

Goncharov (1973), Internet Folklore, and Corporate Copyright

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ABSTRACT

Goncharov (1973) is a meme, which is a term broadly used to refer to a species of viral internet creativity. Memes can be many different things, but Goncharov is an especially rich, complex, collaborative, and mutating one. It revolves around a movie that does not exist. Goncharov is a fictional Martin Scorsese film that the internet collectively pretends was produced in 1973. Over the course of a few feverish weeks in the fall of 2022, social media users, with no coordination and without knowledge of each other or the overall project, created a cast, storyline, soundtrack, reviews, fanfiction, and a promotional poster. And they did it all for free. Actually, they did it all for fun—a concept foreign to copyright law’s idea of what drives creativity.

This Article uses Goncharov to illustrate how copyright law doctrines have developed to support a narrow, corporate conception of copyright. Copyright law depends heavily on an understanding of creativity as an economic venture mediated by contractual relationships. Sprawling collaborative and unmonetized memes like the Goncharov meme sit uneasily in the system because they are likely uncopyrightable as a type of folklore. However, positioning a meme like Goncharov as the equivalent of public domain folklore leaves it vulnerable to financial exploitation. This Article uses the vehicle of Goncharov to ask whether such a result is what copyright law should support, or whether we should rethink how we treat the new traditional knowledge being developed daily by our creative culture. This Article argues that copyright law dangerously focuses attention on a very small slice of human creativity, leaving vast amounts of creativity devalued as undeserving of legal protection. This hierarchy paints a watered-down picture of creativity. Creativity, as can be seen just in the single example of the Goncharov meme, is so much more complex, multi-faceted, unpredictable, and interesting than current copyright law posits. As we prepare to grapple with machine-generated creativity that may challenge copyright assumptions, we should not forget the vast swaths of human creativity that also challenge those assumptions.

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I. INTRODUCTION

Copyright law is corporate in nature.¹ It is structured with the assumption that commercial transactions drive creativity, and that copyright is necessary to encourage it.² Indeed, copyright's essential doctrines—what is copyrightable in the first place, who qualifies as an author, and the situations under which creative works can be used without permission—all assume that creativity is driven purely by financial motivation.³

But such a myopic view of creativity is unfounded. As many scholars have noted, creativity is seldom solely (or even primarily) motivated by financial considerations.⁴ Rather, creativity happens

1. See *infra* Part II.
2. See *infra* Part II.
3. See *infra* Part II.
4. See *infra* Part V.

daily, without thought to financial rewards, and is a natural instinct we learn from childhood.⁵ From playing games of make-believe on the playground to finger-painting masterpieces, children do not create for money—they do it for *fun*.

Creative impulses do not simply die after childhood; they grow. Every day, people of all ages engage in a plethora of creative activities on the internet, driving today's social media platforms with their user-created content. While much of this creativity is monetized in some way or done in the hope of future monetization, there is still a great deal of online creativity that is performed with no direct or indirect profit or hope of any profit. This Article focuses on a prime example of not-for-profit creativity: *Goncharov (1973)*.⁶

Goncharov, a fictional Martin Scorsese film created by social media users, is an especially rich, complex, collaborative, and mutating meme. Over the course of a few feverish weeks in the fall of 2022, social media users, without coordination, knowledge of each other, or strategy for the overall project, created a cast, storyline, soundtrack, reviews, fanfiction, fan art, and much more.⁷ But these social media users did not do it for financial gain—they did it for fun.

This Article uses the *Goncharov* meme to illustrate how copyright doctrines have developed to support a corporate conception of copyright. Copyright law heavily depends on an understanding of creativity as an economic venture mediated by contractual relationships. However, sprawling, collaborative, and unmonetized memes like *Goncharov* do not fit easily within this transaction-driven copyright system. To illustrate this point, this Article attempts to apply copyright law doctrines to the *Goncharov* meme phenomenon.

Other scholars have raised the possibility that internet memes like *Goncharov* should be considered a type of modern folklore and, like traditional folklore that exists in the public domain, be treated as uncopyrightable.⁸ However, positioning a meme like *Goncharov* as an equivalent of public domain folklore leaves the meme vulnerable to financial exploitation by others. In the same way that a public domain story like *Cinderella* is susceptible to being turned into *Walt Disney's Cinderella*, someone could make the movie *Goncharov* and charge people to see it—all without compensating any of the actual creative minds who formed the base of the movie through their engagement with the meme.⁹

5. See *infra* Part III.

6. Although the meme itself is referred to as “Goncharov (1973),” this Article will refer to the meme as “Goncharov.”

7. See *infra* Part III.

8. See *infra* Part III.

9. This is not a far-fetched possibility. Such a thing already happened with the Slenderman meme. See Cathay Y. N. Smith, *Beware the Slender Man: Intellectual Property*

Yet, this would fit the ideal of copyright law that encourages monetizable creativity. The idea of someone making a monetized *Goncharov* movie out of the *Goncharov* meme raises normative questions as to whether internet creativity like *Goncharov* should be open to unrestrained financial exploitation, as well as larger questions around uncopyrighted Artificial Intelligence (AI)-generated creativity and how copyright law should deal with its inevitable financial exploitation by others in the future.

Part II of this Article explains how the basic doctrines of copyright law are designed to encourage and support a very narrow and particular idea of creativity rooted in ideas of corporate monetization. Part III discusses the history and development of the *Goncharov* meme. Part IV explains how *Goncharov* fits in as a piece of internet folklore, ill-fitting enough in corporate copyright law that it should be considered public domain, and thus uncopyrightable material. Part V then explores the implications of *Goncharov*'s creativity being financially exploited by others. Part VI concludes by querying whether leaving uncopyrighted creativity, from internet folklore to AI-generated art, open to financial exploitation is desirable.

II. THE IDEAL CREATIVITY OF COPYRIGHT LAW

Copyright law, as established by the US Constitution, exists to promote “progress.”¹⁰ This has been interpreted to mean that it should promote creativity.¹¹ However, copyright law was conceived with a particular idea of creativity in mind, and its doctrines work to support and prioritize that narrow idea.¹² Under this narrow conception of creativity, copyright encourages a single artist's financial exploitation of a complete piece of creativity produced independently and without collaboration.¹³ Copyrightability, authorship, exclusive rights, and the all-important defense of fair use all revolve around this understanding of creativity.¹⁴

A. Copyrightability

Deciding what is protected by copyright (and therefore what is included in the author's bundle of exclusive rights) is the first

and Internet Folklore, 70 FLA. L. REV. 601, 622 (2018). In addition, Tumblr recently exploited *Goncharov* by having two actors read a user-drafted scene from the movie to promote a new Netflix show. See @entertainment, TUMBLR (May 21, 2024, 10:56 AM), <https://www.tumblr.com/entertainment/751102296918720512/goncharov-we-are-humbled-to-kindly-share-an> [<https://perma.cc/9J3H-XDHL>].

10. See U.S. CONST. art. I, § 8, cl. 8.

11. Shyamkrishna Balganes, *Private Copyright*, 73 VAND. L. REV. 1, 2 (2020).

12. See *infra* Part II.

13. *Id.*

14. *Id.*

question that any copyright theory must answer.¹⁵ Doctrines developed over centuries of copyright jurisprudence, such as the idea-expression dichotomy and the *scènes à faire* doctrine, limit what can be owned under US copyright law.¹⁶ The idea-expression dichotomy is doctrine that does not allow an idea itself to be copyrightable,¹⁷ but does allow “the words, means of embodiment, or expression of those ideas” to be copyrightable.¹⁸ Thus, as a fundamental principal, copyright law protects “only the expression of that idea or concept” and not the idea itself.¹⁹ The *scènes à faire* doctrine is a necessary corollary to this principal.²⁰ The doctrine, as developed by precedent, establishes “that sequences of events necessarily resulting from the choice of setting or situation . . . or ‘incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic’ . . . are not protectable under the copyright laws.”²¹ Therefore, both the idea-expression dichotomy and the *scènes a faire* doctrine set limits around what is allowed to be owned under copyright law.

Both doctrines sound deceptively straightforward: ideas and their accompanying tropes must be free for all to use.²² Drawing the line between public domain material owned by no one and available to everyone and copyrightable expression of ideas that require permission of the copyright holder is fraught with difficulties.²³ While it may be easy to say that a photograph is an expression of the photographer’s idea to take that photograph or that a novel is an expression of an author’s idea for that novel, the problem arises at a more granular level.²⁴ For example, every book written in English is a combination of the same common English words composed of the same twenty-six letters. Ownership of those individual words is impossible, but at some point, the author begins to own their

15. See 17 U.S.C. § 102.

16. See, e.g., *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1354–58 (Fed. Cir. 2014).

17. 2 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 4:31 (2024).

18. *Welles v. Columbia Broad. Sys., Inc.*, 308 F.2d 810, 814 (9th Cir. 1962).

19. *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 322 (S.D.N.Y. 2001); see also *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996); *Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 64 (3d Cir. 1978); *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992).

20. *Oracle Am., Inc.*, 750 F.3d at 1354–58.

21. *Kaplan*, 133 F. Supp. 2d at 322–23 (internal citation omitted) (quoting *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980)); see also *Fulks v. Knowles-Carter*, 207 F. Supp. 3d 274, 279 (S.D.N.Y. 2016).

22. See, e.g., *Hall v. Swift*, No. CV 17-6882-MWF (ASx), 2020 WL 5358390, at *2 (C.D. Cal. Sept. 2, 2020) (“[T]he rationale is that there should be no monopoly on the underlying unprotectable idea.” (quoting *Rassamni v. Fresno Auto Spa, Inc.*, 365 F. Supp. 3d 1039, 1047 (E.D. Cal. 2019))); *Puckett v. Hernandez*, No. 2:16-cv-02199-SVW-AGR, 2016 WL 7647555, at *3 (C.D. Cal. Dec. 21, 2016) (“[T]he idea of a man who has given everything to a woman only for the woman to not return the same feelings or sacrifices cannot be validly copyrighted. Instead, only the expression of that idea is properly copyrightable.”).

23. See *Fulks*, 207 F. Supp. 3d at 279.

24. See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

selection and arrangement of those words.²⁵ However, where that point of ownership happens is deeply unclear and marking that boundary is “rarely possible.”²⁶

Marking the boundary of ownership is “an inexact science,”²⁷ “elusive,” and “impenetrable.”²⁸ Indeed, courts often freeze in the face of boundary-setting questions.²⁹ For example, consider cases concerning ownership over the lyric “haters gonna hate,” used by Taylor Swift in her hit song “Shake It Off.”³⁰ Swift has been sued a few times for her use of the phrase by people who believe they own the phrase.³¹ The courts, however, are divided as to whether the phrase rises to a level of copyrightability or not.³² In *Braham v. Sony/ATV Music Publishing*, the court focused on identifying the phrases “haters gonna hate” and “players gonna play” that occurred in both Swift and Braham’s songs.³³ The court found that the similarity of those shared phrases was undercut by the “readily distinguishing feature in ‘Shake It Off’ [that was] the repetition of the last word of the phrases”³⁴ In other words, the first artist did not own the “idea” of the phrases, only the particular expression of them.³⁵ Taylor Swift may have taken the “idea”—she did, in fact, use those phrases—but her expression differed because she repeated the final word of each of the phrases, where the original artist did not. Thus, the *Braham* court’s way of limiting how much the original author could own of a fairly common phrase centered on the mere repetition of the last word—that repetition was enough to cause the plaintiff to lose the suit.³⁶

25. *See id.*

26. *Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir. 1978).

27. *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 322 (S.D.N.Y. 2001).

28. *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996).

29. *See Braham v. Sony/ATV Music Publ’g*, No. 2:15-cv-8422-MWF (GJSx), 2015 WL 7074571, at *6 (C.D. Cal. Nov. 10, 2015); *Hall v. Swift*, No. CV 17-6882-MWF (ASx), 2020 WL 5358390, at *4 (C.D. Cal. Sept. 2, 2020); *New Day Worldwide Inc. v. Swift*, No. CV 19-0994 8-AB (SSx), 2020 WL 6050700, at *2 (C.D. Cal. July 21, 2020), *aff’d sub nom.* *Graham v. Swift*, No. 20-55779 WL 576024 (9th Cir. Feb. 25, 2022).

30. *See Braham*, 2015 WL 7074571, at *3; *Hall*, 2020 WL 5358390, at *2; *New Day Worldwide Inc.*, 2020 WL 6050700, at *1.

31. *See Braham*, 2015 WL 7074571, at *1; *Hall*, 2020 WL 5358390, at *2; *New Day Worldwide Inc.*, 2020 WL 6050700, at *1.

32. *See Braham*, 2015 WL 7074571, at *3; *Hall*, 2020 WL 5358390, at *4; *New Day Worldwide Inc.*, 2020 WL 6050700, at *1–2.

33. 2015 WL 7074571, at *4.

34. *Id.* at *5; *see also Puckett v. Hernandez*, No. 2:16-cv-02199-SVW-AGR, 2016 WL 7647555, at *3 (C.D. Cal. Dec. 21, 2016) (relying on the fact that the two songs shared only two lines “made up of short, ordinary expressions” that were not even similarly situated within the song to dismiss a copyright infringement complaint).

35. *See Puckett*, 2016 WL 7647555, at *3, *6.

36. *Braham*, 2015 WL 7074571, at *5.

Yet, in a different case over the same phrases, that repetition made no impact on the analysis.³⁷ In *Hall v. Swift*, the plaintiffs sued Swift based on the commonality between the lyrics “players gonna play” and “haters gonna hate.”³⁸ This case differed from the *Braham* case in that this new plaintiff also had a song that used the lyrics “players gonna play” and “haters gonna hate.” The song at issue may have been different but otherwise it was the same case involving the same allegations of copyright infringement over the same phrases in the lyrics.³⁹ The plaintiffs acknowledged that the ideas of players and haters were “firmly rooted in pop culture” but that Swift’s use of the phrases crossed the line between copying the idea and copying the expression of that idea.⁴⁰ The court initially found this to be a straightforward case involving the alleged copying of “only two brief phrases,”⁴¹ which “lack[ed] the modicum of originality and creativity required for copyright protection.”⁴²

In the vocabulary established by the idea-expression dichotomy, the short phrases were uncopyrightable ideas rather than original, copyrightable expressions.⁴³ The US District Court of the Central District of California termed the phrases “not at all creative” and “banal.”⁴⁴ Indeed, the court was so convinced in its conclusion that it doubted there was any reason to grant leave to amend the complaint.⁴⁵ Under the district court’s reasoning, there was no way to assert a valid claim.⁴⁶

Despite the district court’s confidence, the US Court of Appeals for the Ninth Circuit reversed the ruling with very little reasoning or guidance.⁴⁷ The Ninth Circuit disagreed over where to draw the idea-expression dichotomy.⁴⁸ While the district court found that the phrases were obviously ideas that could not be owned by any one entity, the Ninth Circuit thought it was possible that they might be protectable expression rather than mere ideas.⁴⁹ Because the Ninth Circuit held that the “six-word phrase and . . . four-part lyrical sequence” was sufficiently original to be copyrightable,

37. See *Hall v. Swift*, No. CV 17-6882-MWF (ASx), 2021 WL 6104160, at *1 (C.D. Cal. Dec. 9, 2021).

38. *Id.* There was clarification in the case that “gonna” was not actually common between the songs because the plaintiffs’ song used the word “gon” instead. See *id.*

39. See *id.*; *Braham*, 2015 WL 7074571, at *1.

40. *Hall*, 2021 WL 6104160, at *1.

41. *Hall v. Swift*, No. CV 17-6882-MWF (ASx), 2018 WL 2317548, at *1 (C.D. Cal. Feb. 13, 2018), *rev’d and remanded*, 782 F. App’x 639 (9th Cir. 2019), *opinion amended and superseded*, 786 F. App’x 711 (9th Cir. 2019), and *rev’d and remanded*, 786 F. App’x 711 (9th Cir. 2019).

42. *Id.*

43. See *id.* at *1, *7.

44. *Id.* at *7.

45. See *id.* at *8.

46. See *id.*

47. See *Hall v. Swift*, 786 F. App’x 711, 712 (9th Cir. 2019).

48. See *id.*

49. See *id.*; *Hall*, 2018 WL 2317548, at *8.

without details of the court's reasoning, Swift could not effectively argue otherwise.⁵⁰ Thus, the district court had no choice but to change its tune,⁵¹ albeit still skeptical.⁵² The parties ultimately settled, bringing years of debate over the copyrightability of the lyrical phrases to a close without any concrete resolution.⁵³

From these opinions, it is difficult not to conclude that there is simply no authority explaining the meaning of "original," "copyrightable," "idea," or "expression."⁵⁴ The district court's contrasting opinions, read back-to-back, reveal a standardless line of determining copyrightability.⁵⁵ For example, in its original opinion, the district court found no authority to support the plaintiffs' arguments.⁵⁶ Yet, without further explanation in its later opinion, it found that there was no authority supporting the *defendants'* arguments.⁵⁷ Indeed, it seems that the district court's plan was to leave the decision to the jury in the hope that the jury might guide the doctrine.⁵⁸ No one seemed able to answer the question of whether the short phrases were ideas no one could own or expression that someone could own.

Indeed, from the very beginning of its articulation, the ownership inquiry within the idea-expression dichotomy has been a Goldilocks analysis seeking to find an acceptable middle ground between two extreme levels of abstraction.⁵⁹ Thus, the idea-expression dichotomy has found similar issues in different factual scenarios throughout copyright law.⁶⁰

For example, with photographs, you may own a particular photograph, but you cannot own the underlying depiction of reality.⁶¹ The underlying depiction of reality is the "idea" of the photograph, which cannot be owned.⁶² However, the photograph you take of that reality is a protectable expression of that underlying

50. Hall v. Swift, No. CV 17-6882-MWF (ASx), 2021 WL 6104160, at *1 (C.D. Cal. Dec. 9, 2021); Hall v. Swift, No. CV 17-6882-MWF (ASx), 2020 WL 5358390, at *3 (C.D. Cal. Sept. 2, 2020) ("[T]he Ninth Circuit's determination that Plaintiffs have sufficiently alleged originality . . . dooms Defendants [sic] argument.").

51. Hall, 2020 WL 5358390, at *3.

52. See Hall, 2021 WL 6104160, at *1.

53. See Jem Aswad, *Taylor Swift 'Shake It Off' Copyright Lawsuit Dropped*, VARIETY (Dec. 12, 2022, 10:51 AM), <https://variety.com/2022/music/news/taylor-swift-shake-it-off-lawsuit-dropped-1235458220/> [<https://perma.cc/N7JJ-366N>].

54. See Hall, 2020 WL 5358390, at *3; Hall, 2021 WL 6104160, at *1.

55. See Hall, 2020 WL 5358390, at *3; Hall, 2021 WL 6104160, at *1.

56. See Hall, 2018 WL 6104160, at *8.

57. See Hall, 2020 WL 5358390, at *3; Hall, 2021 WL 6104160, at *1.

58. See Hall, 2021 WL 6104160, at *1.

59. See generally Baker v. Selden, 101 U.S. 99 (1879) (finding that a book describing a new system of accounting wasn't completely uncopyrightable, but nor did its copyright extend to the blank forms used in the system of accounting).

60. See, e.g., Franklin Mint Corp. v. Nat'l Wildlife Art Exch., Inc., 575 F.2d 62, 63 (3d Cir. 1978); Kisch v. Ammirati & Puris Inc., 657 F. Supp. 380, 380 (S.D.N.Y. 1987); Kaplan v. Stock Mkt. Photo Agency, Inc., 133 F. Supp. 2d 317, 317 (S.D.N.Y. 2001).

61. See Kisch, 657 F. Supp. at 382.

62. See *id.*

idea. Because “copyrights do not protect thematic concepts . . . the same subject matter may be present” in two creative works without constituting copyright infringement.⁶³ Thus, the photographer owns their “original conception” of the photograph—i.e., their particular expression as embodied in their photographic choices—but not the subject itself.⁶⁴

A photograph’s “subject matter—whether a person, a building, a landscape or something else—is equivalent to an idea that the law insists be freely available to everyone.”⁶⁵ For example, if two people happen to take a photograph of the same naturally occurring, unposed subject at the same time, they may each possess a copyright in their image.⁶⁶ Thus, no photographer can “copyright [the] face” of the person in their photograph, but they can own the face “as it appears in [their] photographs”⁶⁷ As Justice Holmes succinctly put it in a foundational copyright case: “[o]thers are free to copy the original. They are not free to copy the copy.”⁶⁸ In other words, you can take as many photographs of a butterfly as you want, but you cannot copy someone else’s photograph of a butterfly.

