

Surveying the Law of Emojis

By Eric Goldman*

Everyone loves emojis! It's easy to see why. Historically, most online communications have emphasized text, and emojis add much-needed emotional content to text-driven communications—and often help people express themselves more precisely. Due to the enthusiastic embrace of emojis, we are witnessing a historic change in how we communicate online.

This article surveys three significant ways the emoji revolution will impact the law.

First, questions about what emojis mean will arise in a wide range of legal doctrines, from criminal law to contracts. Our standard interpretative tools generally can handle new communicative technologies, but several aspects of emojis will require careful consideration. Most significantly, senders and receivers will unexpectedly see different versions of an emoji due to technological intermediation, leading them to make reasonable—but different—interpretations of the same communication, with potentially adverse consequences for one or both parties. The article will explore some steps that would reduce the risks of these misunderstandings.

Second, emojis will often qualify for copyright and trademark protection. However, IP protection encourages platforms to differentiate their emoji implementations, which exacerbates the risks of miscommunications and

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misunderstandings. To mitigate this outcome, IP protections for emojis should be interpreted narrowly.

Third, emojis create some issues for judicial operations, including if and how judges will display emojis in their opinions, if emojis in court opinions will be searchable, and how best to present emojis as evidence to factfinders.

CONTENTS

Introduction	3
I. Understanding Emoticons and Emojis	5
A. Emoticons	5
B. Emojis	7
C. Other Online Pictographs: GIFs and Memes	12
II. Interpreting Emojis' Meaning	13
A. Interpreting Emojis	13
B. Emoji-Related Interpretive Challenges	15
1. Small Size	15
2. Novelty	16
3. No Dictionary	17
4. Unsettled Grammar Rules	19
5. Dialects	19
6. Conveying Emotions	22
7. Intra-Platform Version Incompatibilities	24
8. Cross-Platform Depiction Diversity	26
9. Cross-Platform Omissions	28
C. How Will the Law Handle Emoji Misunderstandings?.....	29
D. What Should We Do About Emoji Misunderstandings?	31
III. Emoji Ownership	34
A. Copyright in Emojis	34
B. Trademark in Emojis	43
C. Problems Caused by Emoji Ownership	46
IV. Emojis and the Judicial System	50
A. Emojis in Court Opinions	50
B. Will Opinions Display Emojis?	52
C. Searchability	54
D. Presentation of Emojis as Evidence	56
Conclusion	57

Introduction

Humans convey a substantial amount of information through vocal inflections, facial expressions and body language.¹ However, many of the most popular online communication tools—including emails, text (SMS) messaging and social media—emphasize text communications. While text is a powerful form of written communication, it necessarily excludes essential emotional dimensions.²

Emoticons and emojis are pictographs³ that bridge this communication gap. The right emoji or emoticon can quickly and effectively enhance online communications with emotional sentiments, cultural jokes or other valuable information.⁴

Not surprisingly, emojis and emoticons are wildly popular. One study reported that 92% of the online population uses emojis,⁵ and another report

¹ See, e.g., Albert Mehrabian, *Communication Without Words*, PSYCHOL. TODAY, Sept. 1968, at 53, 53.

² Joseph B. Walther & Kyle P. D’Addario, *The Impacts of Emoticons on Message Interpretation in Computer-Mediated Communication*, 19 SOCIAL SCI. COMPUTER REV. 324, 324-25 (2001); Mike Godwin, *ASCII Is Too Intimate*, WIRED, Apr. 1994.

³ A pictograph is “a pictorial sign or symbol.” Pictograph, Dictionary.com, <http://www.dictionary.com/browse/pictograph>. An emoji also functions as a glyph, which is “a symbol (as a curved arrow on a road sign) that conveys information nonverbally.” Definition of GLYPH, Merriam-Webster, <https://www.merriam-webster.com/dictionary/glyph>.

⁴ Daantje Derks et al, *The Role of Emotion in Computer-Mediated Communication: A Review*, 24 COMPUTERS IN HUMAN BEHAVIOR 766 (2008), <https://www.uva.nl/binaries/content/documents/personalpages/f/i/a.h.fischer/nl/tabblad-drie/tabblad-drie/cpitem%5B8%5D/asset?1355373394685> (cites omitted):

In the same way as non-verbal cues in F2F, emoticons also help to accentuate or emphasize a tone or meaning during message creation and interpretation. Furthermore, they help to communicate more clearly a current mood or mental state of the author, thereby also providing additional social cues about this person. Thus, emoticons serve the function of clarifying textual messages which is similar to non-verbal displays in F2F....There is one important difference, however, between the use of emoticons and actual non-verbal displays. Relative to non-verbal signals in F2F interactions, emoticons can be considered more deliberate and voluntary.

See also Gretchen McCulloch, *Will We All Speak Emoji Language in a Couple Years?*, Mental_Floss, Apr. 9, 2015, <http://mentalfloss.com/article/62584/will-we-all-speak-emoji-language-couple-years> (emojis “are the digital equivalent of making a face or a silly hand gesture while you’re speaking”).

⁵ 2015 Emoji Report, Em@gi, Sept. 2015, https://emogi.com/documents/Emoji_Report_2015.pdf [hereinafter 2015 Emoji Report].

indicated that 2.3 trillion mobile messages incorporated emojis in a single year.⁶ The “face with tears of joy” emoji⁷ has appeared in over 1.6 billion tweets;⁸ and domain names that incorporate emojis are being developed.⁹

People’s enthusiastic embrace of emojis and emoticons has been breathtaking. “Emoji is the fastest growing form of language in history based on its incredible adoption rate and speed of evolution.”¹⁰ This development also has major implications for how humans communicate with each other. We’re not just “watching the birth of a new type of language,”¹¹ we are creating “a new and unique way of communicating” with each other.¹² As Clive Thompson explained, “it’s exceedingly rare—maybe unprecedented—for a phonetic alphabet to suddenly acquire a big expansion pack of ideograms.”¹³

As emoticons and emojis play an increasingly important role in how we communicate with each other, they will increasingly raise legal issues. This article surveys the fun and sometimes unsettling world of emojis and the law.

After defining emoticons and emojis in Part I, Part II of this article considers how courts will interpret the meaning of emoticons and emojis. Interpretations will be challenging because emoticons and emojis have “no fixed emotional resonance, clear dictionary definition, or established grammatical rules for

⁶ 2016 Emoji Report, Em@gi, Nov. 16, 2016, http://cdn.emogi.com/docs/reports/2016_emoji_report.pdf [hereinafter 2016 Emoji Report].



⁸ <http://www.emojitracker.com/> (visited March 13, 2017). That particular emoji was also declared Oxford’s 2015 “Word of the Year.” *Oxford Dictionaries Word of the Year 2015 is...*, OxfordWord Blog, <http://blog.oxforddictionaries.com/2015/11/word-of-the-year-2015-emoji/>.

⁹ Michael J. Coren, *The Land Rush For Emoji Domains Is Coming*, QUARTZ, Nov. 5, 2016, <https://qz.com/828436/the-land-rush-for-emoji-domains-is-coming/>.

¹⁰ *Emoji Is Britain’s Fastest Growing Language As Most Popular Symbol Revealed*, The Telegraph, May 19, 2015, <http://www.telegraph.co.uk/news/newstopping/howaboutthat/11614804/Emoji-is-Britains-fastest-growing-language-as-most-popular-symbol-revealed.html>.

¹¹ Clive Thompson, *The Emoji Is the Birth of a New Type of Language (≡ No Joke)*, WIRED, Apr. 19, 2016, <https://www.wired.com/2016/04/the-science-of-emoji/>.

¹² Rachel Scall,   : *Emoji as Language and Their Place Outside American Copyright Law*, 5 N.Y.U. J. INTEL. PROP. & ENTER. L. 381, 385-88 (2016). This is because emojis are interspersed with text.

¹³ Thompson, *supra* note 11.

interpreting them in the various contexts in which they appear.”¹⁴ Furthermore, the technology of emojis creates situations where the sender and recipient make reasonable—but different—interpretations of the same message. The resulting misunderstandings will lead to unexpected legal outcomes. This article will suggest some steps we can take to avoid those incidents.

Part III looks at the copyright and trademark implications of emojis and emoticons. It explains why the scope of intellectual property protection for emojis and emoticons should be limited, and why intellectual property may exacerbate some of the interpretation problems discussed in Part II.

Part IV discusses three judicial administration issues created by emojis and emoticons, including (1) if and when court opinions will display the emojis and emoticons being interpreted, and why it matters, (2) the impossibility of searching for emojis and emoticons in Lexis and Westlaw, and (3) how emojis and emoticons can be presented as evidence to factfinders.

We are still at the earliest stages of encountering emojis and emoticons in court. This article is designed to help prepare us for the tsunami that’s coming our way.

I. Understanding Emoticons and Emojis

This part defines emoticons and emojis, compares them, and contrasts them to two other popular pictographs, GIFs and memes.

A. Emoticons.

“Emoticon” is a portmanteau of the words “emotion” and “icon.”¹⁵ One court defined emoticons as “a group of keyboard characters (as :-)) that typically represents a facial expression or suggests an attitude or emotion and that is used especially in computerized communications (as e-mail).”¹⁶ In other words, emoticons are letters, numbers and other standard keyboard characters sequenced

¹⁴ Amanda Hess, *Exhibit A: :-)*, Slate, Oct. 26, 2015, http://www.slate.com/articles/technology/users/2015/10/emoticons_and_emojis_as_evidence_in_court.html.

¹⁵ Emoticons are sometimes generically called “smileys,” but a smiley is just one of many emoticons.

¹⁶ U.S. v. Cochran, 534 F.3d 631, 632 n.1 (7th Cir. 2008) (citing the *Merriam-Webster Dictionary*); accord State v. Pischel, 277 Neb. 412, 416 (2009); People v. Lesser, 2011 WL 193460, *2 n.3 (Cal. Ct. App. Jan. 21, 2011); State v. Jacques, 332 Wis. 2d 804 n.2 (Wis. Ct. App. 2011).

to create a pictograph.¹⁷ Although emoticons are typically associated with facial expressions,¹⁸ they include other symbols.

A few emoticons are widely recognized and used. For example, the characters

:~)~¹⁹

create a “smiley” when the reader tilts his or her head 90 degrees to the left; and the characters

<3

look like a heart if the reader tilts his or her head 90 degrees to the right. Other well-known emoticons include the winky ;-)) and the sad face :-(.

