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A Genre Theory of Copyright

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One of copyright law's primary goals is the promotion of progress and development in arts and the enrichment of the world of expressions. Economic analysis is the predominant theory used to justify current copyright doctrines and to analyze the possible ways to accomplish copyright law's goals. However, economic analysis, as well as other theories, sometimes fail to account for existing copyright doctrines and to justify new ones due to a lack of empirical data. In the field of literary theory, we find theories that deal with genre and seek to explain, among other things, how art develops and how meaningful artistic products are created. This article offers a genre theory of copyright and examines if and to what extent the legal norm of copyright law, which governs the world of creativity, fits genre theories. It reviews several main copyright doctrines such as the idea/expression dichotomy, the scènes à faire doctrine, fair use, and the right to make derivative works. This article shows that while many copyright doctrines could be explained and justified under genre theories, the right to make derivative work does not fit this normative source and should be adapted.

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INTRODUCTION

One of copyright law's primary goals is the promotion of progress and development in arts and the enrichment of the world of expressions.[1] In the field of literary theory, we find theories that deal with genre and seek to explain, among other things, how art develops and how meaningful artistic products are created. This article examines if and to what extent the legal norm of copyright law, which governs the world of creativity, fits genre theories. The article focuses on three main aspects of the creative world: the author; the audience and creative products; and how creative products act as a mediating element between authors and their audiences. In other words, I will analyze

1. *See* U.S. CONST. art. I, § 8, cl. 8 (providing that Congress has the power "[t]o promote the Progress of Science . . . .").

what components serve as the foundation of creativity, allowing authors to create on the one hand and the audience to understand and give value to the creative products on the other, and whether copyright law allows the use of these components. Thus, the discussion is intended to examine whether there is a match between copyright's goal of enriching the creative world and the way genre theories understand the conditions for such enrichment.

Showing a match between genre theories and copyright law would validate current legal rules, as they adequately reflect extra-legal approaches to the enrichment of the creative world. If, however, there is a mismatch between some copyright doctrines and genre theories, then there is reason to reexamine these doctrines. In this sense, there is a shift from the descriptive to the normative aspect of the discussion. Nevertheless, the argument that copyright doctrine should be amended in order to fit the notions of genre theory needs further support; it does not follow simply from the presumption that copyright law must adhere to other fields of knowledge that study creativity. Rather, to the extent that genre theories explain, among other things, the important and significant conditions for the enrichment of the creative world, and to the extent that copyright law aims at such enrichment, I believe any gap between legal rules and extra-legal understanding of the creative world should be bridged. This is because genre theories examine and explain significant components of creativity and could therefore identify rules that encourage enrichment of the creative world, which is the goal of copyright law. Thus, principles of genre theory that explain both the conditions enabling authors to create and enrich the creative world and how an audience gives value to works of authorship and understands them should be reflected in the legal doctrine that governs creativity.

The normative aspect of this article could be criticized because it does not explain why genre theories are superior to other theories explaining how the creative world best develops, for example, economic analysis. There are three answers to such criticism. First, the mere fact that there are other normative justifications to copyright law and various normative approaches to identifying conditions that enrich the creative world does not, in itself, diminish the theoretical validity of any other approach. Aside from that, the notions from genre theories are flexible; they can accommodate other normative approaches and allow them to frame secondary rules that will contribute to the development of the creative world, including economic analysis. Second, there is no necessary contradiction between genre theories' understanding of how to best enrich the creative world and that of economic analysis. As I will show, some important doctrines in

copyright law (which rely considerably on economic analysis) match the notions of genre theories. The alleged tension mainly concerns the right to make derivative works, which will be discussed below. However, as far as the derivative works right is concerned, its economic justification is controversial even under principles of economic analysis.[2]

Third, and most important, genre theories explain aspects of the creative world where other theories, including economic analysis, fail. In the context of the right to make derivative works, for example, the main reason economic analysis does not provide sound predictions is the lack of empirical data concerning the amount of works that would be created absent this right, the amount of works that would not be created if the author was not awarded this right, and the social welfare resulting from these two groups of works. The ability to collect such empirical data is highly restricted if not impossible. As a result, theories that explain the interrelations between different players on the field of creativity—authors (both first and second) and audience—in a manner that is independent of empirical data could offer a sound solution to various questions in copyright law. Unanswered questions about the justification for the derivative work right and its scope are a key example. In this sense, genre theories are relevant to copyright law because they offer a systematic understanding of the creative world, the interrelations between the different players in it, and the significant conditions that allow its existence and development, which could inform the basic legal rules that should govern creativity.

In this article, I will examine the existing literature on genre theories in an instrumental way to demonstrate their implications for creativity. I will present the main characteristics of genre theories and will extract from the literature notions regarding the components that are significant to the enrichment of the creative world. As I will show, genre theories recognize that in the heart of the creative world stand common building blocks that are the basis for the existence and development of the creative world in two main aspects. First, the common building blocks are a tool that enables authors to create within certain constraints by using known rules and conventions. This means that the common building blocks are used by the author as available raw materials and enable, through the constraints they cast, the crystallization of ideas into perceivable products, and are

2. *See, e.g.*, William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 354 (1989) ("The case for giving the owner of a copyrighted work a monopoly of its derivative works as well is a subtle one."); *see also* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 109 (2003).

simultaneously affected by creativity itself, thus allowing the development of new conventions.[3] In this sense, the common building blocks are both an enabling and constitutive tool for creativity. Second, the common building blocks are also a tool that enables the formation of meaning. For authors, the common building blocks serve as raw materials for creation, while for the audience they function as raw materials for the creation of meaning and as a common language between the audience and authors. The use of common building blocks thus allows not only the making of creative products but also meaningful products that the audience may value. Seen in this light, the common building blocks are a meaning-making tool.

Viewing the creative world through the lens of genre theories could contribute to a better understanding of copyright law, which, as explained above, focuses on the development and enrichment of the creative world. The examination of genre theories and copyright law in this article concerns several main copyright doctrines. The first is the idea/expression dichotomy, a central doctrine in copyright law. Under this doctrine, ideas are not protected by copyright while explicit expressions are. Another doctrine, related to the first, is the scènes à faire doctrine, which provides for the free use of any expressions that are necessary to the depiction of particular artistic styles. A third doctrine is the fair use doctrine, which, under certain conditions, allows the use of protected expressions without the owner's consent. The fourth doctrine is the right to make derivative works. This right gives the owner of a copyrighted work the exclusive right to make works that are based upon it.

The argument I wish to establish in this article is that although there is a match between some copyright doctrines and genre theories, as far as the right to make derivative works is concerned, there is a significant mismatch. Genre theories do not distinguish between ideas and expression (in copyright terms) and see both as a possible source of common building blocks for creativity. Copyright law matches this notion to a great extent. Thus, the idea/expression dichotomy allows the free use of ideas as common building blocks. Copyright law also allows the use of expression in certain cases. One example is the use of unprotected expressions—i.e., in cases where the copyright term has expired or in cases governed by the scènes à faire doctrine. Another example is the fair use doctrine which allows, under some

3. Interestingly, these notions of genre theories match the theories and studies in the cognitive psychology of creativity. *See* Omri Rachum-Twaig, *Recreating Copyright: The Cognitive Process of Creation and Copyright Law*, FORDHAM INTELL. PROP. MEDIA & ENT. L.J. (forthcoming 2016).

circumstances, the use of protected expressions as common building blocks.

However, as far as the right to make derivative works is concerned there is a significant mismatch between copyright law and genre theories. The right to make derivative works provides the owner of a work the exclusive right to make works that are based on it. This means that no one is allowed to use protected expression from existing works to create new works without the copyright owner's consent.[4] According to genre theories, however, using expression to make new works is at the heart of encouraging the creative world, both as a building block that enables creativity from the author's perspective and (maybe more importantly) as a building block that enables meaning-making from the audience's perspective. The argument here is that under genre theories' understanding of the enrichment of creativity, there is a mismatch between genre and copyright law as far as the distinction between derivative works (that use protected expression and thus are forbidden without the owner's consent) and original works (that use ideas or unprotected expression and thus are allowed).

Following this argument, I will claim that as far as genre theories are concerned, there is a qualitative difference between the act of reproduction and the act of making a derivative work, both from the author's inner perspective and from the audience's perspective. Whereas reproduction without additional original contribution does not constitute a new text that contributes to the development of a genre or the creation of a new one, a derivative work (much like an original work) is a text that has a central and important function in the promotion and development of the creative world; its importance to the creative world is not inferior to any other kind of creative text (whether or not it is based on prior ideas of explicit expressions). This notion strengthens the conclusion that a separation between the reproduction right and the derivative work right is warranted due to the different role of both acts in the creative world. In this sense, the argument in this article is both critical-descriptive (examining the match between the current doctrine and genre theories), and normative as it justifies the shift to a different copyright regime with regard to derivative works.

This article is structured as follows. Part II is dedicated to a methodological discussion of the use of genre theories and the relationship between them and other overlapping fields of knowledge. Part III presents a case study, the development of the detective story genre, which serves as an example of the theoretical debate discussed

4. 17 U.S.C. §§ 101, 106(2).

in this article. In Part IV, I present the development of theoretical thinking about genre and its theoretical underpinnings to clarify genre's meaning in this article. In addition, part four describes each side of the debate that follows. Part V characterizes modern approaches to genre by emphasizing each theory's special traits. Next, in Part VI, I highlight two aspects of the modern debate on genre, which provides background for a doctrinal debate. Part VII discusses genre's implications for copyright law in general and the derivative work right specifically. Finally, I conclude the debate.

I. GENRE THEORIES—METHODOLOGICAL NOTES

Before delving into this article's argument, a brief discussion of its methodology, choice of genre theories, and their uniqueness within the study of knowledge is necessary. I must first address the question of what genre theories study and what *genre* is. Defining genre or genre theory in a completely positive way is a difficult, perhaps impossible, task due to the vast pluralism that exists in the field. However, it could be generally said that genre is a set of rules and conventions applying to texts and affecting their creation and understanding, and that genre theories seek to understand these rules, characterize them, and explain how they affect the relevant discourse. It is important to emphasize that while this article concentrates on the literary text as a paradigmatic subject for genre analysis, genre theories apply equally to other non-literary forms of art and creativity such as music, visual arts, films, games and even computer software. [5]

As I will show in this article, genre theories are versatile in the sense that every one of them perceives genre from a different angle and emphasizes a different aspect of the genre phenomenon. The first significant genre theories focused on literary texts because they grew out of literary theory. In the second half of the twentieth century, different genre theories were applied to other cultural phenomena such as cinematic, musical and visual works, and even to other non-artistic social actions such as legal texts, bureaucratic documents, and everyday non-literary rhetorical actions such as phone conversations.[6]

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5. Frow stated in the beginning of his book titled GENRE that his book concerned "kinds or genres of speech, writing, images, and organised sound: forms of talk and writing, of drawing and painting and sculpting, of architecture, of music, and mixed forms like film, television, opera, and drama. It is a book about how genres organise verbal and non-verbal discourse, together with the actions that accompany them, and how they contribute to the social structuring of meaning." JOHN FROW, GENRE 1 (2006). In this article, the term "text" is used in the broader sense proposed by Frow.

6. *See* ANIS S. BAWARSHI & MARY JO REIFF, GENRE: AN INTRODUCTION TO HISTORY, THEORY, RESEARCH, AND PEDAGOGY 23-28 (2010); DAVID DUFF, *Introduction*, *in* MODERN

Despite the fact that there is a certain overlap between genre theories and other fields of knowledge such as literary theory, linguistics, hermeneutics and aesthetics, genre theories are an independent field of knowledge with unique research goals.

Genre theories focus on the sets of rules and conventions that apply to texts and affect their creation and understanding. Genre is derived from two Latin words. The first is *genus*, meaning "type," and the second is *gener*, meaning "to create." As Bawarshi and Reiff noted, the combination of the two meanings characterizes the different approaches to genre's purpose; some scholars consider it as a mere classificatory tool, while others view it as playing a role in the creation and understanding of texts.[7] In the second half of the twentieth century, genre developed into an independent field of knowledge.[8] Beforehand, literature on genre existed in other fields of knowledge.

For example, the philosophy of aesthetics focused, implicitly and explicitly, on genre. Aesthetic theories, generally, define and evaluate art.[9] While pursuing the definition of art, aesthetics scholars defined preconditions for the existence of an artistic product. The discussion on such preconditions in the Classical, Renaissance, and Neoclassical eras, in the poetic and literary context, led to prescriptive approaches to genre.[10]

Precursors to genre theories also developed in literary theory and criticism. In the beginning of the twentieth century, many literary critics focused on questions related to genre and their ideas contributed substantially to the development of an independent theory of genre. The personal identity and conceptual proximity of scholars in literature and genre led to significant overlap between the ideas promoted by twentieth century literary theory and genre theory. The American literature researcher Thomas Beebee, for example, argued that four approaches to genre theories—genre as rules, genre as species, genre as patterns of textual characteristics, and genre as readers'

GENRE THEORY 1, 15-16 (David Duff ed., 2000).

7. BAWARSHI & REIFF, *supra* note 6, at 4.

8. DUFF, *supra* note 6, at 1.

9. *See, e.g.*, MONROE C. BEARDSLEY, AESTHETICS: PROBLEMS IN THE PHILOSOPHY OF CRITICISM 1-6, 15 (1958); Harold Osborne, *Introduction*, *in* AESTHETICS 1, 5 (1972).

10. Thomas Beebee referred to these approaches as production-oriented approaches to genre. *See* THOMAS O. BEEBEE, THE IDEOLOGY OF GENRE 3 (1994). I will later explain in more detail the meaning of such prescriptive approaches to genre. *See infra* Part IV(B). The discussion on aesthetics in the Romantic and Post-romantic eras led to critiques of these prescriptive approaches and marked the beginning of independent theoretical interest in genre. Duff explained that commentators such as Goethe, Schiller, and Schlegel, to whom I will refer later on, have challenged the prescriptive approaches to genre and emphasized the need for an independent philosophical inquiry of genre. *See* DUFF, *supra* note 6, at 2.

conventions—significantly overlap four approaches to literary theory that focus on the source of meaning in texts—the author, the history of the text, the text itself, and the reader.[11]

However, despite overlap between genre theories and literary theories, some significant differences between the two are evident. The primary difference between these two fields of knowledge is that whereas literary theories—both before the twentieth century and during that century—focused their research on the examination of literary text, its attributes, and proper interpretation and understanding,[12] genre theories were not interested in a specific text. Instead, genre theories focused on the set of rules and conventions shared by texts and the question of how such systems develop and affect the different players in the creative field.[13] Another difference between the two fields is that while literary theories are concerned only with literary text (including artistic text), genre theories, at least in their contemporary form, are

11. BEEBEE, *supra* note 10, at 3. The literature critic Terry Eagleton explained that approaches to the source of meaning in literary theory match the different eras of the theoretical thought on literature. The nineteenth-century Romantic era focused on the author as the source of meaning; the new criticism of the early-twentieth century focused on the text itself; and hermeneutical, approaches in the second half of the twentieth century emphasized the role of the reader as a source for meaning. *See* TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION 64 (2d ed. 1996). *See* also ANTHONY C. THISELTON, HERMENEUTICS: AN INTRODUCTION 307 (2009).