In *Kaplan v. Stock Market Photo Agency, Inc.*, one photographer sued another for copyright infringement based on the fact that they had both taken photographs of people contemplating jumping off a tall building.⁶⁹ The court, however, found that there was no copyright infringement because the photographs in question were similar only in terms of a “central idea.”⁷⁰ The plaintiff photographer illustrated the malleability of the idea-expression dichotomy by arguing that the idea of his photograph was “the depiction of a *person* contemplating a leap from a city building.”⁷¹ Thus, under the plaintiff’s argument, the expression of that idea through use of a particular kind of person—in this case, a businessman—should be protected.⁷²

The plaintiff’s argument hinged on the idea that, while no one could own the idea of a person jumping from a building, someone *could* own a *business-person* jumping from a building.⁷³ As such, someone else could own a cheerleader jumping from a building, while another could own a clown jumping from a building. Each of

63. *Franklin Mint*, 575 F.2d at 65.

64. *Kisch*, 657 F. Supp. at 382.

65. *Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 181 (1st Cir. 2013).

66. *See Griner v. King*, 568 F. Supp. 3d 978, 992 (N.D. Iowa 2021).

67. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 46 (2d Cir. 2021), *aff’d sub nom.* *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508 (2023).

68. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 249 (1903).

69. 133 F. Supp. 2d at 317.

70. *Id.* at 323.

71. *Id.* at 324.

72. *Id.*

73. *Id.*

these examples include a particular protectable expression of the underlying unprotectable idea.

The court, however, did not accept this plaintiff's proposed idea-expression dichotomy argument.⁷⁴ Rather, the court found the plaintiff's articulation of the photograph's unprotectable idea to be "overgeneralize[d]."⁷⁵ Indeed, the court was uncomfortable with the argument that any one person could own photographs of businesspeople jumping from buildings and block others from taking such photographs.⁷⁶ Thus, the court concluded that such a generic concept was an unprotectable idea, regardless of the plaintiff's attempt to convert it into protectable expression.⁷⁷

A number of uncopyrightable elements can be combined in a selection and arrangement that becomes copyrightable, but courts cannot decide how many protectable elements need to be combined to reach copyrightability.⁷⁸ The court in *Fulks v. Knowles-Carter* considered (and convoluted) this very issue.⁷⁹ In *Fulks*, the plaintiff alleged that the trailer for Beyonce's "Lemonade" music video infringed the copyright of a short independent film called "Palinoia."⁸⁰ Although the court ultimately found that the similarities between the two creative works were merely unownable "ideas," these "ideas" went far beyond a couple of short phrases or a rhyme scheme.⁸¹ Indeed, the court listed out multiple creative choices that the two works had in common from just nine still shots constituting the majority of the music video.⁸² Each shot had numerous details in common, ranging from the positioning of the subject and the surrounding setting to the angle and lighting used in the shots.⁸³ These choices were not copyrightable on their own—no one can own a scene in a parking garage, a subject posed looking down, or filming from the subject's left side.⁸⁴ Yet, in *Fulks*, not even the combination of the long list of these similarities over multiple shots was enough to rise to the level of copyrightability.⁸⁵ So, whereas the combination of two similarities was enough to be copyrightable according to the Ninth Circuit in the Taylor Swift "Shake It Off" case, *many* more than two similarities combined

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See* Hall v. Swift, No. 17-6882-MWF (ASx), 2020 WL 5358390, at *3 (C.D. Cal. Sept. 2, 2020).

79. 207 F. Supp. 3d 274, 292–93 (S.D.N.Y. 2016).

80. *Id.* at 278.

81. *Id.* at 292.

82. *Id.*

83. *Id.* at 280–90.

84. *See id.* at 280–81; PATRY, *supra* note 17, at § 3:67.

85. *Fulks*, 207 F. Supp. 3d at 292.

together was *not* enough to be copyrightable in *Fulks*.⁸⁶ Faced with such confusion from the courts, predicting when things cross the line into copyrightability is difficult, to say the least.

To resolve the issue of whether something is copyrightable, courts often resort to the platonic ideal of a copyrightable work, which centers on a single artist's maximum monetization of a wholly formed creation.⁸⁷ In other words, the cases seem to indicate that if an artist is financially successful enough so that people recognize their work, the work is copyrightable.⁸⁸ Meanwhile, if an artist is less financially successful and therefore their work is less recognizable, courts seem reluctant to bestow much copyrightable protection.⁸⁹

For example, in *Paramount Pictures Corp. v. Axanar Productions, Inc.*, the infringing work was based on the well-known movie, *Star Trek*.⁹⁰ There, the US District Court for the Central District of California found that some alien species and planet names from the film could be copyrightable to support a claim of infringement.⁹¹ Similarly, in *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, the US Court of Appeals for the Ninth Circuit found that a reference to Dr. Seuss's well-recognized drawing style in combination with his well-recognized rhyming syntax was copyrightable.⁹² Such that a property mimicking these well-recognized features, even if none of the drawings or rhymes were exactly the same as the copyrighted piece, would constitute copyright infringement.⁹³ However, had those same cases involved small artists or independent films with less financial success, a court would likely rule against its copyrightability.⁹⁴ Recognizability seems to play an inexplicit yet powerful role in copyright.⁹⁵

86. The analysis in *Fulks* makes much of the *differences* between the works. *See id.* at 281–92. The myriad differences between the two songs' lyrics in *Hall v. Swift*, however, did not factor into the court's decision. *See generally* *Hall v. Swift*, No. 17-6882-MWF (ASx), 2020 WL 5358390 (C.D. Cal. Sept. 2, 2020).

87. *See, e.g.*, *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-099 38-RGK-E, 2017 WL 83506, at *7 (C.D. Cal. Jan. 3, 2017); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 451 (9th Cir. 2020).

88. *See, e.g.*, *Paramount Pictures Corp.*, 2017 WL 83506, at *7.

89. *See, e.g., id.* (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985)); *Fulks*, 207 F. Supp. 3d at 278.

90. 2017 WL 83506, at *1.

91. *Id.* at *4.

92. 983 F.3d at 461.

93. *See id.* at 456–57.

94. *See, e.g., id.*

95. The words “Dr. Seuss” tend to evoke a mental image and understanding of a specific form of artistry; they also elicit an instinct that something about that artistry must be protected from others. *Id.* Individuals tend to view Dr. Seuss's art, whether rightly or wrongly, as the wholly independent creation of a single artist: Dr. Seuss. *See id.* at 456–58. Yet, when faced with an unrecognizable artist making an unrecognizable kind of art, courts tend to be skeptical about the work's copyrightability. *See Fulks*, 207 F. Supp. 3d at 278–80. For example, a struggling independent filmmaker who posts their short film on YouTube for

The multiple cinematic choices made by the relatively unknown filmmaker in *Fulks* did not rise to the level of copyrightability, even though the filmmaker had actually been consulted in the making of the infringing work.⁹⁶ Arguably, the *Fulks* filmmaker had the same motivation to reference the copyrighted work as the artists in the *Star Trek* and Dr. Seuss cases. Likewise, in the Taylor Swift cases, there were a number of other suits filed against the Swift that were immediately dismissed.⁹⁷ Unsurprisingly, those suits involved relatively unknown songwriters.⁹⁸ While recognizability of the plaintiff is not an explicit element in determining underlying copyrightability, it does seem as if courts are more inclined to find copyrightable creativity in well-known creative properties as opposed to less well-known ones.⁹⁹

Hall v. Swift proved to be the one suit with staying power, persisting for years until it reached a settlement.¹⁰⁰ Unlike the other Swift cases, *Hall* involved musicians who reached some level of financial success on the music charts.¹⁰¹ In the absence of any firm copyrightability standards, courts may be conflating copyrightability with access to the work itself—a separate element of copyright infringement.¹⁰² Yet, the idea of access is in itself a function of financial success: the more successful your work, the easier it is to prove that someone had access to it.¹⁰³

Access is one of the elements of copyright infringement.¹⁰⁴ Thus, in addition to proving that the two works are substantially similar in a protectable subject matter, the plaintiff must also prove that the defendant had access to the plaintiff's work.¹⁰⁵ One way to prove access is through the “widespread dissemination” of the work at issue,¹⁰⁶ which indicates “considerable commercial success.”¹⁰⁷ Thus, people have inherently more access to more successful creative properties under the legal definition of “access,” thereby affecting the likelihood of success on the copyright infringement

free might not get the same protections that Dr. Seuss would because the protection courts are willing to grant to unrecognizable authors seems much more limited. *See, e.g., id.*

96. Complaint at 9–15, *Fulks*, 207 F. Supp. 3d 274 (No. 16-CV-4278).

97. *See, e.g.,* Braham v. Sony/ATV Music Publ'g, No. 2:15-cv-8422-MWF (GJSx), 2015 WL 7074571, at *6 (C.D. Cal. Nov. 10, 2015).

98. *See id.* at *1; Puckett v. Hernandez, No. 2:16-cv-02199-SVW-AGR, 2016 WL 7647555, at *1 (C.D. Cal. Dec. 21, 2016).

99. *See Dr. Seuss Enters.*, 983 F.3d at 456–57.

100. *See* Aswad, *supra* note 53.

101. *See* Hall v. Swift, No. CV 17-6882-MWF (ASx), 2021 WL 6104160, at *1 (C.D. Cal. Dec. 9, 2021).

102. *See, e.g.,* Cates v. Shlemovitz, No. 3:21-CV-0805 (LEK/ML), 2022 WL 1238450, at *3 (N.D.N.Y. Apr. 27, 2022).

103. *See id.*

104. *See id.* at *2.

105. *See id.*

106. *Id.*

107. Silberstein v. Fox Ent. Grp., Inc., 424 F. Supp. 2d 616, 627 (S.D.N.Y. 2004), *aff'd sub nom.* Silberstein v. John Does 1-10, 242 F. App'x 720 (2d Cir. 2007).

claim.¹⁰⁸ It seems that the more successful an artist is at monetizing and exploiting their creativity, the more serious a court may take their claims of copyrightability because monetized success is the type of creativity considered to be the ideal.¹⁰⁹

B. Authorship

Copyright's authorship test presumes the existence of a single (or at least a small number of) dominant author(s) who controls and oversees the creative process.¹¹⁰ In this corporate vision of creativity, control is critical to author recognition by the court.¹¹¹ Indeed, courts dislike multiple authors in copyright claims,¹¹² and "the policy aim of the [authorship] test has been to explicitly limit authorship claims."¹¹³ Some commentators seem to worry that copyright law will give authorship rights to too many undeserving people.¹¹⁴

According to the courts authorship test, if all a person has contributed to a creative project is an idea, then they cannot be considered an author.¹¹⁵ Take, for instance, the case of Orson Welles.¹¹⁶ In a lawsuit involving Welles's authorship of the famous radio production of *The War of the Worlds*, the court acknowledged that Welles came up with the idea of adapting the H.G. Wells novel *The War of the Worlds* for radio broadcast.¹¹⁷ In his adaptation, Welles pretends that the book's alien invasion happens in real time through a series of radio announcements.¹¹⁸ However, because

108. See, e.g., *Atkinson v. Netflix, Inc.*, No. 5:21-CV-00079-RWS, 2022 WL 2899275, at *3 (E.D. Tex. May 18, 2022); *Peel & Co. v. Rug Mkt.*, 238 F.3d 391, 395 (5th Cir. 2001); *Webb v. Stallone*, 910 F. Supp. 2d 681, 686–87 (S.D.N.Y. 2012), *aff'd on other grounds*, 555 F. App'x 31 (2d Cir. 2014); *Clanton v. UMG Recordings, Inc.*, 556 F. Supp. 3d 322, 328 (S.D.N.Y. 2021).

109. See, e.g., *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *7 (C.D. Cal. Jan. 3, 2017); *Dr. Seuss Enters., L.P. v. ComicMix LLC*, 983 F.3d 443, 456–57 (9th Cir. 2020); *Fulks v. Knowles-Carter*, 207 F. Supp. 3d 274, 278–80 (S.D.N.Y. 2016).

110. See, e.g., *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 260 (2d Cir. 2015).

111. See Stacey M. Lantagne, *Mutating Internet Memes and the Amplification of Copyright's Authorship Challenges*, 17 VA. SPORTS & ENT. L.J. 221, 225 (2018) [hereinafter Lantagne, *Authorship Challenges*]; see also, e.g., *16 Casa Duse*, 791 F.3d at 260.

112. See Lantagne, *Authorship Challenges*, *supra* note 111, at 222. As one court noted, "[f]ilmmaking is a collaborative process typically involving artistic contributions from large numbers of people, including—in addition to producers, directors, and screenwriters—actors, designers, cinematographers, camera operators, and a host of skilled technical contributors." *16 Casa Duse*, 791 F.3d at 258. Therefore, the specter of all these people possessing their own copyright over their contribution was too daunting to support. The idea simply does not fit the creative ideal copyright law was built around.

113. See Lantagne, *Authorship Challenges*, *supra* note 111.

114. See Henry Biggs, *Towards a More Comprehensive Approach to the Promotion of Creativity*, 38 U. DAYTON L. REV. 401, 416 (2013).

115. See, e.g., *Welles v. Columbia Broad. Sys., Inc.*, 308 F.2d 810, 812 n.1 (9th Cir. 1962).

116. *Id.* at 811.

117. *Id.* at 812 n.1.

118. *Id.*

adapting the novel for radio and using the broadcasts to mimic a contemporaneous alien invasion were just *ideas* without an original script, the court found that Welles possessed no copyright in the resulting radio broadcast.¹¹⁹ Thus, his contributions, being only ideas, did not render him a co-author of the resulting creative work for the purposes of copyright law.¹²⁰ This meant that Welles had no control, and, therefore, “no valid objection,” when that script created from his initial idea was used without his permission or consent.¹²¹

The idea that an author receives help or contributions from outside sources while creating their work is anathema to copyright law and, thus, its authorship test.¹²² Authors must be singular geniuses who create independently.¹²³ After all, singular authors will allow the resulting work to become more easily monetized because it will make contracts and compensation cleaner and less complicated—yet another one of copyright law’s creative ideals.¹²⁴ Copyright law’s insistence on the market as the prism through which to understand creativity has led scholars to examine how the book, as an example of creativity, became a commodity and “an object to be sold.”¹²⁵

The idea of a world where people might creatively collaborate and share ownership in a project can create outrage in the realm of copyright law.¹²⁶ In *Garcia v. Google*, the court indignantly called this idea “copyright cherry picking,” which would enable any contributor from a costume designer down to an extra or best boy to claim copyright in random bits and pieces of a unitary motion picture¹²⁷ To the *Garcia* court, such a result would be intolerable and inconsistent with copyright law’s seeming insistence that only a small number of people are creative enough to deserve recognition as authors.¹²⁸ Accordingly, under the *Garcia* court’s reasoning, copyright must be applied in such a way as to keep this limitation true, no matter how nonsensical it might be to claim that

119. *Id.* at 814.

120. *Id.* at 812 n.1.

121. *Id.* at 814.

122. See Alan L. Durham, *Copyright and Information Theory: Toward an Alternative Model of “Authorship”*, 2004 BYU L. REV. 69, 70 (2004). While fair use contemplates some influence from outside sources, fair use is a defense to copyright infringement, not a part of the authorship inquiry. See 17 U.S.C. § 107.

123. See Durham, *supra* note 122.

124. See *Garcia v. Google, Inc.*, 786 F.3d 733, 742–43 (9th Cir. 2015).

125. W. Ron Gard & Elizabeth Townsend Gard, Essay, *The Present (User-Generated Crisis) Is the Past (1909 Copyright Act): An Essay Theorizing the “Traditional Contours of Copyright” Language*, 28 CARDOZO ARTS & ENT. L.J. 455, 472 (2011).

126. See Smith, *supra* note 9, at 618–20.

127. 786 F.3d at 737.

128. See *id.* at 744.

an individual (like Orson Welles in the *The War of the Worlds* situation) is not an artist.¹²⁹

Like the copyrightability test, the authorship test assumes that an individual is engaging with creative works that have “financial and logistical” angles to them.¹³⁰ In *Garcia*, the court was required to decide whether actors had any copyright interest in their movie performances.¹³¹ The court ultimately decided that it was impossible to consider individual acting performances copyrightable, not because they were not original or creative but because it would make too much of a mess of the movie’s finances.¹³² The *Garcia* court continuously emphasized this justification for its ruling:

Untangling the complex, difficult-to-access, and often phantom chain of title to tens, hundreds, or even thousands of standalone copyrights is a task that could tie the distribution chain in knots. And filming group scenes like a public parade, or the 1963 March on Washington, would pose a huge burden if each of the thousands of marchers could claim an independent copyright.¹³³

Explicit in this reasoning is the existence of a distribution network beyond the engine of social media.¹³⁴ Scholars have “explore[d] the idea of awarding some form of intellectual property [] to large groups of dispersed creators,” but “[t]his form of effort is not well-accounted for in our legal system.”¹³⁵ In other words, it simply does not fit the copyright mold. Therefore, a meme like *Goncharov* is a challenge to the copyright system.

C. Exclusive Rights

Copyright holders have a number of exclusive rights, including the right to publicly display their works, reproduce their works, distribute their works, and create derivative works based on their original works.¹³⁶ The derivative work right raises special policy questions of copyright ownership.¹³⁷ Copyright law allows authors to own only the expression and whatever might be “based

129. See *id.* at 743; *Welles v. Columbia Broad. Sys., Inc.*, 308 F.2d 810, 812 n.1 (9th Cir. 1962).

130. *Garcia*, 786 F.3d at 743.

131. *Id.* at 736–37, 743.

132. See *id.* at 743.

133. *Id.*

134. See *id.* The *Garcia* court’s ruling reads a little as if every internet user who reblogged or retweeted the *Goncharov* meme would also be considered to be authors, which is not something this Author would propose.

135. Robert P. Merges, *Locke for the Masses: Property Rights and the Products of Collective Creativity*, 36 HOFSTRA L. REV. 1179, 1180 (2008); see also Smith, *supra* note 9, at 618 (noting that copyright “does not generally recognize community authorship by a group of dispersed creators”).

136. See 17 U.S.C. § 106; see also Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 42 (2010).

137. See Litman, *supra* note 136, at 37; see also PATRY, *supra* note 17.

upon” that expression.¹³⁸ However, because “based upon” is an unhelpful definition, courts have sought to limit the reach of this right by looking to a different exclusive right—the right of reproduction.¹³⁹ The standard for infringing upon the reproduction right is that the two works must be substantially similar in something copyrightable.¹⁴⁰ The derivative work right test is identical: a work is based upon an existing work, and thus a derivative work, if it is substantially similar to the existing work in a protectable subject matter.¹⁴¹ While obscuring the difference between the exclusive derivative work right and the exclusive reproduction right,¹⁴² courts’ use of the right of reproduction as guidance has acted as a policy limit on how far the vague “based upon” language can expand.¹⁴³

The “based upon” boundary is interpreted in light of the ideal copyright mode of creativity, which this Article argues is a singular work that has been optimally monetized.¹⁴⁴ Thus, a work is more likely to be considered a “based upon” derivative work if it is a market substitute for the original work.¹⁴⁵ Yet again, the courts focus on monetization.¹⁴⁶ This tendency to focus on monetization uses marketplace concerns to define creativity and presupposes that there is a market for every identifiable copyrighted work.¹⁴⁷

D. Fair Use

The primary defense against a claim of copyright infringement, and perhaps the doctrine most explicitly bound up with commercial considerations, is fair use.¹⁴⁸ The fair use doctrine is designed to give some breathing room to the use of copyrighted works in certain situations.¹⁴⁹ In other words, a use that would otherwise be infringing is nevertheless permissible if it is found to be a fair use.

138. See 4 PATRY, *supra* note 17, §§ 12:8, 12:3.

139. See Michael Abramowicz, *A Theory of Copyright's Derivative Right and Related Doctrines*, 90 MINN. L. REV. 317, 334 (2005).

140. See *id.* at 334–35.

141. See 4 PATRY, *supra* note 17, §§ 12:8, 12:3.

142. See, e.g., Abramowicz, *supra* note 139.

143. See Timothy Everett Nielander, *The Mighty Morphin Ninja Mallard: The Standard for Analysis of Derivative Work Infringement in the Digital Age*, 4 TEX. WESLEYAN L. REV. 1, 12 (1997).

144. See Merges, *supra* note 135, at 1181.

145. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 523 (2023).

146. *Id.* at 531.

147. See Justin Hughes, *The Sub Rosa Rules of Copyright Fair Use*, 64 ARIZ. L. REV. 1, 21 (2022).

148. *Id.* at 1.

149. See *id.* at 4.

Courts consider at least four factors in a fair use determination: the purpose and character of the allegedly infringing use, the nature of the underlying work, the substantiality of the underlying work used in the allegedly infringing use, and the effect on the market for the original copyrighted work.¹⁵⁰ This lack of a concise definition lends to the doctrine's notoriously unpredictable application.