Although emoticons typically require a reader to tilt his or her head,²⁰ kaomojis (顔文字) are an emoticon variation that does not require a head-tilt.²¹ A popular kaomoji is the “whatever” symbol: ~_ (ツ) _/.²²

¹⁷ See Landra L. Rezabek & John J. Cochenour, *Emoticons: Visual Cues for Computer-Mediated Communication*, Imagery and Visual Literacy: Selected Readings from the Annual Conference of the International Visual Literacy Association (October 12-16, 1994), <http://files.eric.ed.gov/fulltext/ED380096.pdf> (“Emoticons are visual cues formed from ordinary typographical symbols that when read sideways represent feelings or emotions”); Finlay v. Potteiger, 2013 WL 2046546, *7 (W.D. Penn. Jan. 23, 2013) (quoting an expert as saying “emoticons are basically symbols demonstrating emotions which are employed in instant messaging”); McAlpine v. Bercow, [2013] EWHC 1342 (QB), <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/mcalpine-bercow-judgment-24052013.pdf> (emoticon is “a type of symbol commonly used in a text message or e-mail”).

¹⁸ See *State v. Atchison*, 15 Neb. App. 422, 424 (Neb. Ct. App. 2007) (emoticons are “symbols such as the well-known smiley faces”); *Enjaian v. Schlissel*, 2015 WL 3408805, *6 n.9 (an emoticon “is a representation of a facial expression created using standard ASCII characters”); *Ghanam v. Does*, 303 Mich. App. 522, 526 n.4 (Mich. Ct. App. 2014) (an emoticon is “an icon formed by grouping keyboard characters together into a representation of a facial expression. Emoticons are used to suggest an attitude or emotion in computerized communications”).

¹⁹ We continue to see heated debates over whether facial expression emoticons, like the smiley and winky, include a dash for a nose. See, e.g., Ashley Feinberg, *Should Smilies Have Noses: The Great Emoticon Debate*, Gizmodo, Jan. 10, 2014, <https://gizmodo.com/should-smilies-have-noses-the-great-emoticon-debate-1498911926>.

²⁰ DAVID W. SANDERSON (ED.), *SMILEYS 2* (1993) (“Not all smileys are turned counterclockwise, but most of them are”).

²¹ Kaomojis originated in Japan and are sometimes called Japanese emoticons. *Emoji and Pictographs*, Unicode.org, http://www.unicode.org/faq/emoji_dingbats.html (last updated Nov. 2, 2016) [hereinafter Unicode, *Emoji*]; see also <http://kaomoji.ru/en/>.

Emoticons are a venerable part of online communications, dating back at least to 1982.²³ Hundreds of emoticons have been defined at some point.²⁴

Emoticons are composed of keyboard characters that are (usually) subject to standardization efforts that make the characters universally recognized across platforms. Therefore, an emoticon will consist of identical characters on both the sender's and recipient's platforms. For example, if the emoticon includes the colon (:) character, both sender and recipient will see that character. For this reason, emoticons can be considered "compatible" across platforms. (In a moment, the article will show how emojis differ on this point). An emoticon's appearance might not be identical if the sender and recipient use different display fonts; but rarely will the choice of display font prevent senders and recipients from recognizing the same characters.

B. Emojis.

The word "emoji" is Japanese for "picture character."²⁵ As one court said, an emoji is a "small digital image or icon used to express an idea, emotion, etc., in electronic communications."²⁶ Most emojis are static, but emojis can be animated.²⁷

²² Robinson Meyer, *The Best Way to Type 🙄*, The Atlantic, May 21, 2014, https://www.theatlantic.com/technology/archive/2014/05/the-best-way-to-type-_/371351/.

²³ See, e.g., Keith Houston, *Smile! A History of Emoticons*, WALL ST. J., Sept. 27, 2013, <http://www.wsj.com/articles/SB10001424052702304213904579093661814158946>. Offline analogues to emoticons can be traced much earlier, such as *Puck* magazine's "typographical art" from 1881. Casey Chan, *The First Emoticons Were Used in 1881*, Gizmodo, July 16, 2013, <https://gizmodo.com/the-first-emoticons-were-used-in-1881-807405171>.

²⁴ See, e.g., SANDERSON, *supra* note 20 (defining about 650 emoticons).

²⁵ Unicode, *Emoji*, *supra* note 21. The fact that the words "emoticons" and "emoji" share the same prefix is a fortuitous coincidence. *Id.*

²⁶ *In re L.F.*, 2015 WL 3500616, *1 n.2 (Cal. Ct. App. June 3, 2015) (citing OED Online); *accord* *People v Moye*, 2016 N.Y. Misc. LEXIS 1553, *13 n.5 (N.Y. Sup. Ct. Mar. 31, 2016); *Ragunauth v. Bisaillon*, 2016 WL 3451762, *2 n.2 (Conn. Superior Ct. June 1, 2016). *Compare* *Enjaian v. Schlissel*, 2015 WL 3408805, *6 n.9 (an emoji is "is a pictograph included in a text message"); *Doe v. Western New England University*, 2017 WL 113059, *6 n.7 (D. Mass. Jan. 11, 2017) (citing the *Enjaian* definition); *State v. McBride*, 2016 Iowa App. LEXIS 1246, *2 n.5 (Ia. Ct. App. Nov. 23, 2016) ("Emoji are a series of symbols that represent emotions and other abstract ideas").

²⁷ *Cf. State v. Jacques*, 332 Wis. 2d 804 (Wis. Ct. App. 2011) (a defendant claimed that his inability to show animated "emoticons" to the jury undermined his defense).

Like emoticons, emojis add a graphical dimension to online communications,²⁸ but with infinitely more possibilities. Emoticon imagery is restricted to the characters on keyboards. In contrast, any image can serve as an emoji. Most popular emoticons (such as the smiley or heart) have emoji analogues, but most emojis have no commonly-used emoticon equivalent.

Typically, users add emojis to their communications by selecting the desired emoji from a set of options. Alternatively, a user's software may automatically convert user keystrokes into emojis. For example, Microsoft Word auto-corrects a few emoticon keystrokes into outline drawings, such as converting the keystrokes :-) into the Dingbat symbol ☺.²⁹ Facebook Messenger does similar auto-corrections, such as converting the keystrokes <3 into ❤️.³⁰ As users type their text messages, Apple's iOS now "auto-suggests" emojis that can be used to replace or supplement words, making it even easier to add emojis into text messages.³¹ Eventually, we may have emoji keys on our physical keyboards or emoji-only keyboards.³²

The universe of emojis can be divided into two major subtypes: "Unicode-defined" emojis and "proprietary" emojis. People often equate all emojis with "Unicode-defined" emojis, but the two types have different technological and legal implications.

*Unicode-defined emojis.*³³ The Unicode Consortium "provides a unique number for every character, no matter what the platform, no matter what the program, no

²⁸ See John G. Browning & Gwendolyn Seale, *More Than Words: The Evidentiary Value of Emoji*, 57 DRI FOR DEF. 34 (Oct. 2015) (calling emojis "a kind of modern hieroglyphics—simply another form of speech using pictures to convey ideas").

²⁹ See, e.g., Allen Wyatt, *Emoticons in Word*, Allen Wyatt's WordTips (last updated June 1, 2013), http://wordribbon.tips.net/T006051_Emoticons_in_Word.html.

³⁰ See, e.g., *Emoji Codes for Facebook*, <http://emojicodes.com/> (visited Mar. 13, 2017). This site lists a couple dozen keyboard "cheats" for Messenger emojis, including instructions for inserting penguins, pigs, and other emojis.

³¹ Such as Apple's emoji prediction feature. See, e.g., Lucia Peters, *How To Use Predictive Emoji In iOS 10, Because It's A Much-Needed Shortcut*, Bustle.com, Sept. 13, 2016, <https://www.bustle.com/articles/183699-how-to-use-predictive-emoji-in-ios-10-because-its-a-much-needed-shortcut>. Third party apps can also provide this functionality. See, e.g., Natasha Lomas, *SwiftKey Officially Unwraps its Emoji Prediction App* 🍌☺️🍌🍌, TechCrunch, July 20, 2016, <https://techcrunch.com/2016/07/20/swiftkey-officially-unwraps-its-emoji-prediction-app/>.

³² See, e.g., <http://emojkeyboard.club/>. To be clear, emoji-only keyboards would supplement regular character keyboards, not replace them.

³³ See generally Scall, *supra* note 12, at 385-88.

matter what the language.”³⁴ Any device, software program, or operating system (collectively, I’ll call them “platforms”) honoring the Unicode standard will recognize characters sent by other compliant platforms without corrupting the character’s meaning. For example, the “j” keyboard character originating from a Unicode-compliant platform will be correctly recognized as a “j” by all other Unicode-compliant platforms. Unicode is the successor to earlier attempts to standardize keyboard characters like ASCII.³⁵

Unicode has incorporated emojis into its standards. Accordingly, each Unicode-defined emoji has a unique numerical value that will be the same across all Unicode-compliant platforms. As of January 1, 2017, roughly 2,000 emojis have Unicode definitions.³⁶

Perhaps counter-intuitively, a Unicode definition of an emoji does not ensure that a sender and recipient will see the same thing on their respective screens. When Unicode defines an emoji, it provides “a representative glyph (in a black-and-white text presentation)” for that emoji³⁷ and leaves it to each platform to implement the emoji as it sees fit. Unicode’s definition does not dictate the emoji’s colors; nor does Unicode’s “representative” shape require the platform’s implementation to conform to that shape. Instead, most platforms adopt distinctive style and house rules for implementing Unicode-defined emojis.

Because platforms differ in their implementations of emojis, a Unicode-defined emoji will often appear differently across platforms. “Unlike plain text where people view the same characters in their exchange, platforms effectively translate emoji: the emoji that the sender chose is translated to the receiver’s platform’s rendering.”³⁸ Accordingly, “since emoji render differently on different

³⁴ *What is Unicode?*, Unicode.org (last updated Dec. 1, 2015), <http://www.unicode.org/standard/WhatIsUnicode.html>.

³⁵ “ASCII code is the numerical representation of a character such as 'a' or '@' or an action of some sort.” <http://www.asciitable.com/>. See *Intellect Wireless, Inc. v. HTC Corp.*, 910 F. Supp. 2d 1056, 1070 (N.D. Ill. 2012) (“the transmission of a so-called emoticon can only be made from a ASCII 128 character keyboard”). Like ASCII, Unicode provides numerical representations of characters; but Unicode covers a much larger number of characters. Unicode honors ASCII standards by incorporating ASCII codes into Unicode’s UTF-8. See, e.g., Markus Kuhn, *UTF-8 and Unicode FAQ for Unix/Linux* (last modified May 11, 2009), <https://www.cl.cam.ac.uk/~mgk25/unicode.html>.

³⁶ Unicode® Technical Report #51, version 4.0 (Nov. 22, 2016), Unicode.org, http://www.unicode.org/reports/tr51/#Emoji_Counts.

