😄 © 📕 : EMOJI AS LANGUAGE AND THEIR PLACE OUTSIDE AMERICAN COPYRIGHT LAW

RACHEL SCALL[*]

As emoji become more ubiquitous in society, users are learning to express themselves through these symbols. Copyright protection of emoji would hamper this growing area of free expression. This note argues that, given the ways in which emoji are used in American culture, they should not receive copyright protection, in order to encourage the use of emoji as an "accessory" to language. Emoji do not readily fit under U.S. copyright protection and their maintenance would be best left to private organizations. This structure would allow people to use emoji freely, in order to develop common meanings for symbols among emoji users and thereby maximize their communicative and expressive functions.

INTRODUCTION

In the mid-1990s, as email and internet communication were gaining ground in his native Japan, Shigetaka Kurita noticed a problem with these new means of communication. Traditionally, the Japanese people would communicate via long personal letters filled with lengthy phrases and greetings meant to convey emotions that were not necessarily found in the dictionary definitions of the words on the page.[1] Email involved much shorter and quicker communication. As a result, people left lengthy expressions of emotion off the page.[2] Suddenly it was not clear whether a given word in an email was "a kind of warm, soft 'I understand' or a 'yeah, I get it' kind of cool, negative feeling."[3]

Kurita recognized that online communications were likely to remain short and terse in comparison to Japan's traditionally long written letters. As such, he sought to find a new, shorter way to express the connotations of a traditional writer's written word. Drawing from street signs, Chinese characters, and symbols used in manga comics,[4] Kurita developed a series of symbols that represent emotions and other abstract ideas.[5] The symbols, which began life as a system of

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[1] Jeff Blagdon, *How Emoji Conquered the World*, VERGE (Mar. 4, 2013, 11:46 AM), http://www.theverge.com/2013/3/4/3966140/how-emoji-conquered-the-world.

[2] *Id.*

[3] *Id.*

[4] Manga is a style of Japanese comics. Anime is the animated version of manga. *See Manga and Anime*, JAPAN GUIDE, http://www.japan-guide.com/e/e2070.html (last visited Feb. 22, 2016).

[5] *Id.*; *see also* Mayumi Negishi, *Meet Shigetaka Kurita, the Father of Emoji*, WALL ST. J. (Mar. 26, 2014, 5:36 AM), http://blogs.wsj.com/japanrealtime/2014/03/26/meet-shigetaka-kurita-the-father-of-emoji/.

176 12-pixel by 12-pixel glyphs,[6] eventually evolved into more than 1,000 symbols now known as emoji.[7]

Kurita "never expected emoji to translate abroad,"[8] but emoji became a mainstay of American culture after Apple included an emoji keyboard with its iPhone iOS 2.2 update in 2011.[9] Since then, emoji have worked their way into many aspects of online communication. Emoji are used in private communications, such as text messages and emails, and public communications, such as Twitter and blog posts.[10] Some users have truly taken their emoji usage to the next level; in 2009, Fred Benson founded a Kickstarter campaign to translate Herman Melville's Moby Dick into an all-emoji version, titled Emoji Dick.[11]

In their short life, emoji have had little contact with the American legal system. In the criminal trial context, courts have begun to admit evidence that includes emoji in the context of a text message or online posting.[12] Judge Katherine Forest, presiding over a trial concerning the online black-market website Silk Road, instructed the jury to take note of any emoji included in any document and

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[6] Blagdon, *supra* note 1.

[7] Adam Sternbergh, *Smile, You're Speaking Emoji*, N.Y. MAG (Nov. 16, 2014, 9:00 PM), http://nymag.com/daily/intelligencer/2014/11/emojis-rapid-evolution.html; Amit Chowdhry, *Apple Releases iOS 8.3 to the Public, It Has New Emoji*, FORBES (Apr. 8, 2015, 1:17 PM), http://www.forbes.com/sites/amitchowdhry/2015/04/08/apple-releases-ios-8-3-to-the-public-its-the-update-with-the-new-emojis/. This paper will only analyze the emoji based on code provided by the Unicode Consortium. Different companies have begun developing their own "branded emoticons," but these glyphs function by downloading an app that provides a branded emoticon keyboard. *See generally* Kristina Monllos, *Here's Why Your Favorite Brands Are Making Their Own Emoji*, ADWEEK (Mar. 9, 2015, 9:15 PM), http://www.adweek.com/news/advertising-branding/here-s-why-your-favorite-brands-are-making-their-own-emoticons-163325. This is different from emoji, which come standard on a variety of devices and function cross-platform as in-line text, rather than inserted pictures.

[8] Negishi, *supra* note 5.

[9] Blagdon, *supra* note 1.

[10] *See, e.g.*, EMOJITRACKER, http://www.emojitracker.com/ (last visited May 14, 2015) (tracking real-time emoji usage on Twitter); EMOJINALYSIS, http://emojinalysis.tumblr.com/ (last visited May 14, 2015) (blogging about the psychology behind the "recently used" emoji on people's cell phones).

[11] Erin Allen, *A Whale of an Acquisition*, LIBR. CONGRESS (Feb. 22, 2013), http://blogs.loc.gov/loc/2013/02/a-whale-of-an-acquisition/. Today, a copy of Emoji Dick resides in the Library of Congress.

[12] Eli Hager, *Is an Emoji Worth 1,000 Words?*, MARSHALL PROJECT (Feb. 2, 2015, 3:34 PM), https://www.themarshallproject.org/2015/02/02/is-an-emoji-worth-1-000-words.

to consider the emoji part of any document submitted to evidence.[13] In the context of intellectual property law, however, little has been said about how emoji fit into the American system of intellectual property protections.

Given that emoji are, by their nature, digital code-based pictures, it is possible that if emoji were to receive intellectual property protection, such protection could fit into the copyright system. Copyright protects "original works of authorship fixed in any tangible medium of expression."[14] Facts and ideas themselves are not protected.[15] One form of copyrightable works is "pictorial, graphic, and sculptural works," to the extent that the works are aesthetic and not functional.[16] Emoji are two-dimensional representations that could plausibly fall under the pictorial, graphic, and sculptural category. Even if emoji do fall within the domain of copyright protection, however, public policy may dictate that they would be better left to the public domain.

This paper argues that, given the ways in which emoji are used in American culture, they should not receive copyright protection and should be left to the public domain. Copyright law should treat emoji more like an evolving language than intellectual property belonging to a person or entity. Americans already use emoji in their communications, and copyright's constitutional purpose of promoting the arts and sciences[17] would be best achieved by encouraging the use of emoji as an "accessory" to language. Free use of emoji as part of the American lexicon will promote communication, thus promoting learning and free expression.[18] Part I of this paper will discuss how emoji function. This section will explain how emoji work from a technical standpoint, as well as how they have become part of today's social and communicative framework. Part II will analyze how emoji could fit into current U.S. copyright law under the protections for pictorial, graphic, and sculptural works. This section will also discuss the impact such protection would have on the incentives to create emoji and will also touch on other intellectual property regimes that may be applied to them. Part III will explain why the public would most benefit from categorically excluding emoji from copyright protection, and how the growth of emoji should be governed outside copyright protection.