12. According to Culler, this is the hermeneutical model to literary theory, which became significant in the nineteenth century and mainly in the twentieth century. *See* JONATHAN D. CULLER, LITERARY THEORY: A VERY SHORT INTRODUCTION 61 (1997). For similar accounts of literary theory that involve the hermeneutical model, see Eagleton, *supra* note 11, at 47-78; Robert Con Davis, *Introduction: The Study of Criticism at the Present Time*, *in* CONTEMPORARY LITERARY CRITICISM 1, 4-5 (1986); K. M. Newton, *Introduction*, *in* TWENTIETH-CENTURY LITERARY THEORY 11, 14 (1988). According to the American literary critic M.H. Abrams, literary theories in the nineteenth and twentieth centuries focused on the relationship between the text and the different players in the literary field – the author, the audience, the text itself and the universe, following the arch-category of aesthetics and the relationship between any artistic product and those players. *See* M. H. ABRAMS, THE MIRROR AND THE LAMP: ROMANTIC THEORY AND THE CRITICAL TRADITION 3-7 (1953). Defining literary theory is a complex task, due to the difficulty in defining literature and the difficulty in identifying a separate methodology used in these "theories." Eagleton, for example, argued that literary theory is not an independent field of knowledge. *See* EAGLETON, *supra* note 11, at 1-14.

13. *See, e.g.*, FROW, *supra* note 5, at 1-2; DAVID FISHELOV, METAPHORS OF GENRE 8-16 (1993); TZVETAN TODOROV, GENRES IN DISCOURSE 17-20 (Catherine Porter trans., 1990) (1978). Culler differentiated the hermeneutical model of literary theory from a different model that was abandoned (according to him), the model of poetics. Poetics, according to Culler, is not about the meaning of specific texts and the way they should be understood, but rather about the tools enabling the making of meaning and the texts themselves. Poetics is based on linguistic approaches and the philosophy of language, and, in this sense, it is the basis for the genre theories of the twentieth century. *See* CULLER, *supra* note 12, at 61-62.

concerned with any type of text, even non-literary social-communicative actions such as speech.[14]

While the relationship between literary theories and copyright law has already been studied,[15] there has been little discussion concerning the relationship between genre theories and copyright law.[16] Due to the overlap between genre theories, literary theories, and other similar fields of knowledge, this article draws from discourse in other fields to explain differing approaches to genre.[17]

II. THE DEVELOPMENT OF THE DETECTIVE STORY: A CASE STUDY

The development of the detective story illustrates the theoretical discussion on genre and the common building blocks' significance for creativity.[18] First, the detective story is a relatively recent genre whose

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14. *See* BAWARSHI & REIFF, *supra* note 6; DUFF, *supra* note 6.

15. One example is the important study by Woodmansee and Jaszi in which they tested whether copyright law is significantly affected by literary theory's Romantic author approach from the eighteenth century, which was a short episode in comparison to the documented history of creativity in the past centuries. In the past, the creative process was conceived and was in practice a social activity that was not attributed to any one individual. *See* THE CONSTRUCTION OF AUTHORSHIP (Martha Woodmansee & Peter Jaszi eds., 1994); MARTHA WOODMANSEE, On *the Author Effect*, *in* THE CONSTRUCTION OF AUTHORSHIP 1, 15 (Martha Woodmansee & Peter Jaszi eds., 1994); Martha Woodmansee, *The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the "Author"*, 17 EIGHTEENTH-CENTURY STUD. 425 (1984); PETER JASZI, *On the Author Effect: Contemporary Copyright and Collective Creativity*, *in* THE CONSTRUCTION OF AUTHORSHIP 29 (Martha Woodmansee & Peter Jaszi eds., 1994).

16. *See* Michal Shur-Ofry, *The (Copyright) Law of Genre: A Network Perspective on Copyright Protection of Cultural Genres*, 2 FLA. ENT. L. REV. 60 (2008) (presenting approaches to genre that are outside the scope of this article). For a discussion on genre in the wider context of intellectual property law and patent law, see Dan L. Burk & Jessica Reyman, *Patents as Genre: A Prospectus*, 26 L. & LITERATURE 163 (2014).

17. Two examples of such overlap are genre and literary theories' use of principles from hermeneutics and linguistics. Many approaches to genre, due to their focus on the sets of rules that apply to texts, were based on important developments in linguistics and the philosophy of language. One of linguistics' greatest influences on genre theories is the writing of Ferdinand de Saussure and his distinction between *langue* – the system of grammatical rules applying to language – and *parole* – specific utterances that use *langue*, such as an individual's choice of words in conversation. *See* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 7-15 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1959). De Saussure's approach was also the impetus behind different approaches to literary studies, including Structuralism. For elaboration on the contribution of de Saussure's research to literary theories see Newton, *supra* note 12, at 118-19; EAGLETON, *supra* note 11, at 84-88; Davis, *supra* note 12, at 295-98. As far as hermeneutics is concerned, the overlap between genre theories and literary theories is especially evident in approaches to genre that recognize the relationship between sets of rules that apply to texts, the audience, and how the audience understands texts. Similarly, some literary approaches argue that the reader is the source of meaning in literary texts. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 306 (2d ed., Joel Weinsheimer & Donald G. Marshall trans., 2004). For a discussion of Gadamer's influence on reception theory and literary theories, see EAGLETON, *supra* note 11 at 57-78; Newton, *supra* note 12, at 219-20.

18. I am thankful to Dror Mishani for a fascinating discussion about the development of

development is well-documented since it first appeared in the first half of the nineteenth century. Second, the development of the detective story occurred long enough ago for us to understand its significance in the literary world. Third, although the detective story developed quite some time ago, it is still evolving and relevant today. Additionally, it is a known and popular genre and therefore convenient for discussion. In this section, I focus on the work of Edgar Alan Poe and Arthur Conan Doyle, the two authors who contributed most to the development of the common building blocks of the detective story as a genre. The books and short stories written by these authors show that the common building blocks developed in various levels of abstraction that are all important to creativity, an observation that has implications in the legal context.

Poe and Doyle's preeminent work is an excellent vehicle for presenting the common building blocks of the detective story. Poe is considered the inventor of the detective story; he was the first author to use a detective as a hero and thus "created" the fictional detective-hero character.[19] The detective character debuted as Chevalier C. Auguste Dupin, the main character in three short stories written by Poe: *The Murders in the Rue Morgue*, *The Mystery of Marie Roget*, and *The Purloined Letter*. With regard to Doyle, the influence of detective Sherlock Holmes, the main character in his books, cannot be overstated. As Murch wrote, Sherlock Holmes is among the very few characters in literature who obtained a separate and distinct identity that is known to thousands, many of whom have never read the works in which it appears.[20] In addition to each author's significant influence on the detective story genre, focusing on them is useful due to their chronological proximity—Doyle was the first significant writer in the detective genre after Poe.[21] Poe's first detective story, *The Murders in*

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the detective story and for references to the common building blocks in the writing of Edgar Alan Poe and Arthur Conan Doyle. Mishani motivated me to study the detective story.

19. A. E. MURCH, THE DEVELOPMENT OF THE DETECTIVE NOVEL 67 (1958). Murch explained that the detective story developed from English crime fiction in the seventeenth and eighteenth centuries in which many plots revolved around various types of criminal activity. *See id.* at 18-35. However, the detective character's first appearance in crime fiction is attributed to Poe.

20. *Id.* at 167. Similarly, Howard Haycraft wrote in 1941 that Sherlock Holmes is the most beloved and renowned detective character in the world. *See* HOWARD HAYCRAFT, MURDER FOR PLEASURE: THE LIFE AND TIMES OF THE DETECTIVE STORY 60-61 (1941). This notion is still true today, over seventy years later and over 120 years after the publication where Holmes first appeared.

21. Of course, Doyle was not the detective genre's first author after Poe. Police and crime fiction in England and France at the time included detective stories prior to Doyle. *See* MURCH, *supra* note 19, at 84-151. However, besides the French author Emile Gaboriau, who influenced Doyle and focused on the detective character Lecoq, Doyle was the most significant author after

the Rue Morgue, was published in 1841 and Doyle's first book, *A Study in Scarlet*, which introduced Holmes, was published in 1887.

As mentioned above, comparing Poe and Doyle's detective stories reveals various levels of abstraction of the common building blocks of the detective genre. The highest level of abstraction is the common focus on the detective as the central hero of the story. Poe's stories, which revolved around detective Dupin, were the first plots that focused exclusively on a detective's endeavors. Similarly, Doyle's plots focused exclusively on the character Sherlock Holmes and his sleuthing. Importantly, when Poe and Doyle published their novels, they were (almost) the only stories with a detective starring as the main character and reappearing in a series of novels.

A lower level of abstraction, but still a rather high one, is the addition of a sidekick—a character who works alongside the detective—that emphasizes the detective's keen investigative skills and helps explain the detective's reasoning to the reader.[22] In Poe's novels, Dupin has a nameless companion who narrates the story. Although Poe's narrator is attentive to Dupin, he possesses only a limited understanding of each clue's significance; thus, he is constantly surprised by Dupin's discoveries. Consequently, Dupin must explain how each clue fits together, which glorifies the detective's character and underscores the detective's thought-process for the reader.[23] The intellectual gap between the narrator and Dupin is best illustrated when Dupin explains that "[t]he necessary knowledge is of what to observe." Doyle's Holmes also has an eternal companion, but he is more well-known and developed than Dupin's companion—Dr. Watson. The more developed character of Watson also emphasizes the uniqueness of Holmes. Watson is famous for always employing "common sense." Further, he is patient and encouraging and serves as a bridge between the detective-hero and the readers because, as Holmes said to him, "you see but you do not observe." Therefore, Watson needs every clue's implications explained to him.[24]

An even lower level of abstraction of common building blocks is in the personality traits of Poe and Doyle's detective-heroes. Poe's Dupin is described by the narrator as a "bi-part soul" whose personality is a combination of the imagination of a poet and the mind of a mathematician.[25] Holmes, on his part, is described by Watson as having

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Poe to use the detective character. *See id.* at 120-32.

22. VINCENT BURANELLI, EDGAR ALLAN POE 83 (1961).

23. *Id.* at 83-84.

24. MURCH, *supra* note 19, at 179; BURANELLI, *supra* note 22, at 83-84.

25. BURANELLI, *supra* note 22, at 84; George Grella, *Murder and Manners: The Formal*

a "dual nature" and a romantic personality possessed by the spirit of science.[26] Dupin is presented as a man living a humble life that does not require him to work regularly and as a loner who has no interest in sexuality. Likewise, Holmes is described as a person living a bohemian lifestyle alone with no interest in intimate relationships.[27] Dupin and Holmes are both heavy pipe smokers and have significant affection for darkness and taking long strolls through the city at night.[28] They both enjoy a preferred treatment from the local police. Dupin has a strong relationship with the French Sûreté, especially with the Prefect of Police, which he helps solve crimes.[29] Holmes is very close to the Scotland Yard and has a complicated relationship with Inspector Lestrade.[30] In both cases, the uniqueness of the detectives is highlighted by their success at solving mysteries that baffled official investigation agencies. A last similar personality trait, and maybe the most important one, is the tendency of both Dupin and Holmes to use logical deduction as a tool for mystery-solving. Both detectives express that they observe every detail and then eliminate possible suspects until they solve the mystery.[31]

The lowest level of abstraction of the common building blocks in Poe and Doyle's novels is the explicit and implicit intertextuality of the stories' contents. One example of the use of similar word choice for maintaining one framework of meaning is found in Doyle's use of the terms "observation" and "deduction," which were also chosen by Poe to describe Dupin's thought process. A more lucid example is Poe's explicit reference to Dupin in Doyle's *A Study in Scarlet*. After Holmes arrives at an important conclusion, Watson turns to him and says: "You remind me of Edgar Allen Poe's Dupin. I had no idea such individuals existed outside of stories." Holmes replies: "in my opinion, Dupin was a very inferior fellow. That trick of his of breaking in on his friends'

Detective Novel, *in* 4 NOVEL: A FORUM ON FICTION 30, 35 (1970). Dupin, for example, is an amateur poet and Holmes is an amateur violinist. *See* respectively BURANELLI, *supra* note 22, at 83 and Grella, *supra* note 25, at 35.

26. MURCH, *supra* note 19, at 178; Grella, *supra* note 25, at 35.

27. MURCH, *supra* note 19, at 178; BURANELLI, *supra* note 22, at 83; Grella, *supra* note 25, at 35.

28. MURCH, *supra* note 19, at 178; BURANELLI, *supra* note 22, at 83.

29. MURCH, *supra* note 19, at 71-74; BURANELLI, *supra* note 22, at 84.

30. BURANELLI, *supra* note 22, at 84.

31. Dupin explains to the narrator in *The Murders at the Rue Morgue* how the "analyst" works: "[T]he analyst . . . makes, in silence, a host of observations and inferences . . . . The necessary knowledge is that of what to observe. Our player confines himself not at all; nor, because the game is the object, does he reject deductions from things external to the game." Similarly, Holmes states to Watson in *A Study in Scarlet* that "I have a turn both for observation and for deduction" and that "[t]hose rules of deduction laid down in that article which aroused your scorn, are invaluable to me in practical work. Observation with me is second nature."

thoughts with an apropos remark after a quarter of an hour's silence is really very showy and superficial. He had some analytical genius, no doubt; but he was by no means such a phenomenon as Poe appeared to imagine." The explicit reference to Dupin and his thinking method (that is also characteristic of Holmes himself) is a significant use of common building blocks to convey the meaning to the reader.[32]

But the most significant use of explicit expression as a common building block is found in one scene shared by Poe and Doyle that subsequently served as a basis for similar scenes in modern detective literature. The first scene takes place in Poe's *The Murders at the Rue Morgue*. Two women, mother and daughter, are brutally murdered in their fourth-floor apartment. The mother's body was thrown out the window and the daughter's body was shoved into a narrow chimney. Inexplicably, both the apartment door and windows were locked from the inside. Dupin reasoned that the murderer had to climb into the apartment through the window in the outer wall of the building and then close the window from the outside when he fled the scene. Dupin also deduced that the murderer was an orangutan that was brought to the scene by a French sailor who purchased him in Borneo Island, located in Southeast Asia, after he was out from quarantine. In Doyle's *The Sign of Four*, the following scene is described. A man was murdered in a third-floor apartment, and the murder scene was found with all the doors and windows locked from the inside. Because the apartment's chimney was too narrow to allow entry, Holmes deduced that the murderer climbed through the roof window by climbing up the building's side and that the murderer closed the window when he fled the scene. The murderer, according to Holmes, was an Aboriginal man described as a "little black man . . . with a great misshapen head" and "a little blood-thirsty imp" who was escorted to the scene by a former British soldier who escaped from prison in the Andaman Islands in South Asia.[33]

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32. In this case the intertextuality is two-fold. In addition to the express reference to Dupin and Poe's novels, Doyle actually refers to one of Poe's strategies for conveying meaning in *The Murders at the Rue Morgue*. There, Dupin turns to the narrator to explain the necessary traits of a good detective and says: "Vidocq, for example, was a good guesser, and a persevering man. But, without educated thought, he erred continually by the very intensity of his investigations. He impaired his vision by holding the object too close. He might see, perhaps, one or two points with unusual clearness, but in so doing he, necessarily, lost sight of the matter as a whole." This is a reference to the story of Eugene Francois Vidocq who was a French criminal in the first half of the nineteenth century and later became a criminologist and private detective and even cooperated with the crime detection unit of the French Sûreté. Dupin's characters were based to a certain extent on the actions of Vidocq.