When determining whether a work falls within the fair use defense, courts must consider the public policy underlying the Copyright Act.¹⁵¹ Unsurprisingly, that policy concerns financial rewards.¹⁵² Indeed, commentators have noted that marketplace concerns have "dominated . . . what fair use should be doing."¹⁵³ The focus on harm is shaped by copyright law's preoccupation with financial incentives: "harm to a copyright holder's expected markets should be the touchstone of infringement because the copyright holder relies on these markets for incentives to create and distribute the copyrighted work."¹⁵⁴ Therefore, the assumption is that copyright holders are creating with financial markets in mind and thus the effect on those markets should be foremost in deciding fair use.

With these commercial considerations in mind, the deciding factor of fair use for courts is often monetary in nature.¹⁵⁵ Uses seeking commercial gain are automatically suspect, while noncommercial uses might be permissible (unless they affect the original work's commercial gain).¹⁵⁶ Copyright law always asks "whether the user stands to profit" in a strictly financial way, like avoiding to pay to properly license the original work.¹⁵⁷ A "use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work" is not considered to have any noteworthy effect on creative incentive because creativity is, in this view, all about the market.¹⁵⁸ Thus, where an allegedly infringing work makes a profit that results from a market the copyright holder cannot exploit, courts conclude that creative incentive remains

150. See 17 U.S.C. § 107.

151. *Sega Enters. Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527 (9th Cir. 1992), *as amended* (Jan. 6, 1993).

152. Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS., no. 2, 2007, at 135, 138 [hereinafter Tushnet, *Payment in Credit*].

153. *Id.*

154. Christina Bohannon, *Copyright Harm and Reform*, 96 IOWA L. REV. BULL. 101, 105 (2010).

155. See *id.*

156. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984).

157. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 562 (1985). *But see Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989) (recognizing that not all infringement is motivated by money).

158. *Sony Corp. of Am.*, 464 U.S. at 450.

intact because no money has been lost.¹⁵⁹ Because the copyright ideal is a singular author who creates independently to achieve maximum financial compensation, uses that do not affect that financial compensation are permissible.¹⁶⁰ Even where copyright laws might “technical[ly]” be violated, there is no harm done if there is no *financial* harm done.¹⁶¹ Marketplace considerations are therefore “crucial” to fair use doctrine.¹⁶²

III. GONCHAROV (1973)

Having established the background of copyright law and its focus on financial markets, this Article now turns its attention to another type of creativity entirely—the internet meme involving the fake movie, *Goncharov*. Ivan Goncharov was a Russian author of the early twentieth century known mainly for his novel, *Oblomov*.¹⁶³ Until 2023, the historical reference to “Goncharov” as a name was focused on this author.¹⁶⁴ Today, however, a Google search of Ivan Goncharov focuses entirely on a fictional movie called *Goncharov*—the subject of a furiously mutating and collaborative meme that went viral in the fall of 2022.¹⁶⁵ The plot of the *Goncharov* movie is different depending on who you ask, as everyone who participated in the meme focused on and added different aspects to it. However, generally speaking, the plot of *Goncharov* revolves around the titular character—a Russian Mafia member who finds himself in Naples—dealing with the murky alliances and devastating betrayals of a shifting cast of characters around him, including his wife Katya.¹⁶⁶ Often, those participating in the meme describe the movie as ending tragically in Goncharov’s and Katya’s deaths.¹⁶⁷ Other versions of the movie depict Katya surviving to embark on a new life with another character in the film, Sofia.¹⁶⁸

159. See *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984); *Bond v. Blum*, 317 F.3d 385, 396 (4th Cir. 2003), *abrogated by* *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197 (2016); *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992) (“[W]here a use has no demonstrable impact on a copyright owners’ potential market, the use need not be prohibited to protect the artist’s incentive to pursue [their] inventive skills.”).

160. See *Rogers*, 960 F.2d at 312.

161. *Mihalek Corp. v. Michigan*, No. 92-1641, 1993 WL 460787, at *3 (6th Cir. Nov. 9, 1993).

162. Tushnet, *Payment in Credit*, *supra* note 152, at 167.

163. See *id.*

164. *Books Ngram Viewer*, GOOGLE, https://books.google.com/ngrams/graph?content=Goncharov&year_start=1800&year_end=2019&corpus=en-2019&smoothing=3 [https://perma.cc/J5XS-B9LR] (last visited Sept. 13, 2024).

165. See @gwenstacying, X (Nov. 21, 2022, 12:24 AM), <https://x.com/gwenstacying/status/1594577476843442176?t=LPeJH73fkWwNGMRUzgTeiw&s=19> [https://perma.cc/FJ V2-PD69] [hereinafter @gwenstacying, 100 pieces].

166. See Connanro, *Goncharov (1973)*, GOOGLE, <https://docs.google.com/document/d/1Fben96MKyc1Bky6c0Ffex4APtar9iNht8ytfZHPpSss/edit> [https://perma.cc/L55A-HEBC] (last visited Sept. 11, 2024).

167. See, e.g., *id.*

168. *Id.*

Goncharov's roots reach back to a Tumblr post created two years earlier than its exponential rise to popularity.¹⁶⁹ The original post depicted a photograph of a pair of real-life, physical boots that the post's author had purchased for use as a pair of shoes.¹⁷⁰ These boots inexplicably contained a label seeming to promote a Martin Scorsese movie called "Goncharov" as "the greatest Mafia [sic] movie ever made."¹⁷¹ A Tumblr user posted a photograph of the label and captioned it, "i got these knockoff boots online and instead of the brand name on the tag they have the name of an apparently non-existent martin scorsese movie???"¹⁷² Another Tumblr user jokingly replied to this particular post stating, "this idiot hasn't seen Goncharov."¹⁷³

This was not initially a popular post. Like most internet jokes, the Goncharov joke faded into obscurity, languishing in its pocket of the internet like countless other exchanges before and after it.¹⁷⁴ After all, in terms of internet phenomena, there was nothing particularly clever about a quick sarcastic reference to a non-existent movie. If this exchange could be called a "meme," it would be in only the most static sense of the word;¹⁷⁵ no one leaped in to continue the joke, expand upon the exchange, or grow it past the narrow circle of its initial post.¹⁷⁶ However, more than two years later, the meme shifted from a forgotten and static exchange into a mutating act of collaborative creativity that would take on a life of its own.¹⁷⁷

A. *The History and Development of Goncharov (1973)*

On November 18, 2022, Tumblr user "@Beelzebub," with little explanation as to why, resurrected the two-year-old exchange regarding the Goncharov boot label by posting a fake poster for the fictional movie *Goncharov*.¹⁷⁸ The poster took the kernel of the idea

169. @zootycoon, TUMBLR (Aug. 21, 2020), <https://loseremo.tumblr.com/post/627117270398894080> [<https://perma.cc/DFQ8-UUZL>].

170. *Id.*

171. *Id.* The explanation seems to be that a machine misread *Gomorrah* and embroidered *Goncharov* instead. See *Web Original: Goncharov*, TVTROPES, [hereinafter *Web Original: Goncharov*] <https://tvtropes.org/pmwiki/pmwiki.php/WebOriginal/Goncharov?from=JustForFun.Goncharov> [<https://perma.cc/C4TR-UFRT>] (last visited Sept. 11, 2024).

172. @zootycoon, *supra* note 169.

173. *Id.*

174. *Id.*

175. See Stacey M. Lantagne, *Famous on the Internet: The Spectrum of Internet Memes and the Legal Challenge of Evolving Methods of Communication*, 52 U. RICH. L. REV. 387, 390 (2018) [hereinafter Lantagne, *Famous on the Internet*].

176. *See id.*

177. *See id.* at 391.

178. @beelzebub, TUMBLR (Nov. 18, 2022), <https://beelzebub.tumblr.com/post/701284869475614720/Goncharov-1973-dir-martin-scorsese-the> [<https://perma.cc/J76G-XUYN>]; see also *Tumblr Staff: Tumblr Tuesday: The Greatest Mafia Movie*, TUMBLR,

of a Martin Scorsese Mafia movie called *Goncharov* and incorporated some of the other information found on the boot label.¹⁷⁹ Because the boot label contained the name “Domenico Procacci” and the marking “Matteo JWHJ 0715,” Tumblr users incorporated those names into their fake movie.¹⁸⁰ The poster also provided casting and character names,¹⁸¹ which were accepted as “canon” by everyone who went on to participate in the meme.¹⁸²

The idea of *Goncharov* suddenly took off.¹⁸³ By the next day, users created tapes, books, soundtracks, academic essays, and fanfiction geared toward the movie.¹⁸⁴ Within twenty-four hours, *Goncharov* had taken over Tumblr so completely that those who had not opened the website that day were completely lost in conversations about the “movie.”¹⁸⁵

As more users became aware of *Goncharov*, the details of the movie began to emerge in fits and bursts through Tumblr’s tagging system.¹⁸⁶ In some iterations, the movie acquired a “big relationship triangle” that one user described as beginning “in Prague during the run up to the 1968 Soviet invasion.”¹⁸⁷ The movie also developed themes like “the family you are born into vs. the mafia family that finds, accepts and trains you, the constant ethical tension between doing what’s right for your morality and what’s right for YOUR family vs. what’s right for THE family.”¹⁸⁸ Aside from these grand,

<https://staff.tumblr.com/post/701641653313748992/tumblr-tuesday-the-greatest-mafia-movie> [<https://perma.cc/6YJY-S6JD>] (last visited Sept. 11, 2024). Indeed, in the AO3 listing of the fandom, credit is given to Beelzebub as the originator. See *Works in Goncharov (1973) dir. Martin Scorsese – beelzebub*, ARCHIVE OF OUR OWN, [hereinafter *Works in Goncharov*] [https://archiveofourown.org/tags/Goncharov%20\(1973\)%20dir*d*%20Martin%20Scorsese%20-%20beelzebub/works](https://archiveofourown.org/tags/Goncharov%20(1973)%20dir*d*%20Martin%20Scorsese%20-%20beelzebub/works) [<https://perma.cc/DX2L-JE7F>] (last visited Sept. 11, 2024).

179. @beelzebub, *supra* note 178.

180. *Web Original: Goncharov*, *supra* note 171; *Tumblr Staff*, *supra* note 178.

181. @beelzebub, *supra* note 178.

182. *Canon*, FANLORE, <https://fanlore.org/wiki/Canon> [<https://perma.cc/9P4C-6YSQ>] (last visited Sept. 13, 2024); see *Tumblr Staff*, *supra* note 178.

183. See @gwenstacying, 100 pieces, *supra* note 165.

184. *Id.*

185. See @illesepen, X (Nov. 21, 2022, 11:46 AM), <https://x.com/illesepen/status/1594883006380277760?s=20> [<https://perma.cc/TPS2-6VLC>]; @n1ghthare, X (Nov. 22, 2022, 5:46 PM), <https://x.com/n1ghthare/status/1595111417212198913?s=20> [<https://perma.cc/67A2-JH3V>] (“[I] haven’t been on tumblr for only a few days what the FUCK”).

186. Tumblr allows users to “tag” their posts. *Organizing with Tags*, TUMBLR, <https://help.tumblr.com/organizing-with-tags/> [<https://perma.cc/QE7B-SD4J>] (last visited Jan. 14, 2024). These tags can be organizational in nature, so that a post could be tagged “art” if it contained art. *Id.* If a post was associated with the *Goncharov* meme, then that post could be tagged “*Goncharov*” or some variation thereof. A person can search tags within Tumblr, for instance, “*Goncharov*,” and find all the posts that have been tagged “*Goncharov*.” See *Tagging Your Posts*, TUMBLR, <https://help.tumblr.com/tagging-your-posts/> [<https://perma.cc/W5PJ-6356>] (last visited Sept. 13, 2024).

187. @cryptid-sighting, TUMBLR, <https://www.tumblr.com/cryptid-sighting/701406660991877120?source=share> [<https://perma.cc/FD8C-PJWC>] (last visited Sept. 13, 2024).

188. @mortalityplays, TUMBLR, <https://mortalityplays.tumblr.com/post/701459316378583040/for-those-who-are-confused-copyright-strikes> [<https://perma.cc/YAS6-XWBA>] (last visited Sept. 11, 2024).

overarching themes and the sketchy, bare-boned plot suggestions they came with, users even began fleshing out individual scenes.¹⁸⁹ These suggestions were thrown out with the gleeful abandon of people just having fun, creating with no end goal in mind other than just participating in the in-joke of *Goncharov*. Thus, sometimes, the scenes went nowhere and just remained silly suggestions. For example, there was not much for users to do with a purported “dancing penguins scene” or a “tightrope walker in act 2.”¹⁹⁰ However, sometimes someone suggested a scene, like “the fruit stand scene”¹⁹¹ and “the bridge scene,”¹⁹² and new participants, inspired by the idea, would flesh out these scenes with suggested pieces of dialogue or brainstorming about where in the plot such scenes might occur. These increasingly embellished details were gathered in at least two Google docs.¹⁹³

As details began to coalesce, the creativity deepened.¹⁹⁴ The *Goncharov* meme continued to display an astonishing amount of creativity being developed for fun and for free.¹⁹⁵ One user offered to “nitpick[] Russian culture and naming conventions” for the film.¹⁹⁶ Another wrote the film’s soundtrack.¹⁹⁷ Users created fake gif sets purported to be scenes from the movie,¹⁹⁸ complete with dialogue

189. See Connanro, *supra* note 166.

190. See, e.g., @potater1247, X (Nov. 22, 2022, 12:58 PM), <https://x.com/potater1247/status/1595129709343301632?s=20> [<https://perma.cc/J9LK-67CE>].

191. @agentjx7, X (Nov. 22, 2022, 9:29 PM), <https://x.com/agentjx7/status/1594895862358065152?s=20> [<https://perma.cc/YBZ2-C6TZ>].

192. @thelaurenshippen, TUMBLR, <https://www.tumblr.com/thelaurenshippen/701733199466971136/hey-lauren-whats-your-favorite-scene-in> [<https://perma.cc/8TFT-8R77>] (last visited Sept. 13, 2024).

193. See Goncharov *Gospel*, GOOGLE, https://docs.google.com/document/d/1Hhre2YKcgYH2mSWggRHMOLvPwznj_fWB5VsWtPc3BnY/edit [<https://perma.cc/H4PJ-8EQM>] (last visited Sept. 13, 2024); Connanro, *supra* note 166.

194. See Connanro, *supra* note 166.

195. See *id.*

196. @destinationtoast, TUMBLR (Nov. 20, 2022, 9:21 AM), <https://destinationtoast.tumblr.com/post/701460556556697601/a-concise-description-of-goncharov-for-anyone-as> [<https://perma.cc/5ZYV-VHQ8>].

197. See @caramiaaddio, TUMBLR (Nov. 20, 2022), <https://caramiaaddio.tumblr.com/post/701503147800248320/caramiaaddio-all-this-talk-about-Goncharov-but-i> [<https://perma.cc/W6BQ-V94A>]; @traumagician, TUMBLR, <https://www.tumblr.com/verynichedome/701622747143585792?source=share> [<https://perma.cc/6DV3-GR98>] (last visited Sept. 13, 2024); @gwenstacying, X (Nov. 21, 2022, 6:27 AM), <https://x.com/gwenstacying/status/1594578202529337345?s=20> [<https://perma.cc/9PAP-7A9C>] [hereinafter @gwenstacying, 24 hours].

198. See @danascully, TUMBLR, <https://www.tumblr.com/danascully/701503084322537472/can-you-hear-it-can-you-hear-the-ticking-of-the?source=share> [<https://perma.cc/78VY-QJ6H>] (last visited Sept. 13, 2024). A gif set is a post containing a number of “gif” files, which are short, looping, silent visual files, each depicting a second or so of visual data, like a very short film. *What Is a GIF? A Guide To Creating and Using GIFs*, SHOPIFY BLOG (May 21, 2024), <https://www.shopify.com/blog/what-is-gif#> [<https://perma.cc/NJK2-DG69>]; *GIF Files*, ADOBE, <https://www.adobe.com/creativecloud/file-types/image/raster/gif-file.html> [<https://perma.cc/E8SF-QUJY>] (last visited Sept. 15, 2024). A number of them posted together can establish a few seconds of “film.” *What Is a GIF?*, *supra*; *GIF Files*, *supra*. They are often captioned with accompanying dialogue. *What Is a GIF?*, *supra*; *GIF Files*, *supra*. This format

created by the user and purporting to belong to the movie.¹⁹⁹ Snippets of the screenplay circulated.²⁰⁰ People manufactured cast interviews and even mocked-up a fake review by film critic, Gene Siskel.²⁰¹ Others claimed to have actually been in the movie,²⁰² including actress Lynda Carter.²⁰³

B. Encouragement of Creative Collaboration on the Tumblr Platform

Goncharov is a stellar example of widespread creative collaboration as users from across the Tumblr platform came together in pursuit of creativity. Tumblr, among all social media platforms, is uniquely suited to drive the collaborative creativity embodied in the *Goncharov* meme. Although *Goncharov* spilled over to both Twitter and TikTok,²⁰⁴ when it came to encouraging collaborative creativity, Tumblr had advantages over both of these platforms.²⁰⁵ Thus, Tumblr stood as the center of *Goncharov*.²⁰⁶

Unlike Twitter, which favors text-based communication and TikTok's video-based communication,²⁰⁷ Tumblr has no preference

is especially popular on Tumblr. See #gifsets, TUMBLR, <https://www.tumblr.com/tagged/gifsets> [<https://perma.cc/V7EG-4JLW>] (last visited Sept. 13, 2024).

199. See @danascully, *supra* note 197. Someone worked a reference to *Goncharov* into a gifset from *Riverdale*, another popular Tumblr fandom. See @mean-vampyre, TUMBLR, <https://www.tumblr.com/mean-vampyre/701459550256168960/chapter-twenty-eight-the-goncharov?source=share> [<https://perma.cc/T33W-8HK4>] (last visited Sept. 13, 2024).

200. See @gwenstacying, 24 hours, *supra* note 197.

201. @gwenstacying, X (Nov. 21, 2022, 6:52 AM), <https://x.com/gwenstacying/status/1594584597144244225?s=20> [<https://perma.cc/CV4L-F5JS>]; see *Tumblr Staff*, *supra* note 178.

202. @BamaStephen, X (Nov. 22, 2022, 4:12 AM), <https://x.com/BamaStephen/status/1594906740352749568?s=20> [<https://perma.cc/J28L-3Y8A>] (“One little-known fact about me is that I had a small part in the lost 1973 Scorsese epic mafia film, ‘*Goncharov*.’ I played a Russian boy growing up in Naples, Italy, delivering San Marzano tomatoes to Ice Pick Joe. Now that people are talking about this film, I can tell my story.”).

203. @gwenstacying, X (Nov. 21, 2022, 7:55 PM), <https://x.com/gwenstacying/status/1594781485432967168?s=20> [<https://perma.cc/7FLA-X5DK>].

204. Chase DiBenedetto, *Is Fake Martin Scorsese Film ‘Goncharov’ the Internet’s Best Shared Delusion?*, MASHABLE (Nov. 26, 2022), <https://mashable.com/article/goncharov-scorsese-movie-tumblr> [<https://perma.cc/NT7Y-BE8B>]. While Twitter is now known as X, it was still Twitter at the time. Jay Peters & Thomas Ricker, *Twitter Is Officially X.com Now*, VERGE (May 17, 2024, 2:19 AM), <https://www.theverge.com/2024/5/17/23829098/twitter-x-com-url-links-switch> [<https://perma.cc/6ZHC-V8HP>].

205. See Rebecca Fishbein, *Welcome to Tumblr. Now Go Away.*, N.Y. TIMES (Nov. 23, 2022), <https://www.nytimes.com/2022/11/23/style/tumblr-twitter-elon-musk.html> [<https://perma.cc/H3E9-GHMP>].

206. See Adi Robertson, *Tumblr Says It’s Going to “Fix” Its “Core Experience” to Appeal to New Users*, VERGE (July 10, 2023, 2:53 PM), <https://www.theverge.com/2023/7/10/23790050/tumblr-user-experience-changes-reblogs-discoverability-creators> [<https://perma.cc/86ZB-TL2B>].