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[13] Benjamin Weiser, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, N.Y. TIMES (Jan. 28, 2015), http://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html?_r=0.

[14] 17 U.S.C. § 102.

[15] Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

[16] 17 U.S.C. § 101.

[17] U.S. Const. art I, § 8, cl. 8.

[18] Golan v. Holder, 132 S.Ct. 873, 901 (2012) (Breyer, J., dissenting).

I
EMOJI'S TECHNICAL ELEMENTS AND THEIR COMMUNICATIVE FUNCTION

This section will explore how emoji function and how people use them. Part A will cover the technology and business of emoji and how they appear on users' devices. Part B will explore how emoji are developing as language as people begin to work them into various forms of electronic communication.

A. How Emoji Work from a Technical Standpoint

Shigetaka Kurita's first set of emoji, created in the mid-1990s,[19] were a feature on a pager marketed to teenagers.[20] A somewhat uniform set of emoji did not emerge until 2008, and the emoji most Americans are familiar with only emerged when Apple included the characters in a 2011 iOS update.[21]

Emoji may appear to be simply a series of pictographs of people (👪), places (🏙), and things (🎥), but, in essence, each emoji is a unique piece of computer code.[22] When Japanese technology companies first began to incorporate emoji in mobile technologies, such as pagers and cell phones, different companies used different codes to represent the same emoji symbol, and sometimes the same code to represent different symbols.[23] This coding problem was not unique to emoji: as different companies around the world entered the realm of computing, different methods emerged for coding symbols used in virtually all languages.[24] Different forms of coding for the same symbols – emoji or otherwise – led to interoperability between computing platforms.[25]

Enter the Unicode Standard. The goal of Unicode is to provide a "unique number for every character, no matter what the platform, no matter what the program, no matter what the language."[26] The first Unicode standard debuted in

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[19] Blagdon, *supra* note 1.

[20] Jessica Bennet, *The Emoji Have Won the Battle of Words*, N.Y. TIMES (July 25, 2014), http://www.nytimes.com/2014/07/27/fashion/emoji-have-won-the-battle-of-words.html?_r=0.

[21] *Id.*

[22] Amy Weiss-Meyer, *A Peek Inside the Non-Profit Consortium That Makes Emoji Possible,* NEW REPUBLIC (June 27, 2014), http://www.newrepublic.com/article/118421/emoji-made-possible-non-profit-consortium.

[23] *Id.*

[24] *What is Unicode?*, UNICODE, http://www.unicode.org/standard/WhatIsUnicode.html (last visited May 14, 2015).

[25] *Id.*

[26] *Id.*

1992.[27] All modern Internet browsers and most leading operating systems support Unicode.[28] The Unicode Consortium manages the Unicode Standard through its role as a non-profit "founded to develop, extend and promote use of the Unicode Standard."[29] The Unicode Consortium has been working to standardize various characters for Internet use for more than 20 years.[30] Unicode's "work is ubiquitous to the point of being invisible";[31] the Unicode Standard governs every character that people read or type on electronic devices.[32]

Given that emoji emerged as a set of characters that only exist via technology,[33] it is not surprising that it should fall to the Unicode Consortium to manage the code that allows users to communicate via emoji.[34] The Unicode Consortium gives each emoji symbol a code and a name, such as "U+1F36D LOLLIPOP."[35] The name only generally describes the character, while the code instructs the computer what, specifically to pull up as text.[36]

The Unicode Consortium determines the code that makes the emoji appear on a user's screen, but it does not design the actual emoji seen by the user.[37] The emoji symbols are similar to typefaces, and are designed by each technology company that chooses to incorporate emoji in its product.[38] For example, U+1F49B YELLOW HEART is designed by apple to look like 💛, but is designed by Android to look like 💕.[39] There are other emoji displays that are simpler and resemble a traditional Dingbats font.[40] The Unicode Consortium provides the

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[27] *Chronology*, UNICODE, http://www.unicode.org/history/versionone.html (last visited February 21, 2016).

[28] *Id.*

[29] *Id.*

[30] Weiss-Meyer, *supra* note 22.

[31] *Id.*

[32] *Id.*

[33] Blagdon, *supra* note 1.

[34] *Emoji and Dingbats*, UNICODE, http://www.unicode.org/faq/emoji_dingbats.html (last visited May 14, 2015).

[35] *Id.*

[36] *Id.*; *see generally Miscellaneous Symbols and Pictographs*, UNICODE, http://www.unicode.org/charts/PDF/U1F300.pdf (last visited May 14, 2015).

[37] Weiss-Meyer, *supra* note 22.

[38] *Id.*

[39] John-Michael Bond, *You May Be Accidentally Sending Friends a Hairy Heart Emoji,* ENGADGET (Apr. 30, 2014, 7:00 PM), http://www.engadget.com/2014/04/30/you-may-be-accidentally-sending-friends-a-hairy-heart-emoji.

[40] *Emoji and Dingbats*, *supra* note 34. Dingbats is a font made up of symbols, rather than alphanumerical characters.

following chart, which compares examples of different emoji displays used by different companies:

The chart features, from top to bottom, four different displays for U+1F36D LOLLIPOP, U+1F36E CUSTARD, U+1F36F HONEY POT, and U+1F370 SHORTCAKE.[41] Technology companies are free to display each piece of code as they choose, and the Unicode Standard names are provided as suggestions for how a given piece of code should appear to the user.[42]

To better understand the role of different players in the functionality of emoji, it is helpful to analyze a problem that has plagued American emoji users since Apple first popularized emoji: the dearth of racial diversity displayed by the "human" characters. Apple's original emoji character set featured more than 30 representations of humans, as well as various hand gestures and body parts (such as ears and noses), all of which were Caucasian.[43] Arguably only 2 or 3 emoji were not Caucasian, and not one was black.[44] Apple agreed there must be more emoji diversity, but claimed its hands were tied by the code provided by the Unicode Standard.[45] However, this statement appears to be an example of Apple dodging

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[41] *Id.* The third column depicts Apple's interpretation of emoji, while the fourth column depicts Android's display.

[42] *Id.*

[43] *See generally* Ben Reid, *iOS 8.3, OS X 10.10.3 Adds New Emojis, Here's What They Look Like*, REDMOND PIE (Feb. 24, 2015), http://www.redmondpie.com/ios-8.3-os-x-10.10.3-adds-new-emojis-heres-what-they-look-like.