33. For a discussion on the comparison, see Stephen Bertman, *Kindred Crimes: Poe's "The Murders in the Rue Morgue" and Doyle's "The Sign of Four,"* 15 EDGAR ALLAN POE REV. 205,

This comparison between the works of Poe and Doyle, emphasizing the common building blocks for both and the detective genre, will serve as a reoccurring example in this article through which I will articulate the differences between the various approaches to genre theory and the importance of common building blocks in the creative world as well as their possible implications for the law.

III. THE BASIS FOR THE IDEA OF GENRE: STATIC APPROACHES OF CLASSIFICATION AND PRESCRIPTION

In this part, I examine the development of genre theories and the different meanings given to the term while describing pre-modern approaches that were the basis for the idea of genre. These approaches are presented together in one part for two reasons. First, these approaches are pre-modern. They begin with the writings of Plato and Aristotle, continue through scholars from the Renaissance and Neoclassical eras, and end with the Romantic and Post-romantic eras. The second characteristic common to these approaches is that in contrast to the dynamic approaches to genre, they recognize genre as a phenomenon that serves one specific purpose. Accordingly, I refer to these approaches as static because they view genre as a finite and predefined system that is not open for change and development. To understand the conceptualization of genre by each of these approaches, it is important to clarify what I do *not* mean when I use the term genre, while showing some significant characteristics of genre that have accompanied it from the beginning of theoretical thinking about genre. The discussion in this section will be thematic despite the fact that there is significant correlation between the different approaches to genre and the time period during which they were prominent.

A. Genre as a Logical Apriori Division of Art

Gérard Genette, one of the leading genre scholars of the twentieth century, demonstrated in his book *The Architext: An Introduction* how modern scholars on genre systematically refer to the writings of Aristotle and Plato as the origin of generic thinking and genre theories.[34] Genette referred to the writing of Warren, Todorov, Bakhin,

206-07 (2014). It is important to note that this example of the use of common building blocks is one of many in Poe and Doyle's writing. Moreover, these similarities were not only recognized retrospectively. The first to note the many common building blocks in the various stories of the two was Simon Sidney Teiser, who already in 1901 referred in his article *Is Doyle a Plagiarist?* to the many similarities and emphasized that it exists in actual scenes and not only in general plot lines. For elaboration, see Simon Sidney Teiser, *Is Doyle a Plagiarist?*, 44 U. VA. MAGAZINE 468 (1901).

34. GÉRARD GENETTE, THE ARCHITEXT: AN INTRODUCTION 3-6 (Jane E. Lewin trans.,

and Batteux, which I will elaborate on later in the part that discusses the dynamic approaches to genre. Similarly, Heather Dubrow suggested in her important book *Genre* that the development of theoretical scholarship on genre along the years is vastly based upon Aristotle, to such extent that it seems like a "series of footnotes" refer to him.[35] Therefore, I begin by describing the approaches of these two important philosophers and the generic division of literary texts, which forms the basis for the discussion in the rest of this section.

The first expression of theoretical thinking on genre appears in the third book of Plato's *Politeia*. In a dialog between Socrates and Adeimantus, Socrates tells his student that poetry can be divided into three possible categories.[36] Frow recognized that this statement marked the beginning of the theoretical thinking on genre because Socrates' goal was to map three possible ways to convey poetry or literature: direct narration (storytelling in the words of the poet), narration by imitation (storytelling by characters) or a combination of both. Genette referred to the division proposed by Socrates as the "Socratic triad" and emphasized that it was the basis for what would later be called "genre."[37]

Further elaboration of the Socratic triad is found in the *Poetics of Aristotle*.[38] As Dubrow mentioned, three notions about poetics are recognizable in Aristotle's text. First, literary works differ in the medium they use to imitate reality (through rhythm, melody, or a combination of both). Second, he distinguished between works based on the subjects of imitation, meaning whether the characters are in a better or worse condition in comparison to reality (when comedy fits the latter and tragedy fits the first). Third, and most importantly for our purposes, Aristotle divided works according to their manner of imitation. This is a reflection of the Socratic triad because Aristotle made a distinction between direct narration (using personal pronouns or a poetic character) and realistic representation of characters.[39]

Dubrow explained that Aristotle's framework was based on the assumption that each literary subject demands a particular form and style. Therefore, every literary work must fit one perfect model, and

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35. HEATHER DUBROW, GENRE 47 (1982). For a similar observation that recognizes the importance of Aristotle's writing on the theoretical thinking of genre, see RICK ALTMAN, FILM/GENRE 20 (1999).

36. PLATO, THE REPUBLIC: BOOKS I-V 231 (Paul Shorey trans., 1999).

37. GENETTE, *supra* note, at 8-9. Genette also stated that the Socratic division refers only to narrated poetry and therefore does not apply lyric poetry at all. *Id.*

38. ARISTOTLE, POETICS 15-16, 17-18 (Gerald F. Else trans., 1990).

39. DUBROW, *supra* note 35, at 47. *See also* FROW, *supra* note 5, at 56.

the author must create with this model in mind.[40] Genette, on his part, explained why the attempt to use Aristotle's division of literary kinds as a superior a priori one is problematic. Genette argued that what Aristotle and Socrates defined as "form" is actually more similar to what we understand today as "mode" or different modes of enunciation.[41] This analysis led Genette to conclude that the different modes suggested by Aristotle cannot be considered superior or a priori forms of poetry because they could be included in categories of a higher level of abstraction or more specific categories of form.[42] According to Genette, such misunderstanding of the Aristotelian division was the basis for the historical distortion of genre's definition, as will be elaborated below.

B. Genre as Prescription

During the Classical era, in the centuries following the work of Plato and Aristotle, the Socratic triad has prevailed; genres are categorized by their mode of narration, and works must conform a particular genre's model to be regarded as perfect.[43] However, in contrast to Plato and Aristotle's frameworks, which concentrated on theoretical questions about the nature of art, scholars that referred to genre as prescription dealt mainly with codification of different literary works. In this regard, Dubrow mentioned the writing of Horatius in *Ars Poetica* through which many English scholars came to learn about the philosophy of Aristotle. Dubrow explained that Horatius concentrated mainly on defining literary prescriptions that would match the theoretical approaches to the nature of poetry.[44] A similar codification project was held by Quintilian and Diomedes.[45] Thus, it is clear that over a millennium after the writings of Plato and Aristotle, the discussion on genre has become prescriptive and classificatory in its nature. In this sense, the theoretical division to modes of representation has turned into a tool that allows one to decide whether a certain text is poetry.[46]

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40. DUBROW, *supra* note 35, at 48. According to her, this was the starting point of Aristotle's followers and critiques along the years.

41. GENETTE, *supra* note 34, at 10-12.

42. *Id.* at 12-21. Genette discussed in length why, even according to Aristotle himself, the categorical division which is a result of intersection between the two modes and the two subject (dramatic, narrative, superior and inferior) that leads to the definition of tragedy (dramatic-superior), comedy (dramatic-inferior), parody (narrative-inferior) and epic (narrative-superior), is not an exclusive and superior one that constitutes the generic basis of poetry.

43. GENETTE, *supra* note 34, at 23-27.

44. DUBROW, *supra* note 35, at 50.

45. GENETTE, *supra* note 34, at 24-27. *See also* FROW, *supra* note 5, at 58.

46. GENETTE, *supra* note 34, at 27. Dubrow also mentioned that the Classical era was

In the following era, the Renaissance, the concentration on genre became more intense and mainly followed the character of the Classical era.[47] In sum, the Classical and Renaissance eras concentrated on classifying and codifying kinds of works in accordance with the theoretical approaches that form the basis of genre; whereas the Neoclassical era was a clear example of a purely prescriptive approach to genre.[48] Dubrow described the Neoclassical era as concerning repetition and refinement of the generic rules of the Classical era and the examination of works in this light. She argued that the Neoclassicists were seldom interested in the theoretical basis for genre and its origins and took the Classical distinctions for granted as part of their respect for the entire era.[49]

The prescriptive understanding of genre is applicable in two ways. First, it can explain to the author the rules he should adhere to if he seeks to create a work of art within a certain genre. Thus, for example, in the context of the detective story genre, the main character should be a detective; the detective should have a companion that emphasizes his special characteristics and ability to solve mysteries; and the detective should have unique personality traits, such as a bohemian lifestyle, strong analytic abilities, and a creative soul accompanied by the will to live a lonely life away from society. Second, a prescriptive understanding of genre could be applied retrospectively to examine whether a certain text is in fact a work of art in a specific genre. Thus, for example, we could say *A Study in Scarlet* is a detective story because it adheres to the above prescription.

C. Genre as a Superior Division of Modes of Nature

In the eighteenth century's Romantic era, the literature on genre revisited the Socratic triad as a unifying literary theory and concentrated on characterizing specific genres and classifying works.

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characterized by perceiving generic rules as guidelines for future creation. Nevertheless, she stated that in contrast to the common belief, different scholars in the Classical era were open to a certain diversion from the strict generic rules based on the understanding that imitating ancient models demands certain amendments dictated by the change of times.

47. Dubrow mentioned that the English literature in the medieval times was rarely engaged with genre and when it did it based significantly on Hellenistic writing and not on Plato and Aristotle. Nevertheless, Dubrow mentioned the writing of St. Bede that referred to the three modes of Aristotle and even gave particular examples for texts that fit each of them. For a full discussion of genre in the Renaissance era, see DUBROW, *supra* note 35, at 52-62.

48. ALASTIR FOWLER, KINDS OF LITERATURE 26 (1982) ("No one can dispute that much neoclassical genre criticism was crudely prescriptive"). *See also* FROW, *supra* note 5, at 58 (arguing that the Neoclassical era was characterized by the attempt to state the empirically-existing genres without interest in the theoretical basis that differentiates between them).

49. DUBROW, *supra* note 35, at 69-71.

Hegel, for example, discussed the three modes—epic, lyric, and dramatic—in depth.[50] The reference to the Socratic triad in terms of the relationship between the subjective and objective was at the center of other genre scholarship in the Romantic era.[51]

But Goethe's writing on the three modes is the most important for understanding genre as a superior division of modes of nature. He distinguished between two terms—poetic kinds (*dichtarten*) and forms of nature (*naturformen*). The poetic kinds are genres in the classificatory sense like the romance, the ballad, and the satire. In contrast, the three real forms of nature (*drei echte Naturformen*) that Goethe described—the epic (characterized by distant narration), the lyric (characterized by enthusiasm) and the dramatic (characterized by representation of human behavior)—were presented as superior types of genres that divide the world of literature to three sets of expressive potential and include all poetic kinds within them.[52]

Genette explained that Geothe's approach misconstrued the theoretical grounds of Plato and Aristotle's writings. He further argued that the Classical and Neoclassical eras revolved around the Socratic triad only out of respect for the past, and that a significant misconception occurred in the Romantic era when the major scholars considered the three modes as superior categories of genre, or "Archigenres," as he phrased it.[53]

This misconception of the Socratic triad was part of the general zeitgeist of the Romantic era that focused on the individual and the idiosyncratic.[54] It was the chief cause of approaches that seek to nullify the very concept of genre. These approaches were at the core of the approaches that seek to reject the idea of genre.

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50. 2 GEORG WILHELM FRIEDRICH HEGEL, AESTHETICS: LECTURES ON FINE ARTS 1038-45 (T. M. Knox trans., 1975). *See also* DUBROW, *supra* note 35, at 72; FROW, *supra* note 5, at 60.

51. Friedrich Schlegel, for example, considered the epic as subjective-objective, the dramatic as objective, and the lyric as subjective. He later considered the epic as objective, the lyric as subjective, and the dramatic as objective-subjective. *See* FRIEDRICH SCHLEGEL, LITERARY NOTEBOOKS 1797-1801, at 175, 204 (Hans Eichner ed., 1957). For further discussion, see GENETTE, *supra* note 34, at 38-39.

52. FROW, *supra* note 5, at 60; GENETTE, *supra* note 34, at 62-64.

53. GENETTE, *supra* note 34, at 62-64. Genette explained the term "archigeneres" as follows: "Archi— because each of them is supposed to overarch and include, ranked by degree of importance, a certain number of empirical genres . . . —genres, because . . . their defining criteria always involves a thematic element that eludes purely formal or linguistic description." *Id.* at 64-65.

54. *See* DUBROW, *supra* note 35, at 72.

D. The Rejection of Genre

One of the most critical statements of the approach rejecting the idea of genre is found in the writings of the eighteenth century German philosopher Friedrich Schlegel, according to which "all modern genres are either one or infinite. Every work has its own kind."[55] Bawarshi and Reiff described the genre nullification approach as one that seeks to reject the very existence of genre as the prescriptive force of texts. In fact, according to this approach, a text is better when the author detaches himself from precious generic conventions.[56] One example of this approach provided by Dubrow is Victor Hugo's critique of the Neoclassical reliance on rules in his 1826 preface to *Odes et Ballades*:

> On the subject of literary productions, one hears talk every day of the 'dignity' of such a genre, the 'appropriateness' of another . . . 'tragedy' forbids what the novel 'permits' . . . . The writer of this book has the bad fortune not to understand all that at all.[57]

Hugo suggested an alternative to the prescriptive focus on genre and argued that a poet needs one model alone: nature. Thus, according to Dubrow, Hugo has replaced nature as the origin of the rules of genre (in the Aristotelian a priori sense) with nature as an alternative to genre (in the prescriptive sense), meaning that the only relevant rules for the making of artistic literary works are the rules of nature, and whatever is natural "fits" the genre.[58]

Approaches that reject the concept of genre as a theoretical tool for defining literature were logically refined a century later by the Italian philosopher Benedetto Croce in *Aesthetics*. Croce posited that knowledge has two forms. One is intuitive; the imagination realizes it, and it is structured by knowledge of individual phenomena in the

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55. SCHLEGEL, *supra* note 51, at 116. This is my own translation. Originally: "Der Modernen Dichtarten sind nur Eine oder unendlich viele. Jedes Gedicht eine Gattung für sich." *See also* FROW, *supra* note 5, at 27. Bawarshi and Reiff attributed the approach that rejected the concept of genre to Shlegel. He further argued that the greatness of the Romantic poetry is that it is more than genre; it is in effect the art of poetry itself. *See* BAWARSHI & REIFF, *supra* note 6, at 20.

56. BAWARSHI & REIFF, *supra* note 6, at 20.

57. VICTOR HUGO, ODES ET BALLADES 22 (1947). The English translation appears in DUBROW, *supra* note 35, at 74. It is interesting to note that Hugo founded the Association Littéraire et Artistique Internationale (ALAI) in 1878, which led to the signing of the Berne Convention on the Protection of Literary and Artistic Works on September 9th 1886. *See* GRAHAM DUTTFIELD & UMA SUTHERSANEN, GLOBAL INTELLECTUAL PROPERTY LAW 26 (2008); Orrin G. Hatch, *Better Late than Never: Implementation of the 1886 Berne Convention*, 22 CORNELL INT'L L.J. 171, 173 (1989); ALAI, *General Information – History* (Jul. 6, 2016) http://bit.do/ALAIHistory.