207. See *The Rise and Rise of the Text-Only Tweet, Tips to Use in Your Next Campaign*, MONTY (May 3, 2021), <https://wearemonty.com/news/the-rise-and-rise-of-the-text-only-tweet-tips-to-use-in-your-next-campaign/> [<https://perma.cc/94AZ-UTHF>]; Anne Haag, *What Do Your Apps Know About You?*, CBA REC., Sept./Oct. 2020, at 37, 37, <https://user-35215390377.cld.bz/Chicago-Bar-Association/CBA-Sept-Oct-2020/36/> [<https://perma.cc/SW8P-AYFB>].

for a particular type of creative communication over any other.²⁰⁸ Although a Tumblr feed can be graphic-heavy and filled with photos and gifs, it can also be the scene of short, tweet-like snippets of text or even dense paragraphs of text.²⁰⁹ Indeed, encountering every media type in a single quick scroll is extremely common and even expected on Tumblr.²¹⁰

In addition, unlike Twitter and TikTok, Tumblr does not favor brevity in its posts.²¹¹ While Twitter's character limits inevitably transform conversations into disjointed threads,²¹² Tumblr posts allow users to author lengthy posts that encourage large bursts of communication.²¹³ Similar to Twitter, TikTok favors quick, succinct communication on the theory that lengthy communications bore users.²¹⁴ However, Tumblr's philosophy is the opposite—it is “one of the few social networks where users can still publish entries that resemble blog posts.”²¹⁵ User-created videos are not a huge part of Tumblr's culture, but links to short videos coincide with many other methods of communication, such as long text posts, brief text posts, image posts, gifsets, and polls.²¹⁶

Unlike Twitter and TikTok, Tumblr is not designed to keep users moving quickly through its algorithm.²¹⁷ In fact, Tumblr is so unique among social media platforms that it does not have an active

208. See Brent Csutoras, *50 Things You Should Know about Tumblr*, SEARCH ENGINE J. (Nov. 12, 2022), <https://www.searchenginejournal.com/50-things-know-tumblr/84595/> [<https://perma.cc/S6LH-VP2V>]; Kyle Chayka, *How Tumblr Became Popular for Being Obsolete*, NEW YORKER (Jan. 14, 2022), <https://www.newyorker.com/culture/infinite-scroll/how-tumblr-became-popular-for-being-obsolete> [<https://perma.cc/MWC3-FLZD>] (“Tumblr is more open-ended, listing various possible post formats with icons at the top of its feed: text, photo, quote, link, chat, audio, video.”).

209. See Csutoras, *supra* note 208; Chayka, *supra* note 208.

210. See Csutoras, *supra* note 208; Chayka, *supra* note 208.

211. See *Writing Posts*, TUMBLR, <https://help.tumblr.com/hc/en-us/articles/360010901913-Writing-Posts> [<https://perma.cc/QL8H-HN4U>] (last visited Sept. 13, 2024) (explaining that each text box can contain 4,096 characters and each post can have 10,000 text blocks for a total of 40,960,000 characters available).

212. See Ashley Biancuzzo, *Twitter Expands Character Limit From 280 to 4,000 (And Promptly Breaks)*, PCWORLD (Feb. 9, 2023, 8:08 AM), <https://www.pcmag.com/article/1508421/twitter-expands-character-count-to-4000-and-crashes-in-the-process.html#:~:text=Twitter%20expands%20character%20limit%20from,Isn%27t%20brevity%20the%20point%3F&text=Loquacious%20people%2C%20rejoice!,4%2C000%E2%80%A6%20but%20there%27s%20a%20catch> [<https://perma.cc/RE6W-2VT9>] (noting that Twitter's character limit was increased after years of limitation).

213. *Writing Posts*, *supra* note 211.

214. Jessica Worb, *How Does the TikTok Algorithm Work? (+10 Hacks to Go Viral)*, LATER BLOG (Feb. 16, 2023), <https://later.com/blog/tiktok-algorithm/> [<https://perma.cc/4SXD-TMNZ>] (“Since watching a video in full is a strong interest indicator, TikTok typically favors videos that are easy-to-digest, have a seamless loop, and cater to users who have a short attention span. Because of this, it's vital to hook your audience within the first three seconds.”).

215. Chayka, *supra* note 208.

216. *Writing Posts*, *supra* note 211.

217. See Robertson, *supra* note 206 (noting Tumblr's uniqueness in allowing users to curate their own experience—which it also terms a weakness); Chayka, *supra* note 208.

algorithm curating user feeds.²¹⁸ While Tumblr does provide an option that creates suggestions based on a user's liked posts or followed tags,²¹⁹ even with that option enabled, Tumblr is primarily experienced through an old-fashioned dashboard.²²⁰ The dashboard shows users every post made by the accounts they are following in chronological order.²²¹ Thus, when something bubbles to the top of Tumblr, it happens organically, not through algorithmic pushing.²²²

Even though Tumblr does not have an algorithm,²²³ the platform is nevertheless well suited to push users outside their realm of mutual friends.²²⁴ While it is true that, like Facebook and Twitter, Tumblr's dash is primarily composed of a user's chosen following, Tumblr is not the echo chamber of social media that one might imagine.²²⁵ Rather, Tumblr's technological interface resists the echo chamber bubble because of its prominent emphasis on re-blogging.²²⁶ Unlike other social media sites, Tumblr posts cannot be locked to limit which users on the site see them.²²⁷ Thus, whatever a user posts can be easily re-blogged beyond that user's narrow circle of acquaintances, allowing the post to take on a life of its own.²²⁸

While Twitter also allows users to repost, the platform's character limits often makes additions to the repost limited and awkward. If a user wants to retweet someone's tweet and add their own observation to it, the user is confined to a limited number of

218. Robertson, *supra* note 206; Chayka, *supra* note 208.

219. *Dashboard Preferences*, TUMBLR, <https://help.tumblr.com/hc/en-us/articles/115013590547-Dashboard-Preferences> [<https://perma.cc/9WPC-P6QX>] (last visited Sept. 13, 2024).

220. *See generally id.*

221. *See How to Get a Chronological Dash as a New Blog*, RPSCHTUFF, <https://rpschtuff.tumblr.com/post/721747776088735744/how-to-get-a-chronological-dash-as-a-new-blog> [<https://perma.cc/Y8M3-KYLY>] (last visited Sept. 13, 2024); Chayka, *supra* note 208. To compete with other social media sites, Tumblr recently shifted into a more algorithmic-based dashboard as the default, but only for new accounts. *Changes on Tumblr*, TUMBLR (June 2, 2023), <https://changes.tumblr.com/post/719036393883598848/friday-june-2nd-2023> [<https://perma.cc/52TX-R9WQ>].

222. *See* Robertson, *supra* note 206; Chayka, *supra* note 208.

223. Robertson, *supra* note 206; *see* Chayka, *supra* note 208.

224. *Dashboard Tabs*, TUMBLR, <https://help.tumblr.com/dashboard-tabs/> [<https://perma.cc/MZB7-9QGA>] (last visited Sept. 15, 2024).

225. *See id.*

226. *See Reblogs*, TUMBLR, <https://help.tumblr.com/reblogs/> [<https://perma.cc/KA66-6UV3>] (last visited Sept. 13, 2024).

227. "Locked" is the term used for a post or account that cannot be seen by the public at large and can only be seen by those users explicitly allowed to see it by the account holder. *Privacy Options*, TUMBLR, <https://help.tumblr.com/hc/en-us/articles/115011611747-Privacy-options> [<https://perma.cc/8575-BZ7Z>] (last visited Sept. 13, 2024). Certain settings can be turned off, such as replying or reblogging, and posts can be hidden from people without accounts, but posts cannot be restricted to a subset of Tumblr users. *Private Posts*, TUMBLR, <https://help.tumblr.com/private-posts/> [<https://perma.cc/M3DK-MCKB>] (last visited Sept. 13, 2024). The only option is to post them privately, which blocks them from the view of any user but yourself. *See Privacy Options*, *supra* note 227.

228. *Reblogs*, *supra* note 226.

characters.²²⁹ Tumblr’s system for re-blogging, however, allows for substantial additions with very little friction.²³⁰ In effect, Tumblr functions as one giant improv class by encouraging the “yes, and” response among its users, a technique employed by improv troupes to keep a joke going.²³¹

While users can directly reply to a post on Tumblr without re-blogging,²³² replies are finicky to engage with, difficult to read, and not optimized in Tumblr’s design.²³³ Tumblr encourages more global, platform-wide conversations with broad participation, like what happened with the *Goncharov* meme.²³⁴ For example, if one user mentions the bridge scene, a second user can re-blog the post with dialogue purporting to come from the bridge scene. Then, a third user can re-blog the second user’s elaborated re-blog of the bridge scene with a gif set utilizing that dialogue and so on.²³⁵ Every re-blog would show all these contributions in the order in which they happened, which creates an easy-to-follow storyline.²³⁶ However, users are not required to add to re-blogs—they can re-blog simply because they like the post, pushing the meme’s reach even further.²³⁷ Moreover, once users start tagging the posts and re-blogs with “*Goncharov*,” others can track the tag and follow the phenomenon.²³⁸ Indeed, Tumblr is not built around “ownership” in the sense that it is not a page about a user created by that user.²³⁹

229. See Biancuzzo, *supra* note 212.

230. *Reblogs, supra* note 226; Ruchira Sharma, ‘Goncharov’: How Tumblr Invented a Martin Scorsese Movie That Doesn’t Exist, VICE (Nov. 28, 2022, 4:45 AM), <https://www.vice.com/en/article/wxnyxn/Goncharov-scorsese-film-tumblr-meme> [<https://perma.cc/76QZ-P2DM>]; María Luisa Paúl, *Martin Scorsese Fans Dub ‘Goncharov’ the Best Mafia Film (N)Ever Made*, WASH. POST (Nov. 29, 2022, 3:13 AM), <https://www.washingtonpost.com/nation/2022/11/29/Goncharov-martin-scorsese-movie/> [<https://perma.cc/K5J6-VUP7>].

231. See Nathan Minns, *What does “Yes, And...” In Improv Really Mean?*, <https://nathanminns.com/what-does-yes-and-in-improv-really-mean/> [<https://perma.cc/B2UP-YKEM>] (last visited Sept. 13, 2024); David Alger, *Rules of Improv I*, PAN THEATER, <https://pantheater.com/rules-of-improv.html> [<https://perma.cc/G6P7-MDML>] (last visited Sept. 15, 2024).

232. See *Replies*, TUMBLR, <https://help.tumblr.com/hc/en-us/articles/231855648-Replies> [<https://perma.cc/6QBW-PTB2>] (last visited Sept. 13, 2024).

233. See *id.*

234. See *Reblogs, supra* note 226; Sharma, *supra* note 230; Paúl, *supra* note 230.

235. See @shabbytigers, TUMBLR, <https://shabbytigers.tumblr.com/post/701465665301774336> [<https://perma.cc/S4PD-VLQ5>] (last visited Sept. 11, 2024).

236. See *Reblogs, supra* note 226; Sharma, *supra* note 230; Paúl, *supra* note 230.

237. See *Reblogs, supra* note 226; Sharma, *supra* note 230; Paúl, *supra* note 230.

238. See *Followed Tags*, TUMBLR, <https://help.tumblr.com/hc/en-us/articles/226259728-Followed-Tags> [<https://perma.cc/U4XL-TVFT>] (last visited Sept. 13, 2024).

239. See @mariaiscrafting, TUMBLR (Feb. 13, 2021, 6:00 PM), <https://mariaiscrafting.tumblr.com/post/643048262914473984/heres-a-little-lesson-in-the-tumblr-algorithm> [<https://perma.cc/NFP9-EAP3>].

Instead, Tumblr is built around collaboration and engagement with self- and community-driven creativity.²⁴⁰

The absence of a content generating algorithm aids in spontaneous collaboration.²⁴¹ It is impossible to know whether an algorithm would have predicted that any user would be interested in the original *Goncharov* post about the boot label. Equally unknown is whether an algorithm would have predicted that users needed to see the fake movie poster. However, Tumblr users uninhibited by the manipulation of being told what to look at by an algorithm engage with a wide array of topics and interests,²⁴² and they do so in a strikingly unmonetized space.²⁴³

Tumblr is known among its users for being notoriously unprofitable; it is constantly decreasing in value.²⁴⁴ However, it is a point of pride that the platform has not yet been successfully monetized,²⁴⁵ albeit also one that leads to fretting about the platform's future.²⁴⁶ Tumblr is cherished by many of its users as a rare digital space that exists outside of optimized financial exploitation.²⁴⁷ After all, when TikTok tried its own fake movie meme, it was immediately accused of "being a viral marketing stunt" commercialized with a contest.²⁴⁸

240. See, e.g., *id.* ("I know that on Twitter, it's largely expected for most of your profile to consist of mostly your own tweets, and not too many retweets. Tumblr is extremely different, in that the entire site is made up of shared posts. The site is designed for maybe 5% of the content on your dash to be original content at any given moment, while 95% will be reblogs from others, and that's perfectly acceptable and expected, actually.")

241. Robertson, *supra* note 206 (noting Tumblr's uniqueness in allowing users to curate their own experience—which it also terms a weakness); Chayka, *supra* note 208.

242. Robertson, *supra* note 206; Chayka, *supra* note 208.

243. See Chayka, *supra* note 208; see also Robertson, *supra* note 206.

244. See Chayka, *supra* note 208 (noting that Tumblr was sold for over a billion dollars in 2013 and for three million dollars in 2019); see also Robertson, *supra* note 206.

245. See, e.g., @threecheersmaka, TUMBLR (Apr. 20, 2021), <https://threecheersmaka.tumblr.com/post/649025845330067456/tumblr-is-my-favourite-social-media-site-because> [<https://perma.cc/2AX2-KCP9>]; Amanda Silberling, *Trouble in Fandom Paradise: Tumblr Users Lash Out Against Its Beta Subscription Feature*, TECHCRUNCH (July 22, 2021, 3:31 PM), <https://techcrunch.com/2021/07/22/tumblr-community-lash-out-post-plus-subscription/> [<https://perma.cc/VJF2-WZUP>] ("Tumblr's vocal community has been empowered over the years to question whether it's possible for a platform to establish new revenue streams in a way that feels organic. The protectiveness that Tumblr's user base feels for the site . . . sets it apart from social media juggernauts like Facebook, which can put e-commerce front and center without much scrutiny."); Robertson, *supra* note 205 ("Part of [Tumblr's] appeal . . . has been as a respite from heavily monetized and optimized social feeds.")

246. See, e.g., @sreegs, TUMBLR (Feb. 24, 2022), <https://sreegs.tumblr.com/post/677100627025936384/just-a-reminder-in-case-you-missed-it-directly> [<https://perma.cc/Y8L2-Y9PV>].

247. See Robertson, *supra* note 226.

248. Gavia Baker-Whitelaw, 'Zepotha': *Why This Fake 1980s Horror Movie Is All over TikTok*, DAILY DOT (Aug. 15, 2023), <https://www.dailydot.com/unclick/zepotha-tiktok-meme/> [<https://perma.cc/7SWK-GCD3>].

The meteoric rise of the *Goncharov* meme (and its attendant universe) did not surprise anyone who knew Tumblr.²⁴⁹ Recognizing the uniqueness of Tumblr’s setup and user culture, one user noted, “in no other platform you would see this happen.”²⁵⁰ Indeed, Tumblr was the best forum for the *Goncharov* meme precisely because *Goncharov* does not exist—it can be whatever fans want it to be.²⁵¹

The collective creativity that Tumblr encourages is a vital feature of the platform that its users celebrate.²⁵² The meme represented, to some people, a shining example of collaborative creativity at its best: “[to be honest] fandom fuels a lot of my faith in/joy about humanity and this sort of thing is why. Building something creative together for the whole community to enjoy is so....)”²⁵³ This type of yearning for joyful and collaborative creativity is the exact opposite of how copyright law views creativity.²⁵⁴ Yet, *Goncharov* still found success.

C. The Meaning of *Goncharov* (1973)

Mutating memes are imbued with meaning as they spread throughout the internet.²⁵⁵ For example, a meme like “Distracted Boyfriend,” a stock photograph of a man admiring a passing woman while his girlfriend is visibly miffed by his wandering eye.²⁵⁶ The meme was used as a commentary on everything from socialism to solar eclipses, exemplifying the meme’s mutating meaning.²⁵⁷ Similarly, the *Goncharov* meme was imbued with an array of meanings by the users who engaged with it.²⁵⁸ The meme, ultimately, was not about a movie at all—it was about the fake fandom around the fake movie and the act of being a fan.²⁵⁹

In fact, a meme like “Distracted Boyfriend” is fairly simplistic when compared with *Goncharov*, a meme that expanded well beyond a single photograph with shifting captions. Thus, the meaning of

249. See @Discords_Morgan, X (Nov. 21, 2022, 11:38 PM), https://x.com/Discords_Morgan/status/1594837691543457792?s=20 [<https://perma.cc/T87N-TJB2>]; @n1ghtha re, *supra* note 184 (“[I]’m not surprised something like this happened on tumblr”).

250. @Nolja21VIP, X (Nov. 22, 2022, 7:37 PM), <https://x.com/Nolja21VIP/status/1595139402216656897?s=20> [<https://perma.cc/V5HG-WM6A>].

251. See @milfmarthawayne, TUMBLR (Nov. 20, 2022), <https://milfmarthawayne.tumblr.com/post/701470233213419520/okay-since-nobody-asked-i-will-explain-further> [<https://perma.cc/YKL5-7LXE>] (“It may be the perfect piece of media for tumblr as its very nonexistence allows it to remain truly flawless and therefore uncancellable.”).

252. See @SadieFick, X (Nov. 22, 2022, 7:54 AM), <https://x.com/SadieFick/status/1594962419411189762?s=20> [<https://perma.cc/WJR4-XNGS>].

253. See *id.*

254. See Lantagne, *Famous on the Internet*, *supra* note 175, at 395.

255. See *id.* at 391.

256. *Distracted Boyfriend*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/distracted-boyfriend> [<https://perma.cc/69BH-6EVQ>] (last visited Nov. 3, 2024).

257. *Id.*

258. See *id.*

259. See Chayka, *supra* note 208.

Goncharov is not a meaning brought to it by each user (although that also exists). Rather, *Goncharov* has an overarching meaning of meta-commentary on the very act of being a fan, a meaning which the fans participating in its creation grasped immediately and instinctively.²⁶⁰ Although *Goncharov* itself is a highly curated fictional movie, its true value to the Tumblr community came from the fandom it created.²⁶¹ That fandom allowed users to perform the tropes of “fannishness.”²⁶² In other words, the *Goncharov* meme was not the creation of the fictional movie, but rather a very explicit and deliberate creation of the *fandom* around the movie. As such, the fandom allowed engaged users to perform the tropes of fannishness.

The *Goncharov* fandom grew with such intensity that Tumblr users even began leaving reviews for the film on Letterboxd, a social media platform specifically dedicated to film opinions.²⁶³ Users also began writing pieces of fiction (known to fans as “fics”) set in the *Goncharov* universe at an exponential rate.²⁶⁴ Fan art cropped up.²⁶⁵ There was discussion about knitting patterns inspired by the film.²⁶⁶ Fan-made quizzes were created.²⁶⁷ A website was also set up for the fictional movie on TVTropes, a real website purporting to catalogue plot devices used by real television shows and movies, pulling together the facts fabricated by Tumblr users and blending those facts with reality.²⁶⁸

Indeed, to fully welcome *Goncharov* into the fandom family, users incorporated it into the active fandoms they already had.²⁶⁹ Users made connections between fake *Goncharov* scenes and real scenes from *Supernatural*, the CW show that is known for its enduring and omnipresent fandom on Tumblr.²⁷⁰ Another user worked a reference to *Goncharov* into a gifset from *Riverdale*, another TV show with a popular Tumblr fandom.²⁷¹

260. See Sharma, *supra* note 230.

261. See *id.*

262. See *id.*

263. See, e.g., @warlockworld, X (Nov. 20, 2022, 10:06 PM), <https://x.com/warlockworld/status/1594452112444096513?s=20> [<https://perma.cc/ZHQ6-BDUX>].

264. See, e.g., @destinationtoast, *supra* note 196; @zwoelffarben, TUMBLR (Nov. 22, 2022), <https://timelesslords.tumblr.com/post/701667816480342016> [<https://perma.cc/DUY7-S2BU>].

265. See *Tumblr Staff*, *supra* note 178; @mimiadraws, TUMBLR, <https://www.tumblr.com/motherfuckingampersands/search/mimiadraws-Goncharov-1973-fanart?source=branch> [<https://perma.cc/S5Y5-9F2X>] (last visited Sept. 13, 2024).

266. @JocelynPalmer92, X (Nov. 28, 2022, 10:27 PM), <https://x.com/JocelynPalmer92/status/1597447152740880385?s=20> [<https://perma.cc/X8FG-X6FD>].

267. @gwenstacying, X (Nov. 21, 2022, 6:32 AM), <https://x.com/gwenstacying/status/1594579412984397825?s=20> [<https://perma.cc/EMW9-PAHG>].

268. *Web Original: Goncharov*, *supra* note 171.

269. See @strwbrrykly, X (Nov. 25, 2022, 6:30 AM), <https://x.com/strwbrrykly/status/159602855523411968?s=20> [<https://perma.cc/YY8E-EXTW>]; @Shouty_y, X (Nov. 24, 2022, 7:22 PM), https://x.com/Shouty_y/status/1595860473794134019?s=20 [<https://perma.cc/ZD6U-DGPT>]; @mean-vampyre, *supra* note 199.