[44] *Id.*

[45] Joey Parker, *What Does Apple Think About the Lack of Diversity in Emojis? We Have Their Response.*, MTV (Mar. 25, 2014, 1:59 PM), https://web.archive.org/web/20140327033829/http://act.mtv.com/posts/apple-responds-to-lack-of-diversity-in-emojis/.

the diversity issue because the Unicode Standard does not control the appearance of the emoji or require any racial or ethnic manifestation.[46] Although it is clear that Unicode controls the emoji code, and companies like Apple control the way they look, the Unicode Consortium worked to find ways to partner with the companies designing emoji in order to provide more diversity.[47] Apple's release of iOS 8.3 in April 2015 finally gave users six skin-tone options to choose from for the majority of "people emoji," but the emoji representing families and couples are only available in a yellow, non-human skin tone.[48]

Because emoji code makes it possible to include images in-line with text, they occupy a new and unique way of communicating. Although users could previously share a photo with one another, or draw each other pictures, the versatility of emoji mixed with text gives them the potential to develop as part of language, or even as their own form of language. Now, people can replace words with emoji where they feel the emoji will convey more emotion simply a typed word.

B. Emoji as an Element of Language Expanding Communication

Emoji may have been intended to clarify connotations in brief online communications,[49] but today they play a larger role in digital communications.[50] Emoji can be used "as punctuation [excited face], as emphasis [sob], as a replacement for [several] words ("Can't wait for [palm trees] [sun] [swim]!") or to replace words altogether."[51] Emojitracker, an online database of real-time emoji use on Twitter, updates so quickly that it opens with an epilepsy warning.[52] In fact, according to Emojitracker's data, "people are averaging 250 to 350 emoji tweets a second."[53] This calculation does not even account for emoji used in text messages, email, "gchat,"[54] and other platforms.[55]

Emoji have been referred to as "an optional written language,"[56] "a foreign language,"[57] and "digital hieroglyphics that, in many cases, can substitute for

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[46] *Emoji and Dingbats*, *supra* note 34.

[47] *Id.*

[48] *See* Reid, *supra* note 43.

[49] Blagdon, *supra* note 1.

[50] Bennet, *supra* note 20.

[51] *Id.*

[52] EMOJITRACKER, *supra* note 10.

[53] Bennet, *supra* note 20.

[54] Gchat is a colloquial term for Google's Gmail instant messenger system.

[55] *See* Bennet, *supra* note 20.

[56] Sternbergh, *supra* note 7.

lettered language."[58] Linguist Ben Zimmer has said that although emoji are not yet a "full-fledged language," they do "seem to have fascinating combinatorial possibilities. Any sort of symbolic system . . . used for communication[] is going to develop dialects."[59] Zimmer's statement is telling: emoji have been used for a number of purposes, but seem most effective when used in the context of an already existing full-fledged language. For example, Emoji Dick, an all-emoji translation of Moby Dick,[60] does not have quite the level of elegance and readability as the original, in part due to the fact that there are more than 1,000,000 words in the English language,[61] but only 1,000 or so emoji.[62] Emoji can, however, approve (👍), express emotions (😄😥😖), describe what you want for dinner (🍕), and add to written works and conversations in a variety of ways. In fact, linguist Tyler Schnoebelen has found that emoji have begun to develop their own grammar of sorts.[63] For example, emoji tend to appear at the end of messages.[64]

Emoji's growth as a language depends on the organic use and development of meaning that has been characteristic of its use thus far. Intellectual property protections, however, could stymie that growth by taking emoji out of the public domain. If emoji creators own copyrights in their creations, users may lose some of their freedom to transform emoji into an increasingly useful form of communication.

II
FAILURE TO FIT EMOJI INTO THE AMERICAN COPYRIGHT STRUCTURE

It is clear that emoji can potentially be classified in multiple ways: as a series of pictures, as typefaces, as computer code or as a component of language. How emoji fit into U.S. copyright protections depends on how they are classified.

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[57] *See* Damon Darlin, *America Needs Its Own Emojis*, N.Y. TIMES (Mar. 7, 2015), http://www.nytimes.com/2015/03/08/opinion/sunday/turn-emojis-red-white-and-blue.html.

[58] Ruth Reader, *The Emoji Is the Future of Texting on the Apple Watch*, VENTUREBEAT (Mar. 9, 2015, 3:46 PM), http://venturebeat.com/2015/03/09/the-emoji-is-the-future-of-texting-on-the-apple-watch.

[59] Darlin, *supra* note 57.

[60] Allen, *supra* note 11.

[61] *Number of Words in the English Language*, GLOBAL LANGUAGE MONITOR (Jan. 1, 2014), http://www.languagemonitor.com/number-of-words/number-of-words-in-the-english-language-1008879/.

[62] *See* Sternbergh, *supra* note 7; Chowdhry, *supra* note 7.

[63] Katy Steinmetz, *Here Are Rules of Using Emoji You Didn't Know You Were Following*, TIME (July 17, 2014), http://time.com/2993508/emoji-rules-tweets/.

[64] *Id.*

Part A of this section will analyze copyright protection for pictorial, graphic, and sculptural works and how emoji – either individually or as a set – could fit into this category of copyright protection. Next, Part B will look at how copyright law would treat emoji when used in combination and will touch on how trademark law may govern combinations of emoji. Part C will briefly discuss possible copyright protection for emoji code. Part D will discuss the standard-essential patent model of intellectual property protection and the consequences of applying a compulsory licensing scheme to emoji.

A. Pictorial, Graphic, and Sculptural Works: Individual Emoji vs. Full Set of Characters

Under the Copyright Act of 1976, U.S. copyright law protects "original works of authorship fixed in any tangible medium of expression," including "pictorial, graphic, and sculptural works" ("PGS" works).[65] PGS works include two and three-dimensional artistic representations, including commercial art, fine art, and anything in between.[66] These works are protected for their artistic merit, but are not protected insofar as they may be useful or functional.[67]

Emoji could plausibly gain copyright protection as PGS works, given their nature as two-dimensional pictures. To be eligible for this protection, emoji would first have to be "original," or a work "independently created by the author" that possesses "at least some minimal degree of creativity."[68] Originality is not a very difficult standard to meet: "a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."[69] An original work must simply "possess some creative spark, 'no matter how crude, humble or obvious' it might be."[70]

To determine whether emoji fulfill copyright's originality requirement, it is important to determine whether the idea behind a given emoji and the expression of said emoji are separable. For example, the "grinning face emoji," also known as the "smiley face emoji" or "happy face emoji," looks like 😃.[71] The idea of a smiley face is not protectable by copyright because ideas themselves do not fall

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[65] 17 U.S.C. § 102.

[66] *Id.* at § 101.

[67] *Id.*

[68] *Feist*, 499 U.S. at 345.