58. DUBROW, *supra* note 35, at 74.

world. The other is logical; the intellect realizes it by focusing on universal phenomena.[59] Croce criticized attempts to conceive a theory of artistic and literary phenomena because theoretical thinking breaks the distinction between the aesthetic phase (when work is created) and the logical phase (when work is perceived theoretically).[60]

The last commentator I address in this subsection is the French philosopher Jacques Derrida, who wrote in the second half of the twentieth century. The writing of Derrida is to some extent the borderline between the approach that rejects the idea of genre altogether and the dynamic approaches to genre. In his important article, *The Law of Genre*, Derrida expressed his stance on the Romantic approach to genre, and, to a certain extent, he continues the approach of rejecting the idea of genre and considers it a constraint of the creation of texts.[61] But Derrida did not stop there. He continued with a thought exercise that invites the reader to examine whether it is possible to identify a work of authorship without it carrying a generic character that distinguishes it from other works.[62] His answer was that although there is no genereless text, a text never belongs to a genre.[63]This approach to genre puts Derrida in a crossroads: it holds that genres exist, but only in the sense that texts participate in genre, meaning that texts are examined in light of existing genres but can form new genres. He posited that genre is an important and necessary component in the creative world, and in this sense his writing was the starting shot for modern pluralistic approaches to genre.[64]

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59. BENEDETTO CROCE, AESTHETIC AS SCIENCE OF EXPRESSION AND GENERAL LINGUISTIC 1 (Douglas Ainslie trans., 1953). Croce defined these two forms of knowledge as aesthetic (intuitive) and intellectual (logic). Moreover, he argued that the latter form is always subordinated to the former because it has to do with "things" in the world that are per se intuitive. *Id.* at 22.

60. *Id.* at 35-36. *See also* DUBROW, *supra* note 35, at 83-84. Croce's writing influenced scholars in the twentieth century, and especially that of Maurice Blanchot who stated that "a book no longer belongs to a genre, every book arises only from literature." MAURICE BLANCHOT, LA LIVRE A VENIRE 293 (1959). The English translation appears in FROW, *supra* note 5, at 27. *See also* BAWARSHI & REIFF, *supra* note 6, at 21. A similar approach was suggested by Philippe Lacoue-Labarthe & Jean-Luc Nancy that reviewed the literary theory of the German Romantic era and showed that the approach to literature in that time was of "Equivocity" in the sense that every work belongs to all kinds or genres at the same time in a way that brings the perception of genre to collapse. This phenomenon was described by them as the "Literary Absolute." *See* PHILIPPE LACOUE-LABARTHE & JEAN-LUC NANCY, THE LITERARY ABSOLUTE: THE THEORY OF LITERATURE IN GERMAN ROMANTICISM 121-27 (Philip Barnard & Cheryl Lester trans., 1988).

61. Jacques Derrida, *The Law of Genre*, 7 CRIT. INQ. 55, 56 (1980). Frow suggested Derrida accepted the premise that genre is a prescriptive and classificatory tool that cannot go hand in hand with the uniqueness of individual texts. *See* FROW, *supra* note 5, at 26.

62. Derrida, *supra* note 61, at 64.

63. *Id.* at 65.

64. Bawarshi and Reiff argued that although Derrida saw genre as a constraint on texts, he

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The static approaches to genres discussed in this part, which were the basis for the idea of genre, explain what I do *not* mean when I use the term genre in the rest of this article. Genre is not just a classificatory tool for prescriptive purposes, as it was considered under the prescriptive approaches to genre. Additionally, I do not refer to genre in the sense of an exclusive a priori division to categories that form the basis of artistic text, as other approaches suggested. Similarly, the term genre does not refer to any other a priori division, such as the Socratic triad. In the next part, I examine dynamic approaches to genre, which provide a better understanding of the term and genre's effect on players in the creative field.

IV. DYNAMIC APPROACHES TO GENRE

In this part, I examine dynamic approaches to genre proposed in the twentieth century and discuss their different characteristics, which allows me to suggest general notions about the effect genre has on the creative world. I refer to the approaches presented here as "dynamic" because, in contrast to the static approaches discussed above, they do not view genre as a predefined and constant phenomenon. As such, they provide a viable alternative to static approaches, which cannot explain how genres change and develop over time.[65] The purpose of presenting different approaches is not to canvass different ways of analyzing genre. It is also not an exhaustive description of all the modern dynamic approaches to genre or even the most prominent ones, and it is not to suggest that any of the approaches discussed below is more important than the other. Instead, the purpose of this part is highly instrumental. It shows that throughout the twentieth century and specifically in its second half, scholars developed dynamic approaches, which explain how genres evolve and affect the field of creativity and the interrelations between its different players. The discussion of the various approaches in this part is organized by the underlying idea of each of approach, although there is often chronological proximity between the commentaries related to each approach. First, I discuss linguistic approaches to genre that developed from the twentieth century philosophy of language. Then, I discuss the institutional approach to genre, which imported sociological aspects into genre's

should be read with reference to Croce and Blanchot, and more precisely in contrast to them; they rejected genre altogether, while Derrida explicitly argued that texts cannot exist without genre. *See* BAWARSHI & REIFF, *supra* note 6, at 21.

65. FOWLER, *supra* note 48, at 24.

theoretical framework. Finally, I conclude with metaphorical approaches to genre, which explain the sets of rules that apply to texts by analogies to different systems known from other fields.

A. Linguistic Approaches to Genre

Because the discussion of genre theory focuses mainly on literary texts, the obvious link between genre and language led to the development of linguistics based generic approaches.

Canadian literary researcher Northrop Frye was the first to combine theories of linguistics and genre. In his important book, *The Anatomy of Criticism*, Frye proposed viewing literary criticism through the lens of science; like all sciences, literature is a closed system that can explain itself using internal logic.[66] One of the main characteristics of literature as a closed self-explanatory system, according to Frye, is the existence of genres and archtypes to which all literary texts could be attributed. The origin of such thought is de Saussure's research and his distinction between *langue* (the system of rules applying to language) and *parole* (a specific utterance of the language), which allowed him to explain language using *langue*.[67] To support the argument that literature is a closed system, Frye detached literature from any exterior aspect and specifically from historical context.[68] As far as genre theories are concerned, Frye's theory—which explains genre as a pre-given historically-independent system of rules that apply to literary texts—is not significantly different from the static approaches of the Classical, Neoclassical, and Romantic eras discussed above.[69] The dynamic aspect of linguistic approaches to genre was only apparent with the introduction of the historical aspect to the systematic understanding of genre.

One of the most prominent commentators that focused on the historical aspect of genre, aside from its linguistic aspect, is Bulgarian literature researcher Tzvetan Todorov, who was among the most important commentators in the structuralist approach to literary theory and one of the most important writers on genre. Todorov used terms

66. NORTHROP FRYE, ANATOMY OF CRITICISM 15-17 (1957).

67. For elaboration on the influence of de Saussure's research on formalistic approaches to literary theory, such as Russian formalism, new criticism, and structuralism. *See* EAGLETON, *supra* note 11, at 84-85.

68. *Id.* at 80.

69. This is why Bawarshi and Reiff defined Frye's theory as a Neoclassical analysis of genre. *See* BAWARSHI & REIFF, *supra* note 6, at 16. In the context of literary theory, however, Frye's approach was a significant innovation because it completely detached the author's role from the meaning of the text; it left the text itself as the subject of examination, thus diverting from the Romantic literary theory. *See* EAGLETON, *supra* note 11, at 80-81.

from the field of linguistics (semiotics in particular) to explain his approach to genre, which he suggested in the end of the 1970s. After discussing prior pre-modern and static definitions to genre (while implicitly criticizing Frye), Todorov proposed viewing genre in a more complex way that entails both the systemic non-historical aspects and the historical-empirical aspects of the phenomenon. Todorov defined genre as the "codification of discursive properties." Discursive properties, according to Todorov, are the semantic and syntactic aspects of text that characterize the linguistic aspect of genre.[70] Additionally, Todorov explained that society will eventually decide to code and empirically recognize discursive properties. This decision is historical in the sense that it depends on social institutions.[71]

The approach to genre as a social institution is discussed in further detail below. The linguistic approach to genre added a historical-social aspect to the linguistic-systemic aspect from within the field of linguistics. This development is owed to Marie-Louise Pratt, who emphasized the importance of pragmatics in the study of literary texts, which improved the analysis of semantics and syntax by focusing on the social context of texts. Pratt viewed genre as a speech act,[72] the importance of which is not limited to its evident grammatical properties. Rather, speech's significance lies mainly in its context, namely the "intentions, attitudes, expectations of the participants, the relationship between participants, and generally, the unspoken rules and conventions that are understood to be in play when an utterance is made and received."[73] Other commentators later adopted this approach to genre.[74]

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70. TZVETAN TODOROV, GENRES IN DISCOURSE 16-18 (Catherine Porter trans., 1990). Bawarshi and Reiff explained that Todorov's approach is structuralist. They defined the structuralist approach to genre as a literary-historical one, in the sense that it understands genres as a historical context dependent cultural phenomenon and not as an a priori theoretical phenomenon, as it was viewed in the Classical era. *See* BAWARSHI & REIFF, *supra* note 6, at 14-19.

71. TODOROV, *supra* note 70, at 19.

72. A "speech act" is the linguistic term for an utterance that generates an action that changes reality, rather than merely describing reality. The source of this linguistic term is the British philosopher of the language John Austin, who was the first to define a speech act as an utterance that does reflect a statement of truth (positive or false) and constitutes at least part of an action in reality. *See* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 1-7 (F.O. Urmson & Marina Sbisa eds., 2d ed. 1962).

73. MARIE LOUSIE PRATT, TOWARD A SPEECH ACT THEORY OF LITERARY DISCOURSE 86 (1977).

74. For elaboration on the influence of the linguistic concept of speech act and its adoption by commentators on genre, see FISHELOV, *supra* note 13, at 119-126. *See also* Rick Altman, *A Semantic/Syntactic Approach to Film Genre*, 23 CINEMA J. 6, 12-13 (1984); Carolyn R. Miller, *Genre as a Social Action*, 70 Q. J. SPEECH 151, 155 (1984). Miller explained that genre does not classify the semantics or syntax of texts, it classifies their pragmatics (i.e. the rhetorical action the

The linguistic approach to genre could be demonstrated using the development of the detective story as follows. When the rule applying to each of Poe and Doyle's stories is examined, one should look at both the formal characters in each text and their social context. For example, Doyle's text includes a detective character that has a specific relationship with his companion, Dr. Watson, who explains to the reader that a detective named Sherlock exists. More importantly, Dr. Watson adds another layer to Doyle's novels, which follows from the books' social context, by alluding to a similar relationship in a different detective story. In this sense, the social context of the text influences how the text functions and the sets of rules that apply to it.

B. Institutional Approaches to Genre

Another branch of the dynamic approaches to genre is defined as the "social institution" approach to genre. The institutional approach to genre was developed by Rene Weleck and Austin Warren, who explained that genre is an institution in the sense that a church, a university, or a state are institutions. [75] This means that when one tries to understand the "church" as a social institution, one should be interested in more than the characteristics of the church's form and structure and its inner logic; rather, one should also study its influence on the different social players that act in relation to it. Likewise, genre is not just its inner set of rules, rather it is also the way it affects the different players in the field of the genre.

In addition to identifying the link between genre and linguistics, Todorov explained that genre is a social institution. According to Todorov, as mentioned above, genre is the codification of discursive properties. The discursive properties are the inner systems of genre's rules. Codification, according to Todorov, is society's choice to recognize certain discursive properties as important, a choice that is made within social institutions.[76] Todorov demonstrated this in the following way. The understanding of genre could be based on inner rules that apply to texts much like the static approaches to genre in the pre-modern eras and even Frye's formalist approach. Under this understanding, genre can only explain theoretical possibilities of discourse and cannot explain specific empirical instances of

discourse performs). *Id.* at 152.

75. RENE WELLECK & AUSTIN WARREN, THEORY OF LITERATURE 226 (3d ed. 1963).

76. TODOROV, *supra* note 70, at 19. In fact, Todorov created a hierarchy that involves the relationship between genre, speech acts, and institution. According to him, the institutional context of genre explains which speech acts are accepted by communities as part of genre, in the institutional sense.

discourse.[77] Another alternative is understanding genre as a social-historical phenomenon. Under this understanding, genre refers to groups of texts that are conceived by society (or social institutions) as genres, and the sets of rules that characterize them are examined in relation to these existing groups of texts.[78]

The second alternative suggested by Todorov characterizes genre as a social institution and focuses on both the empirical-historical aspect of genre and its inner sets of rules. In this sense, according to Todorov, genre explains how authors create texts according to an existing genre (and its typical sets of rules) and the audience reads texts in relation to genre.[79] This approach characterizes the writing of Fishelov and Frow on genre, which could be categorized as an institutional approach. Fishelov, who focused on the literary aspects of genre, theorized that genre combines typical and representative texts, which are accompanied by a set of constitutive rules that apply to different levels of literary text, different authors, and, usually, more than one literary era.[80] In a somewhat similar way, Frow detailed several characteristics of generic texts such as formal properties, thematic structure, rhetoric structure, and physical environment and concluded that genre is a set of conventional and well-organized constraints on the creation and understanding of meaning.[81] Frow also explained that genre is not a character of the text itself or of the reader-interpreter; rather, it is a product of the social relationship between authors, texts, and readers.[82] This last definition explains genre as a social institution well. Bawarshi and Reiff, who described similar approaches as "social" approaches to genre, explained that the institutional approach concentrates on the question of how genres organize, classify, normalize, and enable the creation of texts and other non-literary social actions. According to this approach, genre is a social

77. *Id.* at 18.

78. *Id.* This is the "modern" characteristic of genre, according to Welleck and Warren, as opposed to the pre-modern approaches of genre. According to them, "Modern genre theory is, clearly, descriptive. It doesn't limit the number of possible kinds and doesn't prescribe rules to authors. It supposes that traditional kinds may be 'mixed' and produce a new kind (like tragicomedy). It sees that genres can be built up on the basis of inclusiveness or 'richness' as well as that of 'purity' (genre by accretion as well as by reduction). Instead of emphasizing the distinction between kind and kind, it is interested – after the Romantic emphasis on the uniqueness of each 'original genius' and each work of art – in finding the common denominator of a kind, its shared literary devices and literary purpose." WELLECK & WARREN, *supra* note 75, at 245.

79. TODOROV, *supra* note 70, at 18-19.

80. FISHELOV, *supra* note 74, at 8.

81. FROW, *supra* note 5, at 6-10.

82. *Id.* at 102.

institution, which, along with other institutions, shapes the way we identify, appreciate, and experience texts.[83]

This is demonstrated by the development of the detective story: the mere fact that society recognizes Poe and Doyle's texts as part of the detective genre justifies examination of the sets of rules that apply to it (as a social institution), in order to understand how they affect the various players acting within it.

The essence of the institutional approach to genre is, therefore, the understanding that the sets of rules and conventions governing texts affect players in the creative field and that these players influence the rules and conventions. Thus, every generation of authors creates the basis for participation in the field.[84] Seen in this light, the institutional approach to genre and the linguistic approach to genre are two sides of the same coin. The starting point of the linguistic approach to genre is the formal inner sets of rules that apply to texts and their analysis. The entrance of pragmatics into linguistics added the social aspect to this analysis, which takes into account the way society uses these sets of rules.[85] The starting point of the institutional approach to genre is the opposite; it focuses first on the social aspect of genre and on the fact that there is social value in grouping texts together. Additionally, the institutional approach to genre is interested in examining the sets of rules that shape these groups of texts and the way they affect society.

The difference between the static approaches to genre and the dynamic approaches that consider the social aspect of genre is demonstrated by the development of the detective story. Under the static approaches to genre, one should examine each of Poe and Doyle's stories separately with a predefined set of rules and the hierarchy of the different possible methods of presentation. Under the Socratic triad, for example, we could have reached the conclusion that both stories are drama because they aim at the representation of real relationships between characters. Under the same approach, we could also reach the opposite conclusion: Poe's story is a tragedy while

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83. BAWARSHI & REIFF, *supra* note 6, at 23-28.