270. See @strwbrrykly, *supra* note 269; @Shouty_y, *supra* note 269.

271. See @mean-vampyre, *supra* note 199.

Importantly, fans began talking about the movie as if they were in its fandom.²⁷² Their interest was not in just creating a movie, it was in creating a fandom for the movie.²⁷³ So, for instance, even though the movie did not exist and these characters' storylines were never actually portrayed, fans familiar with the typical cadence of fan discourse began mimicking fandom behaviors, saying things like:

Anyone who watched *Goncharov* and does not pick up on the clear sapphic story between Sophia and Katya is just really blind or does not want to see it. Day/Night dynamic, the way Sophia LOOKS at her when she thinks she can't see her, and most importantly "you could've been my sun"????!?!?!?!?274

Discourse like this assumes facts not in evidence—no one actually knows the story behind Katya and Sophia. However, Tumblr users are extremely familiar with this *type* of situation and how the debates around it should go.²⁷⁵ Indeed, the Katya and Sophia discourse followed well-worn grooves of fandom debate.²⁷⁶ According to one user, “Katya and Sophia never belonged together because Katya only wanted ownership, not love. Sophia got the raw end of a bad deal.”²⁷⁷ Another added, “I’m glad [Sophia] got her happy ending with katya but I feel like katya kinda just treated her like an outlet for her emotions for a lot of the movie.”²⁷⁸ A video that one user created to document the rise of the meme is full of this kind of fake fan-speak.²⁷⁹ These examples illustrate that there is a certain “fan vocabulary” known by users.²⁸⁰ The vocabulary then molds the

272. See @kazisonline, TUMBLR, <https://www.tumblr.com/kazisonline/701471507065487360/anyone-who-watched-Goncharov-and-does-not-pick-up?source=share> [https://perma.cc/K7C3-WVR8] (last visited Sept. 13, 2024); @sewnwideopen, X (Nov. 22, 2022, 1:20 AM), <https://x.com/sewnwideopen/status/1594863469177831426?s=20> [https://perma.cc/KV3H-SFLU]; @lesbianmarston, X (Nov. 21, 2022, 9:25 PM), <https://x.com/eurodynesdoll/status/1594894829237960706?s=20> [https://perma.cc/QHB9-CS7B].

273. See @kazisonline, *supra* note 272; @sewnwideopen, *supra* note 272; @lesbianmarston, *supra* note 272.

274. @kazisonline, *supra* note 272.

275. See, e.g., Jasmine, *The Ship Debate: The Vampire Diaries Edition*, FANGIRLISH (July 11, 2019), <https://fangirlish.com/2019/07/11/the-ship-debate-the-vampire-diaries-edition/> [https://perma.cc/8RGX-T58A?type=standard]; *Ship Debates*, FANDOM, <https://fun-fandom-kotle.fandom.com/wiki/Forum/Debates/Ships> [https://perma.cc/Q9KR-B345] (last visited Sept. 11, 2024); *The Most Controversial Part of Fandoms: Shipping*, FANDOM LEARNING CURVE (July 11, 2013, 9:06 PM), <https://fandomlearningcurve.wordpress.com/2013/07/11/the-most-controversial-part-of-fandoms-shipping/> [https://perma.cc/FB8V-EQXT]; Mike Knopp, *Why Do Ship Debates Feel So Important in the Harry Potter Community?*, QUORA, <https://www.quora.com/Why-do-ship-debates-feel-so-important-in-the-Harry-Potter-community> [https://perma.cc/AD5Y-53H4] (last visited Sept. 11, 2024).

276. See, e.g., @sewnwideopen, *supra* note 272; @lesbianmarston, *supra* note 272.

277. @sewnwideopen, *supra* note 272.

278. @lesbianmarston, *supra* note 272.

279. See @turnpikeghosts, TUMBLR (Nov. 25, 2022), <https://www.tumblr.com/turnpikeghosts/701931967976030208/Goncharov?source=share> [https://perma.cc/9R9G-QE9X].

280. See Aja Romano, *Canon, Fanon, Shipping and More: A Glossary of the Tricky Terminology That Makes Up Fan Culture*, VOX (June 7, 2016, 12:00 PM), <https://www.vox.com/2016/6/7/11858680/fandom-glossary-fanfiction-explained> [https://perma.cc/J9NM-HG3C].

form the discussion should take without a need to fill in any blanks.²⁸¹

A shared understanding of what existed in the movie's plot gaps was created by the way the gaps were referenced.²⁸² It was enough for one user to proclaim, "I'd really like to see more leftist analysis of *Goncharov*" to connect the movie into the geopolitics of the Cold War.²⁸³ The content of the analyses the user is theoretically criticizing does not need to exist; the criticism tells the fans everything they need to know.

But fandoms are not just lovefests; they are also full of squabbling. As such, the *Goncharov* fans also captured the snobby gatekeeping inherent in fandoms. For instance, one user announced that no one could truly appreciate *Goncharov* unless they watched it "in the original aspect ratio," implying that the masses were not seeing the *true* version of *Goncharov*.²⁸⁴ Fandoms also attract "haters."²⁸⁵ Within the fandom universe, haters are people who invest time and energy into hating parts of a creative property and discoursing about their hate.²⁸⁶ Every fan is familiar with haters who drop into a fandom merely to complain about their beloved interest. Because the participants in the *Goncharov* meme were engaged in creating a fandom for their fake movie, some participants played the part of haters to flesh out the full picture.²⁸⁷ There was no movie to hate, but part of the joke was that the movie's nonexistence would not stop the haters.²⁸⁸

The *Goncharov* meme may be a representation of a fandom, but it is not, technically speaking, a fandom in the conventional sense of the word. A "fandom" is a group of people who love a creative

281. See Charlotte Colombo, *Lost Martin Scorsese Movie, Goncharov, Takes over the Internet*, DIGIT. FIX (Nov. 21, 2022), <https://www.thedigitalfix.com/martin-scorsese/movie-goncharov> [<https://perma.cc/K8SY-GTD6>].

282. See @cryptid-sighting, *supra* note 187.

283. *Id.*

284. @Ninaberry, X (Nov. 22, 2022, 10:13 PM), <https://x.com/Ninaberry/status/1595178659958005760?s=20> [<https://perma.cc/F3DP-KCB5>].

285. See *Fan Hater*, TVTROPES, <https://tvtropes.org/pmwiki/pmwiki.php/Main/FanHater> [<https://perma.cc/ST6L-ABUK>] (last visited Sept. 11, 2024).

286. Stitch, *On Woobification and Why Infantilizing Villains Can Harm Useful Discourse*, TEEN VOGUE (Nov. 7, 2022), <https://www.teenvogue.com/story/on-woobification-and-why-infantilizing-villains-can-harm-useful-discourse-fan-service> [<https://perma.cc/6G3H-DH4M>].

287. See, e.g., @Mediahead85, X (Nov. 22, 2022, 11:50 PM), <https://x.com/Mediahead85/status/1595203105750147076?s=20>. [<https://perma.cc/9PNT-JZGK>]; @itscjrodgers, X (Nov. 21, 2022, 1:54 AM), <https://x.com/itscjrodgers/status/1594871869789949952?s=20>. [<https://perma.cc/TQ9G-W5S4>] ("Ya'll mislead me about this. I thought I was getting to see a movie about how the Cold War affected international mafia relationships and instead I got a depressing attempt at a love triangle and random shootouts. Two hours of my life wasted."); @monsterhospital, TUMBLR (Nov. 19, 2022), <https://monsterhospital.tumblr.com/post/701394032793960448/a-few-of-of-my-favorite-goncharov-reviews-on?> [<https://perma.cc/BW22-CEU4>] ("Movie is overhyped . . .").

288. See @monsterhospital, *supra* note 287.

property.²⁸⁹ However, there *is* no creative property to love in the *Goncharov* fandom—it is a fandom built around nothing. As one participant in the meme noted, “[t]his actually puts AO3’s ‘no original fiction’ policy in an interesting place.”²⁹⁰ AO3 is one of the leading archives of fanfiction on the internet.²⁹¹ The question became whether all of the fanfiction written in the *Goncharov* universe and posted to AO3 actually qualified as “fanfiction.”²⁹² This points to the idea that fandoms are more of a state of collective thinking than they are connected to the particulars of any single piece of media. Participants in the *Goncharov* meme considered themselves to be in the *Goncharov* fandom even though there was no movie that existed to be a fan *of*. These meme participants did not need a movie to exercise the gestures of being a fan.

Goncharov also exemplifies how people blend fiction and reality. Indeed, users made *Goncharov* seem like such a seamless part of history that it is almost hard to believe it is a purely fictional movie.²⁹³ For example, one person used the mythology of the movie to explain Scorsese’s focus on the Italian and Irish Mafias as opposed to the Russian Mafia.²⁹⁴ The user credited *Goncharov* as the inspiration for the movie *Goodfellas*,²⁹⁵ as well as the juggling of actors that resulted in Robert DeNiro’s role in the movie *Mean Streets*.²⁹⁶ Some *Goncharov* contributors have tried to convince the community that *Goncharov* is a real movie that is deeply buried in film history.²⁹⁷ These contributors convincingly pretend that, despite the jokes surrounding the movie, the movie is not a joke at all.²⁹⁸ Rather, the joke is that *Goncharov* is a film everyone has seen and therefore its plot is common knowledge. To add to this

289. *Fandom*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095810465> [<https://perma.cc/U2EA-GN79>] (last visited Sept. 16, 2024).

290. @cryomaniac, X (Nov. 22, 2022, 8:11 PM), <https://x.com/cryomaniac/status/1595147946504638464?s=20>. [<https://perma.cc/N59H-NRZU>].

291. See Kristine Yahna Todaro, *Fan Fiction Site “Archive of Our Own” Wins a Coveted Hugo Award*, MUHLENBERG COLL. (Aug. 22, 2019, 11:07 AM), <https://www.muhlenberg.edu/news/2019/archiveofourownfanfictionsitewinsacovetedhugoaward.html> [<https://perma.cc/KDR7-GCUR>].

292. *Works in Goncharov*, *supra* note 178; see *Fanfiction*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/fanfiction> [<https://perma.cc/ER63-NL8X>] (last visited Sept. 11, 2024).

293. @mortalityplays, *supra* note 188.

294. @brinconvenient, TUMBLR (Nov. 20, 2022), <https://brinconvenient.tumblr.com/post/701465036041994240/ok-good-explainer-here-but-and-i-cant-believe> [<https://perma.cc/E3MZ-TCEQ>].

295. *Id.*

296. *Id.*

297. See, e.g., @mortalityplays, *supra* note 188 (“For decades [*Goncharov*] has been a popular niche in-joke among film critics, directors, etc to pretend that you’ve seen *Goncharov* and make reference to it as if its plot, themes, characters etc. are common knowledge. Which meant that naturally lots of people who weren’t in on the joke ended up *also* writing about *Goncharov*, pretending *they* had really seen it.”).

298. *Id.*

convincing plot, other users use phrases that gesture uncertainty (like “I could be wrong...”) to add verisimilitude to the fiction they craft.²⁹⁹ In reality, these users could not possibly be wrong—the very existence of the film is fictitious.

Goncharov also stands as a strong reminder that many different yet similar narratives can co-exist without destroying each other. For example, the TVTropes entry attempts to gather all the “canon” for the movie into one place and breezily dismisses contradictions by explaining that Scorsese cut more than one version of the movie as he kept fiddling with it.³⁰⁰

On the less positive side, the meme stands as an example of how quickly and easily misinformation can spread and be convincingly woven into reality.³⁰¹ As the *Goncharov* discourse and plot thickened, users began to doubt whether the movie was truly fake at all.³⁰² “The confidence in which I have seen it spoken about online on tumblr and especially on tiktok is making me doubt myself into thinking it’s real and it’s insane.”³⁰³ Although Tumblr users created *Goncharov* as a joke, at first, it was difficult for some users to understand that it truly was a joke. Users began posting “warnings” to other users of Tumblr to explain that *Goncharov* was not reality.

Reblogging to save the lives of anyone who took their eye off tumblr for five fucking minutes and now thinks they’re living in an alternate universe. ;) . . . (No, it’s not a real movie. The current tumblr meme is to joke post about the non-existent film, playing ‘yes, and’ with other people’s posts. At the rate we’re going we will have generated a screenplay by the end of the week. I’m explaining the joke because while I enjoy it a lot, it’s the kind of thing that can get genuinely confusing/distressing very fast if you’re not sure you can trust your memory.)³⁰⁴

However, the timeline of *Goncharov*’s exponential rise to stardom may be particularly insightful as to why users created this reality-altering joke. Arising just as Twitter disabled content

299. *Id.*

300. *Web Original: Goncharov, supra* note 171.

301. See @beetleboymax, X (Nov. 21, 2022, 6:51 AM), https://x.com/bee_tleboymax/status/1594584243107254273?s=20 [<https://perma.cc/2VNL-LESU>] (“[I]t’s a lot and keeps making me think it’s real”).

302. @kitconnorstans, X (Nov. 27, 2022, 5:06 AM), <https://x.com/kitconnorstans/status/1596732292252041216?s=20> [<https://perma.cc/P7LJ-86KZ>].

303. *Id.*

304. @brightwanderer, TUMBLR (Nov. 20, 2022), <https://brightwanderer.tumblr.com/post/701443174836649984/reblogging-to-save-the-lives-of-anyone-who-took> [<https://perma.cc/5EQ6-6MGZ>]. Other users also reported being confused by the sudden conflagration of the fake movie across the platform. @philistella, X (Nov. 20, 2022, 4:21 PM), <https://x.com/philistella/status/1594365366943244288?lang=en> [<https://perma.cc/2K8F-C69B>]; @ad_astarion, X (Nov. 22, 2022, 10:23 AM), https://x.com/ad_astarion/status/1594999891952107521?s=20 [<https://perma.cc/4LNR-KAED>] (“I logged in yesterday and for a second managed to get gaslit into believing it exists before I saw an unreality tag and was like,, why would you do this to me I’m now invested in Katya and ice pick joe”).

moderation (a move that resulted in a flood of misinformation),³⁰⁵ the *Goncharov* meme might have been intended in some ways as a commentary on that misinformation. That is, *Goncharov* might have been created to stand as a testament to how easily social media can make users doubt reality. Tumblr even encouraged tagging the *Goncharov* posts with “#unreality (for those who need it).”³⁰⁶ The objective, after all, was *not* to trick people.³⁰⁷ Nonetheless, *Goncharov* showed how easily it could be done.³⁰⁸

IV. GONCHAROV AS INTERNET FOLKLORE

As other scholars have concluded, memes like *Goncharov* that multiply into vast amounts of collaborative creativity are probably best characterized as a form of internet folklore.³⁰⁹ Professor Cathay Smith describes the hallmark of internet folklore as having three main characteristics.³¹⁰ First, internet folklore involves embellishments and collaborative creativity among a community of users.³¹¹ Second, the folklore involves variation, as different users tell their own versions of the underlying story.³¹² Finally, it is evolving and mutating as participants continue to “tweak” the underlying story in response to the feedback and ideas of other members of the community.³¹³ *Goncharov* contains all these attributes.³¹⁴

But *Goncharov* has another attribute of internet folklore: copyright doctrines do not easily handle its creativity.³¹⁵ As explained in the next section of this Article, *Goncharov* can be somewhat broken down into its timeline, which allows for an analysis of the copyrightability of its pieces.

305. See Katie Paul & Shelia Dang, *Exclusive: Twitter Leans on Automation to Moderate Content as Harmful Speech Surges*, REUTERS (Dec. 5, 2022, 3:41 PM), <https://www.reuters.com/technology/twitter-exec-says-moving-fast-moderation-harmful-content-surges-2022-12-03/> [<https://perma.cc/E646-EASJ>].

306. *Tumblr Staff*, *supra* note 178.

307. See @brightwanderer, *supra* note 304 (“No, it’s not a real movie. The current tumblr meme is to joke post about the non-existent film, playing ‘yes, and’ with other people’s posts.”).

308. *Id.* Other users also reported being confused by the sudden conflagration of the fake movie across the platform. @philistell, *supra* note 304; @ad_astarion, *supra* note 304.

309. Smith, *supra* note 9, at 602. Those participating in the meme also supported this view. See @gwenstacying, 100 pieces, *supra* note 165.

310. Smith, *supra* note 9, at 608.

311. *Id.*

312. *Id.*

313. See *id.* at 608–09.

314. See discussion *infra* Section IV.A.

315. See Smith, *supra* note 9, at 624.

A. Copyright as Applied to Goncharov

1. Copyrightability

a. *The Boot Label*

The meme all started with a boot label.³¹⁶ The boot label might be copyrightable by the manufacturer of the boots, in which case the public display of that copyrightable tag by the original poster might be considered copyright infringement.³¹⁷ Although there may not be much originality on a boot label, only a “dash” of originality is required by law.³¹⁸ As the Taylor Swift cases make clear, just the juxtaposition of two fairly common phrases could be just the right amount of originality to warrant protection.³¹⁹ While the tag is hardly at the consumer recognition level of *Star Trek* or Dr. Seuss, because it was created with a commercial purpose in mind, a court might be more sympathetic to a copyright claim to protect the maker of the boots.³²⁰

b. *The Photograph of the Boot Label*

The photograph of the boot label came next.³²¹ Copyright protection requires only a modicum of creativity, and photographs meet that low threshold.³²² Thus, the photograph is surely copyrightable. Although the photographer might not own much, given the apparent lack of creative expression in the photograph, they would presumably own some part that is copyrightable.³²³

c. *The Fake Poster*

The next step—the step that sent the meme on its exponential rise to fame—was the fake poster.³²⁴ The poster’s artwork is doubtless copyrightable by the original artist as an original work of artistry.³²⁵ But aside from the art itself, the original

316. See @zootycoon, *supra* note 169.

317. See 17 U.S.C. § 106.

318. Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992).

319. See Hall v. Swift, No. CV 17-6882-MWF (ASx), 2021 WL 6104160, at *3 (C.D. Cal. Dec. 9, 2021).

320. See Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 584 (1994).

321. @zootycoon, *supra* note 169.

322. See Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130, 143 (S.D.N.Y. 1968) (noting that any photograph necessarily involves some copyrightable creative choices made by the photographer).

323. See *id.*

324. See *Web Original: Goncharov*, *supra* note 171.

325. See 17 U.S.C. § 102(a).

artist also named the characters and established the casting.³²⁶ Yet, mere character names and casting are likely ideas that cannot be owned because no one can possess a copyright in a single word.³²⁷ Indeed, it is hard to tell what protectable expression exists in the “idea” of casting a certain actor. Certainly, the original artist cannot copyright all uses of the name Katya or the idea of Robert DeNiro starring in a Martin Scorsese movie. If that were the case, no one else could name their character Katya and Robert DeNiro would have had a much more limited career.

d. The Other Pieces of Creativity Around the Meme

Undoubtedly, there are other copyrightable parts of the *Goncharov* meme. For example, the fanart and fanfiction are original works of artistic expression that are copyrightable in the same way that any drawing or literary work would be.³²⁸ Likewise, the soundtrack contains copyrightable musical compositions and sound recordings.³²⁹ Additionally, the text of mock interviews and reviews rises to the level of copyrightability in the same way that real interviews and movie reviews do; they are literary works.³³⁰

e. The Fake Movie at the Heart of the Meme

But what about the movie itself? Movies are copyrightable to the extent that they are original works of creative expression,³³¹ but is *Goncharov*? The plot of *Goncharov* surrounds the struggle of the Russian Mafia trying to gain a foothold in Naples.³³² The situation reads like a textbook example of drawing boundaries between ideas and expressions.³³³

The movie’s themes are surely ideas that nobody can own.³³⁴ The idea-expression dichotomy ensures that no one owns something that could stall the creativity of others.³³⁵ Allowing a single person to own the theme of a Mafia movie or family loyalty would certainly block the creativity of anyone else who would like to make a Mafia movie or even any movie about a family. Similarly, the idea of a scene set by a fruit stand or on a bridge are also not copyrightable because, like the photograph of a businessman, those elements are

326. See @beelzebub, *supra* note 178.

327. 37 C.F.R. § 202.1(a).