[69] *Id.*

[70] *Id.* (citing 1 MELVILLE B. NIMMER & DAVID NIMMER, COPYRIGHT § 1.08[C][1] (1990)).

[71] *Grinning Face*, EMOJIPEDIA, http://emojipedia.org/grinning-face/ (last visited May 15, 2015). Emojipedia is a website that catalogues emoji with their picture and common descriptive names.

within copyright's scope of protections.[72] Smiley faces, as a category, represent "a larger private preserve than Congress intended to be set aside in the public market" under the monopoly created by copyright.[73] But the grinning face emoji is only one example of the many ways to express a smiley face. In fact, the emoji set alone contains many examples of smiley faces: 😀, 😁, 😃. The different smiley face emoji are expression of the idea of a smiley face, and copyright protection may be applied to expression of an idea, so long as the expression is an original creation.[74] Given that smiley faces may be expressed in many ways, and assuming that emoji were not copied from already-existing smiley faces, the grinning face emoji likely fulfills copyright's originality requirement.[75]

There is, however, an important exception to copyright's originality rule. When an idea is "very narrow, so that the topic necessarily requires if not only one form of expression, at best only a limited number . . . the subject matter would be appropriated by permitting the copyrighting of its expression."[76] This "merger" of expression with idea makes a work uncopyrightable and therefore, "when merger occurs, identical copying is permitted."[77] This means that if there is only one way, or very few ways, to create an image of a particular idea, that image will not receive copyright protection.[78] To give copyright protection to an image that captures the heart of an idea would be to ignore the idea-expression distinction and to give a copyright monopoly over something that Congress judges to belong in the public domain.[79] For example, there may be only a small number of ways to create an icon of a basketball or an American flag. If this is true, it is possible that the basketball emoji, 🏀, and American flag emoji, 🇺🇸, are not copyrightable because the idea behind those emoji merges with the images used. The more generic, and less creative, an emoji is, the more likely it will merge with the idea it represents and therefore be uncopyrightable.

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[72] *Feist*, 499 U.S. at 345.

[73] Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971)

[74] *Id.* at 740-41.

[75] *Id.* at 741. Rather than perform this analysis for every emoji, this paper will assume each emoji passes muster under this originality test, while acknowledging that a court may find otherwise.

[76] Morrissey v. Proctor & Gamble Co., 379 F.2d 675, 678-79 (1st Cir. 1967) (internal citations omitted).

[77] Lotus Development Corp. v. Borland Int'l, Inc., 49 F.3d 807, n. 9 (1st Cir. 1995).

[78] *Id.*

[79] *Morrissey*, 379 F.2d at 678-79.

Different providers of emoji "fonts" have interpreted the Unicode emoji code in order to come up with different, and original, displays of emoji.[80] Where an emoji is more than an "indispensable, or at least standard" manner of displaying a given idea, it is likely copyrightable (assuming it was not copied from a preexisting work).[81] However, where an emoji is either the only way, or one of very few ways to express an idea, it is likely uncopyrightable and part of the public domain. Given that many emoji do not appear to be generic images, or duplicate images representing the same ideas,[82] this analysis assumes that the majority of individual emoji are not subject to the merger doctrine and are therefore copyrightable.

Next, in order to gain copyright protection, emoji must be "fixed in any tangible medium of expression."[83] "A work is 'fixed' in a tangible medium of expression when its embodiment in a copy . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[84] Digital displays of original images are considered "fixed" because they can be perceived by the user.[85] It does not matter that the user affects the display by choosing the emoji she wishes to use – the display is still considered "permanent or stable" for the purpose of fixation.[86] Assuming that emoji, as individual images, meet the copyright requirements of originality and fixation, it appears that they are eligible for copyright protection as PGS works.

Taken as a collection, it is not as clear that emoji are protectable under current copyright law. As a collection, emoji bear a close resemblance to a typeface. A typeface is "a design of an alphabet and other typographical symbols placed on devices" used in connection with printing, traditionally, and digital displays.[87] Congress had an opportunity to consider copyright protection of typefaces while preparing the Copyright Act of 1976, but Congress decided against

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[80] *See supra* Part I.A.

[81] Hoehling v. Universal City Studios, Inc., 618 F.2d 972, 979 (1980).

[82] For example, Apple's iOS 8.3 emoji keyboard contains 13 emoji representing trains or trams, three emoji representing CDs, 4 mailbox emoji, 14 emoji hearts, and many other duplicative emoji.

[83] 17 U.S.C. § 102.

[84] *Id.* at § 101.

[85] Williams Elec., Inc. v. Artic Int'l, Inc., 685 F.2d 870, 874 (1982).

[86] *Id.*

[87] Eltra Corp. v. Ringer, 579 F.2d 294, 296 (1978). *See also* Adobe Sys. Inc. v. S. Software Inc., 1998 WL 104303, at *4 (N.D. Cal. Feb. 2, 1998). A font is the computer program used to "generate human readable typeface designs on computer screens, printers, and other devices. Monotype Imaging, Inc. v. Bitstream, Inc., 376 F.Supp. 2d 877, 882 (N.D. Ill. 2005).

protecting typefaces under copyright law.[88] This decision, to deny copyright protection to typefaces, was upheld by the Fourth Circuit in *Eltra Corp. v. Ringer*.[89] There, the court stated that a "typeface is an industrial design in which the design cannot exist independently and separately as a work of art." Due to this holding, and lack of protection under the Copyright Act, typeface has never received copyright protection.[90]

Legal commentators still debate whether typefaces are truly industrial design or are actually works of art deserving copyright protection.[91] Because typefaces are necessary for humans to communicate via writing, giving typeface creators lengthy copyright monopolies over their designs would not make sense because it could limit means of communication, thereby stymying free expression. Furthermore, copyright law cannot provide a monopoly on the limited ways to legibly express a letter.[92] It is possible that the creative aspects of a typeface simply cannot be separated from its usefulness. Given these arguments, denying typefaces copyright protection makes sense.

Emoji may fall into the category of "other typographical symbols," much like the ITC Zapf Dingbats typeface.[93] ITC Zapf Dingbats qualifies as a set of copyrighted symbols, but is not a copyrighted typeface.[94] Therefore, it is possible that emoji are protected as individual "copyrighted symbols," but as a system represent an uncopyrightable typeface. Excluding emoji from copyright protection, as a typeface, would create a protection regime for emoji that would favor users over creators, thus allowing emoji to develop as a language, rather than as a marketable good. Without copyright protection, users are free to include emoji in text messages, websites, and other written digital works and communications without the threat of a copyright suit. This system of non-protection promotes free

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[88] Leonard Storch Enter., Inc. v. Mergenthaler Linotype Co., 1980 WL 1175, at *4 (E.D.N.Y. Aug. 8, 1980).