84. In this context, Frederic Jameson's definition fits well. He explained, "Genres are essentially literary institutions, or social contracts between a writer and a specific public, whose function is to specify the proper use of a particular cultural artifact." FREDERIC JAMESON, THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT 103, 106 (1981).

85. As part of his discussion on the institutional approach to genre, Fishelov explained that the meaning of such approach is that the phenomena analyzed through this framework should be understood not as mere facts but rather as institutional facts that depend on the cultural meaning derived from a set of institutional rules that are shared by the members of a community that revolves around an institution. *See* FISHELOV, *supra* note 13, at 87. Fishelov showed that this approach was demonstrated by Culler, who argued that "actions are meaningful only with respect to a set of institutional conventions." JONATHAN CULLER, STRUCTURALIST POETICS 5 (1975).

Doyle's is a comedy. In any case, the similarities between the stories are not important for genre analysis under these approaches.

Under the dynamic approaches to genre, which consider the importance of the social aspect of texts, the analysis is completely different. According to Todorov's demonstration, for example, because society places Poe and Doyle's stories in the same category, it is proper to examine the set of rules that govern and unite them. Additionally, in contrast to the analysis under the static approaches to genre that examines every text alone, under the dynamic approaches, we would consider parts of Doyle's later text in light of Poe's earlier text because the social-historical context could be important for the understanding of the rules characterizing the genre and the way to use them. Thus, the similarities between the stories—such as the characters of the detective and his companion, some repeating scenes, and the personality traits of the detective—would receive special consideration under dynamic social approaches to genre.

C. Metaphorical Approaches to Genre

As mentioned above, the dynamic approaches to genre reject the notion that genre is a static ahistorical phenomenon. Due to the difficulty in finding a positive and exclusive definition of genre, some approaches use analogy or metaphor to understand genre. Fishelov reviewed four metaphors for understanding genre, but I will concentrate on only two of them in this section: genres as *biological species* and genre as *family resemblance*.[86]

Under the development of the dynamic approaches to genre, which sought definitions that understand how genres form and develop, the French literary researcher Ferdinand Brunetière proposed examining the development of genre by analogizing genre to Darwin's evolutionary biology of species.[87] The analogy between genres and biological species was severely criticized by genre theoreticians at first, mainly due to three basic problems with the comparison. First, while biological genres usually do not produce hybrids, genres often merge,

86. FISHELOV, *supra* note 74, at 51. The other two analogies that Fishelov mentioned are genres as social institutions and genres as speech acts. Fishelov explained that these two approaches are better understood as analogies to genre, rather than as identical to genre**.** Because I elaborated on these two approaches earlier, I will not mention them in the analogical sense in this section.

87. *See* FERDINAND BRUNETIÈRE, L'EVOLUTION DES GENRES DANS L'HISTOIRE DE LA LITTÉRATURE: LEÇONS PROFESSÉES À L'ECOLE NORMALE SUPÉRIEURE 9-31 (1914). Brunetière referred to five significant issues in the development of genres: the existence of genres; the differences between genres; the fixation (or life term) of genres, changes in genres; and the transformation of genres. *Id*. at 11-13.

creating a new mixed genre. Second, in contrast to biological species, it is possible for one individual to change the entire definition of the genre. Third, genres are different from biological species in that they do not necessarily have an evident circle of life.[88]

In light of this criticism, Fishelov offered a renewed approach to genres as biological species that explains the link between the phenomena in a metaphorical way and not through identity or direct analogy. Fishelov explained, for example, that although genres tend to evolve and change in a relatively short period of time compared to biological species, one individual can pass new properties to its offspring in a way that eventually changes the entire species.[89] This observation allows analogy to biological species without leading to a static perception of generic development. Fishelov based this thought on the Darwinian approach to evolution the implications of which will be discussed below. Aside from that, it is important to point out that in contrast to the dynamic approaches to genre discussed above, the metaphor to biological species does not explain the inner structure of genres, the sets of rules that apply to text, or the influence of specific genres on the field of creativity.[90]

I will explore the metaphor of biological species using the development of the detective story. Poe's detective story could be conceived of as an offspring of the crime fiction stories that existed in England and France in the relevant period; it shares common attributes with other texts in that genre, such as the existence of a crime in the heart of the plot. Aside from that, Poe's story includes a new trait that is not shared with the genre it supposedly belongs to: the detective as the main character of the story.[91] Doyle's detective story, which is in a sense a direct offspring of Poe's detective story, also includes a new trait and so do its own direct offspring. All of these offspring develop and strengthen the new trait (the centrality of the detective character), leading to the development of a new genre, the detective story.

The approach that proposes analogy between genre and family resemblance is a follow-up on the family resemblance approach to linguistics that was developed by Ludwig Wittgenstein. Wittgenstein observed that we sometimes categorize items based on their resemblance to each other, even though every member of the category

88. *See* FISHELOV, *supra* note 74, at 19-22 (providing examples).

89. *Id.* at 21.

90. Fishelov himself was aware of these limits. *Id.* at 19.

91. This trait is at a very high level of abstraction. It could also be demonstrated by traits of lower level of abstraction, like the personality traits of the detective or the way in which mysteries are solved in the story.

does not actually share a common trait.[92] He proposed that the best way to describe such a system is to compare it to family resemblance.[93] Wittgenstein's idea marked a turning point from the Classical view, according to which groups or classes must be organized by the common traits of all individuals that belong to them, and created a new approach named the *prototype theory*.[94]

Wittgenstein's approach was quickly adopted by genre commentators. Alastir Fowler explained, this approach holds that generic texts are related to each other in a family resemblance way without having one common trait.[95] Fishelov, on his part, argued that Fowler's application of the family resemblance model to genre theory was too simplistic and failed exactly where previous definitions did. According to him, the will to break the boundaries of the perception of genre as a limited predefined set of rules cannot justify a shift to an approach that sees no necessary link between all individual texts that form a genre. Fishelov suggested a different interpretation of Wittgenstein's family resemblance model as it applies to genre theory. Under this interpretation, genres are different categories that share a core of exemplar texts, these texts greatly resemble each other, while other texts share only some traits with the exemplar texts.[96] Another property of genres that Fishelov absorbed from the family resemblance model is the existence of a common ancestry of texts that form a genre. This common trait has nothing to do with texts' similar content; instead, it concerns interrelations with previous texts and assists in assigning texts genres—or families of texts.[97] To demonstrate this using the detective story, we could view Poe and Doyle's stories (and many others following them) as texts that are in the core of the detective story and thus share many common traits. Aside from that, it is possible to attribute to the detective story genre a story that focuses on the

92. Wittgenstein gave the example of games. Thus, according to him, the terms of board-games, card-games, ball-games, Olympic Games, and others do not share one trait that is common to all. Rather, these games' resemblance to each other links them. *See* LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 31 (G. E. M. Anscombe trans., 3d. ed. 1986).

93. *Id.* at 32. Wittgenstein suggested another metaphor to illustrate the idea of family resemblance as a unifying term for the definition of individuals in a group – the *fibre* metaphor. He noted that "[i]n spinning a thread we twist fibre on fibre. And the strength of the fibre does not reside in the fact that one fibre runs through its whole length, but in the overlapping of many fibers." *Id.* For an application of this metaphor on classification in the sense of genre, see CHANA KRONFELD, ON THE MARGINS OF MODERNISM: DECENTERING LITERARY DYNAMICS 62-64 (1996).

94. GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 5-6, 16-17 (1987).

95. FOWLER, *supra* note 48, at 41.

96. FISHELOV, *supra* note 74, at 59-63.

97. *Id.* at 65-68.

detective character and his relationship with his companion without the detective solving a mystery. A story that focuses on solving mysteries without a detective character is also attributable to the detective genre. While both such stories would not share common traits with one another, they would share traits with the texts in the core of the genre and therefore would be considered offspring of common ancestors.

V. COMMON BUILDING BLOCKS AS A BASIS FOR GENRE, THE TOOL THAT LINKS THE VARIOUS PLAYERS IN THE FIELD OF CREATIVITY

The different approaches to genre discussed thus far are representative exemplars for the modern debate on genre, which started in the second half of the twentieth century. This debate is characterized by dynamic approaches to genre that reject static approaches to genre, but differ from one another in the starting reference point to genre and the different aspects of the phenomenon that the different definitions attempt to encapsulate. However, I argue that it is possible to identify basic common grounds that characterize the modern debate on genre—genre as the common building blocks in the basis of texts. The common building blocks approach allows examination of the sets of rules that apply to groups of texts and the analysis of the way these sets of rules affect the creative field and the players acting within it. The rest of the discussion on genre focuses on the common building blocks and the two important roles they have in the creative world: first is the power of these common building blocks as a tool that enables creativity and second is the use of common building blocks as a meaning-making tool. These two aspects relate to different players in the world of creativity; the first relates to the authors who engage in creativity and the second relates to the audience who engages in the valuation and understanding of works of authorship.[98] These two aspects view creativity as a sociological/philosophical and help illuminate the legal debate on creativity.

98. As stated above, the focus on the relationship between texts and different players in the field of creativity is not unique to genre theories. Different literary theories focused on the relationship in earlier eras and from different perspectives. The main difference between genre theories and literary theory in this context is that while the latter identified the relationship between different players in the field of creativity and texts with regard to texts' meaning (does meaning lie in the author, the text itself or the reader?), genre theories do not seek the source of meaning. Rather, they explain how the common building blocks of texts allow authors and audiences to act within the creative field. For elaboration, *see supra* Part II.

A. Common Building Blocks as a Tool That Enables Creativity

In this section, I argue that many dynamic approaches to genre view the identification of common building blocks of texts as necessary for the creation of text (or other rhetoric actions) by authors. It is important to emphasize, however, that although the enabling aspect of the common building blocks approach is somewhat "prescriptive," it is not prescriptive in the Neoclassical sense according to which genres are predefined and every text must be created in their light. To the contrary, the enabling aspect of the common building blocks lies in the fact that the building blocks facilitate the creation of new texts within the framework of existing genres while simultaneously allowing the evolution of new genres and building blocks that drive future creativity. In this sense, this approach to genre corrects an ancient misapprehension described by Scottish genre and literature researcher Alastir Fowler: genre is a predefined prescription for the making of texts.[99] The discussion in this section examines how commentators who endorse dynamic approaches to genre understand the common building blocks' contribution to the enrichment of the creative world from the authors' perspective.

Following the critique on the static approach to genre, according to which genres are predefined, proponents of dynamic approaches questioned how are genres created and change over time. Fowler, in the introduction to his important book *Kinds of Literature*, argued that every genre has several distinctive properties, which are not necessarily reflected in each and every exemplar of a particular genre (similar to the family resemblance metaphor to genre). According to him, the most representative characteristic of genre is that it changes; such changes are of the most literary importance.[100] Fowler also stated that every text belongs to at least one genre, and one can identify significant generic properties in it (or common building blocks). However, he explained that genre's effect on creativity differs from previous understandings in than it is more than a mere constraint on spontaneous expression. He argued that a proper understanding of genre identifies it as a tool that facilitates creative expression, and that the relationship between texts and their genres is not one of passive participation but rather one of active change.[101] For example, consider the similarity between Poe's detective story and the crime fiction in England and France at that time, much like the discussion on the biological species metaphor above.

99. This is also the name of the first chapter in Fowler's seminal book on genre. *See* FOWLER, *supra* note 48, at 26-32.

100. *Id.* at 18.

101. *Id.* at 20.

While Poe's detective story participated in the crime fiction genre, due to the fact that his plot focused on a crime scene, it also actively changed the genre by making the central character a detective who investigates the crime.

Fowler explained that genre's active changes are a type of communication; therefore, genre should be understood as a speech act.[102] In this sense, the author communicates through a system of common grammatical rules and artistic conventions. This system is similar to the semiotic system that de Saussure defined as *langue*. The text itself is an expression of the system of rules and is similar to *parole*;[103] in this sense, it depends and is based significantly on a preexisting system, but simultaneously changes it and differs from it in a way that creates new rules and conventions that will be used for future textual expressions.[104]

According to Fowler, genres are in a constant state of change, but it is the change of genre itself that gives a text an artistic value.[105] However, Fowler argued that it is not possible to object to the prescriptive aspect altogether. Certain authors need rules and conventions to create, and others need a framework for creativity and a reminder to evaluate their work in light of these rules.[106] Fowler viewed the prescriptive aspect of genre (in its open and dynamic sense) as one that facilitates creativity rather than inhibits it. He stated two main reasons for the lack of harm in prescriptive approaches to genre. First, the author can always (try to) relate its work to mixed, hybrid or ill-defined genres—thus untethering his work from prior conventions. Second, the author can create a new system of rules that will be accepted under the wide generic framework in which he acts, especially when the creative environment is relatively new. In this way, prescriptive genres, in the dynamic sense that allows development and change, encourage authors to break through by expanding the generic boundaries or by variation of the existing generic framework.[107]

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102. *Id.*

103. For the difference between *langue* and *parole*, see FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 7-15 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1959).

104. FOWLER, *supra* note 48, at 20.

105. *Id.* at 26.

106. *Id.* at 28.

107. *Id*. at 29. It is important to note that there is no contradiction between Fowler's prescriptive approach and the dynamic approaches to genre discussed above. Fowler's approach views genre as an open and dynamic prescription that does not limit the creation of texts to predefined static rules and is open to understand changes resulting from diversion of texts from the existing rules.

Moreover, Fowler argued that genres do not inhibit creativity, they positively support it. Genres give the author a predefined creative space that urges them to use past experience in a novel way. Fowler stated that genre gives the author access to formal examples for possible combinations of common building blocks while also allowing him to rise above existing exemplars.[108] He concluded that it is impossible to forsake the prescriptiveness of genres; the author most interested in originality is the most interested in genre.[109]

The prescriptive aspect of genre (in the dynamic and open sense) as a tool that enables creativity is demonstrated by the detective story. Poe's detective story—the first to put the detective character in the heart of the story—was not written in a vacuum. Poe worked with a certain prescription, the crime fiction genre popular at that time. But his activity within this prescription was not constraining, rather, it was enabling in the sense that Poe could have added a new layer to the existing prescription—thus changing its rules from that point on. Doyle used Poe's new prescription, or at least parts of it, to create his detective story. Doyle's use of the prescription, moreover, was not static and closed, it was open and dynamic in the sense that he too continued to develop the rules of the new prescription.

Todorov also expressed this dynamic approach to genre that emphasizes the significance of common building blocks as a constitutive tool that facilitates creativity and the development of genres. One of his important arguments in this context was his answer to where genres come from. Todorov answered: "Quite simply from other genres. A new genre is always the transformation of an earlier one, or of several: by inversion, by displacement, by combination."[110] But Todorov did not specify exactly how this phenomenon takes place. Fowler, in contrast, did not stop at the theoretical observation regarding the dynamic character of genre; he dedicated a significant discussion to the typical ways genres change.

One way generic change occurs, as noted by Fowler, is when new topics for genre are invented. When a new topic joins the repertoire of a certain genre, a sub-genre may evolve around that topic. The new topics can be transformed from one genre into another or from different mediums.[111] Poe's detective story is a good example of this when it is considered from the point of view of the crime fiction genre. Poe's focus on the detective character added a new subject to the crime fiction

108. *Id.* at 31.

109. *Id.* at 29, 32.

