s motives and actions. There are certainly bad stories that don’t dig particular[ly] deeply into the characters or which fall back on fairly banal interpretations, but the last time I looked, fair use gets defined in functional terms (what is the writer trying to do) and not aesthetic terms (what they produce is good or bad artistically). Fan fiction extrapolates more broadly beyond what is explicitly stated in the text than do most conventional critical essays and may include the active appropriation and transformation of the characters as presented but even here, I would argue that the point of situating the characters in a different historical context, say, or in another genre is to show what makes these characters tick and how they might well remain the same (or be radically different) if they operated in another time and place. Fan fiction is speculative but that does not mean that it is not at its core interpretative.

(Jenkins 2006a)

He also points out that fanworks come out of the push-pull of fascination and frustration: fans usually enjoy the original, but also see its flaws and gaps, which their works attempt to address and, sometimes, redress. It is in these repairs and additions that fair use is most likely to be found. Although Jenkins disclaims legal expertise, his account provides a clear explanation of how the legal concept of “transformativeness,” which heavily favors fair use, should be operationalized when it comes to fanworks.

In the courts, the litigated cases find transformativeness when the new work has a new meaning or message that is distinct from the meaning or message of the original (*Cariou v. Prince* 2013: 705). If the original is “used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings – this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society” (*Cariou v. Prince* 2013: 706). Jenkins’ work explains how fanworks’ target audience perceives those new insights and understandings, even if non-fans do not see it. And this is consistent with copyright law’s general claim to aesthetic neutrality, made in defense of copyright for everything from ads to database programs to pornography. To the extent that fair use comes from creating new meanings, it is a doctrine dependent on cultural construction, and cultures are always in ferment. Seen in that way, the fundamentals of copyright law are not inherently flawed, despite overexpansion and copyright owners’ over-claiming in recent decades. Copyright has plenty of room to recognize the value of new creations based on existing works.

It is with the same positive spirit that I have approached my work with the Organization for Transformative Works (OTW), a 501(c)(3) nonprofit that attempts to protect, preserve and defend fanworks as legitimate cultural objects and as fair uses under copyright law. Along with running a major noncommercial archive of fanworks, the OTW has participated in various legal proceedings in order to provide judges and policymakers with evidence and insights from fan creations and creators. While fair use law in the US has increasingly recognized reworkings and reinterpretations as transformative and therefore likely to be fair, noncommercial fanworks have rarely been part of that legal conversation. In part this is because of a climate of fear, especially for fans whose involvement predated online fan cultures and the explosion of overt fannish activity. In part this is because fanworks' very noncommerciality makes it hard to find people invested in making legal precedent about them, without a lot of money on the table. But fandom is no longer "under the radar," if it ever was, and fans now need to be able to articulate legal arguments when challenged.

Within fan studies, a major change has been to focus on close readings of particular fanworks in a context in which the genre's general significance has already been established by scholarship such as *Textual Poachers* (Busse 2009: 105).³ For example, Louisa Stein recently analyzed two specific fan videos based on the television show *Supernatural* to explore millennials' spirituality (2010). In legal discussions, it is often important to make both moves: explain why fandom matters, and then explain why fanworks matter, since it is individual fanworks that could face potential legal challenges under copyright law.

For example, US law now bans "circumvention" of technical measures on copyright-protected works, which means that taking short clips from DVDs and video downloaded from sources such as Amazon Unbox is illegal by default. When the OTW participated in the US Copyright Office's hearings on this anticircumvention law in order to secure the right of vidders to make short clips from TV shows and movies to make vids, we began with general explanations of the social and cultural context of vidding (Organization for Transformative Works 2011), especially its relationship to feminist critique, which Jenkins has previously noted (1992: 223-249). Then we identified specific vids that were both artistically excellent and easily legible to nonfans. We did this not because we thought those vids were the only worthy ones. To the contrary, we tried to make clear to the Copyright Office that it is a terrible idea to give legal protection only to works that somebody other than the author thinks are "good." We also made the so-called Sturgeon's Law point: no culture gets only "good" works from its artists. The way to get enduring works of genius is to encourage a huge amount of creativity and evaluate from there. But we chose our shiniest examples because we knew we were facing an audience unfamiliar with fandom cultures.