[89] *Eltra Corp.*, 579 F.2d 294.

[90] *Id.* at 298.

[91] *See generally* Phillip W. Snyder, *Typeface Design After the Desktop Revolution: A New Case for Legal Protection*, 16 COLUM.-VLA J.L. & ARTS 97 (1991) (describing the legal status of typefaces in the digital age and possible intellectual property protections for digital typefaces); Emily N. Evans, *Fonts, Typefaces, and IP Protection: Getting to Just Right*, 21 J. INTELL. PROP. L. 307, 337-39 (2014) (discussing how typefaces may fulfill requirements of copyright law, but should not fall under copyright protection).

[92] Evans, *supra* note 91, at 337.

[93] ITC Zapf Dingbats is a typeface consisting of pictorial symbols rather than alphanumeric symbols. When the word "emoji" is typed in ITC Zapf Dingbats, it appears as "□□□□□"

[94] Monotype Corp. PLC v. Int'l Typeface Corp., 43 F.3d 443, n.3 (9th Cir. 1994).

speech via emoji, thus allowing the greatest number of people to participate in helping them evolve as a language or component of language.

Of course, it is necessary that companies have the incentives to create emoji fonts, so that users have access to emoji images and not only the underlying code. Without images, emoji are not useful for communication. It is unlikely that a lack of copyright protection for emoji images would disincentivize creators, given the environment in which emoji are currently created. Electronic goods and software manufacturers develop emoji as a feature of a given smart phone or other digital platform. So long as consumers demand emoji on their digital devices, manufacturers will have incentives to include emoji typefaces on those devices. It is not necessary that many emoji typefaces be created, because the fewer the typefaces, the more homogenous emoji will be, and the easier it will be for different people to understand the characters.

Although people may prefer one style or expression of Unicode's emoji code to another style or expression, communication of emoji is dependent upon uniform display to promote understanding. For example, what appears to an Apple user as the hair flick emoji (💁) may not be recognizable on an Android device, where the same emoji appears like this: 💁.[95] A study of popular anthropomorphic emoji found that people do not interpret emoji the same way and that "[c]ommunicating across platforms . . . adds additional potential for misconstrual."[96] Having one standard set of emoji, rather than encouraging people or companies to create various expressions of emoji, would help eliminate this communication problem.[97] Additionally, having a standard display would prevent various creators of emoji display from interpreting Unicode emoji code as completely different displays, as with the Apple yellow heart emoji and the Android 4.4 hairy heart emoji. A uniform system of emoji images would prevent different dialects from developing – a valid public policy goal that would avoid people being split into dialect groups simply based on their chosen electronic or mobile device provider. Otherwise, people with iPhones would end up developing one emoji dialect, while people with Android would essentially develop a separate language. Copyrighting emoji code would essentially place barriers between people simply because of their electronics preferences.

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[95] EMOJIPEDIA, http://emojipedia.org/information-desk-person/ (last visited Feb. 22, 2016).

[96] Hannah Miller, et al., *"Blissfully happy" or "ready to fight": Varying Interpretations of Emoji*, ICWSM-16 at 8-9 (forthcoming May 2016), available at http://grouplens.org/site-content/uploads/Emoji_Interpretation.pdf.

[97] *See id.* at 9.

B. *Intellectual Property Protection May Be Available for Emoji in Combination*

When people use emoji to communicate, they may express their ideas using a grouping or combination of emoji. For example, you could ask someone if they want to grab pizza and a movie (🍕 ➕ 🎥 ❓), or signal disbelief with the phrase "holy crap" (🙏 💩).[98] Looking at the emoji set as a means of communication, each emoji represents a word or phrase. Groupings of emoji therefore make up phrases or sentences, but would likely not be considered creative works for the purpose of copyright protection. When those phrases or sentences are strung together to make a novel or other creative, written work, however, the grouping of emoji may rise to the level of originality necessary for copyright protection. A short string of emoji used to ask a friend to grab pizza and a movie would likely merge with the idea of asking the question in the emoji language, and therefore be uncopyrightable under merger doctrine. Yet, rewriting Moby Dick in emoji requires creative choices and the resulting emoji novel would be copyrightable.[99]

It is possible that short strings of emoji that are unprotectable under copyright could be eligible for trademark protection. Trademark law gives the producer a monopoly on the mark, allowing him or her to prevent competitors from using it.[100] Trademarks can include "any word, name, symbol, or device, or any combination thereof" used by a person "to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown."[101] Under this definition, it is unlikely that a single emoji or a combination of emoji used commonly in communication could be trademarked because such commonly used emoji would not be able to "identify or distinguish" a brand. This policy allows emoji as words and emoji as sentences or phrases to remain in the public domain as emoji develop as a means of communication. A combination of emoji that would not readily communicate an idea unless associated with a brand, however, may be eligible for trademark protection. For example, a company called 💾 🌵, or Disk Cactus, may be able to register its brand name as a trademark because the combination 💾 🌵 is unique and will only have meaning if associated with the brand.[102]

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[98] *See generally All Emojigrams, A-Z,* EMOJISAURUS, http://emojisaurus.com/all (last visited May 14, 2015).

[99] Allen, *supra* note 11.

[100] Qualitex Co. v. Jacobsen Prod. Co., 514 U.S. 159, 162 (1995) (internal citations omitted).

[101] 15 U.S.C. § 1127.

[102] *See* DISK CACTUS, http://www.diskcactus.com/ (last visited May 14, 2015).

C. Computer Program Protection of Unicode Standard Coding of Emoji

Another category of original, fixed works protected by copyright law is computer programs.[103] The Copyright Act defines a computer program as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result."[104] Computer programs qualify as literary works even though they are not written using words.[105] As with PGS works (and all copyrightable works), a computer program must be fixed and original in order to be protected by copyright.[106] Each piece of emoji code is a short combination of letters and numbers.[107] These combinations of letters and numbers tell a computer to pull up the specific emoji the user wishes to type.[108] Therefore, the emoji code technically fits within the copyright definition of a computer program.[109] It is more natural, however, to understand the computer code enabling the use of the emoji, such as the software that allows the user to type with emoji, to be understood as a computer program. Because it is not very natural to think of something that is as short as emoji code as a computer program, it is likely that the code underlying emoji is not copyrightable as a computer program.

The lack of copyright protection for emoji's underlying code would ensure that copyright law could not interfere with the Unicode Consortium's work in making emoji (and all languages) interoperable across digital platforms. Interoperability ensures that people using all types of computer and Internet platforms can communicate with one another via the Internet. Otherwise, it is possible that something typed on an Apple computer or a Google Chrome Internet browser would show up as empty rectangle, rather than readable type, on a Windows computer or an Internet Explorer browser.[110] If every digital platform had to create its own computer code for emoji in order to avoid infringing another platform's copyright, then users on different platforms would never be able to send each other emoji.