³⁷ Unicode, *Emoji*, *supra* note 21.

³⁸ Hannah Miller et al, “*Blissfully Happy*” or “*Ready to Fight*”: *Varying Interpretations of Emoji*, Proceedings of the 10th International Conference on Web and Social Media, ICWSM 2016, p. 259

platforms, the emoji graphic that is sent by one person on one device may be quite different than what is seen by the recipient using a different device.”³⁹

This article will look at several examples of diverse platform implementations of Unicode-defined emojis. Let’s start with an illustrative example. The following chart illustrates various platforms’ implementations of the cow emoji:⁴⁰



The cow on the far left is the Unicode-defined outline of the cow’s shape. Like most Unicode-defined emojis, it has no color. The other depictions show how eight different platforms have implemented this Unicode definition. Some platforms have adopted the black-and-white spotting associated with dairy cows, while others have adopted a brown coloring typically associated with beef cows. Some platforms have adopted a more rotund cow outline than the Unicode outline, and two platforms have rotated the cow’s outline so that it faces the viewer more. In some implementations, the cow’s legs are spindly like the Unicode outline; in others, the legs are chubbier or even indistinct. Some platforms have added details that don’t exist in the Unicode outline, such as a bell tied around the cow’s neck, clearly marked hooves, or a prominent udder. We’ll explore the implications of these diverse platform implementations in the next part.

“*Proprietary*” *Emojis*. Although Unicode-defined emojis get most of the attention, platforms can and do offer emojis to their users that don’t have a

(2016), http://www-users.cs.umn.edu/~bhecht/publications/ICWSM2016_emoji.pdf; see also Katy Steinmetz, *What It’s Like Inside the World’s First Emoji Convention*, TIME, Nov. 6, 2016, <http://time.com/4559662/emojicon-emoji-convention-2016/> (“If Unicode doesn’t set a standard, users with different devices might get the dreaded ‘did not compute’ ▪ of mystery.”) [hereinafter Steinmetz, *Emoji Convention*].

³⁹ Miller, *supra* note 38; see also Ashleigh Allsopp, *Lost in Translation: Android Emoji vs iOS Emoji*, TechAdvisor, Dec. 15, 2014, <http://www.techadvisor.co.uk/opinion/mobile-phone/lost-in-translation-android-emoji-vs-ios-emoji/> (cataloging some of the most significant differences in emoji implementations between Google and Apple).

⁴⁰ *Full Emoji Data*, v4.0, <http://unicode.org/emoji/charts/full-emoji-list.html> (last updated Dec. 20, 2016) [hereinafter Unicode, *Full Emoji Data*].

Unicode definition, such as Facebook's⁴¹ and Snapchat's⁴² "stickers." Indeed, while there are only about 2,000 Unicode-defined emojis, there are countless more non-Unicode emojis.⁴³ Proprietary emojis can look similar or identical to Unicode-defined emojis; other proprietary emojis have no Unicode-defined analogue.

Because proprietary emojis do not honor the Unicode definitions, they are not likely to be recognized by other platforms. For example, if I incorporate a Facebook sticker into a message sent outside of Facebook, it's likely that the sticker won't display properly on the other platform. In those circumstances, the recipient's platform may replace the incoming proprietary emoji with a standard placeholder symbol (such as a blank white square or small black square); or the platform may simply omit the unrecognized emoji from the recipient's message without providing any indication at all.

Recap of Cross-Platform Compatibility. Because legal doctrines will depend on when emoticons and emojis appear differently to the sender and recipient, it's worth recapping the cross-platform compatibility of each:

- Emoticons are cross-platform compatible, although display fonts may differ.
- Unicode-defined emojis share a common outline and short description, but implementations can differ significantly across platforms. Therefore, senders and recipients may not see the same thing.
- Proprietary emojis usually are not compatible across platforms, so the recipient will see a placeholder symbol replacing the proprietary emoji—or nothing at all.

⁴¹ See, e.g., Brad Esposito, *The Definitive Ranking of Every Facebook Sticker Pack*, BuzzFeed, Feb. 28, 2014, <https://www.buzzfeed.com/bradesposito/the-definitive-ranking-of-every-facebook-sticker-pack>.

⁴² See, e.g., Marie Brewis, *How To Add Emoji Stickers To Snapchat Video: Pin Moving, Resizable Emoji To Snapchat Videos*, TechAdvisor, Apr. 14, 2016, <http://www.pcadvisor.co.uk/how-to/social-networks/how-add-emoji-stickers-video-in-snapchat-3638263/>.

⁴³ See generally 2016 Emoji Report, *supra* note 6 (discussing the rapid expansion of proprietary emojis on various platforms).

There are countless examples of proprietary emoji sets. See, e.g., Brian Barrett, *How Lego Built a Social Network for Kids That's Not Creepy*, Wired, Jan. 31, 2017, <https://www.wired.com/2017/01/lego-life-social-network-kids> (discussing the proprietary emoji set in Lego Life); Jeff Parsons, *These Are Grindr's New Custom Emojis - They're Called 'Gaymoji'*, Mirror, Mar. 15, 2017, <http://www.mirror.co.uk/tech/grindr-s-new-custom-emojis-theyre-10032706>.

Note: as discussed below, there can be intra-platform compatibility problems between versions of a software program. These raise the same issues as cross-platform incompatibility.

Nomenclature. Despite their different technological underpinnings, emoticons and emojis are often confused for each other.⁴⁴ At the risk of exacerbating the semantic ambiguity, the rest of this article will use the term “emojis”⁴⁵ to refer to both emoticons and emojis except where explicitly noted otherwise.⁴⁶

Emojis are not exclusively an online phenomenon; similar images routinely appear in offline communications.⁴⁷ Indeed, I found at least five opinions where a court used the term “emoticon” to describe imagery in offline communications.⁴⁸

C. Other Online Pictographs: GIFs and Memes

GIFs. “GIFs”⁴⁹ are short video clips incorporated into social media posts to express an emotion or make a joke. The clips usually come from popular TV

⁴⁴ See, e.g., *People v. Krasnoperov*, 2015 Cal. App. Unpub. LEXIS 343 (Cal. App. Ct. Jan. 15, 2015) (referring to “crossing fingers” as an emoticon); *Enjaian v. Schlissel*, 2015 WL 3408805, *6 n.9 (E.D. Mich. May 27, 2015) (the court says the plaintiff conflated emojis and emoticons); *U.S. v. Cochran*, 510 F. Supp. 2d 470 (N.D. Ind. 2007) (defining emoticons as “animated icons making various expressions” even though emoticons are never animated); *State v. Nero*, 122 Conn. App. 763 (2010) (defining an emoticon as “a little cartoon face that can be added to the text of an instant message. The faces come in numerous expressions and are used to illustrate how the speaker is feeling or the intended meaning of what he or she has written”); *State v. Jacques*, 332 Wis. 2d 804 (Wis. Ct. App. 2011) (referring to “animated” emoticons); *U.S. v. Wilson*, 2016 U.S. Dist. LEXIS 87908 (D.N.J. July 6, 2016) (referring to a “handgun” and “explosion” as emoticons).

⁴⁵ Although also the subject of heated debates, I believe either “emoji” or “emojis” is an acceptable plural version of “emoji.” See Robinson Meyer, *What's the Plural of Emoji?*, *The Atlantic*, Jan. 6, 2016, <https://www.theatlantic.com/technology/archive/2016/01/whats-the-plural-of-emoji-emojis/422763/>.

⁴⁶ See Browning & Seale, *supra* note 28 (doing the same).

⁴⁷ Indeed, as suggested above, the graphical images used for emoticons and emojis surely originated offline before being incorporated into online communications. See, e.g., Houston, *supra* note 23.

⁴⁸ *Smith v. Rose*, 2009 U.S. Dist. LEXIS 43787 (W.D. Wis. May 20, 2009) (handwritten smiley in letter); *In re Oladiran*, 2010 U.S. Dist. LEXIS 106385 (D. Az. Sept. 21, 2010) (smiley in printed letter); *People v. Reyes*, 2012 Cal. App. Unpub. LEXIS 5347 (Cal. Ct. App. July 20, 2012) (handwritten sad face in journal); *Arnold v. Reliant Bank*, 932 F. Supp. 2d 840 (M.D. Tenn. 2013) (smiley face in employee performance review); *Commonwealth v. Bogle*, 2013 Pa. Super. Unpub. LEXIS 2589 (Pa. Superior Ct. June 20, 2013) (handwritten sad face in letter).

⁴⁹ There is considerable controversy about whether to pronounce the “G” in “GIF” as a hard or soft G. See, e.g., Amy O’Leary, *Battle Over ‘GIF’ Pronunciation Erupts*, *N.Y. TIMES BITS BLOG*, May 23, 2013, <http://bits.blogs.nytimes.com/2013/05/23/battle-over-gif-pronunciation-erupts/>.

shows or movies. Often, the clips are captioned with the depicted person's words. GIFs function like a video analogue to emojis.

GIFs are similar to animated emojis. However, technologically, it may be easier to intersperse animated emojis into text communications. Also, animated emojis often do not draw upon TV shows or movies for inspiration.

Memes. Memes ordinarily mean “an idea, behavior, style, or usage that spreads from person to person within a culture.”⁵⁰ However, in this context, “meme” refers to graphical images—photos or drawings—that are displayed in social media to express an emotion or make a joke. Like GIFs, the images are often drawn from popular TV shows or movies, though memes can originate solely from online sources. “Meme generators” allow users to add their own caption to the image, which multiplies and iterates the meanings associated with the image.

Some legal issues associated with GIFs and memes overlap the legal issues raised by emoticons and emojis, but addressing those implications is beyond this article's scope.

II. Interpreting Emojis' Meaning

The prior part defined our terms. The next three parts will survey some of the legal implications raised by emojis. We'll start by looking at how courts will interpret emojis' meanings.