110. TODOROV, *supra* note 70, at 15.

111. Fowler, *supra* note 48, at 170.

genre and developed it in a way that led to the formation of a new genre. Another way genre changes is the combination of generic repertoire that, when successful, may form a new unified repertoire for a new genre.[112] A third way is when an aggregate of works from one or various genres form a distinct genre (for example an aggregate of poems may create a genre of poem cycles). Indeed, the aggregate may sometimes supersede the repertoire of its components.[113] The fourth way Fowler mentioned is based on the scale of the works that form a genre. A new genre can thus be formed by the expansion or contraction of the type of works that constitute an existing genre.[114] The classic example of this is the use of the sets of rules that apply to the short story genre to create a full-length novel. A fifth way genre changes is through changes in the conventional functions of genre, for example by changing the way a character tends to address others or changing the type of characters. Fowler emphasized that such a change may be intentional but could also be unintentional and gradual and thus will form a new generic convention over time.[115] This is illustrated by comparing Dupin and his companion's relationship with Holmes and Watson's relationship; Dupin's relationship is characterized by an official tone and clear hierarchy between the characters, while Holmes's relationship is characterized by sarcasm and humorous remarks. Thus, the detective story genre could have developed both as a dramatic genre and as a comedy. A sixth way Fowler observed is generic mixture: the addition of one genre's properties to another genre, allowing a wider spectrum of works to be created using common building blocks. Hybrids, as Fowler named them, are the most frequent type of generic mixture. They are characterized by a mixture of works from different genres that are so similar in scale and form that one cannot identify the most dominant genre in the mixture.[116] A good example is the combination of rules that apply to the detective story genre and those that apply to the children story genre, which would result in the genre of detective stories for children. It is interesting to note that the different ways for the change and development of genres that Fowler identified are very similar to the cognitive patterns of creativity identified by commentators in the field of cognitive psychology.[117]

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112. *Id.* at 171.

113. *Id.* at 171-72.

114. *Id.* at 172-73.

115. *Id.* at 173-74.

116. *Id.* at 181-88.

117. Similar ideas were expressed by Finke, Ward, and Smith as part of the Geneplore model for creativity as well as in research conducted by Baughman and Mumford. *See*, *e.g.,* RONALD A.

Another commentator that focused on the constitutive aspect of the common building blocks is Fishelov. He also concentrated on the misconception of genre as a predefined static prescription, which is unchangable and leaves no place for the dynamics of genre. Thus, Fishelov suggested that genre is a set of rules that are enabling in their nature more than they are regulatory or restraining, in the sense that they do not refer to a preexisting action but enable a new one.[118] To demonstrate how this approach to genre takes place, Fishelov reviewed different metaphors for genre used in literature. One important metaphor which I discussed earlier is the biological species metaphor.[119] He offered a Darwinian evolutionary approach to genre, according to which organisms are analogous to texts, biological species are metaphors to genres, and the natural environment is a metaphor for the "cultural environment." Fishelov stressed that the evolutionary survival of a genre depends not on the continuity of a "correct" interpretation of it but on its continuous productivity.

Generic productivity, according to Fishelov, is divided into two stages: the primary stage and secondary stage. The primary stage of productivity happens when works that constitute a genre influence and encourage the creation of new works that are perceived as part of the same genre by both authors and readers. The secondary stage of productivity happens when new texts are produced in light of a generic formula. Fishelov gave examples of secondary productivity, including translation, parody, imitation (preserving the form but changing the content), and adaptation (preserving the content but changing the form or the medium).[120] The development of the detective story is an excellent example of generic productivity. Poe's detective story, as noted above, could be conceived of as a development of the crime fiction genre that added the detective character and his personality traits, the companion character, and the murder mystery scene. Doye's detective story is an example of both the primary phase of generic

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FINKE, THOMAS B. WARD & STEVEN M. SMITH, CREATIVE COGNITION: THEORY, RESEARCH AND APPLICATIONS 17-43 (1992); Wayne A. Baughman & Michael D. Mumford, *Process-Analytic Models of Creative Capacities: Operations Influencing the Combination-and-Reorganization Process*, 8 CREATIVITY RES. J. 37 (1995). For further elaboration, see Rachum-Twaig, *supra* note 3.

118. FISHELOV, *supra* note 74, at 14.

119. *Id.* at 18.

120. *Id.* at 35-39. It is important to note that the derivative work right in copyright law is often referred to as the "adaptation" right. Despite the resemblance between adaptation in Fishelov's terms and the right to make derivative works, there is not full overlap between the two. Maintaining the content of a text while changing its medium or form is just one type of action that could result in a derivative work. Aside from that, a derivative work could be made by what Fishelov defined as "imitation," which means maintaining the form while changing the content.

productivity—it belongs to the same generic compound of Poe's new characteristics—and the secondary phase of productivity—it is compatible with the characteristics presented by Poe and therefore contributes to the survival of the new genre. It is important to note that any one of the characteristic created by Poe, in every level of abstraction, could be the basis for generic productivity and the creation of a new genre. Further, it is interesting that the different forms of secondary productivity proposed by Fishelov are highly compatible with the legal definition of a derivative work.[121]

According to Australian genre commentator Vijay Bhatia, the most significant characteristics of genre are the communicative conventions that constrain the use of common building blocks in a specific discourse, thus allowing formation of stable and predefined rules for participating in the discourse.[122] However, Bhatia also emphasized that the stability of genre is not entirely static. Genre's conventions are based on recurring social-rhetoric utterances, but the recurring utterances are often not identical to the typical utterance—thus requiring the community to respond to these changes using the arsenal of generic conventions in their hands. In this way, experienced participants in the discourse can manipulate their deep understanding of these conventions to break through the boarders of genre and satisfy immediate social needs.[123] Bhatia emphasized, however, that such changes are often considered "innovative" or "creative" only by members of the genre; the resulting change is thus never a complete abandonment of convention.[124] In this sense, it is clear that Bhatia also understood the common building blocks as an enabling phenomenon that facilitates creativity and development and not as a restraining and inhibiting phenomenon. At the same time, Bhatia's commentary stressed the common building blocks' importance and genre's inability to detach from them entirely.

Bhatia contended that two main characteristics of genre explain its dynamics and ability to change. He argued that genres across different disciplines have similar properties, which form groups that he defined as "colonies of genres."[125] The colonization of genres occurs when one genre invades another, thus mixing the conventions that characterize both genres. This mixture of conventions, according to Bhatia, leads to the creation of a hybrid that shares the properties of

121. *See infra* Part VII(C).

122. VIJAY BHATIA, WORLDS OF WRITTEN DISCOURSE: A GENRE-BASED VIEW 23 (2004).

123. *Id.* at 24.

124. *Id.* at 24-25.

125. *Id.* at 57.

both genres and allows the use of both genre's resources to create a new genre, which is a combination of the underlying genres.[126] Another dynamic characteristic of genre mentioned by Bhatia is the use experienced participants in the genre discourse make of the generic conventions in order to express their "personal intentions" through the common building blocks in a way that "bends" the borders of genre towards the development of a new genre.[127] It is important to note, however, that a new genre that breaks through the borders of an existing one is always dependent on the use of the existing common building blocks.

The discussion above explains that the common building blocks at the heart of genres are a tool that enables creation from the author's perspective and are thus necessary for creativity.[128] This notion is a significant part of the dynamic approaches to genre, which reject that genre is a predefined prescription for the making of texts. It is also notable that the discussion in this section focused on the enabling aspect of common building blocks from the author's point of view, and the conclusions derived from it are similar to the cognitive psychology of creativity.[129] Aside from that, the common building blocks have a significant impact on another part of the creative field—the audience. The common building blocks at the heart of genre affect the way the audience gives meaning to works of authorship. This aspect will be discussed in the following section.

B. Common Building Blocks as a Meaning-Making Tool

The dynamic approaches to genre debate the enabling aspect of the common building blocks, which facilitate creativity and the development of genres. This debate focuses mainly on the influence of the common building blocks on the participants of the creative process, the authors. However, some commentators suggest that the common building blocks of texts have significant influence on other participants in the creativity discourse: the audience.[130] Thus, although Todorov

126. *Id.* at 58. In this sense, Bhatia's approach is similar to those of Fowler as far as the change of genres is concerned. *See* FOWLER, *supra* note 48, at 170-88.

127. BHATIA, *supra* note 122, at 87.

128. It is important to note that while the enabling aspect of the common building blocks in the creative world is important and significant for authors, this does not make it necessary. It is possible to think of creative activities that are possible regardless of the existence of common building blocks. However, such creative activities would most likely be meaningless or lack value for the audience, due to the meaning-making aspect of the common building blocks that will be discussed later. *See infra* Part VI(B) In this sense, the importance of the enabling aspect of common building blocks to authors is of high importance.

129. *See* Rachum-Twaig, *supra* note 3.

130. In literary theories that attempt to explain the source of meaning of texts, some

dedicated a vast discussion to the prescriptive aspect of genres (in its open and dynamic sense), he also argued that the historical existence of genre has two sides. The first side is the author who creates texts as a function of the existing generic system (even if not in accordance with it). The second side is the reader who understands texts as a function of the same generic system, even if sometimes unconsciously.[131] Similarly, Frow argued that genres do not function only as a classificatory mechanism; instead they mainly function as representative frameworks that play a crucial part in the everyday meaning-making process.[132]

Fowler explained the common building blocks' contribution to the meaning-making of artistic texts through a comparison to communication theory. According to him, non-artistic interpersonal communication preserves messages in a manner that allows their reception and understanding, even though the redundancy of information they contain causes uncertainty. This occurs through the situational context in which the communication occurs. Fowler argued that artistic texts have no real situational context, and they should therefore carry a substitute that will allow the same meaning-making process.[133] He explained that in contrast to everyday communication, artistic texts enjoy a much wider repertoire of possible forms, which are drawn from the basic grammatical forms of the relevant language.[134] This wide repertoire allows the formation of a system of rules (or *langue*) that is wider than everyday language and serves as a substitute for the lack of situational context in two main ways: first, the artistic rules supply an artistic context to the situation, which the text refers to; second, the artistic rules strengthen the semiotic set of communications with additional coding rules that may sometimes replace the codes of the "normal" language or supplement to them.[135]

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commentators argued, in different periods, that the source of meaning is either in the author, in the text itself, or in the audience. *See, e.g.*, EAGLETON, *supra* note 11, at 64. As I explained above, *supra* Part II, genre theories do not focus on the source of meaning, rather they focus on the sets of rules that apply to texts and the way different players in the creative field use them. Thus, the focus on the text itself is independently meaningless under dynamic approaches to genre, in contrast to static and formalistic approaches.

131. TODOROV, *supra* note 70, at 18-19.

132. FROW, *supra* note 5, at 19. For another modern approach to genre that views it more as a "source of meaning" than a "set of rules" see Sungsoon Wang, *Text Types and Dynamism of Genres*, *in* DISCOURSE, OF COURSE: AN OVERVIEW OF RESEARCH IN DISCOURSE STUDIES 81, 83 (Jan Renkema ed., 2009); John Swales, *On Models of Applied Discourse Analysis*, *in* RESEARCH AND PRACTICE IN PROFESSIONAL DISCOURSE 61 (C.N. Candlin ed., 2002).

133. FOWLER, *supra* note 48, at 21.

134. *Id.* at 20.

135. *Id.* at 22.

Fowler added that the artistic coding "validates" the work itself and the message it contains, in the sense of credibility and the possibility to enjoy is communicative expression. Thus, a reader's attention is more easily captured by conventional and known properties of texts (generic characters for example) and every convention used by the author influences the meaning of text. This description led Fowler to state that the most important code in the artistic *langue* is genre and that it is used as a meaning-making tool: "It is an instrument not of classification or prescription, but of meaning."[136]

A similar conceptualization of the same idea was suggested by Miller. Miller's starting point was that human actions are based on and directed by meaning. Thus, before one can act, he must interpret the material environment and define the situation in which he acts.[137] She added that we understand situations by comparing them to prior situations or other known situations. According to Miller, we understand the new by identifying relevant similarities, which are referred to as "type."[138] She argued that successful communication can occur only when participants of the discourse share common types. The meaning-making process makes use of the common building blocks in different levels of hierarchy. Miller explained that this process is based on a combination of content (semantics) that is presented in a certain form (syntax) with context (pragmatics).[139] However, at a certain point in the hierarchy of meaning, the content and form merge and become a new type of content in a higher level of the hierarchy, which is also divided to content, form, and context. Genre, or the common building blocks, according to Miller, is a merger of content and form in a specific context that plays a crucial role in the meaning-making process.[140] It is important to note that Miller's approach articulates that the common building blocks are not limited to the rules regarding the form in which texts are expressed, they also apply to content or semantics shared by texts that create meaning. This note has implications for copyright law, as will be discussed below.

The difference in Fowler and Miller's conceptualizations of the meaning-making aspect of genres is demonstrated by the detective genre. Regarding Doyle's detective story, its content and form carry a meaning value resulting from Doyle's use of language and the relationships between the different characters in the story. By contrast,

136. *Id.*

137. Miller, *supra* note 74, at 156.

138. *Id.* at 156-57. This is in fact a description of the common building blocks of texts.

139. *Id.* at 159.

140. *Id.* at 159-60.

a different meaning value results from factors that are not part of Doyle's common use of language when Doyle's work is read in light of a preexisting text in the same genre, Poe's detective story. This could occur, for example, when explicit intertextuality exists in the text, such as Doyle's reference to Poe's detective, Dupin. Thus, when Doyle wrote that Dupin was an inferior fellow, a different meaning value is added that does not result from the understanding that a person named Dupin is inferior. Instead, it results from the fact that Dupin was the hero of a different text. Additional meaning value could also exist without explicit intertextuality. Thus, in light of Poe's story, the reference to the relationship between a detective with certain personality traits and his companion in the context of mystery solving carries a meaning value in additional to the ordinary lexical value. Here too, it is important to emphasize that the additional meaning value may result from various abstraction levels of common building blocks, much like the case of the detective story, such as plot lines, general ideas, explicit personality traits, and scenes.

Fowler's argument, according to which the meaning of artistic texts depends on generic types for its existence, was supported by Hirsch's statement that:

> A verbal meaning is always a type since otherwise it could not be sharable. If it lacked a boundary, there would be nothing in particular to share; and if a given instance could not be accepted or rejected as an instance of the meaning . . . the interpreter would have no way of knowing what the boundary was.[141]

Hirsch's approach could be summarized by one sentence in his book: "All understanding of verbal meaning is necessarily genre-bound."[142] This approach is related to another approach that views the importance of common building blocks from the audience's point of view—the reader response approach in aesthetics and literary theories.[143] This approach holds that genre is a heuristic tool that serves the reader-interpreter or, as Adena Rosmarin put it: "The genre is the critic's heuristic tool, his chosen or defined way of persuading his audience to see the literary text in all its previously inexplicable and 'literary' fullness and then to relate this text to those that are similar or, more

141. E. D. HIRSCH, JR., VALIDITY IN INTERPRETATION 50 (1967). *See also* FOWLER, *supra* note 48, at 24.

142. HIRSCH, *supra* note 141, at 76.

143. For elaboration on the reader response approach to genre, see BAWARSHI & REIFF, *supra* note 6, at 22-23.

precisely, to those that may be similarly explained."[144] Bawarshi and Reiff explained that genre in this sense functions as a consensus about the guesses and expectations readers assume about a text and according to which their understanding of the text and its meaning is shaped at a certain point in history.[145] This characteristic of genre is substantially based on Hans Robert Jauss, who studied the development of genre in texts of medieval Germany. Jauss concluded that texts create a "horizon of expectations" in the reader that are based on rules the reader learned from previous texts. These common building blocks could be transformed, expanded, amended, or simply reproduced.[146]

The significance of the common building blocks of texts as a meaning-making tool was emphasized in literature that relates to the institutional approach to genre. According to Bawarshi and Reiff, this approach questions how genres organize, classify, normalize, and assist the creation of texts and other non-written social actions. Under this approach, genres are social institutions that shape the way we identify, valuate, and experience texts.[147] One of the central commentators of this approach is Thomas Beebe, who argued that genre is a precondition for the making and reading of texts.[148] Beebe explained that the common building blocks allow the audience not only to understand a text passively but also to use it and actively valuate it.[149] In fact, under this approach, the common building blocks are the tool through which texts are recognizable, receive meaning, and are useful in relation to each other.[150]

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In this part, I focused on the importance of the common building blocks of texts as the main characteristic of genre as part of creativity. I showed that the modern literature on genre explains the important role of common building blocks as a constitutive tool that facilitates creativity both through known patterns and through the development

144. ADENA ROSMARIN, THE POWER OF GENRE 25 (1986).

145. BAWARSHI & REIFF, *supra* note 6, at 23.

146. HANS ROBERT JAUSS, TOWARDS AN AESTHETIC OF RECEPTION 88 (Timothy Bahti trans., 1982).

147. For elaboration on the "cultural" approach to genre, see BAWARSHI & REIFF, *supra* note 6, at 23-28.

148. THOMAS O. BEEBE, THE IDEOLOGY OF GENRE: A COMPARATIVE STUDY OF GENERIC INSTABILITY 250 (1994). Bawarshi and Reiff explained that these characteristics give genre a functional value and turn it into a tool for the promotion of culture and hence also an ideological phenomenon. *See* BAWARSHI & REIFF, *supra* note 6, at 27.