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[103] Apple Comp., Inc. v. Franklin Comp. Corp., 714 F.2d 1240, 1247 (1983); *see* 17 U.S.C. § 102.

[104] 17 U.S.C. § 101.

[105] *Apple Comp.*, 714 F.2d at 1249.

[106] 17 U.S.C. § 102.

[107] *Emoji and Dingbats*, *supra* note 34.

[108] *See id.*

[109] *See* 17 U.S.C. § 101.

[110] *See supra* Part I.A.

D. *The Standard-Essential Patent Model and Compulsory Licensing of Emoji under Copyright*

It may be tempting to draw parallels between emoji and products that must conform to a standard in order to be usable, such as electronics with outlet-plugs. Emoji require code that conforms to interoperability standards set by the Unicode Consortium, much like a plug must fit a standardized outlet. The plug and outlet are covered by the patent system because they are useful articles. Specific types of plugs and specific types of outlets, however, are required in order for products to function in the U.S., so the patent system cannot give any one entity a monopoly over these standards. Therefore, a special category of patents exists, called standard-essential patents, which require "fair, reasonable, and non-discriminatory" licensing.[111]

Perhaps a similar type of special copyright protection could be given to emoji, requiring compulsory licensing in a similar manner. This would mean that the emoji code created by the Unicode Consortium would be licensed to computer manufacturers for a fair, reasonable, and non-discriminatory rate. The manufacturers who choose to pay the licensing rate could then develop images and keyboards for the emoji of their choice and issue another fair, reasonable, and non-discriminatory license to users who wish to use emoji outside of private communications.[112]

Even with "fair, reasonable, and non-discriminatory" licensing, however, such a system would erect barriers to emoji use that do not seem to be required to fulfill the Framers' intellectual property goals: the promotion of learning and the creation of works that produce "utility."[113] The Unicode Consortium, which controls the creation and management of all emoji code, is a non-profit and would not benefit from a license that would make emoji code into a commercial and profitable good.[114] The companies that create emoji images and make them usable by consumers could potentially make a profit by licensing emoji for public display, but it seems unlikely that this would be a very profitable market. Consumers are

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[111] Rajendra K. Bera, *Standard Essential Patents (SEPs) and "Fair, Reasonable and Non-Discriminatory" (FRAND) Licensing,* 1 (Jan. 29, 2015) (unpublished article), http://papers.ssrn.com/abstract_id=2557390.

[112] *See* 17 U.S.C. § 106 (Stating private use of a copyrighted work is not prohibited by copyright).

[113] Golan v. Holder, 132 S.Ct. 873, 901 (2012) (Breyer, J., dissenting).

[114] *The Unicode Consortium*, UNICODE, http://www.unicode.org/consortium/consort.html (last visited May 14, 2015).

already accustomed to being able to use emoji however and whenever they wish without the need to pay for a license.[115] A licensing system may not cause users to abandon emoji altogether, especially not in the realm of private communications, but may limit creation of emoji-related resources if the creators of those resources cannot or will not pay licensing fees.[116] Companies could sue users for public display of copyright-protected emoji images, but the companies would be suing their own consumers, which would likely be bad for business and public relations. Moreover, users may be able to bring strong fair use defenses that would result in lengthy and costly litigation.[117] Overall, this system of copyright-with-licensing would create an unnecessarily confusing and complicated marketplace.

An analysis of current U.S. copyright law reveals that it may be possible to protect emoji in some way. Perhaps individual emoji images could be given copyright protection or could be subject to a compulsory licensing scheme. Even if the copyright regime allowed these protections, however, public policy dictates that emoji should be excluded from copyright protection and left to the public domain.

III
EMOJI AS CONSTRUCTED LANGUAGE AND WHY COPYRIGHT CANNOT BE APPLIED

Emoji are more than just a set of small glyphs; they can be seen as a burgeoning means of communication. Part A of this section will introduce the idea of constructed languages and explain how emoji may be seen as a constructed language accessory. Part B will explain how emoji will continue to grow if categorically excluded from copyright protection in order to promote emoji's use as language. Part C will explain how emoji may be governed and developed if left to the public domain.

A. Emoji and Their Development as a Constructed Language Accessory

In many ways, emoji may be best likened to constructed languages. A constructed language, also known as an invented or planned language, is a language owing its origins to an individual human inventor, as opposed to a

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[115] Hence the creation of resources like EmojiTracker. EMOJITRACKER, *supra* note 10.

[116] Some examples of such resources include the Emoji Dictionary, Emojitracker, and translations of previously existing works into emoji. EMOJI DICTIONARY, http://emojidictionary.emojifoundation.com/home.php?people (last visited May 14, 2015); EMOJITRACKER, *supra* note 10; Allen, *supra* note 11.

[117] *See* 17 U.S.C. § 107. *See, e.g.,* Cariou v. Prince, 714 F.3d 694 (2d. Cir. 2013), Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

language that originates and evolves as people communicate over time.[118] While a constructed language may owe its "phonology, morphology, syntax, and sometimes alphabet" to a human inventor, aspects of the language may evolve organically from the inventor's starting point.[119] English, Chinese, and Russian are a few of the many natural languages used today. Examples of constructed languages include Solresol, a language based on music scales developed by Jean François Sudre in the 1830s; Esperanto, a language created by Dr. Ludwig Lazarus Zamenhof in order to help bridge the gap "between hostile groups of Russians, Poles, Germans, and Jews;" and Klingon, a language created for the 1984 film, *Star Trek III: The Search for Spock*.[120]

Like the constructed languages that came before it, emoji were introduced by an individual creator who laid out the bare bones for their use.[121] Since then, of course, emoji have been given life by users who incorporate the symbols into their conversations and writings. This evolution is similar to other constructed languages, such as those created by J.R.R. Tolkien in his *Lord of the Rings* trilogy.[122] After Tolkien laid out the initial vocabulary and structure of Elvish languages such as Quenya and Sindarin, fans studied and expanded the languages in order to write their own works in Tolkien's constructed tongues.[123]

Emoji, however, are not currently developed to the extent of a typical constructed language; as noted above, emoji are not truly a full-fledged language.[124] Emoji have the potential to expand, as Unicode creates additional emoji code and providers illustrate that code, and may eventually constitute a full constructed language.[125] Yet, until then, emoji can be best thought of as a constructed language accessory; a new, invented vocabulary to be added to and mixed with existing language. To some extent, this is what Shigetaka Kurita had in mind when he invented emoji. Kurita wanted Japanese Internet and mobile users to be able to communicate in short-form, without losing the expressiveness seen in

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[118] Michael Adelman, Constructed Languages and Copyright: A Brief History and Proposal for Divorce, 27 HARV. J.L. & TECH. 543, 545 (2014).