328. See *Keeling v. Hars*, 809 F.3d 43, 49 (2d Cir. 2015).

329. See 17 U.S.C. § 102.

330. *Id.*

331. *Id.*

332. See *supra* Part III.

333. PATRY, *supra* note 17.

334. See *id.*

335. See discussion *supra* Section II.A.

far too common to constitute protectable copyright.³³⁶ On their own, therefore, none of the plot elements are copyrightable because they are only ideas.³³⁷ Thus the ideas surrounding the scene on a boat, the love triangle, the main female character’s fake death, or even a character’s distinctive walk, are all plot elements that cannot be copyrighted on their own.³³⁸

But at what point does the selection and arrangement of all of these elements turn into something copyrightable? Presumably combining all of the elements together would rise to the level of protectable copyright, especially because some cases have found that “at least two . . . creative choices” could be enough.³³⁹ Thus, although individual lines of dialogue might not rise to the level of protectable copyright on their own, the continued, deepening detail of the dialogue may eventually rise to copyrightability.³⁴⁰

At some point, some users engaging with *Goncharov* consciously crossed over to creating copyrightable pieces.³⁴¹ For instance, in November and December 2022, users joined together to encourage others to create “all kinds of games or other media” about *Goncharov*.³⁴² The pieces of media created in response to this encouragement included things like short stories, which step beyond the idea line and into the expression line and thus are copyrightable.³⁴³

Moreover, the Google Docs that hold all the *Goncharov* ideas must surely reach the threshold of copyrightability at some point—one of the Google Docs is forty-nine pages long.³⁴⁴ A forty-nine page document detailing the plot, characters, and dialogue is certainly long enough to be original in its selection and arrangement of otherwise non-protectable things like character names and scenes.³⁴⁵ After all, although individual facts cannot be owned, “[c]ompilations of facts . . . ordinarily *are* entitled to copyright protection.”³⁴⁶ Indeed, the document itself purports to

336. See *id.*; see also *Fulks v. Knowles-Carter*, 207 F. Supp. 3d 274, 290–91 (S.D.N.Y. 2016).

337. See PATRY, *supra* note 17.

338. See *id.*; @gingerhastoomanyobsessions, TUMBLR (Nov. 20, 2022), <https://gingerhastoomanyobsessions.tumblr.com/post/701454739308675072/heavy-clock-symbolism-a-pivotal-scene-occurs-at-a> [<https://perma.cc/2XLJ-2Z7Y>].

339. *Hall v. Swift*, No. 17-6882-MWF (ASx), 2020 WL 5358390, at *4 (C.D. Cal. Sept. 2, 2020). *But see* *Hall v. Swift*, No. CV 17-6882-MWF (ASx), 2018 WL 2317548, at *7 (C.D. Cal. Feb. 13, 2018), *rev'd and remanded*, 782 F. App'x 639 (9th Cir. 2019), *opinion amended and superseded*, 786 F. App'x 711 (9th Cir. 2019), and *rev'd and remanded*, 786 F. App'x 711 (9th Cir. 2019) (finding initially that these “[t]wo unprotectable elements” were “not enough”).

340. See PATRY, *supra* note 17.

341. See *Goncharov Game Jam*, ITCH.IO, <https://itch.io/jam/goncharov-game-jam> [<https://perma.cc/3K7G-3ZAD>] (last visited Sept. 11, 2024).

342. *Id.*

343. See *id.*; PATRY, *supra* note 17.

344. *Connanro*, *supra* note 166.

345. *Cf. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348–49 (1991).

346. *Harney v. Sony Pictures Television, Inc.*, 704 F.3d 173, 182 (1st Cir. 2013).

place itself in the public domain through a Creative Commons license.³⁴⁷ Such a license is used by authors of copyrightable works to define what can be done with those works.³⁴⁸ Thus, the creators of the Google Docs considered them to be copyrightable works with terms of use they were empowered to define.

2. Authorship Issues

In some ways, the ownership of the broken-down, copyrightable bits of *Goncharov* seems straightforward. For example, the person who took the original photograph of the boot label owns the copyright in the photograph.³⁴⁹ Next, if the boot label was created under a work-for-hire doctrine—a doctrine under which the creative works of employees or, in some circumstances, independent contractors, are owned by the employer or entity who hired them—then whoever commissioned the label would own the copyright.³⁵⁰ Failing that, whoever designed the boot label would own the copyright.³⁵¹ Additionally, the person who created the original poster owns the copyright in it.³⁵² Similarly, the composer of the soundtrack owns that copyright.³⁵³ Lastly, authors of particular stories own those stories just as artists of particular pieces of fanart own those pieces of art.³⁵⁴

However, even if people contributed something more than ideas that could be separated out from the fake movie, thereby authoring something that could rise to the level of copyrightability, their authorship rights might still be denied.³⁵⁵ The authorship test does not care how important a creative contribution might be to a work. Rather, it focuses only on whether the contributor had power and control over that work.³⁵⁶ If it is true that everyone participating in *Goncharov* intended to collaborate, the intent portion of the test might not be problematic. However, the supervision and control

347. Connanro, *supra* note 166.

348. *About CC Licenses*, CREATIVE COMMONS, <https://creativecommons.org/share-your-work/cclicenses/> [<https://perma.cc/VE5Q-VNLR>] (last visited Sept. 11, 2024).

349. *See* 17 U.S.C. § 201(a).

350. *See id.* § 201(b).

351. *See id.* § 201(a).

352. *See id.*

353. *See id.*

354. *See id.* §201.

355. Lantagne, *Authorship Challenges*, *supra* note 111, at 224; *see also* Lopez v. Musinorte Ent. Corp., No. CV 03-167 TUC DCB, 2004 WL 7324723, at *6 (D. Ariz. Dec. 29, 2004), *rev'd and remanded on other grounds*, 2007 WL 579746 (9th Cir. Feb. 21, 2007); Ford v. Ray, 130 F. Supp. 3d 1358, 1363 (W.D. Wash. 2015) (“[S]imply making a significant contribution to a work does not make one an author.”); Morrill v. Smashing Pumpkins, 157 F. Supp. 2d 1120, 1123 (C.D. Cal. 2001).

356. Lantagne, *Authorship Challenges*, *supra* note 111, at 224; *see also* Lopez, 2004 WL 7324723, at *6; Ford, 130 F. Supp. 3d at 1363; Morrill, 157 F. Supp. 2d at 1123.

element would be—nobody controlled or supervised anything about the meme.³⁵⁷

Indeed, the movie *Goncharov* (as represented by the Google Docs, Wikipedia page, or the TVTropes page) contains the copyrightable contribution of numerous authors, none of whom exerted the least bit of control over the creative process.³⁵⁸ Courts analyzing control have looked to identifying the contributor with the “decision-making authority . . . over what changes are made and what [was] included in a work.”³⁵⁹ Those who compiled the Google Docs or Wikipedia pages may have had some control over what to include but, because those documents could be edited by others, even that sliver of control was limited.³⁶⁰ The very nature of the meme demanded that no one was in charge of it and that everyone collectively decided what they liked and what they did not like about the contributions.³⁶¹ In other words, every participant was making creative contributions to the meme, but nobody was controlling it—and it is only control that matters to copyright law when deciding authorship.³⁶²

Often, when deciding authorship questions, courts look to how the creative work was credited in the financial market.³⁶³ Thus, whether an individual was credited as the writer becomes particularly important because a court is more likely to legally consider that person to be the author—or not.³⁶⁴ But, in the case of the *Goncharov* meme, because there were no formal awards of credit, there is nothing a court could look to in determining how the participants viewed the meme’s authors. In fact, presumably participants considered themselves the author of whatever they had contributed, and no more than that. Finally, there were no “agreements with outsiders” that could indicate who was in charge, another element courts utilize in their authorship determinations.³⁶⁵

Evidently, the free-for-all, collaborative creativity that formed the basis of *Goncharov* presents a challenge to copyright’s hierarchical, control-centered authorship test.³⁶⁶ This is because

357. See Lantagne, *Authorship Challenges*, *supra* note 111, at 224.

358. See discussion *supra* Sections II.A, III.A.

359. *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 258 (2d Cir. 2015) (internal quotes omitted).

360. See Connanro, *supra* note 166.

361. See discussion *supra* Section III.C.

362. Lantagne, *Authorship Challenges*, *supra* note 111.

363. See *16 Casa Duse*, 791 F.3d at 260–61.

364. See *Thomson v. Larson*, 147 F.3d 195, 203 (2d Cir. 1998).

365. See *16 Casa Duse*, 791 F.3d at 261.

366. See Lantagne, *Authorship Challenges*, *supra* note 111, at 224; see also *Lopez v. Musinorte Ent. Corp.*, No. CV 03-167 TUC DCB, 2004 WL 7324723, at *6 (D. Ariz. Dec. 29, 2004), *rev’d and remanded on other grounds*, 2007 WL 579746 (9th Cir. Feb. 21, 2007); *Ford v. Ray*, 130 F. Supp. 3d 1358, 1363 (W.D. Wash. 2015) (“[S]imply making a significant contribution to a work does not make one an author.”); *Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120, 1123 (C.D. Cal. 2001).

that authorship test was developed with the assumption that creators will enter into “highly formalized arrangement[s]” to ensure optimum and efficient monetization of their works.³⁶⁷ But memes simply do not function via contract.³⁶⁸ Indeed, the community-based and joyful creation of memes betrays copyright law’s focus on an understanding that creators mostly create for the promise of financial rewards.³⁶⁹ This underlying assumption has been challenged time and again in situations where the authorship test crumbles because its foundation proves false.³⁷⁰ Thus, *Goncharov* is yet another example of what is, by now, a common story.³⁷¹

The unstructured expansion of the *Goncharov* meme is the opposite of the orderly, corporatized creativity the authorship test presupposes.³⁷² There was no “mastermind” behind the *Goncharov* meme; no singular user called the shots.³⁷³ But copyright law assumes a creative process radically different from the free-for-all creativity of the *Goncharov* meme.³⁷⁴ By assuming a corporate form of creativity bound by contracts and formalities, copyright leaves creators like those behind *Goncharov* out of its focus.³⁷⁵ While the current law might leave individual bits of *Goncharov* copyrighted, it might also leave *Goncharov* as a whole unownable.³⁷⁶

Ironically, questions about ownership are built into the very origin of *Goncharov*. Within the context of the meme, contributors debated over whether Scorsese should be given “credit” for the “movie.”³⁷⁷ For example, one user complained, “I just hate seeing Matteo getting left out of the . . . conversation, especially now that arguably his greatest work is finally getting attention.”³⁷⁸ However, if part of the meaning of the *Goncharov* meme is a meta-commentary

367. Lantagne, *Authorship Challenges*, *supra* note 111.

368. See *Grumpy Cat Ltd. v. Grenade Bev. LLC*, No. SA CV 15-2063-DOC (DFMx), 2017 U.S. Dist. LEXIS 222401, at *4 (C.D. Cal. 2017).

369. See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 549 (2023) (“[P]ayments like these are incentives for artists to create original works.”).

370. See *16 Casa Duse*, 791 F.3d at 259; *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015); *Ford*, 130 F. Supp. 3d at 1363.

371. See discussion *supra* Section III.A.

372. See *Merges*, *supra* note 135 (noting that the copyright system “is organized around the idea of a single highly centralized creative entity (usually a person or corporation)”).

373. See Lantagne, *Authorship Challenges*, *supra* note 111 (“[The copyright authorship] test assumes one ‘mastermind’ . . . The test assumes a hierarchical arrangement of working *for* instead of working *with*.”).

374. See *supra* Part II.

375. See discussion *supra* Sections II.A, II.B.

376. See Lantagne, *Authorship Challenges*, *supra* note 111, at 222 (discussing memes that “scatter[] authorship so widely that the resulting creative output is so effectively crowd-sourced as to be a *de facto* common good outside of copyright protection”); Elizabeth L. Rosenblatt, *Who Will Speak for the Slender Man?: Dialogism and Dilemmas in Character Copyright*, 70 FLA. L. REV. F. 69, 75 (2018) (arguing in the context of Slender Man that while “each incremental contribution . . . may be owned by its individual contributor, the body of work—the Slender Man oeuvre, so to speak—cannot and should not be owned”).

377. See @brinconvenient, *supra* note 294.

378. See *id.*

on the act of being a fan, then it makes sense that fans have also incorporated the authorial skepticism captured within fan activities.

In a legal world where fans' creativity is consistently undervalued, fans themselves are well-versed in the flimsy justifications surrounding ownership proclamations.³⁷⁹ For example, fanfiction is often viewed as a "lesser" form of writing, used as "practice" for "real" writing.³⁸⁰ Thus, those who engage in fandoms know that their creativity is often belittled. One commentator sarcastically reenacted the belittling critique behind fandom creativity through *Goncharov* commentary by claiming that Scorsese was not the director of *Goncharov* but actually stealing credit from the real director because of Scorsese's reputation for Mafia movies.³⁸¹ The user characterized this as "fanfic AU[s],"³⁸² which stands for "alternate universe," a form of fanfiction that places someone else's story in a different setting.³⁸³

3. Derivative Work Right

If there is a recognition that the meme *is* copyrightable and has a legally recognizable author, the question then becomes what to do with the rest of the meme. Can the creator of one part of the meme block other parts of the meme as derivative works?

The problem is that *Goncharov* does not exist in a vacuum.³⁸⁴ While some *Goncharov* participants might own the original content they contributed, the aspects of the meme that they did *not* contribute to must be carved out of their ownership rights.³⁸⁵ For example, the artist behind the original *Goncharov* poster would own the art of the poster but might not own the details of Martin Scorsese's or Matteo JW's involvement as depicted on the poster because those elements were not original to that artist; they came from the boot label.³⁸⁶ Although the artist may attempt to establish ownership over the characters or casting because they were the artist's original ideas, those ideas are uncopyrightable.³⁸⁷

379. See *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010); *Paramount Pictures Corp. v. Axanar Prods., Inc.*, No. 2:15-CV-09938-RGK-E, 2017 WL 83506, at *5 (C.D. Cal. Jan. 3, 2017); *Wozniak v. Warner Bros. Ent. Inc.*, No. 22-CV-8969, 2024 WL 1311856, at *11 (S.D.N.Y. Mar. 27, 2024).

380. See Meg Cabot, *Meg's Diary: Fan Fiction*, (Mar. 8, 2006), <https://megcabot.com/2006/03/114184067156643148/> [<https://perma.cc/N4UM-NLDX>].

381. See @brinconvenient, *supra* note 294.

382. *Id.*

383. See *Alternative Universe (Fan Fiction)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Alternative_universe_\(fan_fiction\)](https://en.wikipedia.org/wiki/Alternative_universe_(fan_fiction)) [<https://perma.cc/DAV9-N7XG>] (last visited Aug. 26, 2024).

384. See Andres Sawicki, *A View of Copyright from the Digital Ground*, 70 FLA. L. REV. F. 102, 107 (2018) ("Participants . . . derive value in part because they are contributing to a mythology that others have previously contributed to . . .").

385. See 17 U.S.C. § 201.

386. @zootycoon, *supra* note 169.

387. PATRY, *supra* note 17.

Every *Goncharov* participant explicitly based their creativity on something that came before their contributions.³⁸⁸ All creativity is based on something that came before, but copyright law makes much of this implicit.³⁸⁹ The derivative work right discourages inspirational links out of fear of losing all protection if the work is determined to be “based on” something that came before.³⁹⁰ The participants in the *Goncharov* meme made this inspirational subtext into the text by vocalizing the connections between the pieces of the meme. Indeed, *Goncharov* fans used other user’s casting to create their own visuals, as well as other’s scenes and storyline references to write their own dialogue.³⁹¹ In other words, the point of the meme *was* its incorporation of details from everything that came before.³⁹² For example, people used the raw material of the boot label in startling and inventive ways.³⁹³ To one user, the nonsense of “Matteo JWHW 0715” embroidered on the label was used for the name of the fictional filmmaker.³⁹⁴ To another, “JWHJ0715” became a Twitter handle to whom the leak of the film could be attributed.³⁹⁵ To a third, “JWHW0715” was the “member id number [of Matteo] in Italy’s version of the Director’s Guild of America.”³⁹⁶ Others jokingly concluded that Matteo’s father was a license plate.³⁹⁷ While many users attributed the movie to Martin Scorsese, one user dissected the tag’s “Martin Scorsese Presents” wording to interpret Scorsese as the distributor instead of the director.³⁹⁸ With all the discourse surrounding the boot tag, the TVTropes page called the boot label an “unorthodox advertising campaign.”³⁹⁹

All *Goncharov* participants based their creative contributions on the original boot label.⁴⁰⁰ But it is almost laughable to say that the movie poster, soundtrack, or scripted scenes are substantially similar to a boot label in a photograph. The ways in which the pieces of fanfiction, fanart, and other *Goncharov* spin-offs resemble the boot label, the photograph, or even the original movie

388. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 587–89 (2023) (Kagan, J., dissenting); Rosenblatt, *supra* note 376, at 70 (“[T]he creative process necessarily incorporates something of what came before.”).

389. See Rosenblatt, *supra* note 376, at 70.

390. See discussion *supra* Section II.C.

391. See discussion *supra* Section III.A.

392. See Sawicki, *supra* note 384, at 102 (“[T]he whole point is to participate in a shared, iterative creative enterprise.”).

393. See @beelzebub, *supra* note 178; *Web Original: Goncharov*, *supra* note 171; see also @brinconvient, *supra* note 294; @gwenstacying, X (Nov. 21, 2022, 11:44 PM), <https://x.com/gwenstacying/status/1594839307558207489?s=20> [<https://perma.cc/PWC7-XNW4?type=image>] [hereinafter @gwenstacying, funniest update yet].

394. @beelzebub, *supra* note 178.

395. @mortalityplays, *supra* note 188.

396. *Id.*

397. @gwenstacying, funniest update yet, *supra* note 393.

398. @brinconvenient, *supra* note 294.

399. *Web Original: Goncharov*, *supra* note 171.

400. See discussion *supra* Section III.A.

poster would not seem to reflect any copyrightable features of those original pieces. The only similarities in the pieces lie in only the names and short phrases.⁴⁰¹ Moreover, dismissing the vast amount of creativity spurred by responding to and incorporating the prior creativity of others as merely something derivative would have strangled the *Goncharov* meme at the cradle of the boot label photograph.⁴⁰² Applying the derivative work right to *Goncharov* exemplifies its stifle, rather than its incentivization of creativity.⁴⁰³

B. Accepting Goncharov (1973) as a Piece of Uncopyrightable Folklore

While it is possible to break the *Goncharov* meme down into copyrightable bits, *Goncharov* is bigger than any of those isolated occurrences. *Goncharov* is the collection of all the copyrightable pieces in an interrelated web.⁴⁰⁴ Decontextualized and isolated, the individual pieces of creativity mean very little. For example, a statement like, “but I would die for you Katya Michailov” is, by itself, hardly remarkable and likely not copyrightable because it does not possess the requisite amount of originality.⁴⁰⁵ Were there actually a character named Katya Michailov, then this would be a commonplace statement. However, in the *Goncharov* meme, there is only the *idea* of such a character, vague and nebulous. Users proclaiming that they would die for this fake character from a fake movie is a loving mockery of fans’ passionate identifications with fictional characters. To users familiar with this form of fan behavior, the joke requires no knowledge about the character to decide that the character deserves loyalty unto death.⁴⁰⁶ It is also an appreciative commentary on fans’ instincts to deepen the narratives of characters to form bonds with them.⁴⁰⁷ Fans can take a minor character and create reams of narratives around them with very little provocation.⁴⁰⁸ The proclamation is not a statement about

401. See discussion *supra* Section III.A.

402. See 17 U.S.C. § 106.

403. See Sawicki, *supra* note 384 (noting that memes “cast[] doubt on a common proposition[] that a principal normative aim of copyright law ought to be the creation of new works or of works that are more different than those that came before,” given the creativity inherent in meme creations).

404. See *Goncharov (meme)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Goncharov_\(meme\)](https://en.wikipedia.org/wiki/Goncharov_(meme)) [<https://perma.cc/D9S9-YNGZ>] (last visited Aug. 13, 2024).

405. See *Hall v. Swift*, No. CV 17-6882-MWF (ASx), 2021 WL 6104160, at *3 (C.D. Cal. Dec. 9, 2021).

406. See Abby Norman, *The Psychology of Fandom: Why We Get Attached to Fictional Characters*, MARY SUE (Aug. 19, 2015, 12:58 PM), <https://www.themarysue.com/the-psychology-of-fandom/> [<https://perma.cc/D86Z-E6V8>].

407. See *id.*

408. Murvenstiel, *Arthur and Eames Scenepack (Inception) – Murvenstiel*, YOUTUBE (Sept. 9, 2022), <https://www.youtube.com/watch?v=MTh6SwIWIBM> [<https://perma.cc/KM7G-THUY>]. A quintessential of this is the characters of Arthur and Eames from the 2010

Katya Michailov; it is a statement about how fans behave toward characters. The meaning, and thus its value, can only be recognized in conjunction with the rest of the meme and its developing story around Katya. That meaning is what makes it a joke in the context of the meme, instead of just a typical, run-of-the-mill sentence that it would be about an existing character. Each piece of creativity embodied in the meme is like that: much smaller on its own than in context.