149. BEEBE, *supra* note 148, at 14.

150. BAWARSHI & REIFF, *supra* note 6, at 27.

of new ones. In this sense, the discussion on the common building blocks bears a strong resemblance to the discussion of the cognitive process of creation and the basic need to use memory and domain-relevant knowledge. The common building blocks that authors use to create new texts are similar to the task-relevant knowledge that cognitive psychology identifies as a crucial component in the creative process.[151] In addition, and maybe most important for the argument in this article, I explained how the modern discussion on genre emphasizes the importance of the common building blocks as a meaning-making tool for the audience, which is independent of the use of common building blocks by the author. This notion is of most importance to creativity because without the ability to give meaning to creative products, they cannot be valuated and thus, to a certain extent, there is no justification for their creation in the first place.[152]

Before I conclude this part, and as a link to the next one, it is important to clarify the benefit of using the common building blocks approach as an organizing idea about genre and creativity with regard to copyright law. The discussion of the common building blocks approach has been mainly theoretical thus far, but it is important to explain what kinds of common building blocks are theoretically possible and exist in the world of creativity. The spectrum of possible kinds of common building blocks is relatively wide. It begins with high levels of abstraction, such as artistic styles, general themes, and what is referred to in the copyright discourse as "ideas." As far as this level of abstraction is concerned, copyright law fits the understanding of the enrichment of the creative world as genre theories view it.

Additionally, common building blocks may be found in much lower and more particular levels of abstraction. Thus, a certain text (or melody, character, painting etc.) may constitute a building block for the development of other text in the same creative environment. As explained above, one way to develop a genre is recombining texts and other existing artistic expression. The rest of this article establishes that

151. Rachum-Twaig, *supra* note 3.

152. As I explained above, the importance of readers to the question of texts' meaning is a relatively late notion in literary theories; it was discussed only in the second half of the twentieth century. This notion is different from earlier literary theories that identified the author, and later the text, as the source of meaning. *See* EAGLETON, *supra* note 11, at 64; THISELTON, *supra* note 11, at 307. However, even though the focus on the reader as an important player in the creative field is a result of accepting the reader-response approach, it does not necessarily mean that texts and meaning are created only by the readers. The reader-response approach could tolerate approaches that argue the source of meaning is the author, such as Hirsch's approach to meaning-making. *See* HIRSCH, *supra* note 141, at 78-81. *See also* EAGLETON, *supra* note 11, at 58-62. For an analysis according to which the reader-response approach could tolerate author-oriented approaches to meaning, see THISELTON, *supra* note 11, at 305.

common building blocks of a lower level of abstraction, "expressions" in copyright terms, are not inferior in their importance to the field of creativity when compared to other building blocks. The development of the detective story is a good example for this argument. These notions have significant implications for copyright law, especially the right to make derivative works, which governs when common building blocks may be used to create new products.

VI. IMPLICATIONS FOR COPYRIGHT LAW

Thus far I have shown that the enrichment of the creative world could be explained by the use of common building blocks in genres. One aspect of common building blocks' importance is their contribution to the creative process and the existence and developments of creative patterns. A second, and maybe the most important, aspect of common building blocks is their contribution to the audience's process of meaning-making. In this sense, genre theories explain the importance of common building blocks and the system of rules that apply to them as a tool. The audience uses this tool to give meaning to creative products, valuate them, and justify their creation and contribution to society. Accordingly, it is important to examine whether these notions are reflected in copyright law.

My argument in this part is that copyright law is aware, even if intuitively, of the common building blocks' importance to the creative world, and copyright law reflects their importance to a great extent. It does so in two main doctrines: the idea/expression dichotomy (and the scènes à faire doctrine that derives from it) and the fair use doctrine. However, I argue that the significant match between genre theories' understanding of the common building blocks' importance to the promotion of creativity and that of copyright law is not complete. The mismatch is most evident with regard to derivative works. The right to make derivative works allows the owner of a work of authorship to forbid the making of works that are substantially based on the underlying work. Thus, the first author has a de facto right to bar the use of the common building blocks that his work is based on in the making of new works, a constraint that naturally limits the ability of the audience to identify these common building blocks in future (derivative) works. This is demonstrated by the development of the detective story. Doyle's use of common building blocks, such as expressions (the detailed detective character of Dupin and the locked room mystery scene) from Poe's story could be considered a derivative work under current doctrine. Had this doctrine existed and applied

when the detective story genre was developing, Poe could have prevented Doyle from using these common building blocks.

According to genre theories, the use of common building blocks as part of the enrichment of the creative world, occurs on different levels of abstraction, including expressions. The right to make derivative works therefore collides with a substantial aspect of the sociological-philosophical understanding of the creative world and thus should be reevaluated.

A. The Idea/Expression Dichotomy

At the heart of copyright law stands a basic principle: the idea that a work of authorship is based on is not protected by copyright; such protection is provided only to the author's expression of the idea—the original expression only.[153] Courts and authors employ this distinction to determine whether a certain work or parts thereof are copyrightable and whether their use by another is infringing the author's rights.[154] In fact, the idea-expression dichotomy is based on the notion that prohibiting the free use of ideas will impede one of the main goals of copyright law, the encouragement of creativity and the preservation of an adequate public domain.[155]

The scènes à faire doctrine, which derives partially from the idea-expression dichotomy, refers to instances in which a certain idea or work requires the use of specific expressions.[156] A common example of such instances is the use of a sheriff character and a shooting duel in a Western movie or the appearance of a car chase in a police thriller.[157] In contrast to the idea-expression dichotomy that does not provide copyright protection to ideas, the scènes à faire doctrine does not concern the copyrightability of such scenes; rather, it serves as a tool

153. *See* 17 U.S.C. § 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.").

154. *See, e.g.*, Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1234 (3d Cir. 1986); Dunlap v. G&L Holding Group, Inc., 381 F.3d 1285, 1296 (11th Cir. 2004).

155. Nimmer explained that this principle is based, among other things, on the constitutional right to freedom of speech and that this doctrine affects preliminary copyright protection very little; it is mainly used in infringement actions, particularly for determining whether a disputed use is substantial enough to constitute infringement. *See* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.03[D] (2014) (hereinafter NIMMER ON COPYRIGHT).

156. The exact translation of the term from French is "scenes that must occur" and this is the normative basis for the legal doctrine. *See id.* § 13.03[B][4].

157. For the application of the doctrine in case law, see for example, Atari Inc. v. North American Philips Consumer Electrics Corp., 672 F.2d 607, 616 (7th Cir. 1982); Reyher v. Children's Television Workshop, 533 F.2d 87, 87 (2d Cir. 1975); Hoehling v. Universal City Studios Inc., 618 F.2d 972 (2d Cir. 1980).

for determining whether a second work is infringing on the copyright protection of a first work by only using such scenes.[158]

In light of these two doctrines, it may be argued that copyright law accommodates the need to use common building blocks to further creativity.[159] To a certain extent, this is correct. If anyone in the public domain is free to use ideas and if the use of stock scenes (including necessary expression for specific ideas) is non-infringing, then there is no real constraint on the use of some types of common building blocks, and the development of meaning as part of the creative world is uninhibited. The contribution of the scènes à faire doctrine in this context is demonstrated by a Ninth Circuit decision that treated it as the expression of the genre institute in copyright law. In that case, the plaintiff argued that the defendant, TV Broadcaster NBC, infringed his copyright in a television series script he wrote. The court rejected the argument based on the scènes à faire doctrine and stated:

> The two shows emphasize action and lack identifiable themes. Both shows may be broadly described as comic, and they therefore have similar moods. Both works are quickly paced. However, these similarities are common to the *genre* of action-adventure television series and movies and therefore do not demonstrate substantial similarity. (emphasis added—O.R.T).[160]

This decision shows how the use of the descriptive-prescriptive aspect of genre to detect common building blocks can assist in the application of the scènes à faire doctrine and the idea/expression dichotomy. When common building blocks can be detected between texts belonging to the same genre, a court may reach the decision that these could be used freely and that they amount to mere ideas or necessary expressions that are not copyrightable.[161]

Outside the scope of the scènes à faire doctrine, notions from genre theories could be applied to copyright law's infringement analysis. In cases where the alleged copyright infringement is a non-literal one, courts have developed several different tests to examine whether a similarity exists between the plaintiff's and the defendant's

158. NIMMER ON COPYRIGHT, *supra* note 155, § 13.03[B][4].

159. In fact, Abramowicz's justification for the right to make derivative works in its current form and his criticism on the suggestion to restrict this right and limit its breadth was substantially based on the argument that the idea-expression dichotomy in copyright law ensures the ability to use common building blocks for future creation. *See* Michael Abramowicz, *A Theory of Copyright's Derivative Work Right*, 90 MINN. L. REV. 317, 339 (2005).

160. Olson v. National Broadcasting Co., 855 F.2d 1446, 1451 (9th Cir. 1988).

161. For a discussion in the context of computer games of the scènes à faire doctrine as an expression of the importance of genre in copyright law, see Dan L. Burk, *Owning E-Sports: Proprietary Rights in Professional Computer Gaming*, 161 U. PENN. L. REV. 1535, 1565-67 (2013); Dan L. Burk, *The "Creating Around" Paradox*, 128 HARV. L. REV. F. 118, 121 (2015).

works. One of the most cited tests among the different circuits is the "total concept and feel" test, according to which a work would be infringing if an ordinary observer will recognize it as being similar to the copyrighted work considering its total concept and feel.[162]

The total concept and feel test has been largely criticized by various scholars, mainly due to the fact that it essentially ignores copyright's idea/expression dichotomy and allows the protection of ideas and non-copyrightable expressions.[163] Pamela Samuelson, for example, suggested that applying an analysis based on dissection as well as expert testimony could solve some of the troubling aspects of infringement analysis based on the total concept and feel test.[164] Such an approach could be justified by genre theories. Understanding that any work is based on common building blocks that are essential to the creative process and the enrichment of the creative world justifies an infringement analysis that will not stop at the general impression of the total concept and feel of the works compared, but rather will dissect the works and determine what building blocks are protected or not and only then compare the copyrighted work with the allegedly infringing one. Genre analysis would be a good tool to make such inquiry and could call for expert testimony in the specific creative field in question. This could be accomplished by the abstraction-filtration-comparison infringement test, which was developed mainly for computer software cases but could be easily applied to other works.[165]

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162. The test was first introduced in Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970). It was also later embedded into the extrinsic/intrinsic similarity test developed by the 9th Circuit in Sid & Marty Krofft Television Productions v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). For a discussion of the total concept and feel test and an analysis of its dominance in the case law, see NIMMER ON COPYRIGHT, *supra* note 155, at 13.03[A][1][c]; Pamela Samuelson, *A Fresh Look at Tests for Nonliteral Copyright Infringement*, 107 NW. U. L. REV. 1821, 1830-32 (2013).

163. *See, e.g.*, NIMMER ON COPYRIGHT, *supra* note 155, at §13.03[F] ("the touchstone of "total concept and feel" threatens to subvert the very essence of copyright, namely the protection of original *expression*") [italics in original]; Samuelson, *supra* note 162, at 1832-35 ("There are several troubling things about the total concept approach. . . For one thing, it does not focus. . . on specific expressive elements"); Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's Total Concept and Feel*, 38 EMORY L. J. 393 (1989) (criticizing the total concept and feel test on the basis of freedom of speech and first amendment considerations).

164. Samuelson, *supra* note 162, at 1840-41, 1844-45.

165. The abstraction-filtration-comparison test is divided to three stages. At the first stage, the work is abstracted to its components. At the second stage, each component is scrutinized using the idea/expression dichotomy and other copyright doctrines that deny liability for infringement. At the third stage, the protected components are compared to the allegedly infringing ones. Courts differ as to whether the second stage refers to copyrightability in general or only as a defense against an infringement action. For discussion on the different approaches and an analysis of the test's predominance in computer cases among the different circuits, see Oracle Am., Inc. v. Google Inc., 750 F.3d 1339, 1357-58 (Fed. Cir. 2014). *See also* NIMMER ON COPYRIGHT, *supra*

But I argue that this is not enough. First, the common building blocks of texts are not restricted to a certain level of abstraction that necessarily fits the legal definition of "idea" or stock scene. The common building blocks can function at a much more concrete level of abstraction and easily rise to the legal definition of a copyrightable "expression." Thus the law definitely limits this use of common building blocks (with the exception of fair use cases discussed below).

I have demonstrated the possible level of abstraction of common building blocks with the development of the detective story. Thus, the highest level of abstraction—the use of the detective character as a hero in a criminal fiction—is a mere idea, which is free to use without infringing copyright. However, the lowest level of abstraction (and maybe even higher ones)—the use of a scene that includes the locked room mystery in a detective story—was, at least at the beginning of the development of the genre, use of a protected expression. This point leads to the second weakness of the scènes à faire doctrine. The doctrine can only identify stock scenes retrospectively, after the relevant scenes have become common enough, meaning only when a genre is fully developed. In the detective story example, when Doyle used the locked room mystery this expression was (still) not a stock scene and therefore was a protectable expression.[166] In this sense, the scènes à faire doctrine does not allow the use of protected expressions for the making of a new work unless the expression is common enough. Thus, copyright law limits the amount of common building blocks that can constitute and facilitate the development of creative patterns and to offer a larger sum of meanings to the public.[167] It is now important to determine whether the fair use doctrine resolves this difficulty.

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note 155, at 13.03[F]; Samuelson, *supra* note 162, at 1837-40. For a suggestion to apply the abstraction-filtration-comparison test to architectural works as well, see Daniel Su, Note, *Substantial Similarity and Architectural Works: Filtering out Total Concept and Feel*, 101 NW. U. L. REV. 1851, 1878-81 (2007). For a similar suggestion for all types of works based on cognitive approaches to creativity, see Rachum-Twaig, *supra* note 3, at 44-45.