[119] *See id.*

[120] *Id.* at 545, 547-48.

[121] *See generally* Blagdon, *supra* note 1.

[122] Adelman, *supra* note 118, at 551-52.

[123] *Id.*

[124] *See* discussion *supra* Part I.B.

[125] For example, Apple's release of iOS 8.3 on April 8, 2015, added more than 300 new emoji to its selection. Chowdhry, *supra* note 7.

traditional Japanese written letters.[126] What Kurita did not anticipate was that emoji would become popular outside of Japan and find their way into communications worldwide.[127] Therefore, Kurita is the inventor of the words and vocabulary of emoji (the images themselves), but users develop emoji's grammar and fit them into the context of preexisting languages. Emoji were constructed[128] by Kurita,[129] but they are used as an accessory to preexisting natural languages, rather than as a comprehensive language on their own.

The only way for emoji to grow as a meaningful language accessory is for people to use them and figure out how best to incorporate them into their communications. Currently, barriers for using and learning emoji are very low. Generally, all a user has to do is opt to add an emoji keyboard on her smartphone, and she will have all the tools she needs to begin using emoji.[130] A typical constructed language may attract very few people and require time and dedication to learn the language. For example, the most-watched episode of HBO's Game of Thrones had approximately 7.1 million viewers.[131] Of those viewers, only a small percentage will bother to learn the show's constructed languages, Dothraki and Valyrian, especially given their limited vocabularies and functionality.[132] Emoji, however, are available on most smartphones. As of January 2014, approximately 58% of all American adults used a smartphone, in addition to many younger Americans.[133] Any of these smart phone users can follow simple instructions to add an emoji keyboard to her phone's standard set of keyboards and can begin to use emoji without any further knowledge.[134]

Categorically excluding emoji from copyright protection by classifying them as a form of language will keep barriers to using emoji low. The more emoji are used, the more people will come to associate meaning with them and the more emoji will be able to be used for communication. Some users may give up on

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[126] Blagdon, *supra* note 1.

[127] Negishi, *supra* note 5.

[128] *See* Adelman, *supra* note 118, at 545.

[129] Negishi, *supra* note 5.

[130] *See, e.g.,* Kyli Singh, *How to Enable Emoji on iOS*, MASHABLE (June 17, 2014) http://mashable.com/2014/06/17/emoji-on-ios/.

[131] Rick Kissell, *HBO's 'Game of Thrones' Finale Draws 7.1 Million Viewers Sunday*, VARIETY (June 16, 2014, 8:56 AM), http://variety.com/2014/tv/ratings/hbos-game-of-thrones-closes-with-7-1-million-viewers-sunday-1201221238/.

[132] *See generally* TONGUES OF ICE AND FIRE, http://www.dothraki.org/ (last visited May 14, 2015).

[133] *Mobile Technology Fact Sheet*, PEW RESEARCH CENTER, http://www.pewinternet.org/fact-sheets/mobile-technology-fact-sheet/ (last visited May 14, 2015).

[134] *See, e.g.,* Singh, *supra* note 130.

emoji if they have to purchase materials in order to learn their language or if emoji are not used widely, much like how many fans of television programs featuring constructed languages do not bother to learn those languages. Exclusion of emoji from copyright protection as a form of language will allow them to develop, without hurting the incentives already in place for the creation and maintenance of emoji.

B. Future Growth of Emoji with Categorical Denial of Copyright Protection

It is important to keep barriers to emoji usage low because the more people who use emoji, the more they develop as an accessory to language, giving people a greater range of expression in their communication. As linguist Ben Zimmer stated, "It's the wild west of the emoji era. People are making up the rules as they go. It's completely organic."[135] Therefore, even if the Copyright Office or a court felt that emoji were deserving of copyright protection, society would benefit most if emoji were categorically denied copyright protection.

If emoji are not subject to copyright protection, they will fall into the public domain and be free for all to use. The more people using emoji, the more they may develop as a form of communication. This would promote one of the Founding Fathers' original goals of copyright law: promotion of learning.[136] At the time the Constitution was drafted, the Founder's predominant view was that copyright should be used to encourage the creation of new works in order to improve learning, but should not grant monopolies on intellectual property that would prevent the dissemination of information.[137] In fact, Thomas Jefferson was so fearful that copyright monopolies would stand in the way of learning that he was hesitant to grant copyright and patent protection at all.[138]

Of course, the Founders did decide to include intellectual property protection in the Constitution because they felt, with regard to copyright, that men would to some extent require "encouragement to . . . pursue ideas which may produce utility."[139] It does not appear, however, that men need such encouragement to produce emoji. The first emoji came from Japan, and found their way to the U.S.

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[135] Alice Robb, *How Using Emoji Makes Us Less Emotional,* NEW REPUBLIC (July 7, 2014), http://www.newrepublic.com/article/118562/emoticons-effect-way-we-communicate-linguists-study-effects.

[136] Golan v. Holder, 132 S.Ct. 873, 901 (2012) (Breyer, J., dissenting).

[137] *Id.*

[138] *Id.*

[139] *Id.*

without copyright protection.[140] Emoji proliferate not only in digital communications, but can be found in the fashion[141] and art worlds.[142] Additionally, despite a lack of copyright protection, new emoji are being created and disseminated. The Unicode Consortium accepts submissions from anyone with an idea for a new emoji.[143] The Consortium evaluates proposals for new emoji and develops suitable proposals into usable characters.[144] Once a Unicode Standard exists for a new character, it is up to the computer platform manufacturers to illustrate the character and make it available on an emoji keyboard.[145] For example, on April 8, 2015, Apple released its iOS 8.3 operating system, which included a new set of emoji that help alleviate the early emojis' lack of diversity, adding more than 300 new emoji to Apple's keyboard.[146]

To exclude emoji from copyright protection under the current U.S. copyright framework, and thereby allow them to develop as a language, emoji would need to be classified as a typeface – i.e. an expression of emoji that itself merges with the idea of the emoji as language. Because typefaces are not copyrightable,[147] typeface classification would mean that users could type with emoji in order to express their ideas and thoughts, and users could display those expressions as desired. Typeface classification would not, however, mean that individual emoji are not copyrightable symbols or pictures.[148] When emoji are not used as language, that is, not used in their typeface capacity but individually as art or adornment,[149] the developer of the emoji display may have a copyright claim based on the individual symbol's copyright protection. Yet, emoji as language would remain in the public domain.

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[140] Weiss-Meyer, *supra* note 22.

[141] *See, e.g.*, Dennis Green, *Emoji-Inspired Slippers Puts $300 Poo on Your Shoe*, MASHABLE (Mar. 25, 2014), http://mashable.com/2014/03/25/emoji-slippers/, *Emoji-nal Backpack*, NASTY GAL, http://www.nastygal.com/product/emojinal-backpack (last visited May 14, 2015).