Those participating in the meme recognized that they were contributing pieces that added up to a cohesive whole:

Little pieces of made-up symbolism images and plot points invented for joke posts that go viral all adding up into a somewhat cohesive frankenstein's monster of a screenplay like the world's most chaotic, widespread exquisite corpse, and on that day we will have finally willed it into existence: the greatest mafia movie ever made.⁴⁰⁹

1. Crossing into Copyright

Some users were baffled that *Goncharov* spread so quickly. For example, one user stated, “isn't it so interesting how days ago *Goncharov* wasn't real but now it is real. This movie didn't exist but all [of] us just created a movie. This is how stories come to life. *Goncharov* is our [I]liad and I'm not even joking. This is how things go from nothing to a story.”⁴¹⁰ But such a community-based creation full of collaboration, variability, and creative evolution is exactly what folklore hinges upon.

Therefore, *Goncharov* is a piece of folklore because it fits into the tradition of “communities [that] collaborate, reuse, and modify creative works to generate intangible cultural products.”⁴¹¹ *Goncharov* is full of collaborative creativity among participants who are reusing and modifying each other's creative works. When one person names a character Katya, the next person adds that Katya will be in “the bridge scene,” and the next person writes the dialogue of “the bridge scene,” while someone else decides to “ship” Katya with another character named Sofia.⁴¹² If the three hallmarks of folklore are collaboration, variability, and evolution,⁴¹³ *Goncharov* has all that in spades.

Christopher Nolan movie *Inception*, who interact on screen together for only about two minutes of the film's running time but have spawned a large and enduring fandom with almost nine thousand pieces of fanfiction. *Works in Arthur/Eames (Inception)*, ARCHIVE OF OUR OWN, [https://archiveofourown.org/tags/Arthur*s*Eames%20\(Inception\)/works](https://archiveofourown.org/tags/Arthur*s*Eames%20(Inception)/works) [<https://perma.cc/A35K-EQEE?type=standard>] (last visited Sept. 16, 2024).

409. @leehallfae, TUMBLR (Nov. 22, 2022), <https://cheesecakemermaid1048.tumblr.com/post/701656562980306944> [<https://perma.cc/YR56-M4YM>].

410. @mulderscully, TUMBLR, <https://www.tumblr.com/moonlight19256/703824804065722368> [<https://perma.cc/A47B-JS8V>] (last visited Sept. 11, 2024).

411. Smith, *supra* note 9, at 606.

412. DiBenedetto, *supra* note 204.

413. Smith, *supra* note 9, at 608.

Yet, as “familiar” as folklore might be to human creativity,⁴¹⁴ it does not fit easily into copyright law.⁴¹⁵ One might conclude that, as a result, folklore is simply not copyrightable at all, meaning that nobody contributing to *Goncharov* owns any of their creativity in that meme.⁴¹⁶ But that minimizes the fact that creative contributions made to the meme aimed to prioritize a neat and streamlined inquiry.⁴¹⁷ Nonetheless, that might be preferred to copyright law’s kneejerk instinct in the face of confused private ordering “to give *someone* a legally enforceable claim of ownership.”⁴¹⁸

Perhaps, legally, one might claim that anyone contributing to the meme abandoned any ongoing ownership over their contribution.⁴¹⁹ Indeed, some scholars have noted that “in cases where volunteers generate an abundance of intellectual goods like copyrighted expression, society may benefit from no protection at all . . . ‘Nobody bothers to create property for some resource that lies around in abundance.’”⁴²⁰ Under that argument, even if some creators have a copyright claim to some aspects of the *Goncharov* meme, one might argue that those creators waived enforcement of it, given their understanding that they were contributing as part of an ongoing collaborative project. In other words, one could argue that they had impliedly licensed other people to use their contributions.⁴²¹

Copyright abandonment has often been argued in the meme context.⁴²² By definition, memes are borne from situations where the original “author” has lost control of their creation on the internet.⁴²³ As the original creative work spreads from community to community online, without any threats of copyright infringement lawsuits, the situation could be characterized as one where the original author has chosen to “abandon” their copyright.⁴²⁴

Copyright abandonment requires “an overt act . . . show[ing] intent to abandon.”⁴²⁵ Of relevance to this inquiry, therefore, are the

414. *Id.* at 605.

415. *Id.* at 623.

416. *Id.* at 624.

417. *See id.*; *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015).

418. Elizabeth L. Rosenblatt, *IP Law in the Shadow of Norms*, 40 CARDOZO ARTS & ENT. L.J. 655, 673 (2023) (noting that this tendency “inevitably erodes a norm-based public domain”).

419. *See Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 965 (C.D. Cal. 2019); *Griner v. King*, 568 F. Supp. 3d 978, 991 (N.D. Iowa 2021).

420. Jake Linford, *Copyright and Attention Scarcity*, 42 CARDOZO L. REV. 143, 157–58 (2020) (quoting Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 134 (1998)).

421. *See Furie*, 401 F. Supp. 3d at 968; *Griner*, 568 F. Supp. 3d at 991–92.

422. *See Furie*, 401 F. Supp. 3d at 958; *Griner*, 568 F. Supp. 3d at 986.

423. *See Lee J. Matalon*, Note, *Modern Problems Require Modern Solutions: Internet Memes and Copyright*, 98 TEX. L. REV. 405, 420 (2019).

424. *See Furie*, 401 F. Supp. 3d at 965.

425. *Griner*, 568 F. Supp. 3d at 991.

acts of the copyright holder.⁴²⁶ Courts have refused to find abandonment where the copyrighted work in question was used on the internet as a meme.⁴²⁷ There is simply not enough evidence of overt intent to abandon copyright, which courts look for in specific and explicit statements.⁴²⁸ For example, when analyzing whether the creator of the cartoon forming the basis of the “Pepe the Frog” meme abandoned his copyright, the court focused on his past public statements.⁴²⁹ In some statements, he said he was happy for people to play around with Pepe the Frog as a meme, while in others he stated he still owned the copyright to Pepe.⁴³⁰ The court thought that the issue of abandonment had to be decided by a jury because intent to abandon could not be decided on summary judgment based on the artist’s statements about the meme.⁴³¹ Even arguing that a work has been abandoned in an attempt to avoid complicated copyright questions still requires assessing whether someone had a copyright to abandon in the first place.⁴³²

Determining who owns that copyright is a complicated question in the context of a meme like *Goncharov*. For example, a court would have to determine whose public statements to pay attention to. Further, a court must decide if each contributor would be understood to have overtly abandoned their individual creative contribution, and how that would impact the meme as a whole.

2. Implied Licenses

Another way to look at a meme like *Goncharov* is through the lens of implied licenses.⁴³³ But implied licenses in copyright law are rare.⁴³⁴ In order for an implied license to exist, there must be an intent to grant the license.⁴³⁵ Courts usually decide the question of intent by asking “whether the licensee requested the work, whether the creator made and delivered that work, and whether the creator intended that the licensee would copy and make use of the work.”⁴³⁶ Unsurprisingly, courts have balked at finding implied licenses in meme situations, which, considering the ubiquity and spread of

426. *See id.* at 991–92.

427. *See Furie*, 401 F. Supp. 3d at 968.

428. *See Griner*, 568 F. Supp. 3d at 991–92.

429. *See Furie*, 401 F. Supp. 3d at 966.

430. *See id.* at 965.

431. *See id.* at 967.

432. *See id.* at 965; *Griner*, 568 F. Supp. 3d at 991.

433. As contrasted with an ordinary license to use someone’s work, which happens explicitly, an implied license is *implied* by the circumstances. *See, e.g., McElroy v. Courtney Ajiñca Events LLC*, 512 F. Supp. 3d 1328, 1336 (N.D. Ga. 2021).

434. *See Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 47 (1st Cir. 2010).

435. *See id.* at 41.

436. *Id.*

memes, would constitute a huge expansion of the doctrine.⁴³⁷ For example, those adding to the *Goncharov* meme or just reblogging it did not request that the meme be created.⁴³⁸ Already, the first factor counsels against a finding of an implied license because the first factor of an implied license asks whether the licensee requested the work.⁴³⁹

In addition, courts have found that the relationship between creator and alleged licensee must be explicit, not abstract.⁴⁴⁰ For instance, courts have declined to find an implied license where there was no prior communication between the parties.⁴⁴¹ In that case, one court could not locate the offer required by contract law to form a binding contract.⁴⁴² Another court explicitly rejected the possibility that an implied license could be granted “to classes of users, so that any user within that class” could use the copyrighted work.⁴⁴³ Therefore, for a court to find an implied license, there would have to be prior communication between the contributors to the *Goncharov* meme and the users of those contributions, which likely did not occur.⁴⁴⁴

If it truly is the case that a movie is a collection of uncopyrightable contributions and only the finished product can be owned, where does that leave *Goncharov*? Case law seems to say that a contribution must be “separable” to be considered copyrightable.⁴⁴⁵ That begs that question: should a contribution to the *Goncharov* meme receive copyright protection if it can be separated from the rest of the meme?

Then again, one could consider a movie not as a collection of copyrightable contributions,⁴⁴⁶ but rather the product of the person who gathers those copyrightable contributions together. Under that formulation, perhaps the unknown authors of the Google Docs are the owners of *Goncharov*.

The final way to consider a movie might be through its many copyrightable contributions (scripts, soundtracks, and more). However, thinking of a movie in this way introduces confusion into situations where there is no movie studio exhibiting control over the creative process.

437. See, e.g., *Griner v. King*, No. 21-CV-4024 CJW-MAR, 2022 WL 4282215, at *11 (N.D. Iowa Aug. 9, 2022); *Furie*, 401 F. Supp. 3d at 968.

438. See discussion *supra* Section III.A.

439. *Estate of Hevia*, 602 F.3d at 41.

440. See *Griner*, 2022 WL 4282215, at *11; *Furie*, 401 F. Supp. 3d at 968.

441. See *Griner*, 2022 WL 4282215, at *11–12; *Furie*, 401 F. Supp. 3d at 968.

442. See *Furie*, 401 F. Supp. 3d at 968.

443. *Griner*, 2022 WL 4282215, at *11.

444. See discussion *supra* Sections III.A, III.B.

445. See *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 257 (2d Cir. 2015).

446. See *Garcia v. Google, Inc.*, 786 F.3d 733, 749 (9th Cir. 2015) (Kozinski, J., dissenting).

V. FUTURE EXPLOITATION OF *GONCHAROV*

If *Goncharov* is unprotected by copyright, the larger internet community would be encouraged to continue building upon it.⁴⁴⁷ Such a result would doubtlessly be welcomed by those participating in the meme in the first place, as these were the terms under which they entered the creative fray.⁴⁴⁸ However, leaving *Goncharov* uncopyrighted also leaves it open to financial exploitation.⁴⁴⁹ Although people participated in the creation of the *Goncharov* meme without the promise of a financial reward, that does not necessarily mean that they would support *others* reaping a financial reward from their work. After all, there is a difference between wanting to exert control over one's creative work and wanting to be compensated for that work before anyone else does.⁴⁵⁰

Currently, *Goncharov* does not exist as a movie, per se.⁴⁵¹ It is merely a collection of details about a movie that could exist.⁴⁵² However, the meme unavoidably raises the specter of someone making *Goncharov* into a real movie someday, like Scorsese himself,⁴⁵³ someone else,⁴⁵⁴ or perhaps even AI.⁴⁵⁵

This speculation is not at all theoretical. In 2024, Tumblr took it upon itself to revive *Goncharov* by producing a scene of professional actors reading a *Goncharov* script written by user “Canadian-Finch” during the meme’s heyday.⁴⁵⁶ Tumblr, without the consent of Canadian-Finch (or, it seems, anyone else involved with the meme), co-opted the meme to be used as promotional material for the Netflix show *Dead Boy Detectives*—thereby effectively achieving the financial exploitation of the creativity that copyright law favors.⁴⁵⁷

As Tumblr’s actions prove, there can be no exploitation of *Goncharov* as a movie without an exploitation of the meme. It makes instinctive sense to believe that this exploitation should involve copyright infringement. However, if all of the contributions of the

447. See Smith, *supra* note 9, at 644–45.

448. See discussion *supra* Sections III.A, III.B.

449. See Smith, *supra* note 9, at 625–26.

450. See Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513, 517 (2009) [hereinafter Tushnet, *Economies of Desire*].

451. Sharma, *supra* note 230.

452. See *id.*

453. @YourMrGold, X (Nov. 21, 2022, 12:00 AM), <https://x.com/YourMrGold/status/1594843222962053121?s=20> [https://perma.cc/YP32-XYFF]; @ChaosRising451, X (Nov. 21, 2022, 5:12 PM), <https://x.com/ChaosRising451/status/1594740619435511809?s=20> [https://perma.cc/BXZ6-TVNT].

454. @Pixieliss1, X (Nov. 22, 2022, 9:43 PM), <https://x.com/Pixieliss1/status/1595171075465351209?s=20> [https://perma.cc/MRK5-W834].

455. @Invertible_Man, X (Nov. 21, 2022, 8:06 PM), https://x.com/Invertible_Man/status/1594784285097172992?s=20 [https://perma.cc/5NXB-9T2A].

456. See @entertainment, *supra* note 9.

457. See *id.*

participants in the *Goncharov* meme were considered individual ideas, then none of the participants could object if those ideas were then exploited by a movie studio, as they would have no legally cognizable ownership over those ideas.⁴⁵⁸

Even if everyone who contributed something copyrightable to the meme was deemed to be a co-author, that might increase the difficulties rather than solve them, as co-authors “have no right to interfere with a co-author’s use of the copyrighted work.”⁴⁵⁹ Thus, if Scorsese procured the permission of a single contributor to make the movie, this might mean all of the other contributors would be powerless to block it.⁴⁶⁰ However, those contributors *would* be able to sue for their share of the profits of the movie—surely not an outcome anyone making a real movie would desire.⁴⁶¹

Canadian-Finch’s Tumblr post concerned a single scene written by a single person, and so perhaps it makes for a clearer case of the ownership over that particular scene.⁴⁶² However, even that raises issues of permissiveness: in the realm of the *Goncharov* meme, everyone built on everyone else’s creativity without concern for copyright implications.⁴⁶³ Fittingly, once the corporate aspect steps in and copyright implications come into play, and the creative process devolves immediately into an analysis of structuring contracts and licenses.⁴⁶⁴

If *Goncharov* were copyrightable, anyone producing a real movie based on the *Goncharov* meme might try to argue fair use.⁴⁶⁵ For instance, if Martin Scorsese tried his hand at making his “lost masterpiece,” he would surely add his own signature style to transform the meme.⁴⁶⁶ To flesh it out into a full movie, he might update the dated casting, link disparate scenes, and resolve inconsistencies. In doing so, he would doubtlessly make creative choices that would transform the original meme.⁴⁶⁷

However, the US Supreme Court’s recent decision in *Andy Warhol Foundation for Visual Arts, Inc. v. Goldsmith* might affect

458. See 17 U.S.C. § 102(b).

459. 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 259 (2d Cir. 2015).

460. See, e.g., *id.* at 255.

461. See, e.g., *Jefferson v. Raisen*, No. CV 19-9107-DMG (MAAx), 2020 WL 6440034, at *4 (C.D. Cal. Aug. 14, 2020).

462. See @entertainment, *supra* note 9.

463. See discussion *supra* Section III.A.

464. See @museaway, TUMBLR, <https://www.tumblr.com/museaway/751131225646907392/if-youve-been-on-tumblr-today-you-might-have?source=share> [<https://perma.cc/74N6-652Y>] (last visited Sept. 11, 2024).

465. 17 U.S.C. § 107.

466. See Stephen Johnson, *Where to Stream ‘Goncharov,’ Martin Scorsese’s Lost Masterpiece*, LIFEHACKER (Nov. 23, 2022), <https://lifehacker.com/where-to-stream-Goncharov-martin-scorseses-lost-master-1849817752> [<https://perma.cc/Z9XA-RXVU>].

467. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1111 (1990).

this analysis.⁴⁶⁸ Indeed, the affirmed US Court of Appeals for the Second Circuit decision even raised Martin Scorsese as an example of someone who would still need permission before using copyrighted work: “[T]he fact that Martin Scorsese’s recent film *The Irishman* is recognizably ‘a Scorsese’ does not absolve him of the obligation to license the original book.”⁴⁶⁹ Therefore, if there is anything copyrightable in the *Goncharov* meme, commercialization of it without the consent of any of the authors associated with the meme might not be protected by fair use.⁴⁷⁰ After all, any transformative features “must be weighed against other considerations, like commercialism,” making attempted commercial exploitation problematic.⁴⁷¹ Finally, film adaptations are almost always considered to be derivative works that require the consent of the underlying copyright holder.⁴⁷²

If copyright law establishes a regime where *Goncharov* can be financially exploited in the future, it will also establish a regime where *Goncharov* could, as a result, be locked into copyright and overpoliced.⁴⁷³ It is not absurd to suggest that parties might “beg[i]n to assert ownership” over *Goncharov*, as it has happened to other internet memes.⁴⁷⁴

Ironically, leaving *Goncharov* uncopyrighted could result in eventually transforming the meme into an infringement of a future exploitation of *Goncharov*.⁴⁷⁵ This is because any such future financial exploitation would fit copyright’s creative ideal much more closely than the original meme.⁴⁷⁶ As such, copyright law would more easily protect this financial exploitation, since it would understand this monetized, united piece of creativity and operate to support it.⁴⁷⁷ In this way, copyright law would not have inspired the underlying creativity of *Goncharov*; it merely would have inspired the *monetization* of that creativity.⁴⁷⁸ And it would also then serve to *impair* further creativity of the type that spawned *Goncharov* in the first place because anyone who wanted to continue playing in

468. See 11 F.4th 26, 43 (2d Cir. 2021), *aff’d sub nom.* Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508 (2023).

469. *Id.* (internal quotations omitted).

470. Of course, noncommercial use of it may be protected by fair use, especially as that would seem to merely be the terms of engagement with the meme itself.

471. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 509 (2023).

472. *Andy Warhol Found.*, 11 F.4th at 40.

473. See Rosenblatt, *supra* note 376, at 76 (noting that copyright law can provide “incentives to overclaim”).

474. Smith, *supra* note 9, at 618.

475. See *id.*; Rosenblatt, *supra* note 376, at 76.

476. See discussion *supra* Section II.B.

477. See *supra* Part I.

478. See *supra* Part I.

the *Goncharov* meme might run afoul of the copyright of *Goncharov* the movie.⁴⁷⁹

Other commentators have noted the shortcomings of wrongly assuming that creativity is either exclusively or mainly motivated by financial remuneration.⁴⁸⁰ Indeed, research has found that sometimes monetary reward actually *discourages* creativity.⁴⁸¹ Copyright law is largely unconcerned with creativity experienced by artists.⁴⁸² In fact, scholars have found again and again that “artists with no financial incentives . . . nonetheless produc[e] works eagerly.”⁴⁸³ This indicates that, “[i]n many contexts, copyright’s incentives are weak or irrelevant.”⁴⁸⁴

The conclusion continually must be voiced: “perhaps [creators] never needed the motivation of money, just the ability to create and distribute content.”⁴⁸⁵ For these reasons, copyright should not be viewed through a lens of incentivization; rather, it should be viewed as a tool of *enablement*, helping people engage in creativity the way they want to, regardless of market considerations. After all, “[p]eople are creative beings. They will play at creation if given an opportunity.”⁴⁸⁶

In taking such a narrow, economic view of what “opportunity” causes creativity, copyright law “can miss the mark and harm what it aims to protect.”⁴⁸⁷ But copyright law is simply wrong. People are not motivated to create by financial rewards—they will create simply for the sheer fun of it.⁴⁸⁸

Copyright law was developed to manage business relationships and competition.⁴⁸⁹ Before the internet came along, one might have been fooled into thinking that creativity was a rare

479. See *supra* Part I; Smith, *supra* note 9, at 621 (noting a “chilling effect on Slender Man creations” in the wake of assertions of ownership); Rosenblatt, *supra* note 376, at 77. Of course, the question can be raised whether copyright law cares about impairing the creativity of *Goncharov*, as it may only be concerned with incentivizing works that can be financially exploited. See Paul Kimani, *A Consolidated Assessment of the Legal Protection of Folklore*, 23 WAKE FOREST J. BUS. & INTELL. PROP. L. 272, 294 (2023).