166. In fact, the idea underlying the scènes à faire doctrine is false diachronically because it ignores the fact that at a certain period of time, it was impossible to think of a certain expression as a stock scene and the mere use of it—which, over many years, made it a stock scene—would be considered infringing. The locked room mystery scene is a good example of that; at the time of Poe and Doyle, no one thought of that scene as a stock scene and it was only possible to conceive of it in this way years later and only after other authors made use of it. For elaboration on the locked room mystery, see JOHN T. IRWIN, THE MYSTERY TO A SOLUTION: POE, BORGES, AND THE ANALYTIC DETECTIVE STORY 176-94 (1994); Donald E. Westlake, *The Locked Room*, *in* MURDEROUS SCHEMES: AN ANTHOLOGY OF CLASSIC DETECTIVE STORIES 7 (Donald E. Westlake ed., 1996).

167. In this context, it is interesting to look at the decision in CBS Broad., Inc. v. ABC, 2003 U.S. Dist. LEXIS 20258 (S.D.N.Y. 2003). In that case, TV broadcaster CBS, who owned the copyright to the famous TV show "Survivor," requested an injunction against ABC's broadcasting of a show titled "I'm a Celebrity: Get Me Out of Here!" for an alleged copyright

B. The Fair Use Doctrine

While the idea/expression dichotomy and the scènes à faire doctrine accommodate the common building blocks approach's contribution to the enrichment of the creative world, the fair use doctrine provides an answer to this need. Under current copyright law, using of a work of authorship protected by copyright will be considered fair and non-infringing, if it is made "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" when considering the following factors: "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work."[168]

Empirical evidence shows that while the fourth factor is the most-mentioned in fair use cases, it is the first factor that is the most significant in the fairness analysis.[169] Courts have clarified that the most significant question under the first factor is whether the use is "transformative" or not.[170] Transformative use is defined as a use that "adds something new, with the further purpose or different character, altering the first [expression] with new expression, meaning, or message."[171] A use can be transformative in two significant ways: transformation of purpose and transformation of content.[172] Transformation of purpose could exist when a certain work is included

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infringement. Both shows focused on documenting the participants performing various tasks in conditions that mimic survival on a deserted island. The court considered the similarities between scenes that appear in both shows in which participants are requested to eat worms. The court stated that "in a remote, hostile environment, or deserted island setup, eating unattractive, crawling creatures is part of the scenes a faire." *Id.* at *40. This note was not based on proof that a survival show genre exists in which worm-eating tasks are necessary. Rather, it was based on the notion that if such a genre could be imagined, such a scene must appear in it. This is an exceptional application of the doctrine, which could have resulted from the expert opinion provided to the court, according to which "the evolution of TV shows . . . is a continual process involving borrowing liberally from what has gone before." *Id.* at *1.

168. 17 U.S.C. § 107.

169. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PENN. L. REV. 549 (2008); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715 (2011).

170. "Transformative use" was a term used by Judge Leval. *See* Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990). The Supreme Court adopted this term in Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 576 (1994).

171. *Id.* at 579. For further discussion, see Netanel, *supra* note 169, at 746-51.

172. For discussion, see Rebecca Tushnet, *Content, Purpose, or Both*, 90 WASH. L. REV. 869 (2015). *See also* Pamela Samuelson, *Possible Futures of Fair Use*, 90 WASH. L. REV. 815, 843-50 (2015).

in its entirety in a new reporting or when a different work is displayed in its entirety as a parody.[173] Transformation of content occurs when the content of a work is changed (using protected expressions from it) in a way that significantly changes its meaning such that it does not fulfill the same communicative purpose as it originally did.[174] An example would be the making of a critical or parodic sequel to an existing literary work—such as "Harry Potter in Space."

It is thus evident that the fair use doctrine allows a significant use of common building blocks in the form of expressions in various contexts. In this sense, the fair use doctrine matches the understanding of the importance of common building blocks to the creative world under genre theories. The fair use doctrine nicely reflects different ways in which common building blocks enable the development and creation of genres on the author's part. Thus, for example, some of the ways for generic development proposed by Fowler could exist under fair use. Two main examples illustrate the first way Fowler observed—the combination of new subjects with existing genres (which fits with transformation of purpose)—and the fifth way—the change of function and main conventions in an existing genre (which fits with transformation of content).[175] Examples provided by Fishelov for the development of genres also fit well with fair use. In his debate on secondary generic productivity, Fishelov explained that parody, imitation (keeping the form but changing the content), and adaptation (keeping the content but changing the form) are main ways for secondary generic productivity, meaning the making of texts in a new generic form that fortifies its position. Many cases that fall under these definitions are a direct example of transformative use. The fair use doctrine also allows, in many cases, the use of explicit intertextuality, such as the reference to detective Dupin in Doyle's story.

Although the fair use doctrine reflects the centrality of common building blocks in the creative world, this reflection is incomplete and does not accommodate the full spectrum of uses of common building blocks according to genre theories. The fair use doctrine applies only to limited types of expression that pass the four-factor analysis. Thus, many uses of common building blocks in the form of expression will

173. Tushnet, *supra* note 172, at 869. Tushnet argued that this type of creativity leads to a greater chance the use is within the fair use doctrine. *See also* Anthony R. Reese, *Transformativeness and the Derivative Work Right*, 31 COLUM. J.L. & ARTS 467, 493-94 (2008).

174. Tushnet, *supra* note 172, at 869-70.

175. *See supra* notes 125-31 and accompanying text.

not be considered fair use. This includes the making of derivative works, which is not allowed without the first author's consent.[176]

C. The Right to Make Derivative Works

I showed that copyright law allows the use of certain types of common building blocks of texts and thus reflects the understanding of their importance to the enrichment of the creative world. This is evident in the idea/expression dichotomy that allows authors to use building blocks in the form of abstract ideas. The scènes à faire doctrine allows the use of common building blocks when their use is necessary to creating a work that falls within a particular genre. In addition, transformative use of protected expressions is allowed under the fair use doctrine and thus allows the use of another type of common building blocks. However, copyright law forbids the use of common building blocks in the form of expressions (that are not fair use or stock scenes) in order to enrich the creative world. These cases fall under the definition of the right to make derivative works.

The right to make derivative works is relatively new in copyright law's "bundle" of rights and was first introduced in the 1976 Copyright Act.[177] It expanded the preexisting adaptation right and absorbed the case law's expansion of the reproduction right.[178] The derivative work right grants the author an exclusive right to make works that are "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."[179] On the positive level, while Nimmer contends that the right to make derivative works is "superfluous" because the making of a derivative work will (almost) always involve the reproduction of the underlying work,[180] Samuelson argues that the derivative work right could be understood in a different way that exists independently from the

176. Despite overlap between fair use and derivative works, the two doctrines do not fully overlap, and many types of derivative works will not be covered by the fair use doctrine. *See* Reese, *supra* note 173, at 484, 494; Tushnet, *supra* note 172, at 887; Samuelson, *supra* note 172, at 843-44.

177. 17 U.S.C. §§ 101, 106.

178. Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186, 224-33 (2008); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 211-15 (1983); Jed Rubinfeld, *Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L.J. 1, 49-52 (2002).

179. 17 U.S.C. § 101.

180. 1 NIMMER ON COPYRIGHT, *supra* note 155, § 8.09[A][1].

reproduction right.[181] On the normative level, however, most commentators argued that the current broad definition of the derivative work right could not be justified.[182]

My argument is that the first author's right to bar subsequent authors from using many types of common building blocks to enrich the creative world and promote creativity does not match genre theories' understanding of the common building blocks' importance to the creative world. Thus, the right to make derivative works as a legal norm does not match the sociological-philosophical understanding of creativity and should be scrutinized and reevaluated.

Genre theories can assist in the rethinking of the derivative work right in two main respects. The first is the scope of the derivative work right and its relation to the reproduction right. The second is the strength of remedies available to an owner of a work in relation to the unauthorized making of derivative works based on it. As far as the first is concerned, genre theories can explain why the derivative work right should be separated and distinguished from the reproduction right. The current overlap between the derivative work right and the reproduction right does not reflect a qualitative difference between the two. Genre theories explain why making a derivative work is qualitatively different from the making of a reproduction and thus why the two should be separated.

As I showed, the use of common building blocks—in the establishment of a new genre, its development on the author's part, and the meaning-making of texts on the audience's part—is necessary and

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181. Pamela Samuelson, *The Quest for a Sound Conception of Copyright's Derivative Work Right*, 101 GEO. L.J. 1505 (2013).

182. For a critique of the derivative work right based on freedom of speech, see Christina Bohannan, *Taming the Derivative Worfk Right: A Modest Proposal for Reducing Overbreadth and Vagueness in Copyright*, 12 VAND. J. ENT. & TECH. L. 669, 688 (2010); Gervais, *supra* note 178, at 836-39; Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L. J. 283, 347-64 (1996); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 CARDOZO ARTS & ENT. L.J. 215, 277-83 (1996); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 Brook. L. Rev. 1213, 1213-58 (1997). For a critique on the derivative work right based on economic analysis, see Stewart Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1215-17 (1996); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 227 (1983); Lydia Pallas Loren, *The Changing Nature of Derivative Works in the Face of New Technologies*, 4 J. SMALL & EMERGING BUS. L. 57, 77-78 (2000); Shubha Ghosh, *Market Entry and the Proper Scope of Copyright*, 12 INT'L J. ECON. & BUS. 347, 351 (2005); Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009); Glynn S. Lunney, *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 650-53 (1996); Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK. L. REV. 1213, 1241-45 (1997); Chris Newman, *Transformation in Property and Copyright*, 56 VILL. L. REV. 251, 252-53 (2011); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 1048-68 (1997).

significant to the creative world. Common building blocks are important both in using rules and conventions on the one hand (derivation) and on developing the existing rules on the other (originality). Genre theories are indifferent to whether the use of common building blocks is of ideas or unprotected expression or whether it is of protected expressions, as long as the use develops new genres or expands existing ones. In contrast, the use of common building blocks without the development of genres does not contribute to promoting creativity and does not have a significant part in genre theories. Thus, in copyright terms, derivative works are much more similar to original works than they are to reproductions and an overlap between derivative works and reproductions could not be justified. This notion justifies a new derivative work doctrine that would completely separate it from the scope of the reproduction right.

Here too, the detective story is a good example. The common building blocks in Poe and Doyle's stories are of different levels of abstraction, though some amount to expressions in copyright terms. For example, the detective character of Dupin and his detailed personality traits that Doyle used for the creation of detective Holmes, as well as the locked room mysteries in both stories. Despite the fact that Doyle's detective story is different from Poe's and is, without a doubt, an original work on its own, under copyright's derivative work right and reproduction right, Doyle's story would likely infringe modern copyright protections.[183] It seems that under the understanding of the importance of common building blocks to creativity according to genre theories, Doyle's story is better seen as a derivative work rather than as a reproduction.

This point leads me to the second respect in which the importance of common building blocks affects the right to make derivative works: the strength of the remedies available to the owner. Even if we define Doyle's story as a derivative work and not as a reproduction, under the current definition of the derivative work right, it would still amount to copyright infringement. Genre theories could support a different doctrine. The main collision between the current derivative work right and the genre theories' understanding of common building blocks is in the first author's right to prevent subsequent authors from using common building blocks when other doctrines such as fair use or

183. *See, e.g., Salinger v. Colting*, 607 F.3d 68, 71-72 (2d Cir. 2010), in which the court decided that a sequel to *The Catcher in the Rye* infringed J. D. Salinger's copyright. It is important to note that in spite of the criticism of this decision, according to which fair use should have been found, sequels in general amount to copyright infringement. For a criticism of the decision, see Tushnet, *supra* note 172, at 887 n.96.

idea/expression dichotomy do not apply. Therefore, genre theories could support a change in the remedies available to the owner of the derivative work right so that the first author could not prevent a second author from such uses of common building blocks.

It is important to clarify that I do not argue that the derivative work right should be completely annulled such that it does not recognize any interest the first author has in potential second works based upon his original expressions. One could definitely think of cases in which such an interest should be recognized. Similarly, I do not argue that there is no value in making a distinction between ideas and expressions or in the scènes à faire doctrine. It also makes sense, in inner-legal logical terms, to set a border beyond which the first author has no more interest in second works. This happens when the second work is based on ideas from the first or when it is based upon stock expressions. However, the findings in this article assist in portraying a remedy model for the derivative work right that will match the understanding of the common building blocks' importance to the promotion of creativity under genre theories.

As noted earlier, the implications of genre theories on copyright law and the mismatch between the two concerning the derivative work right includes a normative aspect on top of the descriptive-critical one. This means that the mismatch between the conditions for the enrichment of the creative world under genre theories and the right to make derivative works could be a normative justification for changing the current legal doctrine. This is because genre theories examine and explain the significant necessary components for the enrichment of the creative world, and because copyright law's goal is to promote such enrichment. Therefore, notions from genre theories regarding the conditions that enable authors to create and develop the creative world and enable the audience to value works of authorship and extract meaning from them must be reflected in the legal rules that govern creativity.

CONCLUSION

Although there is a significant match between copyright law's understating of the way in which the creative world develops and the importance of common building blocks to such development under genre theories, as far as derivative works are concerned there is a mismatch between the two. To support this argument, I discussed different approaches to genre that focus on the development of creative texts and showed these approaches recognize that common building blocks are the foundation of creative development. The common

building blocks have two main aspects. First, the common building blocks enable creativity within constraints, rules, and familiar conventions from the author's perspective. Second, the common building blocks have an aspect that enables the audience to assign meaning and value to creative products and make them socially valuable. I also showed that the understanding of the enrichment of the creative world by using common building blocks views expressions and ideas as relevant types of common building blocks.

Using these notions from genre theories, I examined the possible implications this debate has on copyright law. As far as the idea/expression dichotomy is concerned—as well as the scènes à faire doctrine, which allows the use of protected expressions that are customary under a recognized genre—I showed that there is a match between genre theories and the legal rules. However, I argued that these doctrines do not supply a sufficient tool and do not allow the use of all types of common building blocks that genre theories recognize. This is because the scènes à faire doctrine does not fully reflect the way in which artistic styles are formed and developed. Further, in many cases, the use of what would be considered a protected expression at a certain period is necessary to creating an artistic style.

As far as the fair use doctrine is concerned, I showed that this doctrine also nicely reflects the importance of common building blocks to the promotion of creativity under genre theories. Transformative use, whether of purpose or content, allows the use of common building blocks in the form of expression to develop the creative world in certain ways. However, I showed that this doctrine does not offer a full response to the spectrum of use of common building blocks that genre theories recognize, due to its limited scope and other factors that are part of the doctrine.

As a result of the examination of these doctrines, I showed that the mismatch between genre theories and their understanding of the importance of common building block to the enrichment of the creative world and copyright law is in the right to make derivative works, which forbids the use of common building blocks in the form of protected expression for the development of the creative world. The main argument was that according to genre theories' understanding of the development of the creative world, the use of common building blocks in the form of protected expression for the promotion of creativity should be allowed. This is because the use of expressions as common building blocks is significant for the development of new genres both from the author's perspective and, most importantly, from the audience's perspective. Thus, my argument was that there is no justification for an overlap between the making of a new work based

on protected expression (derivative work), an act which develops the creative world, and the use of protected expressions that does not promote creativity (reproductions). Therefore, the notions from genre theories presented in this article support the separation of the derivative work right from the reproduction right and the understanding of the two as qualitatively different. In addition, I argued that there is a collision between the right to make derivative works and genre theories because the derivative work right allows first authors to bar second authors from using common building blocks. Therefore, I argued that genre theories could support and portray a shift in the remedies available under the current doctrine that does not prevent the making of unauthorized derivative works.