[142] *See* EMOJI ART AND DESIGN SHOW, http://www.emojishow.com/ (last visited May 14, 2015).

[143] *Submitting Character Proposals,* UNICODE, (Feb. 12, 2016, 9:53 PM), http://www.unicode.org/pending/proposals.html.

[144] *Id.*

[145] *See* Weiss-Meyer, *supra* note 22.

[146] Chowdhry, *supra* note 7.

[147] Eltra Corp. v. Ringer, 579 F.2d 294, 298 (1978).

[148] Monotype Corp. PLC v. Int'l Typeface Corp., 43 F.3d at n.3.

[149] For example, emoji have been used as adornment on clothing, rather than as a form of communication. *See, e.g.,* CURRENT MOJI, http://www.currentmoji.com/ (last visited May 14, 2015).

C. Governing Emoji as Language without Copyright Protection

Without copyright protection, the greatest number of people can use emoji without creating any disincentive for the continued use of existing emoji or the creation of new characters. This lack of protection raises an important question: who will control the emoji "vocabulary?" Emoji users have developed a unique emoji grammar in a grassroots fashion.[150] Yet, private companies and the Unicode Consortium control the introduction of new characters. Users can only access newly created and existing emoji if computing platform manufacturers choose to make them available on keyboards.[151] The manufacturers, in turn, can only develop images for emoji code provided by the Unicode Consortium.[152] Essentially, the Unicode Consortium and the manufacturers form a de facto language regulator, much like the L'Academie Francaise in France or the Academy of the Hebrew Language in Israel.[153]

It would not make sense for a national governing body, like L'Academie Francaise, to determine the correct use of emoji and when new emoji should be added to the language set. Although emoji technically originated in Japan, they can hardly be considered property of the Japanese government, which had nothing to do with their creation.[154] It would not make sense for the Japanese government to suddenly attempt to reign in and control a language invented by a single citizen and used by people around the world.

The Unicode Consortium seems to have taken the best approach of any player thus far with regard to controlling the development of emoji. Because the goal of Unicode is to make emoji and other characters interoperable, the Unicode Consortium has no reason to favor some digital users over others as it develops new emoji.[155] The Consortium allows submissions from any user who wishes to propose new emoji.[156] The Consortium does not provide much information about

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[150] Robb, *supra* note 135.

[151] There are currently Unicode Standard codes for 249 national flags, but the flags that show up in a given set of emoji are determined by software manufacturers. For example, Apple's U.S. iPhone features 10 national flags. *Emoji and Dingbats*, *supra* note 34.

[152] *Id.*

[153] *See generally* ACADEMIE FRANCAIS, http://www.academie-francaise.fr/ (last visited May 14, 2015); Dafna Yitzhaki, Minority Languages and Language Policy: The Case of Arabic in Israel, 7 (May 2008) (unpublished Ph.D. thesis, Bar-Ilan University), http://www.academia.edu/11506403/Minority_Languages_and_Language_Policy_The_Case_of_Arabic_in_Israel.

[154] *See* Negishi, *supra* note 5.

[155] *What is Unicode?*, *supra* note 24.

[156] *Submitting Character Proposals*, *supra* note 143.

how emoji proposals are selected for production, other than that technical experts review the proposals.[157] Greater disclosure and transparency of this review process may make people more comfortable with the amount of control the Unicode Consortium has over the development of emoji.

The Unicode Consortium does not decide how emoji will look or which emoji users will be able to access, but perhaps another non-profit organization would be able to fill this gap. By allowing computer manufacturers to fill this gap, the manufacturers are able to shape emoji in a way that may help drive profits, or that may cater to some classes of consumers more than others. In contrast, a disinterested party not driven by profit may be able to read the demands of consumers as a whole and determine the best set of emoji for American users. For example, American users rarely use the Baggage Claim emoji, ,[158] but would find great use of a dumpling emoji.[159] If a non-profit set an "American emoji keyboard" standard that contained the optimal emoji set, based on research of American consumer demands, computer manufacturers would want to adopt that emoji keyboard for its American products because consumers would prefer the characters in that set. The same logic can be applied to emoji-related software designed for other countries. Furthermore, if the non-profit provided the illustrations for every emoji, even those emoji not provided to an American market could still be operable on American computers because the non-profit will ensure that an image for each emoji code is available worldwide. This emoji-imaging non-profit could work with the Unicode Consortium to illustrate the new emoji code created by the Consortium, thus ensuring that a fair process of emoji development runs from proposal to user-ready character.

CONCLUSION

Emoji were invented to add context and emotion to Japanese consumers' digital communications.[160] Thanks to Apple and other computer platform manufacturers, emoji have become a popular means of communication for U.S. consumers as well.[161] Emoji's rise in popularity in the U.S., however, has come

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[157] *Id.*

[158] The Baggage Claim emoji is the least-used emoji on Twitter, worldwide. EMOJITRACKER, *supra* note 10.

[159] *See, e.g.*, Ann-Marie Alcantara, *79 New Emoji Are Coming, Including a Dumpling!*, POPSUGAR (Feb. 9, 2016), http://www.popsugar.com/tech/New-Emoji-2016-37539573. The dumpling emoji is a candidate to be coded as an emoji in 2017.

[160] Blagdon, *supra* note 1.

[161] *Id.*

without copyright protections. The American public stands to gain the most from emoji if the characters remain uncopyrightable.

It is possible that individual emoji could be eligible for copyright protection as pictorial, graphic, and sculptural works.[162] When emoji are taken as a group, however, they closely resemble a typeface, and typefaces are categorically excluded from copyright.[163] The code that causes emoji to function on users' devices is also unlikely to be copyrightable because it is too short to truly fit the definition of computer code.[164]

Even if emoji were found to be copyrightable under current U.S. copyright law, public policy dictates that symbols should be categorically excluded from copyright protection. Without copyright protection, emoji will remain in the public domain, and users will be free to use the symbols as a form of expression that will add to the strong American tradition of free speech. To give any entity copyright protection over emoji – or even over one set of emoji illustrations – would create barriers to communication and free expression. As emoji become more ubiquitous in society, users are learning to express themselves through these symbols. Copyright protection of emoji would hamper this growing area of free expression.

People do not need copyright to incentivize the management and creation of new emoji. Both non-profit and for-profit companies are currently working to bring new emoji to users without any promise of intellectual property protections.[165] Excluding emoji from copyright protections favors users, and it is the users who have made emoji into the powerful tool of communication that they have become.

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[162] *See* 17 U.S.C. § 101, 102.

[163] Eltra Corp. v. Ringer, 579 F.2d 294, 298 (1978).

[164] *See* 17 U.S.C. § 101, 102.

[165] *See Submitting Character Proposals*, *supra* note 141; Chowdhry, *supra* note 7.