A. Interpreting Emojis

Before getting into emoji-specific interpretative challenges, we should acknowledge the courts' longstanding expertise handling interpretative questions, even “novel” ones. Interpretation issues arise in virtually every legal doctrine and legal practice area, and our judicial system has centuries of practice interpreting human communication—including signs, symbols, logos and other visual

⁵⁰ <https://www.merriam-webster.com/dictionary/meme>.

communication devices.⁵¹ As emoji-related issues hit the courts, emojis will look like just another type of content that courts need to interpret.⁵²

Some early emoji-related opinions show that courts can usually handle emoji interpretation just fine.⁵³ For example, courts can figure out when emojis are being used to change the meaning of the associated text. In one case, a court concluded that a smiley emoticon converted the preceding text into a joke that should be read to mean the direct opposite of what it said:

Christensen claims Neuhardt violated attorney-client privilege and the Sixth Amendment by offering, in an e-mail to the prosecutor accompanied by an emoticon, to ‘stipulate that my client is guilty. :)’ No one took Neuhardt’s frivolous e-mail as an actual stipulation.⁵⁴

⁵¹ As just one example, courts routinely analyze hand signs to determine if they are “gang signs.” Cf. Katie Lynn Joyce, Note, *Stars, Dragons, and The Letter “M”: Consequential Symbols in California Prison Gang Policy*, 104 CAL. L. REV. 733 (2016); Justin Walters, Comment, *Flamed Up and Patted Down: Gang Insignia, Terry Stops, and Speech Integral to Criminal Conduct*, 82 MISS. L.J. SUPRA 367 (2013).

⁵² Tyler Schnoebelen, *Humans Can Barely Understand Emojis. Will Machines Do Any Better?*, Qualcomm Spark, Sept. 18, 2015, <https://www.qualcomm.com/news/spark/2015/09/18/humans-can-barely-understand-emojis-will-machines-do-any-better> (“parsing the symbols isn’t all that different from parsing ambiguity inherent to any language”).

⁵³ Cf. *Lenz v. Universal Music Corp.*, 2010 U.S. Dist. LEXIS 16899, *12-15 (N.D. Cal. Feb. 25, 2010) (judicially interpreting the meaning of the “winky” emoticon); *Ghanam v. Does*, 303 Mich. App. 522 (Mich. Ct. App. 2014) (interpreting the meaning of “:P”, the “tongue sticking out” emoticon); *In re L.F.*, 2015 WL 3500616, *2 (Cal. Ct. App. June 3, 2015) (interpreting the “laughing” emoji).

⁵⁴ *United States v. Christensen*, 2013 U.S. Dist. LEXIS 52464, *5 (D. Mont. Apr. 11, 2013); see also *Ghanam v. Does*, 303 Mich. App. 522, 549 (Mich. Ct. App. 2014) (“This statement on its face cannot be taken seriously as asserting a fact. The use of the ‘:P’ emoticon makes it patently clear that the commenter was making a joke. As noted earlier, a ‘:P’ emoticon is used to represent a face with its tongue sticking out to denote a joke or sarcasm. Thus, a reasonable reader could not view the statement as defamatory”). Cf. *Lancashire County Council v M & Ors* (Rev 1) [2016] EWFC 9 (Feb. 4, 2016), <http://www.bailii.org/ew/cases/EWFC/HCI/2016/9.html> (“The message said that the family would be back on 3 August. It has a ☺ beside the date. After the family left, the police searched the caravan. They found the message and say that the ☺ is winking, meaning that the mother knew they wouldn’t be coming back. I don’t agree that the ☺ is winking. It is just a ☺. The police are wrong about that”); *McAlpine v. Bercow*, [2013] EWHC 1342 (QB), <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/mcalpine-bercow-judgment-24052013.pdf> (interpreting the text words “*innocent face*” in a tweet as “insincere and ironical”).

Another court interpreted smileys as supplements to the text that added emotional valence (in that case, happiness):

Ms. Scerbo began her email with a ‘smiley face emoticon,’ asking ‘:-)) did Ray chat with you about Elaina?’ Plaintiff argues that this is a reference to Plaintiff’s termination, to which Mr. Mauch responded ‘Yes he did. Thank you for your help. That deserves a big :-))!!!’ The Court believes that a reasonable jury could find that the ‘emoticons,’ attached to the emails of two Munich Re managers late in the day on which Plaintiff was terminated, are evidence that the decision-makers at Munich Re were happy to be able to terminate Plaintiff.⁵⁵

Collectively, these two rulings demonstrate that courts can successfully analyze the same emoji (in these cases, the smiley emoticon) and yet reach different—but logical—conclusions about its meaning. That’s consistent with courts’ regular interpretative challenges, where words and other symbols are routinely capable of multiple, and possibly opposite, meanings. Emojis are just another set of symbols for that interpretive process.

B. Emoji-Related Interpretive Challenges

Although we should have significant faith in courts’ abilities to interpret emojis, nevertheless emojis will pose some interpretative challenges. This subpart analyzes nine attributes of emojis will require special consideration by courts.⁵⁶ This subpart establishes the ways senders and recipients of emojis will misunderstand each other. The next subpart will look at the legal consequences of those misunderstandings.

1. *Small Size*. Emojis are small graphical images. Depending on the user’s device, the screen resolution may make it difficult for the recipient to decode the exact emoji being displayed. Furthermore, many emojis (especially face emojis) look similar; there are dozen or so smiling/grinning Unicode-defined emojis and the differences between them are subtle.⁵⁷ For example, the “smiling face with open mouth & smiling eyes” (below, on the left) and “smiling face with open mouth & cold sweat” (on the right) differ only by a tiny sweat bead:

⁵⁵ *Apatoff v. Munich Re Am. Servs.*, 2014 U.S. Dist. LEXIS 106665 (D. N.J. Aug. 1, 2014) (citations omitted).

⁵⁶ Hess, *supra* note 14 (“Courts have always had to interpret nonverbal cues, like shrugs and winks, that arise in face-to-face conversations. But digital symbols are something new”).

⁵⁷ See Unicode, *Full Emoji Data*, *supra* note 40.



A recipient could easily misidentify which of these two images he/she has received, especially if viewing the emojis on a cellphone's small screen. The emoji's small size, especially when views on a device with low resolution, may create situations where a reasonable recipient misinterprets the sender's meaning.⁵⁸

2. *Novelty*. Societies are constantly creating new words and symbols and giving new meanings to existing words and symbols. This is true with emojis as well, except that the velocity of the emoji "language" expansion and transmutation may be faster than anything we've ever seen before.⁵⁹

Furthermore, newly created emojis will become increasingly more specialized, which further increases the chances that recipients won't know what they mean. We already saw something similar with emoticons, where a clever new emoticon usually needed an explanation because its meaning wasn't otherwise intuitive or well-understood. As new emojis proliferate, it will take time for users learn the meaning of the new emojis. In the interim, emoji recipients may not understand—or may misunderstand—the sender's meaning. Misunderstanding new words or slang meanings isn't novel, but we should expect to encounter it frequently with emojis due to the dynamism of the emoji ecosystem.

Also, emojis are an emerging technology and are working through the typical innovation adoption curve. Many people are still learning what emojis mean and how to use them properly. As with any new technology, people less familiar with the technology may be more prone to confusion or misunderstanding.⁶⁰

⁵⁸ Also, senders could make "typographical" errors when selecting emojis, i.e., the sender accidentally picks the wrong emoji and doesn't catch the mistake before sending the message. Those errors might occur because the screen resolution is so tiny that the sender's finger movements aren't sufficiently precise. It also could be due to the sender's mental error. Emoji typographical errors may not be different than other typographical errors already encountered in courts, so these mistakes may not require unique consideration.

⁵⁹ See *supra* notes 10-13.

⁶⁰ There also may be generational differences in emoji usage.

3. *No Dictionary*. Due to their venerability, books⁶¹ and many online directories⁶² provide definitions of emoticons. Nevertheless, beyond a few very popular emoticons,⁶³ most emoticons may not have well-recognized meanings.

The situation with emoji definitions is more fluid. Unicode provides a short description of every emoji it defines,⁶⁴ but only a small fraction of emojis are Unicode-defined, and Unicode self-acknowledges that its descriptions “may not encompass all the possible meanings of an emoji character, and in some cases may even be misleading.”⁶⁵

Indeed, Unicode short descriptions routinely do not reflect slang meanings that have emerged. Some examples:⁶⁶

- When discussing cellphones, a skull emoji⁶⁷ doesn’t symbolize death. It acts as a metaphor: being without connectivity is like death.⁶⁸
- The “folded hands” emoji⁶⁹ was designed to symbolize please and thank you, but it is used to mean “I’m praying” or “high five.”⁷⁰
- The syringe emoji⁷¹ can refer to donating blood, getting shots, “blood brothers,” or issues with tattoos.⁷²

⁶¹ E.g., SANDERSON, *supra* note 20; SETH GODIN, THE SMILEY DICTIONARY (1993).

⁶² See, e.g., *List of Emoticons*, Wikipedia.org, https://en.wikipedia.org/wiki/List_of_emoticons (visited January 26, 2017).

⁶³ See Walther & D’Addario, *supra* note 2, at 335 (“Among these basic connotations, there seems to be a fairly firm semantic understanding of emoticons, whether or not they function this way syntactically”).

⁶⁴ Unicode, *Full Emoji Data*, *supra* note 40.

⁶⁵ Unicode, *Emoji*, *supra* note 21.

⁶⁶ For other examples, see Cara Rose DeFabio, *Instagram Hashtags Could Be The Best Guide To Emoji Meaning We’ve Ever Had*, Fusion, May 1, 2015, <http://fusion.net/story/127904/instagram-hashtags-could-be-the-best-guide-to-emoji-meaning-weve-ever-had/>.

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⁶⁸ Schnoebelen, *supra* note 52.

⁶⁹ 

This emoji is usually called “person with folded hands,” but only a few platforms implement it with a person’s face/body in addition to the hands.

⁷⁰ See Kat Chow, *Simmering Online Debate Shows Emoji Is In The Eye Of The Beholder*, NPR, Aug. 1, 2014, <http://www.npr.org/sections/alltechconsidered/2014/08/01/336884531/simmering-online-debate-shows-emoji-is-in-the-eye-of-the-beholder>.

⁷¹ 

Some online emoji guides provide definitions to supplement the Unicode short descriptions. For example, Emojipedia⁷³ (incompletely) provides some slang definitions of emojis.⁷⁴ The “Emoji Dictionary”⁷⁵ characterizes itself as “first crowdsourced Emoji resource on the web” and allows users to submit their own definitions of emojis; but it describes itself as a “tongue and cheek art movement,”⁷⁶ and its credibility is dubious.⁷⁷

The lack of credible dictionaries creates several problems. First, recipients may not know how to find an unfamiliar emoji’s meaning. Without a dictionary that allows image searches, it may be even more challenging to look up an unfamiliar emoji.⁷⁸ Second, as emojis evolve additional or different meanings,⁷⁹ senders and recipients may not know those meanings. All of this increases the possibilities that senders and recipients might miscommunicate with each other.

⁷² See Schnoebelen, *supra* note 52; DeFabio, *supra* note 66 (saying this emoji is used for “everything from blood donation, to drugs, to tattoos”).

⁷³ <http://emojipedia.org/>.

⁷⁴ For example, Emojipedia’s definition of the “100” emoji 100 discusses various slang implications:

100 emoji: the number one-hundred, written in red, underlined twice for emphasis.