We used Gianduja Kiss's vid "It Depends on What You Pay" (2009) as an example of the need to use clips taken from Amazon's Unbox service. Unbox makes TV shows available long before they are released on DVD, at a time when it is possible to participate in an ongoing conversation

³ "Recent scholarship on media fandom in particular has attempted to take into account the ever-growing diversity of fans and fan works, often focusing on a particular fandom or even a single fan work. In fact, legitimizing fan works as objects of study in their own right, rather than merely products of an interesting subculture, may be one of the most important shifts in fan studies" (Busse 2009: 105). The Organization for Transformative Works keeps a bibliography, updated biannually, of scholarly references to fan works (2011).

about a season of TV. The vid argues that *Dollhouse*, though created by noted feminist auteur Joss Whedon, ends up endorsing and excusing rape. The show features characters whose personalities are repeatedly implanted by computer, and whose memories are then wiped, to fulfill clients' fantasies. Those fantasies often involve sexual desires. The show tried to disavow the problem of rape both by appealing to concepts of prior consent (even though this wasn't consistent with the actual narrative) and by defining and distinguishing "real" rapists from other people who had sex with the mind-wiped characters.

Gianduja Kiss used a now-suppressed song about rape from the musical *The Fantasticks* to make her argument: on the vid's audio track, the singer enthusiastically endorses rape, while the video shows scenes of apparently consensual, tender encounters and scenes that voyeuristically focus on actresses' bodies. The vid quickly moves to scenes of physical and sexual violence. The juxtaposition of the song and the images forces the ugly premise of the show to the surface. It is not an easy vid to watch, but it is a great one, and one whose critical message is exactly the kind of transformative work that copyright owners would prefer to be able to suppress at will. It is also not necessarily a typical vid, but it is the kind of work that usually requires serious editing expertise to produce—expertise produced by making many other vids.

Indeed, rather than attack "It Depends on What You Pay" as unworthy, the opponents of a remix exemption—representatives of the film and music industries—instead criticized one of Gianduja Kiss's earlier vids, "Der Komissar," which used clips from the James Bond movies. They claimed that the vid was nontransformative and merely a promotion for James Bond: a kind of movie trailer (AAP, BSA, ESA, MPAA, PACA, and RIAA 2012: 39). They were wrong about this. She was actually mocking Bond's aggressive heterosexuality, something that her fannish audience recognized. But the opponents' reaction, to look for something they didn't understand and then declare that it didn't have any particular meaning, is an unfortunately standard one. In response, Gianduja Kiss pointed out not only that she did have a transformative meaning, but that she made the Bond vid earlier in her artistic lifetime, and that her skills improved over time (Organization for Transformative Works 2012: 34)—which is to say that it is hard to get the best, most critical works without allowing an artist to develop. Kiss also reiterated a basic claim for artistic freedom: "protection can't and shouldn't turn on the vidder's skill" (Organization for Transformative Works 2012: 34).

"It Depends on What You Pay" was our exemplar, but the result for which we advocated would not require the Copyright Office to find all vids individually meritorious. Instead, we maintained that transformativeness is inherently contextual: it occurs when the artist and the audience see a new meaning or message, even if outsiders do not. We would not expect a non-fan of opera to be able to make many distinctions or evaluations that would come easily to an opera fan. By the same token, fans' response to works within their areas of expertise are valid, even if the subject matter is unfamiliar or puzzling to non-fans. Fair use doctrine has increasingly accepted this context-specific evaluation of new creations, recognizing difference as transformative.

Our approach was successful, both in 2009 and 2012—the Librarian of Congress granted an exemption for noncommercial remix, though it only lasts three years and then will expire unless it is renewed in a difficult and unpredictable process. Identifying vids whose critical, transformative messages could be understood even by a non-fan helped convince the Copyright

Office that fannish culture produces the kinds of creative works that copyright is designed to promote, not to suppress. Anticircumvention law is a perfect example of how modern copyright law promotes the interests of large corporate owners over ordinary people, including ordinary creators. Congress simply did not consider that some people might need to make clips to make their own art. It is in this context that *Textual Poachers*, and Jenkins' work overall, corrects for the dismissiveness of most decisionmakers.