480. See, e.g., Biggs, *supra* note 114, at 402; see also Sawicki, *supra* note 384, at 103–04.

481. See Biggs, *supra* note 114, at 402; Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 463, 493 (2015).

482. Tushnet, *Economies of Desire*, *supra* note 450, at 515.

483. See, e.g., Biggs, *supra* note 114, at 423; see also Jessica Silbey, *Fairer Uses*, 96 B.U. L. REV. 857, 858 (2016) (noting “growing research undermining the simplistic explanation of property incentives as the motor for productivity”); Arielle Matza, Note, *What’s the [Irreparable] Harm?: Incentivizing Creativity Through Preliminary Injunctions in Copyright Law*, 38 CARDOZO L. REV. 1579, 1583 (2017); David A. Simon, *Culture, Creativity, & Copyright*, 29 CARDOZO ARTS & ENT. L.J. 279, 281–82 (2011); Sawicki, *supra* note 384, at 102.

484. Sawicki, *supra* note 384, at 103.

485. Lemley, *supra* note 481, at 463.

486. Yochai Benkler, *Coase’s Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 424 (2002).

487. Tushnet, *Economies of Desire*, *supra* note 450, at 515.

488. Lemley, *supra* note 481, at 492.

489. See Litman, *supra* note 136, at 11–12.

and unusual occurrence borne mainly from corporate interactions. But the creativity behind copyrighted works has never fit the economic mold proposed by copyright law justification.⁴⁹⁰

The internet made this disconnect stark. One could no longer pretend that only a few select people engaged in creativity and only within delineated parameters. The internet is a creative free-for-all where everyone jumps in, heedless of corporate arrangements. With the disintegration of gatekeeping around distribution channels, the incongruity between copyright law's incentive scheme and the actual driving factor of creativity has been irrevocably exposed.⁴⁹¹ Indeed, people have raised the possibility that “copyright is *less* essential to the production and dissemination of expressive works than previously believed.”⁴⁹²

As exemplified by *Goncharov*, the law's corporate creativity is completely foreign from the massive amounts of creativity that people witness every day through internet memes.⁴⁹³ Courts have claimed that, “[w]ithout [copyright], authors would have little *economic* incentive to create and publish their work.”⁴⁹⁴ However, that is not the same as having no incentive to create, as memes like *Goncharov* make clear.

VI. COPYRIGHT LAW IN AN UNCOPYRIGHTABLE WORLD

The profusion of memes online might already herald a boon in uncopyrightable works.⁴⁹⁵ Arguably, generative AI systems may be poised to add even more works into the uncopyrightable pot.⁴⁹⁶ As the US Copyright Office has taken the stance that works created by AI are not copyrightable in and of themselves, and as AI systems can generate multitudes of uncopyrighted works quickly and easily, there may be an already-identified veritable flood of uncopyrightable works on top of the internet folklore.⁴⁹⁷ Copyright law should adapt to operate in a world full of creativity with no identifiable authors to exert exclusive rights.

490. *Id.* at 10; *see also* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1391 (6th Cir. 1996).

491. *See* Gard & Gard, *supra* note 125, at 463.

492. Silbey, *supra* note 483, at 867–68; *see also* Jessica Silbey, *We're All Pirates Now: Making Do in a Precarious IP Ecosystem*, 39 CARDOZO ARTS & ENT. L.J. 691, 693 (2021).

493. *See* Biggs, *supra* note 114, at 404 (referencing “the explosion of monetarily unrewarded creativity witnessed over the past decade on the internet”); Lemley, *supra* note 481, at 463 (“The Internet . . . has . . . given rise to the creation of more works of all types than ever before in history, often by several orders of magnitude.”).

494. Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1262 (11th Cir. 2001) (emphasis added).

495. *See* KNOW YOUR MEME, <https://knowyourmeme.com/> [https://perma.cc/T9V6-6JTU] (last visited Sept. 11, 2024).

496. *See* 37 C.F.R. § 202 (2024).

497. *See id.*

There were few issues with corporate copyright when most of the visible creativity *was* in fact corporate and could be supplemented by contractual transactions.⁴⁹⁸ It is clearer than ever before that copyright law is not necessary to incentivize the creation of artistic works. Copyright seeks to incentivize the *monetization* of creative works.⁴⁹⁹ But monetization benefits the creators less than it benefits the entities established to exploit the creativity of those creators—with, or in the case of uncopyrightable works like internet folklore and possibly generative AI, without their permission.⁵⁰⁰

The Copyright Clause of the US Constitution famously declares the purpose of copyright to be “[t]o promote . . . progress.”⁵⁰¹ The promotion of progress became conflated with the promotion of *creativity*, spawning the enduring idea that copyright exists to *incentivize* creativity.⁵⁰² As the Supreme Court straightforwardly declared in *Sony Corporation of America v. Universal City Studios, Inc.*, “[t]he purpose of copyright is to create incentives for creative effort.”⁵⁰³

This theory became the foundational explanation for the existence of copyright.⁵⁰⁴ But this theory of copyright assumed a very important fact as truth: that creativity must be incentivized. Under this assumption, creativity must be coaxed into existence from unwilling artists and authors who would apparently rather not create anything at all but would be unable to turn down a payday. All of copyright law was therefore established in service of this dubious assumption.⁵⁰⁵

Copyright law supports its incentivization goal through market forces.⁵⁰⁶ Indeed, “[b]y establishing a *marketable* right to the use of one’s expression, copyright supplies the *economic* incentive to

498. See *supra* Part I.

499. See Dalindyabo Shabalala, *Do We Need Exit Rules for Traditional Knowledge? Lessons from Solomon Linda and the ‘Mbube’/‘The Lion Sleeps Tonight’ Case*, 12 QUEEN MARY J. INTELL. PROP. 532, 549 (2022) (noting that shifting an understanding of copyright would make it “less effective as a tool for . . . commercialization”).

500. See Litman, *supra* note 136, at 11–12.

501. U.S. CONST. art. I, § 8, cl. 8.

502. See Lemley, *supra* note 481, at 463 (“The rationale for IP has always been . . . to encourage people to create things when they otherwise wouldn’t.”).

503. 464 U.S. 417, 450 (1984); see also *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 260 (D.D.C.), *rev’d sub nom.* Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003) (“[C]opyrights serve as important incentives to encourage and protect expression . . .”).

504. See, e.g., Tushnet, *Economies of Desire*, *supra* note 450; Silbey, *supra* note 483, at 858; Linford, *supra* note 420, at 148; Matza, *supra* note 483, at 1611–13; Peter DiCola, *Money from Music: Survey Evidence on Musicians’ Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301, 303 (2013); Simon, *supra* note 483, at 281; Kristelia García, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265, 275 (2020); Matalon, *supra* note 423.

505. See Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1237 (11th Cir. 2014).

506. See Matza, *supra* note 483, at 1611–13.

create and disseminate ideas.”⁵⁰⁷ Therefore, legal inquiries look at the effect on *commercial* exploitation as affecting the *monetary* rewards of the copyright holder.⁵⁰⁸ Thus, copyright is a matter of *economic* philosophy.⁵⁰⁹ Through this lens, deciding questions of copyright law inevitably becomes a matter of deciding financial transactions.⁵¹⁰

The decisions in the copyright cases discussed throughout this Article were founded in an understanding of corporate copyright—that is, that copyright exists mainly for the benefit of the corporations and not for the benefits of the actual creators.⁵¹¹ Although courts acknowledge that those deprived of authorship benefits do indeed make creative contributions,⁵¹² courts find it impossible to give those contributions any legal merit because doing so would unacceptably “splinter” the copyright.⁵¹³ There is no pretense that the court is worried about creativity at all—the focus is entirely on finances.

This emphasis on copyright as a way of protecting financial interests to motivate creativity ignores the fact that much creativity exists outside of this narrow view of the world. There are many non-financial motivations involved in creativity, but those motivations are easily overlooked by financial-centric copyright law doctrine.⁵¹⁴ Indeed, viewing copyright as a matter of economic philosophy misses the mark, as “psychological and sociological concepts can do more to explain creative impulses than classical economics.”⁵¹⁵

To be sure, the law’s focus on financial compensation has its benefits. For example, it clarifies copyright’s definition of “harm” in a concrete and practically numerical sense.⁵¹⁶ However, this focus has caused the doctrines to develop in a way that stunts

507. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (emphasis added); see also Suntrust Bank v. Houghton Mifflin Co., 268 F.3d 1257, 1261 (11th Cir. 2001) (“The Copyright Act . . . provides an economic incentive for authors to publish books and disseminate ideas to the public.”); Biggs, *supra* note 114, at 403–04.

508. See *Sony Corp. of Am.*, 464 U.S. at 450.

509. Mazer v. Stein, 347 U.S. 201, 219 (1954); Kimani, *supra* note 479, at 294 (“In the U.S., art is viewed within a creative economy . . .”). Meanwhile, other countries have a more moralistic approach to copyright law. See, e.g., Mahon v. Mainsail LLC, No. 20-CV-01523-YGR, 2020 WL 4569597, at *7 (N.D. Cal. Aug. 7, 2020); Fahmy v. Jay-Z, 908 F.3d 383, 391 (9th Cir. 2018). The United States, however, focuses on “encourage[ing] creators who wish to exploit their works commercially to assign all rights to an intermediary in return for some amount of money.” Litman, *supra* note 136, at 35.

510. See Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190, 1235 (N.D. Ga. 2012), *rev’d sub nom.* Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014).

511. See generally Litman, *supra* note 136.

512. Aalmuhammed v. Lee, 202 F.3d 1227, 1233 (9th Cir. 2000).

513. Garcia v. Google, Inc., 786 F.3d 733, 742 (9th Cir. 2015).

514. Tushnet, *Payment in Credit*, *supra* note 152, at 167.

515. Tushnet, *Economics of Desire*, *supra* note 450, at 515.

516. See *supra* Part II.

understanding of human creativity.⁵¹⁷ Thus, there are considerable drawbacks to this corporate copyright idea, not least the fact that it does not have anything to do with creativity, as directly revealed by the cases themselves.⁵¹⁸

In *Princeton University Press v. Michigan Document Services, Inc.*, the US Court of Appeals for the Sixth Circuit grappled with the fact that academics might not need financial compensation to write all of their articles, given that they often do not receive express payment in exchange for their scholarly work.⁵¹⁹ However, the court concluded that copyright protections over academic articles remained necessary because the *publishers* of those articles needed the economic incentive.⁵²⁰ Because the works were explicitly created with no financial incentive,⁵²¹ the court found someone along the chain who *was* financially motivated, even if that person had nothing to do with the actual creation of the work.⁵²²

Memes thriving from the efforts and contributions of a myriad of internet users might be considered unownable public goods, free for anyone to engage with. Given copyright culture's obsession with monetization, that could mean, however, that the memes would also be free for someone to inevitably financially exploit. While this is true of all creative properties that exist in the public domain, most of those properties were either put there deliberately by the authors or the authors have long ago died.⁵²³ Most of those who participated in the *Goncharov* meme are probably still alive, and most of them probably did not consider the implications of the copyrightability of their respective contributions. Indeed, the terms of their engagement with the meme in the context of the Tumblr community might not contemplate a major movie studio making money off of those contributions—or even Tumblr using their creativity to promote a Netflix show.⁵²⁴

However, understanding how copyright law could account for these societal expectations among the meme creators poses challenges. It would require a rethinking of how copyright considers internet creativity. Thinking of who gets to financially benefit from *Goncharov* requires a hard look at who the copyright system is designed to compensate, and who it is designed to merely endorse

517. See *supra* Part IV.

518. *Garcia*, 786 F.3d at 742.

519. See 99 F.3d 1381, 1391 (6th Cir. 1996).

520. See *id.*

521. *Id.*

522. *Id.* Even the criminal copyright statute similarly exposed the misunderstanding of assuming financial compensation was at the heart of relevant motivation. See Lemley, *supra* note 481, at 483. The statute, originally drafted only to criminalize financially motivated infringements, had to be amended when it became clear that many actions impacting copyright law were not motivated by profit. *Id.*

523. RAYMOND J. DOWD, COPYRIGHT LITIGATION HANDBOOK § 13:19 (2d ed. 2023).

524. See @entertainment, *supra* note 9.

stealing from. As one Tumblr user said in response to Tumblr's use of a *Goncharov* script scene to promote *Dead Boy Detectives*, “[d]id anyone stop to ask if the script’s author had given permission for this to happen, or even been notified? How will you compensate [C]anadian-[F]inch for the unauthorized use of their script?”⁵²⁵ The free-wheeling nature of the meme gives the impression that Tumblr did not need to stop and think about the copyright implications of using the scripted scene. Even if Tumblr did consider the copyright implications, copyright law has not been designed to protect creators like Canadian-Finch from this kind of exploitation.⁵²⁶ Rather, the land of contracts and terms of service handle these issues.

On the one hand, someone monetizing the free-wheeling creativity of *Goncharov* might be doing exactly what the copyright system is designed to do. People clearly desire a movie like the one Tumblr users made up, and if someone is incentivized to make one by the anticipation of financial rewards, then the copyright incentive works and should compensate that movie producer to encourage the creation. On the other hand, the copyright incentive clearly was not necessary to create any of the existing contributions of *Goncharov*.⁵²⁷ Those were created without any expectation of financial compensation.⁵²⁸

The *Goncharov* meme, and other forms of creativity like it, challenge the foundational assumption of copyright: that people are motivated to create by financial considerations. If copyright law is meant to encourage people to create, one must ask the question of *which* people. The Supreme Court seems confident that US copyright law “is a powerful engine of creativity” because of “the last century of American art, literature, music, and film.”⁵²⁹ But others looking at where American creative industries have ended up express doubt about the consolidation of certain forms of creativity into behemoths.⁵³⁰ Therefore, copyright law arguably exists to encourage a major movie studio to create the movie *Goncharov*, not the disorganized internet in the form of a sprawling meme.

525. @museaway, *supra* note 464.

526. See Lantagne, *Famous on the Internet*, *supra* note 175, at 395.

527. See *supra* Part III.

528. See *supra* Part III.

529. See *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 550 (2023).

530. See Lemley, *supra* note 481, at 494 (“A number of scholars have suggested that what IP truly encourages is not the act of creation but the act of commercialization.”); Tushnet, *Economies of Desire*, *supra* note 450, at 543–44 (noting that the financial motivation argument seems to only work when applied to the *distributors* of the creativity); DiCola, *supra* note 504, at 343 (“[C]opyright law mostly affects the revenue of the highest-income musicians This is not a surprise, given the prevalence of winner-take-all markets in the entertainment industry.”); Litman, *supra* note 136, at 9–10 (“In most creative spheres, authors’ control over their works is short-lived, and the earnings they collect from them are modest. The control of their works and the bulk of the proceeds they earn are held instead by copyright owners who serve as intermediaries between the authors and their audiences.”).

Thus, if a major movie studio makes the movie *Goncharov*, as copyright law might desire, the movie studio will take the concrete steps to make the movie, but will do so by mining from the free labor of the rest of the internet.⁵³¹ In such a case, we might ask if the right people are seeing the compensation for the creativity. It is clear that individuals do not need to be incentivized to create. So, are copyright incentives really just incentives placed on *corporations* as money-making entities?

Copyright law professes to abhor a free-rider,⁵³² but it is unclear if anyone would make a real movie out of *Goncharov* if they had to undertake the true “costs of creation.”⁵³³ When one thinks of the infamous radio broadcast of *The War of the Worlds*, one thinks of Orson Welles.⁵³⁴ Yet, copyright law does not recognize Orson Welles as the legal author of *The War of the Worlds*.⁵³⁵ Evidently, there is a split between who society credits for the creative property and who the law credits.⁵³⁶

That split between society’s expectations and the reality of the law can be seen in other copyright doctrines as well.⁵³⁷ Laypeople also understand the idea-expression dichotomy. They have an expectation of what can be owned even though that expectation does not necessarily comport with where the law would draw the line. For instance, many people seem to believe that memes are very obviously ideas that cannot be owned,⁵³⁸ but copyright cases have disagreed.⁵³⁹

This is not just a question about a random internet meme and whether its contributors have any say in its future. This is a feature of US copyright law that extends well beyond this singular example.⁵⁴⁰ As scholars have noted, the legal conundrum

531. See Linford, *supra* note 420, at 147 (discussing that copyright should be sure to discourage “free riders”).

532. See, e.g., Bohannon, *supra* note 154, at 104 (“[C]opyright law should protect against the kind of free-riding that is likely to undermine the incentives to produce and distribute creative works.”).

533. Linford, *supra* note 420, at 148.

534. See A. Brad Schwartz, *The Infamous “War of the Worlds” Radio Broadcast Was a Magnificent Fluke*, SMITHSONIAN MAG. (May 6, 2015), <https://www.smithsonianmag.com/history/infamous-war-worlds-radio-broadcast-was-magnificent-fluke-180955180/> [<https://perma.cc/W8LH-D6ZV>].

535. See *Welles v. Columbia Broad. Sys., Inc.*, 308 F.2d 810, 812 n.1 (9th Cir. 1962).

536. *Id.*

537. See Stacey M. Lantagne, *Of Disaster Girl and Everyday: How NFTs Invite Challenging Copyright Assumptions Around Creator Support*, 13 HARV. J. SPORTS & ENT. L. 265, 266 (2022).

538. See Lantagne, *Famous on the Internet*, *supra* note 175, at 399 (noting that some people on the internet believe that memes are “ideas” that cannot be owned).

539. See *Griner v. King*, 568 F. Supp. 3d 978, 991 (N.D. Iowa 2021); *Furie v. Infowars, LLC*, 401 F. Supp. 3d 952, 965 (C.D. Cal. 2019).

540. See, e.g., Rosenblatt, *supra* note 376, at 77 (“[W]ell-resourced creators can build upon what came before but less-privileged creators face increased risk and expenses.”).

represented by internet folklore like *Goncharov* “is a familiar dilemma” to

[t]raditional communities [who] are not rewarded for their creations with exclusivity or other pecuniary rewards under intellectual property law because their works are in the commons. However, sophisticated entities that freely appropriate these communities’ folklore not only make millions of dollars off of the folklore, they are also awarded with exclusivity to the new expressions in the derivatives they have created, and can exclude even the original creative community from the new work.⁵⁴¹

Like the authors of *Goncharov*, these traditional communities have not chosen for their work to be in the public domain. Yet, their works sit there, vulnerable to exploitation.⁵⁴² The issue is a complex one,⁵⁴³ but other countries have started to reconsider how to characterize human knowledge in an effort to protect traditional folklore.⁵⁴⁴ As the world stands at the precipice of generative AI’s changes to the copyright landscape, these international changes are vital to protecting creativity.⁵⁴⁵ We must decide if AI-generated works will be left to the public domain for exploitation by all or locked up by corporate parties. US copyright law seems to have established an either-or dichotomy, to the exclusion of more expansive ways to view, protect, and nurture creativity, whether by human or machine.

VII. CONCLUSION

Copyright law does not account for the community understanding of collaborative creativity found in a meme like *Goncharov (1973)*. Thus, copyright analysis feels incomplete and as if it is happening in a vacuum. A vast majority of copyright law’s focus has surrounded the ownership incentive, but there is just as much creativity to be fostered by limiting the boundaries of that ownership. Many decades ago, the Supreme Court noted:

The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.⁵⁴⁶

That last sentence perfectly encapsulates the experience of the *Goncharov* meme.

541. See, e.g., Smith, *supra* note 9, at 643; see also Shabalala, *supra* note 499, at 532.

542. See Smith, *supra* note 9, at 643; see also Shabalala, *supra* note 499, at 532.

543. See Smith, *supra* note 9, at 623.

544. See Shabalala, *supra* note 499, at 532; Kimani, *supra* note 479, at 273.

545. Julia Yoon & Chris Borges, *Informing the Innovation Policy Debate: Key Concepts in Copyright Laws for Generative AI*, CTR. STRATEGIC & INT’L STUD. (Apr. 12, 2024), <https://www.csis.org/blogs/perspectives-innovation/informing-innovation-policy-debate-key-concepts-copyright-laws> [<https://perma.cc/W9A3-XEC3>].

546. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991); see also *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 550 (2023) (Kagan, J., dissenting) (“The law does not grant artists (and authors and composers and so on) exclusive rights—that is, monopolies—for their own sake. It does so to foster creativity . . .”).

By definition, fans create for love and not money, which flummoxes copyright law.⁵⁴⁷ But *Goncharov* is not unusual.⁵⁴⁸ *Goncharov* is explicitly what all creativity is—it is based on a coming-together of many factors too numerous to list and concocted by many different human minds. Thus, it is not *Goncharov* that should be considered bizarre; it is copyright law itself.

547. See Tushnet, *Economies of Desire*, *supra* note 450, at 528 (“[C]opyright theorists have been quite interested in fanworks as evidence of creative practices that exist without, and even in contradiction to, copyright’s official incentive story.”).

548. See Tushnet, *Payment in Credit*, *supra* note 152, at 167 (“Fan authors are not exceptional in their involvement with and use of copyrighted texts.”); see also Lemley, *supra* note 481, at 492 (noting that people being creatively inspired by other people’s creativity is a well-documented phenomenon whereby “[b]eing around people with good ideas . . . actually makes it more likely that you will have good ideas of your own”).