Originating from the number 100 written on a school exam or paper to indicate a perfect score of 100 out of 100. Teachers in Japan may also use a stamp in addition to the 100 mark, to indicate that a student has performed very well.

This 100 emoji is commonly used as a shorthand for 100%, with the usage meaning “keep it real” or a similar sentiment. A 100 emoji can be used to express pride or general acceptance of an idea.

In Snapchat, the 100 emoji appearing next to a fire emoji indicates a 100 day Snapstreak.

¹⁰⁰ Hundred Points, Emojipedia, <http://emojipedia.org/hundred-points-symbol/> (visited February 11, 2017).

⁷⁵ The Emoji Dictionary, <https://emojidictionary.emojifoundation.com>.

⁷⁶ *Id.*, <https://emojidictionary.emojifoundation.com/learn>.

⁷⁷ Among other reasons, it’s sponsored by the “World Translation Foundation,” and its acronym “WTF” is almost certainly not-coincidentally the same acronym as “what the fuck.”

⁷⁸ A reverse Google image search (<https://support.google.com/websearch/answer/1325808?hl=en>) will find other instances of the emoji but it won’t resolve any ambiguity about meaning. Similarly, Instagram allows searches of emojis accompanied by a hashtag but doesn’t resolve meaning ambiguity either. DeFabio, *supra* note 66.

⁷⁹ Steinmetz, *Emoji Convention*, *supra* note 38 (quoting Tyler Schnoebelen as saying “Language changes and emojis are changing”).

Third, it will be harder to establish an emoji's historical meaning, such as a court case in 2025 that needs to establish the meaning of an emoji in 2017.

4. *Unsettled Grammar Rules.* We do not have definitive grammar rules about how to interpret the presentation of multiple emojis.⁸⁰ One commentator explained.⁸¹

When writers put two or more emojis together, the order of the characters is also very important. A cloud in front of a car,⁸² for instance, might mean “driving into the wind.” But that’s rare; much more frequent is a cloud behind a car,⁸³ meaning “a fast car.”

Some grammar conventions are emerging, such as sequencing multiple emojis in linear time and presenting emojis signaling the sender's emotion before emojis elaborating on or clarifying that position.⁸⁴ Until the grammar rules are settled, senders and recipients may reasonably apply different grammar rules to emoji sequences⁸⁵ and misunderstand each other as a result.

5. *Dialects.* Like other types of communication, emojis will develop local “dialects.” Dialects can develop in groups as small as two people, such as a

⁸⁰ See Julia Greenberg, *That ;) You Type Can and Will Be Used Against You in a Court of Law*, WIRED, Feb. 12, 2015, <https://www.wired.com/2015/02/emoji-in-court-cases/> (quoting Tyler Schnoebelen as saying “Emoji are new, so they haven’t been conventionalized”)

⁸¹ Schnoebelen, *supra* note 52.

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⁸⁴ 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/>; cf. ANNA MROWIEC, HOW TO SPEAK EMOJI L 😊VE (2016) (following these conventions).

⁸⁵ Cf. Jonah Bromwich, *How Emojis Find Their Way to Phones*, N.Y. TIMES, Oct. 21, 2015, <https://www.nytimes.com/2015/10/21/technology/how-emojis-find-their-way-to-phones.html> (quoting Mark Davis, Unicode Consortium president, as saying “I can tell you, using language, I need to go get a haircut, but only if I can get there by 3 p.m., and otherwise I have to pick up the kids... You try to express that in emoji and you get a series of symbols that people could interpret in a thousand different ways.”); *id.* (quoting Colin Rothfels, with the job title “Emoji grammarian,” as saying “We've had this vocabulary kind of dropped on us and different kinds of people are finding different ways to use it”).

writer and his wife who “use the Easter Island head [emoji] to connote absurdity.”⁸⁶

Due to linguistic and cultural differences, geographic emoji dialects naturally will develop.⁸⁷ For example:

- among native Arabic speakers, the smiley emoticon does not indicate happiness or joy; it is used “for something more superficial or maybe even to hide anger or sarcasm.”⁸⁸
- if an employee sends the face mask emoji⁸⁹ to a Japanese boss, he or she will think the sender is sick. In contrast, a U.S. boss might associate the emoji with robbing banks.⁹⁰
- some implementations of the bank emoji contain the letters “BK.”⁹¹ In Japan, this has become associated with “bakkureru,” slang for evading one’s responsibility.⁹²
- in the United States, the eggplant emoji⁹³ is used as a phallic reference.⁹⁴

Platform-specific emoji dialects will also develop. On the Internet, platforms constitute natural community boundaries because the platform’s software provides common user experiences and shared cultural reference points. Emojis accelerate this process because each platform implements Unicode-defined

⁸⁶ Thompson, *supra* note 11 (noting that “friends use [emojis’] malleability to invest specific emojis with their own private meanings”).

⁸⁷ See *Most-Used Emoji Revealed: Americans Love Skulls, Brazilians Love Cats, The French Love Hearts*, SwiftKey Blog, Apr. 21, 2015, <https://blog.swiftkey.com/americans-love-skulls-brazilians-love-cats-swiftkey-emoji-meanings-report/>.

⁸⁸ *Emotional Pictures*, University of Albany News Center, Nov. 9, 2016, <http://www.albany.edu/news/74747.php> (discussing research by Prof. Laurie Beth Feldman).



⁹⁰ Damon Darlin, *America Needs Its Own Emojis*, N.Y. TIMES, Mar. 7, 2015, <https://www.nytimes.com/2015/03/08/opinion/sunday/turn-emojis-red-white-and-blue.html>.

⁹¹ One example: 

⁹² Unicode, *Emoji*, *supra* note 21.



⁹⁴ *Eggplant Emoji*, Know Your Meme, <http://knowyourmeme.com/memes/eggplant-emoji> (last visited Jan. 6, 2017); Bromwich, *supra* note 85 (suggesting the eggplant-as-phallus reference occurs primarily in the United States, not other countries). This association is so common that Instagram has blocked searches for the eggplant emoji with a hashtag. DeFabio, *supra* note 66.

emojis differently.⁹⁵ Those differences can lead to the development of platform-specific meanings for emojis that may not be understood by users on other platforms.

For example, users on Apple’s platform often treated the peach emoji⁹⁶ as a euphemism for human “butts.”⁹⁷ Because peach emoji implementations look differently on other platforms,⁹⁸ those users may not make—or even know of—that association.

A platform’s “auto-suggest” functionality could contribute to dialect formation. The platform makes associations between the typed words and the suggested emojis, and those associations are not necessarily based on Unicode’s short description. For example, Apple’s iOS suggests the “hugging face” emoji⁹⁹ when users type “jazz hands” or “hugs.”¹⁰⁰ This increases the odds that Apple users define that emoji as meaning either word. However, if other platforms make different auto-suggestions, their users will form different associations with the hugging face emoji.

Regional and community dialects routinely occur in language development, so the emergence of emoji dialects is normal. Furthermore, courts routinely handle the interpretation of dialects. Indeed, the Internet has made such efforts easier with the advent of tools like the Urban Dictionary,¹⁰¹ which offers multiple competing crowdsourced definitions of slang and street lingo. This makes it

⁹⁵ Scall, *supra* note 12.

⁹⁶  Apple has subsequently changed its implementation to make it look less butt-like: 

⁹⁷ *Peach Emoji*, Know Your Meme, <http://knowyourmeme.com/memes/peach-emoji> (last visited Jan. 6, 2017).

⁹⁸ See <http://emojipedia.org/peach/>. For example, Google’s peach emoji is a different color (a light maroon, like a red radish’s color), has bigger leaves, a smaller “crack,” and a white spot suggesting the reflection of light:



¹⁰⁰ Another emoji, “open hands,” can also mean “jazz hands” or “hugs,” but Apple’s auto-suggestion does not suggest the “open hands” emoji. I’m grateful to Gabriella Zicarelli for educating me about this jazz hands/hugs example.

¹⁰¹ <https://www.urbandictionary.com/>.

easier for courts¹⁰²—and everyone else—to efficiently learn about and determine the possible meanings of these terms.

In contrast, the likelihood of emoji dialects highlights the absence of credible emoji dictionaries. Not only are cross-community conversations likely to produce misinterpretations, but we don't have a good way to identify the disparate dialect meanings. We need an Urban Dictionary for emojis to capture their multiple meanings.

6. *Conveying Emotions.* As noted earlier, text-based online communications omit vital body language and vocal inflections, and emojis can inject missing emotional content to online communications.¹⁰³ In fact, conveying emotions has proven to be the most compelling use of emojis. Of “the 20 most frequently used emoji, nearly all are hearts, smilies, or hand gestures—the ones that emote.”¹⁰⁴

However, their role in conveying emotions puts a lot of pressure on emojis.¹⁰⁵ The simple designs of emojis don't leave much room for nuanced emotional expression.¹⁰⁶ As one commentator observed, “efforts to build a unified emotional context for hundreds of emojis used by millions of people around the world have failed.”¹⁰⁷

Several factors contribute to the risk that recipients will misunderstand the sender's desired emotional meaning of emojis.

First, “[i]n most cases, emoticons were overwhelmed by the valence of verbal statements that they accompanied.”¹⁰⁸ Furthermore, senders sometimes use

¹⁰² On February 22, 2017, I searched for the term “Urban Dictionary” in Westlaw's ALLCASES database and found 127 references (search results on file with the author).

¹⁰³ Schnoebelen, *supra* note 52.

¹⁰⁴ Thompson, *supra* note 11.

¹⁰⁵ See Walther & D'Addario, *supra* note 2.

¹⁰⁶ See Hess, *supra* note 14 (saying emojis have “emotional flexibility” and citing the originator of emoticons as realizing “that the meanings of emoticons *themselves* were highly subjective”).

¹⁰⁷ *Id.*

¹⁰⁸ See Walther & D'Addario, *supra* note 2, at 341. They added: “In almost all cases, e-mail messages containing emoticons did not generate different interpretations than did messages without emoticons. In terms of the known functional relationships of nonverbal communication to verbal communication, the emoticon may serve the function of complementing verbal messages at best but not contradicting or enhancing them.” *Id.* at 341-42.

emojis to facilitate their writing process, not to convey their emotions.¹⁰⁹ Thus, it's easy for recipients to assign more emotional meaning to emojis than senders intended.