Similarly, two US government agencies, the Patent & Trademark Office and the National Telecommunications & Information Administration (a branch of the Department of Commerce) (PTO/NTIA), recently solicited comments on a Green Paper (Department of Commerce Internet Policy Task Force 2013). A Green Paper offers an agency's observations on some topic along with proposed legal changes for discussion; often, the proposals become the basis for further legislative action. With the US Copyright Act nearly 40 years old, and with the major changes wrought by the rise of the internet and the digital economy, momentum is building for some kind of reform of US copyright law. What is up for grabs is how this reform will work—whether it will promote entrenched interests, as copyright reform has so often done in the past, or whether it will protect new and emerging forms of creativity and communication.

The Green Paper discussed the rise of remix culture, though without specific attention to fanworks, and asked whether there was a need for legal change to “smooth the path” for remixes, specifically identifying increased licensing—whether voluntary or compulsory—as a possibility (Department of Commerce Internet Policy Task Force 2013: 38-39).⁴ It noted that technological mechanisms, such as YouTube's Content ID filters, allow copyright owners to monetize remixes, and questioned whether this kind of licensing or “microlicensing” to individual consumers was an adequate supplement to, or substitute for, fair use (Department of Commerce Internet Policy Task Force 2013: 38-39). On the more user-favorable side, the paper asked whether a specific copyright exception for remixes ought to be considered, which would mean that copyright owners could neither suppress remixes nor monetize them.

Many of the participants who responded to the request for comments were repeat players in the copyright law community—the Recording Industry Association of America, the Motion Picture Association of America (MPAA), the Association of American Publishers, and a number of other rights-holder organizations, along with library organizations, internet intermediaries like Google, and public interest groups representing various consumer/user interests such as the Center for Democracy and Technology and the Electronic Frontier Foundation. The OTW decided to participate to bring in voices that were less likely to be heard, and more likely to be unfamiliar, since the authors of the Green Paper evidenced no familiarity with media fandom and focused mostly on remix and the idea of “user-generated content” as a new phenomenon spurred by the internet.

⁴ Compulsory licenses are licenses mandated by law: anyone who meets specific qualifications can get one, and can pay the statutory price, as opposed to a price voluntarily negotiated with a specific copyright owner. In the United States, cover versions of songs are subject to a compulsory license, and compulsory licensing is often suggested in copyright markets where voluntary licensing doesn't seem to be working well. In practice, many “voluntary” industry-wide licenses can look a lot like compulsory licenses, because concerns about anticompetitive practices have made private licensing organizations offer many licenses on similarly nondiscriminatory terms. However, both kinds of licenses are really designed for commercial institutions, not for individual artists working outside commercial sectors.

Again, we focused on accessibility: translating fandom for audiences that might be unfamiliar with its amazing variety and creativity. Our submission emphasized the passion fans feel, the creativity of the works they produce, and the benefits that producing fanworks offers them. These benefits are both personal and structural, in terms of offering critiques of existing media. Fandom's benefits can also be material, something we thought wise to emphasize given the focus of the PTO/NTIA on economic reasoning. We asked fans to share personal stories about how fandom helped them, in order to bring voices into the conversation that are rarely heard in policy discussions in Washington.

Fans' reactions revealed that many of us think in ways consistent with *Textual Poachers* and Jenkins' subsequent work on digital participatory cultures. As fan N.J.B. wrote to the OTW:

In the early aughts, many social scientists deliberated on the "democratizing effect of the internet" and of technological knowledge in general. In fanfiction, we see that democratization. It is the response to many who feel alienated by the dominant paradigm (indeed, who at times does not feel alienated, for there is not such thing as a "normal" person). Fanfiction is the supportive, creative space for blacks who after seeing a movie in which all the main characters are white, thinks, "I would do it differently, and here's how." Fanfiction is for the girls who read a comic book in which the heroes are all men, and imagines herself as Captain America. Fanfiction is for all those who watch/listen/read to a story and cannot empathize with the characters as they are, but see potential in tweaking, recreating, and re-imagining the story to fit and resonate with their own lives. Finally, fanfiction is for all groups of people misrepresented in our mass media, and it gives them a space to create alternatives which are as empowering for the producer as the consumer.