Second, senders may make counter-intuitive emotional associations with emojis, such as the “mystifying” finding that the “bento box emoji is used in largely negative contexts, while the panda face is associated with less positive emotions than most other animals featured on the emoji keyboard.”¹¹⁰

Third, face emojis constitute a majority of emoji usage,¹¹¹ but interpreting their emotional valence poses extra challenges.¹¹² Different cultures assign different meanings to facial expressions.¹¹³ Also, facetious, sarcastic, and parodic meanings are notoriously difficult to communicate online, and recipients or third party may not appreciate those meanings when senders use face emojis.¹¹⁴

An example helps illustrate the potential ambiguity of face emojis. This is Apple's implementation of the “unamused face” emoji. If a sender attached it to text, what emotion was the sender was trying to communicate?



¹⁰⁹ “Emoticons may help the writer, not the reader...by helping to express, to check, and if need be to edit, that which may be unclear during initial message production. As such, emoticons are not communicative but generative.” *Id.* at 343.

¹¹⁰ Hess, *supra* note 14. The article discusses the “Emoji Sentiment Ranking,” available at http://kt.ijs.si/data/Emoji_sentiment_ranking/.

¹¹¹ *SwiftKey Emoji Report*, Apr. 2015, http://www.aargauerzeitung.ch/asset_document/i/129067827/download (nearly 60% of emojis sent are faces).

¹¹² *See generally* Miller, *supra* note 38 (focusing their survey on “anthropomorphic emoji, or those that represent faces or people, because (1) they are very common and (2) we hypothesized that misconstrual would be more likely among these emoji than those that characterize ‘things’”).

¹¹³ *Id.* (“it is likely that emoji usage and interpretation is culturally dependent”).

¹¹⁴ Walther & D’Addario, *supra* note 2. *Cf.* Hess, *supra* note 14 (discussing particular difficulties interpreting the wink and tongue-sticking-out emoticons).

If you're uncertain, you're not alone. One survey found that people assigned a range of emotions to this emoji, including "disappointment," "depressing," "unimpressed" or "suspicious."¹¹⁵ Any associated text could help recipients determine the intended meaning. However, with such a wide range of possible emotional meanings, odds are good that the recipient will misunderstand the sender.

The ambiguity of the "unamused face" emoji is not unique. Researchers found that each of the top 3 most confusing emojis (by platform) generated "significantly different responses from the participants for a given rendering," with the "smirking face" ranking in the top 3 on 4 of the 5 platforms tested.¹¹⁶

More generally, the survey revealed that 25% of the time, people did not agree whether an emoji's emotional valence was positive, neutral, or negative.¹¹⁷ The worst performer was Microsoft's implementation of "smiling face with open mouth and tightly closed eyes"¹¹⁸: "44% of participants labeled it as negative and 54% labeled it as positive, indicating a clear lack of consensus."¹¹⁹

The survey authors concluded: "when two people consider the same emoji rendering, they may interpret both the sentiment and semantic meaning differently."¹²⁰ Accordingly, senders and recipients may reasonably attach different meanings to the same emojis.

7. Intra-Platform Version Incompatibilities. Arguably, the prior six interpretative challenges are not unique to emojis. Similar issues may be encountered across a wide range of technologies and social practices. Existing interpretative tools should be able to handle the challenges (perhaps with some accommodations), although their applications will likely cause some disappointment in situations when senders and receivers reasonably made different interpretations of an emoji and changed their legal position accordingly.

¹¹⁵ Miller, *supra* note 38.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸  After the Miller survey, Microsoft changed its implementation to . See Danielle McClune, *Project Emoji: The Complete Redesign*, Windows Blog, Aug. 4, 2016, <https://blogs.windows.com/windowsexperience/2016/08/04/project-emoji-the-complete-redesign/#dB4IWk7zfvOA1Viu.97>. To me, the redesigned emoji is still ambiguous but less likely to be interpreted as negative.

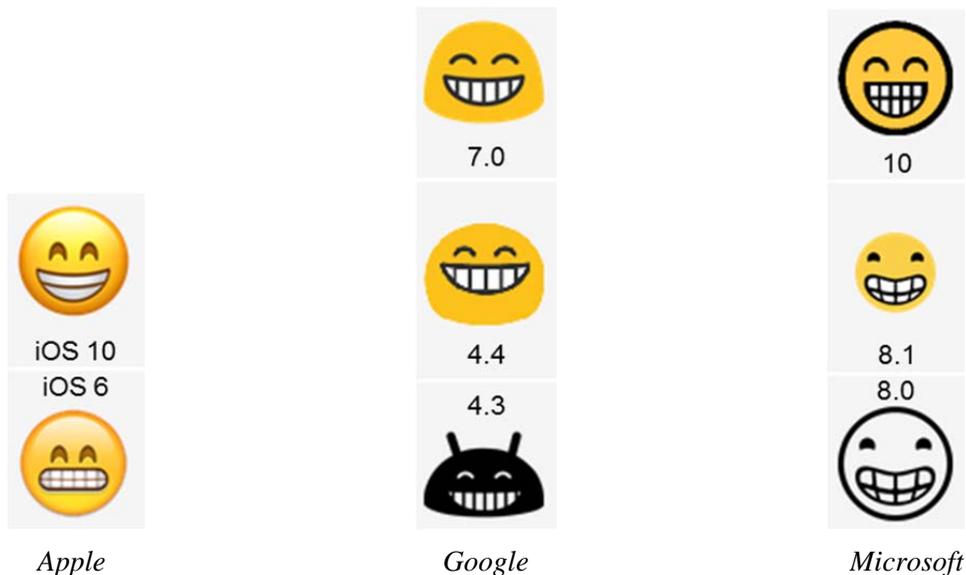
¹¹⁹ Miller, *supra* note 38.

¹²⁰ *Id.*

In contrast to the prior 6 issues, the remaining three issues, which all relate to platform compatibility, are more uniquely associated with emojis. Because emoticons are cross-platform compatible, these three issues only apply to emojis and not emoticons.

In the remaining three situations, the technological implementation of emojis causes the sender and recipient to see different things *and not realize that they are seeing different things*. In other words, emoji technology will directly cause misunderstanding and confusion by changing the sender's meaning without disclosure.

The first compatibility issue relates to differences in emoji implementations in different software versions of the same platform. Platforms iterate their emoji implementations frequently. For example, the “Grinning Face With Smiling Eyes” emoji¹²¹ has gone through the following iterations on the Apple, Google and Microsoft platforms:



(these figures show the oldest version at the bottom and newer versions above it)

For Apple, the bottom depicts iOS 6.0 and the top depicts iOS 10.0. The mouth shape and teeth are strikingly different. For Google, the bottom represents Android 4.3, the middle Android 4.4 and the top Android 7.0. The differences

¹²¹ See <http://emojipedia.org/grinning-face-with-smiling-eyes/>.

between 4.4 and 7.0 are subtle, but the outline shape, mouth shape, teeth, and relative position of eyes to mouth all changed. The differences between 4.3 and 4.4 are dramatic: different color, outline shape, mouth and teeth, and antennae. For Microsoft, the bottom is Windows 8.0, the middle is Windows 8.1, and the top is Windows 10 Anniversary Update. The addition of color is the main change from 8.0 to 8.1, but the changes from 8.1 to 10 were significant, including the mouth shape, the teeth, the eyes, and the thick outline border.

If the sender and recipient are on the same platform and using the same version of the operating system (i.e., both sender and recipient are on iOS 10.0), then they should see the same versions of the platform's emoji implementation.

This may not necessarily be true if the sender and recipient use different versions of the platform's operating system. In that case, the sender and recipient may see the same emoji, but its implementation may differ based on the user's version. For example, if the sender is on iOS 10.0 and the recipient is on iOS 6.0, then they will see different emoji implementations as depicted above.

This is a problem because the interpretations of those two emoji implementations might be very different. One study showed that people interpreted the iOS 6.0 implementation as meaning "ready to fight"¹²²—a very different meaning than the short description ("grinning face with smiling eyes") or the sender's meaning of the iOS 10.0 version. Therefore, users on different versions of the platform's software run the risk of miscommunicating with each other because changes in the emoji implementations may cause the sender and recipient to see different things.

8. *Cross-Platform Depiction Diversity*. Part I(B) explained that Unicode-defined emojis can look different on different platforms, as illustrated by the cow emoji example. We now revisit this issue in light of the difficulties interpreting emotions communicated by emojis. Subtle differences in emojis, especially face emojis, can lead people to assign different emotional meanings to the symbols. Thus, platform-specific implementations of emojis will cause misunderstandings between senders and recipients.

Countless examples illustrate this principle,¹²³ but we'll just look at three:

¹²² As depicted in point number 7 *supra*, Apple has changed this emoji implementation since this study was conducted.

¹²³ A bonus example: the platform-specific implementations of the Unicode-defined "calendar" and "tear-off calendar" emojis display different dates. Why?

Example #1: “Grinning Face with Smiling Eyes.” For example, the prior subpart discussed the Unicode “grinning face with smiling eyes” emoji. A survey¹²⁴ illustrates the potential for cross-platform miscommunication. People thought Google’s implementation¹²⁵ meant “blissfully happy” but thought Apple’s implementation meant “ready to fight,”¹²⁶ obviously a very different meaning!

Example #2: “Astonished Face.” A chart showing how platforms implemented the Unicode “astonished face” emoji.¹²⁷



The Unicode outline is on the far left. Google’s implementation is the third from the left. It does not resemble the Unicode outline at all; the outline shape, eyes and mouth are all different. As a result, recipients aren’t likely to interpret this implementation as “astonished.” Facebook Messenger’s implementation is in the middle. It uses Xs-as-eyes,¹²⁸ a metaphor typically associated with death,¹²⁹



Full Emoji Data, v4.0, <http://unicode.org/emoji/charts/full-emoji-list.html> (last updated Mar. 3, 2017).

¹²⁴ Miller, *supra* note 38.



As depicted above, Apple changed its implementation after this study was conducted.

¹²⁷ Unicode, *Full Emoji Data*, *supra* note 40.

¹²⁸ Although not reflected on this chart, a few other platforms also use Xs-as-eyes in their implementations, including LG, Mozilla and Emojidex. See *Astonished Face*, Emojipedia, <http://emojipedia.org/astonished-face/> (visited Feb. 24, 2017). The Unicode “dizzy face” emoji uses

Xes for eyes and closely resembles Facebook Messenger’s implementation of “astonished”: . As Emojipedia explains, the “Astonished Face” emoji “was previously difficult to distinguish from the Dizzy Face emoji on iOS.” *Id.*

¹²⁹ *Winking Eyes*, TV Tropes, <http://tvtropes.org/pmwiki/pmwiki.php/Main/WinkingEyes> (visited Feb. 23, 2017).

so a Facebook Messenger user receiving this emoji could take it as a threat.¹³⁰ Samsung’s implementation is to the immediate right of Facebook Messenger, and it might be more associated with anger, shock or annoyance than astonishment.

Example #3: “Pistol.” A chart showing how platforms implemented the Unicode “pistol” emoji.¹³¹



The Unicode outline again is on the far left. The implementations all look like pistols except for Apple’s (second from the left), which intentionally substituted a water pistol for a firearm pistol.¹³² As Prof. Jonathan Zittrain observed, Apple’s substitution “breaks the conceptual compatibility that Unicode is meant to establish.”¹³³ It also increases the odds that Apple users will develop their own dialect.

These examples demonstrate how senders and recipients will miscommunicate with each other *solely because of technology intermediation*.¹³⁴

9. Cross-Platform Omissions. Similar issues arise from the lack of cross-platform compatibility for proprietary emojis. As mentioned in Part I, sometimes the recipient will get an indication—like an empty or black square—to indicate that a proprietary emoji was omitted;¹³⁵ in other cases, the recipient will not get any notice about the omission.¹³⁶ This creates more situations where the sender and recipient see different things because of the technological intermediation.

¹³⁰ Other plausible interpretations include illness or exhaustion.

¹³¹ Unicode, *Full Emoji Data*, *supra* note 40.

¹³² Margaret Rhodes, *Apple’s New Squirt Gun Emoji Hides a Big Political Statement*, *Wired*, Aug. 4, 2016, <https://www.wired.com/2016/08/apples-new-squirt-gun-emoji-hides-big-political-statement/>.

¹³³ Jonathan Zittrain, *Apple’s Emoji Gun Control*, *N.Y. TIMES*, Aug. 16, 2016, <http://www.nytimes.com/2016/08/16/opinion/get-out-of-gun-control-apple.html>.

¹³⁴ *Cf.* Miller, *supra* note 38 (“communication across platform is even more prone to misconstrual than within-platform”).

¹³⁵ *Id.* (“Many participants mentioned instances in which emoji did not render on their phone (showing up as black squares), which at least informs the recipient that they are missing some meaning.”).

¹³⁶ *Cf.* *People v. Lesser*, 2011 WL 193460, *4-*6 (Cal. Ct. App. Jan. 21, 2011) (discussing the problems a litigant had printing out chat messages containing “emoticons” (which were probably actually emojis); the printouts omitted the emoticons without any indication).

C. How Will The Law Handle Emoji Misunderstandings?

The prior subpart detailed numerous ways that emojis can cause misunderstandings. In many cases, the sender and recipient may make objectively reasonable but different interpretations of the emoji or the message.¹³⁷ From a legal standpoint, some of these situations will not be materially different than the issues encountered with other words and symbols, but the intra- and inter-compatibility issues are emoji-specific. How will the law resolve the misunderstandings? It would be impossible to run through all of the implications across hundreds of legal doctrines, so this subpart will use two examples, from criminal and contracts law, to get a sense of the legal consequences of emoji misunderstandings.

Criminal Threats Example. In the context of criminal threats, it's easy to see how a recipient might objectively perceive a physical threat of violence that the sender subjectively and objectively did not communicate:

- if the sender uses the “grinning face with smiling eyes” emoji on Google to signal “blissfully happy,” but the recipient on Apple perceives the sender is “ready to fight.”
- if the sender uses the “astonished face” emoji on most platforms but the recipient on Facebook Messenger interprets the emoji as a death threat.
- if the sender uses the “pistol” emoji on Apple thinking it's a squirt gun and a recipient on any other system perceives the realistic pistol emoji implementation as a warning of getting shot.

We could also imagine a circumstance where both the sender's and recipient's platforms faithfully honor the Unicode outline but implement the emoji using different colors. Assume the sender incorporates an emoji that uses a color not typically associated with any gang; and the recipient's platform assigns a different color to the emoji, and that color is associated with a gang. When combined with the negative words, the display of the gang color could cause the recipient to reasonably interpret the sender's message as a threat of physical violence.

Where a crime requires bad intent by the sender,¹³⁸ platform-specific differences in emoji implementations won't create any new interpretative challenges. Our standard interpretative processes can parse the sender's intent,

¹³⁷ Miller, *supra* note 38 (giving examples of where this has happened).

¹³⁸ See, e.g., *Elonis v. U.S.*, 575 U. S. __ (2015).

although the absence of a dictionary or an Urban Dictionary-equivalent might make the task harder.

However, where the law turns on the recipient's subjective or objective beliefs, it is problematic to hold the sender liable for an emoji implementation he or she did not send and never saw. In those cases, the sender will have a strong defense that he or she lacked any mens rea; and we should question whether the sender even committed an actus reus.

Contracts Example. Consider the following hypothetical: In the course of contract negotiations, the sender responds to an offer with words that could be interpreted as acceptance (such as “awesome”)¹³⁹ but adds a Unicode-defined emoji to signal the sender's sarcasm, and reasonable senders would interpret that emoji as communicating sarcasm. Because the recipient platform implements the emoji differently, the recipient reasonably does not perceive the intended sarcasm, so the recipient believes the sender accepted the offer and detrimentally changes her position based on that belief. Now what?

Due to its venerability, contract law has developed a variety of tools to deal with miscommunications between contracting parties. Most likely, it would be treated as a “misunderstanding” case, i.e., the emoji equivalent of the celebrated “Peerless” case *Raffles v. Wichelhaus*.¹⁴⁰ Restatements 2d of Contracts § 20 says:¹⁴¹

- (1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
 - (a) neither party knows or has reason to know the meaning attached by the other; or
 - (b) each party knows or each party has reason to know the meaning attached by the other.
- (2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if

¹³⁹ *Cf.* *CX Digital Media, Inc. v. Smoking Everywhere, Inc.*, 2011 WL 1102782 (S.D. Fla. Mar. 23, 2011) (contract formed by a text message saying “awesome!”); *Beastie Boys v. Monster Energy Co.*, 983 F. Supp. 2d 338 (S.D.N.Y. 2013) (emailed response “Dope!” did not constitute a license grant).

¹⁴⁰ *Raffles v. Wichelhaus*, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Ex. 1864)

¹⁴¹ RESTATEMENT (SECOND) OF CONTRACTS § 20 (1979).

- (a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or
- (b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

The Peerless issue arose from the semantic ambiguity of the parties' reference to "The Peerless," i.e., two different ships with the same name. This hypothetical's misunderstanding isn't due to semantic ambiguity. Instead, technology intermediation causes the misunderstanding; the emoji looks different across platforms and the sender and recipient both don't realize how the technology works. Because the technology caused the differences in meaning and neither sender nor recipient realized it, § 20 indicates that there's no contract. That could be an unfortunate outcome for any party that detrimentally relied upon the apparent contract formation.

If one party knows about cross-platform compatibility, § 20(2) indicates that party will lose.¹⁴² But what about situations, like the cross-platform omission, where the emoji is omitted but the recipient gets some notice, like an empty square? Courts may view the indicator as putting the recipient on inquiry notice to find out what information got omitted; in which case their failure to do so would lead to them taking responsibility for the misunderstanding. However, many recipients would view the empty square as a glitch, not as a prompt to clarify the sender's meaning. Thus, a reasonable person likely would not actually inquire, and would be harsh to impose an inquiry obligation when a reasonable person wouldn't actually inquire.

D. What Should We Do About Emoji Misunderstandings?

Before overreacting to emoji-caused miscommunications, we should acknowledge that new communication technologies routinely create such challenges. Inevitably, such challenges fade over time through a combination of user education, industry self-regulation and incremental legal responses. Indeed, online users will gain more experience with emojis, over time learning about their strengths and weaknesses as communication tools. As that happens, senders

¹⁴² Cf. *WorkSTEPS, Inc. v. ErgoScience, Inc.*, 88 F. Supp. 3d 752 (W.D. Tex. 2015) (applying the unilateral mistake doctrine when a party couldn't see contract redlines because of a misconfiguration of Adobe PDF settings).

will get better at using emojis more precisely and recipients will get better at interpreting emojis consistent with the sender’s intended meaning.

We can accelerate this process by increasing our digital literacy education to include emojis. Other steps we might take:

A Platform’s Responsibilities

In theory, we could hold platforms legally liable for miscommunications caused by their idiosyncratic implementations of Unicode-defined emojis. After all, the platforms construct the meaning on their platform, and they are in the best position to reduce any user confusion about that meaning. Then again, platforms routinely create and define new symbols and user interfaces on their platforms. So long as there is no falsity or fraud, they should be free to do so. Indeed, user interfaces routinely improve as platforms experiment with new designs, something we do not want to chill. Furthermore, as Part III will discuss, platforms may feel compelled to make their emoji implementations different from all others to avoid the risks of intellectual property violations. All told, imposing legal liability on platforms probably would be the wrong approach.

Still, platforms need to accept responsibility to help their users avoid misunderstandings. It’s a matter of good ethics. It’s also essential to a well-functioning information ecosystem. And it’s a key towards maintaining user trust. If platforms are routinely causing misunderstandings among their users, they will lose credibility with their users (i.e., the platforms are not reliable enough for users to trust them).

Platforms could help users by warning them of the potential for miscommunication. However, it wouldn’t help to make this a legal obligation. If platforms are required to warn users, they will satisfy this duty through generic boilerplate disclosures in their form contracts that do not help users understand.¹⁴³

Instead, platforms can show users how their messages will look on their communication partner’s platform.¹⁴⁴ For example, a sender’s platform could warn the sender that the recipient will see a different emoji implementation and

¹⁴³ There is a voluminous amount of (mostly negative) literature on the efficacy of legally mandated disclosures to improve consumer understanding. *See, e.g.*, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

¹⁴⁴ Cf. the app Emojily (<https://play.google.com/store/apps/details?id=com.hollinsky.emojily&hl=en>) lets Android users “input a string of text and emoji, and it will show you what an iOS user would see.”

give them the option to see what the recipient will see; and the recipient's platform could warn the recipient that the sender saw a different emoji implementation and give them the option to see it.¹⁴⁵

Better yet, the platforms could license each other's emoji implementations and show recipients exactly what the sender saw, rather than substituting in the recipient platform's emoji implementation. This would not solve any ambiguity in emoji interpretation, but it would eliminate the confusion that comes because the technology causes the sender and recipient to see different things. It might also reduce the development of platform-specific dialects.