(Organization for Transformative Works 2013: 30)

So, fans explained how fandom had enabled them to challenge gender, racial, sexual, and disability hierarchies, and how they used skills learned in fandom to succeed in other areas, including in their careers. Because fans are drawn together by shared love of a source, they encourage each other and offer advice on improving in order to get more and better fanworks. We drew on Jenkins' *Why Heather Can Write* (2004), particularly his explanation of the literacy benefits for adolescents of participating in *Harry Potter* fandom, and we supplemented it with stories from individual fans who had lived through the same experiences he recounted, only in different fandoms. For example, one woman from a low-income background explained how she gained skills, including confidence in her own ability to communicate, through fannish interactions. She eventually progressed from community college to UCLA to a Ph.D. program (Organization for Transformative Works 2013: 45-46). Others described career success in the arts, video editing, website design, and writing best-selling novels, all building on the skills learned in fandom.

The insights of *Textual Poachers* can also be applied to formal educational settings. It is commonplace to note that we all stand on the shoulders of giants, and our debts are often particularly exposed in educational contexts, where imitation is usually another word for learning

through practice. Remixing explicitly recognized as such has been identified as an important pedagogical tool from primary school to the university level, in significant part through Jenkins' work on the ways in which fannish energies can be used to motivate participation, practice, and improvement over time (Lankshear and Knobel 2008; Latterell 2005). Every genre, from fan fiction to fan art to fan video, can be used to improve education (Burwell 2013; Jessop 2010; Manifold 2009). Literacy experts now understand that appropriating elements from preexisting stories is an important part of the process by which children develop cultural literacy, and educators have suggested using fan fiction writing in a classroom context (Jenkins 2006b: 177; Mackey 2008). We find our own voices by trying out the alternatives and seeing what fits.

These things are all true—I believe them foundationally; I have lived them. The reason I decided to start a new educational resource for intellectual property professors was that fandom taught me that, if I wanted something that did not exist, I should make it. The database I created hosts audiovisual materials related to intellectual property (and some other related fields of law), allowing teachers around the world the ability to show their students what the cases are actually about. It is now a widely used resource, recognized as one of the most valuable contributions to teaching in the field, and it exists because of fandom.

But my point in running through these arguments is not just to reiterate the benefits of fandom, and specifically the benefits of creating transformative fanworks. (I expect the audience for this article largely agrees already.) It is to defend a degree of boosterism as necessary in a world in which we are still under threat from forces that would like to reduce fandom to yet another source of revenue. The MPAA, for example, pointed to Amazon's recent Kindle Worlds experiment, which uses the rhetoric of "fan fiction," as evidence that licensing markets could substitute for fair use and that noncommercial users did not need or deserve any protection from copyright owners' control and monetization of their activities (Motion Picture Association of America 2013: 5).

Kindle Worlds offers none of the communal benefits of media fandom—who, for example, would routinely *pay* money in order to help a young writer develop and improve her skills? When markets are involved, we are rarely happy paying for someone else's training, and we usually consider our money payment enough without additional feedback to assist artistic improvement. Relatedly, Kindle Worlds does not allow authors to circulate works for free; it does not let authors use non-Amazon platforms, encouraging Amazon's near-monopoly position in ebooks; and it has serious content restrictions. For instance, Bloodshot's "world" includes multiple such restrictions, from standard bans on "erotica" and "offensive content" to the even more unpredictable requirement that characters be "in-character," along with bans on "profane language," graphic violence, "references to acquiring, using, or being under the influence of illegal drugs," and "wanton disregard for scientific and historical accuracy." Amazon also requires writers to be at least 18 years old, excluding the young people who discover, and benefit so much from, fandom (Amazon 2013). None of this supports the freedom and joy of fandom—Kindle Worlds even requires works to be of a certain length, which is understandable for a commercial enterprise but deadly for social practices that thrive on spontaneity, experimentation, and flexibility. No *Vampire Diaries* sonnets for Amazon!

Given these developments, the positive project of *Textual Poachers* needs reiteration more than ever. *Textual Poachers* is not only a corrective to theoretical approaches that treat fans as receptacles of dominant meaning. Contempt is not just found in the halls of academe; it is found in the halls of Congress, as well as in public discourse. *Textual Poachers* offers a vision that is sometimes utopian, but also true, and that truth needs to be heard by many people who are as yet unfamiliar with the many affordances of remix cultures.

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