Unicode's Responsibilities

Unicode takes a somewhat lackadaisical approach to cross-platform compatibility. It says:

any pictorial representation of a [Unicode outline], whether a line drawing, gray scale, or colored image (possibly animated) is considered an acceptable rendition for the given emoji. However, a design that is too different from other vendors' representations may cause interoperability problems.¹⁴⁶

Unicode can play a more active role in reducing cross-platform compatibility problems.¹⁴⁷ Some ideas:

- it could provide more detailed outlines of defined emojis so platforms would have less reason to develop their own idiosyncratic implementations.
- it could specify colors for defined emojis to encourage cross-platform standardization.
- it could seek to coordinate licenses among platforms so that each platform could freely use the emoji implementations of other platforms, thus laying the legal foundation for platforms to show their users what the emojis will look like on other platforms.
- it could attempt to sanction platforms that implement emojis so differently than the official Unicode outline that the meaning is changed,

¹⁴⁵ See Miller, *supra* note 38 (suggesting that platforms could do more to help recipients see the version that the sender saw).

¹⁴⁶ Unicode, *Emoji*, *supra* note 21.

¹⁴⁷ See Miller, *supra* note 38 (suggesting that Unicode should do more to standardize platform implementations).

such as the Apple squirt gun implementation of a pistol firearm. However, Unicode's enforcement powers are limited. Still, if a platform tries to change the meaning of an emoji, Unicode could try to convince the platform to stop using the Unicode-assigned number to that emoji. In other words, Apple can offer its users a water gun emoji; but it can't do so using the numerical code that Unicode assigns for the pistol emoji. Of course, Apple can choose not to implement the Unicode pistol emoji, though that will lead to recipients seeing the empty-square omission notice on incoming messages from other platforms (or the incoming emoji being omitted entirely).

Dictionaries' Responsibilities

We need an emoji dictionary. Maybe it needs to be built from scratch, but ideally traditional dictionaries will recognize the growing importance of emojis to our lexicon and add emojis to their existing dictionaries. For any emoji dictionary to be useful, it must offer a reverse image search that allows users to use emoji images as the search query.

III. Emoji Ownership

Emojis are protectable under copyright and trademark law.¹⁴⁸ This part will look at that protection, doctrinal and public policy limits on the protection, and the challenges that result from IP ownership of emojis.

A. Copyright in Emojis.

Individual emojis may be protectable as copyrightable works. Copyright law protects "pictorial, graphic, and sculptural works,"¹⁴⁹ including "two-dimensional art."¹⁵⁰ Individual emojis are a type of two-dimensional art, so they should presumptively qualify for copyright protection.¹⁵¹ Nevertheless, sorting through the story of copyright protection for emojis is complicated, and several copyright law doctrines bear on the question. As a result, it will be impossible to reach a single categorical conclusion about copyright protection for individual emojis.

¹⁴⁸ Bitmoji offers an app that helps users make customized emojis using actual people's faces. <https://www.bitmoji.com/> These emojis may raise publicity rights issues that are beyond the scope of this article.

¹⁴⁹ 17 U.S.C. § 102(5).

¹⁵⁰ 17 U.S.C. § 101.

¹⁵¹ Scall, *supra* note 12, at 390.

Overview of Copyrightability. Copyright applies to two-dimensional art even if the renderings are fairly simple. For example, corporate logos are copyrightable if they satisfy “the requisite qualifications for copyright” and embody “some creative authorship in its delineation or form.”¹⁵² However, there is no bright-line test for how much detail is required to make two-dimensional art copyrightable.

Copyrightability of Emoticons. The Copyright Office Compendium says:

As a general rule, the mere arrangement of type on a page or screen is not copyrightable. However, if the arrangement produces an abstract or representational image, such as an advertisement that uses letters to create a representation of a person, the Office may register the claim provided that the resulting image contains a sufficient amount of pictorial expression.¹⁵³

Individual emoticons are very simple graphical images. The most popular emoticons are just two or three keyboard characters. These simple emoticons probably lack enough detail to satisfy the “pictorial expression” to become works of authorship. In contrast, extremely complicated emoticons might nevertheless clear the threshold.

There appear to be some registrations of emoticon copyrights. On March 1, 2017, I searched the Copyright Office registration database for the keyword “emoticon” and got 24 results,¹⁵⁴ a few of which might be individual emoticons or emoticon sets.¹⁵⁵

Copyrightability of Emojis. Although emojis usually have more detail than emoticons, emojis also can be quite simple. For example, the Unicode outline for

¹⁵² COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES, 3d Ed. § 913.1 [hereinafter COPYRIGHT COMPENDIUM]; 37 C.F.R. § 202.10.

¹⁵³ COPYRIGHT COMPENDIUM, *supra* note 152, § 313.3D.

¹⁵⁴ Search results on file with the author. Because emoticons or emoticon-like images could be registered without referencing the word “emoticon,” this search is surely underinclusive.

¹⁵⁵ The registrations that seemed most likely to include individual emoticons or emoticon sets: VAu000690551 / 2006-01-26 (Carnegie Fabrics); VA0002014215 / 2016-05-03 (Disney Enterprises, for “Emoticon Mickey”); VA0001814013 / 2012-03-26 (David Rand, for “Emoticon “;p” Key Design for Print”); VAu001017590 / 2010-01-07 (Blue Man Productions, for “Emoticon Project Sketches”); VA0000721183 / 1995-04-18 (William Sniffen); VA0001078477 / 2001-03-23 (Stephen Engel); VAu001181706 / 2014-08-15 (GNR8N Kulture).

As discussed in a moment, copyright registrations aren’t conclusive determinations of copyrightability.

“face without mouth”¹⁵⁶ is one circle with two dots. Such a simple drawing will likely be uncopyrightable, even if it’s depicted in color.

However, the copyrightability threshold is quite low. Simple face drawings might qualify as copyrightable;¹⁵⁷ and emojis with more complex details should be copyrightable.¹⁵⁸ Some Unicode-defined emoji outlines that are fairly detailed include the “clown face,”¹⁵⁹ “lion face,”¹⁶⁰ “bento box,”¹⁶¹ and “stadium.”¹⁶² In fact, though most Unicode emoji outlines are intentionally simple by design, most outlines are likely copyrightable.

Platform-specific implementations of Unicode outlines often add color and additional details to the outline, which increases the likelihood that the platform’s implementations are copyrightable, even if the Unicode outline is not.

Similarly, many proprietary emojis will have enough colors and details to be copyrightable, and the U.S. Copyright Office has already registered proprietary emojis. On January 20, 2017, I searched the Copyright Office registration



156

¹⁵⁷ Cf. *I.C. ex rel. Solovsky v. Delta Galil USA*, 135 F. Supp. 3d 196, 214-15 (S.D.N.Y. 2015) (“plaintiff cannot copyright the idea of arranging smiley and frowning faces with the words high and bye....[but] plaintiff chose to place the positive smiley face and the word “hi” on the front of the shirt, greeting another person approaching the wearer; and chose to place the negative frowning face and the word “bye” on the back of the shirt, which another person would see when the wearer leaves”).

¹⁵⁸ See *Blehm v. Jacobs*, 702 F.3d 1193 (10th Cir. 2012), finding the following simple stick figure drawing copyrightable:



The court said: “The Penmen at first glance might be considered simple stick figures, but they are more nuanced than a child’s rudimentary doodling.” *Id.*



159



160



161



162

database¹⁶³ for registrations containing the title “emoji” and came up with 89 records containing the term,¹⁶⁴ of which (judging solely from the titles) about half appear to be registrations for individual emojis or emoji sets¹⁶⁵ (we’ll discuss emoji sets shortly). This does not guarantee that the emoji copyrights are enforceable. Registration provides prima facie evidence of copyrightability (if made within 5 years of first publication),¹⁶⁶ but the presumption can be overcome in court.

Copyrightability means that the subject work clears the minimum eligibility threshold for copyright protection. However, it’s just one step in a multi-step process to determine if a subject work can be successfully enforced and who owns the copyright.

Merger. The merger doctrine limits copyrightability when there is “only one way or only a limited number of ways to express a particular idea, procedure, process, system, method of operation, concept, principle, or discovery.”¹⁶⁷ It means individual emojis not copyrightable if there’s only one way, or a limited number of ways, to express the idea.

¹⁶³ <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE=First>.

¹⁶⁴ Search results on file with the author.

¹⁶⁵ The Coca-Cola Company registered 40 emojis (or sets of emojis) on two consecutive days in 2015. See VAu001220148 / 2015-06-18, VAu001220003 / 2015-06-17, VAu001220015 / 2015-06-17, VAu001220007 / 2015-06-17, VAu001220005 / 2015-06-17, VAu001220009 / 2015-06-17, VAu001220017 / 2015-06-17, VAu001220018 / 2015-06-17, VAu001220008 / 2015-06-17, VAu001220004 / 2015-06-17, VAu001220006 / 2015-06-17, VAu001220019 / 2015-06-17, VAu001220150 / 2015-06-18, VAu001220149 / 2015-06-18, VAu001219970 / 2015-06-18, VAu001219977 / 2015-06-18, VAu001220151 / 2015-06-18, VAu001220152 / 2015-06-18, VAu001220154 / 2015-06-18, VAu001219979 / 2015-06-18, VAu001220144 / 2015-06-18, VAu001220157 / 2015-06-18, VAu001220156 / 2015-06-18, VAu001220038 / 2015-06-18, VAu001220026 / 2015-06-18, VAu001220037 / 2015-06-18, VAu001220036 / 2015-06-18, VAu001220035 / 2015-06-18, VAu001220033 / 2015-06-18, VAu001220258 / 2015-06-18, VAu001220260 / 2015-06-18, VAu001220248 / 2015-06-18, VAu001220236 / 2015-06-18, VAu001220034 / 2015-06-18, VAu001219993 / 2015-06-18, VAu001220023 / 2015-06-18, VAu001220247 / 2015-06-18, VAu001220246 / 2015-06-18, VAu001220237 / 2015-06-18.

Other possible examples include: VA0001998998 / 2015-12-23 (Sketchers Company); VA0001928725 / 2014-09-25 (Insytes Design Group LLC, for a “wishful emoji,” apparently for upholstery fabric); VAu001241008 / 2016-04-15 (Idea Nuevo, for a set of 8 unpublished emojis); VA0001881566 / 2013-08-12 (Viva Time); VAu001250187 / 2016-04-12 (High Point Design); VAu001187425 / 2014-09-23 (ju already kno, which includes a “emoji hands finger hole”); VA0002023053 / 2016-06-28 (Nosakhare Ogbebor for “flirty emojis”).

¹⁶⁶ 17 U.S.C. § 410(c).

¹⁶⁷ COPYRIGHT COMPENDIUM, *supra* note 152, § 313.3(B).

Recall the example of the “face without mouth” emoji. As limited by the design parameters of a Unicode outline (small and black-and-white), there are only so many ways to express the idea of a “face without mouth.”¹⁶⁸ If the “face without emoji” outline qualifies as an original work of authorship, it still might not be copyrightable based on the merger doctrine. Other Unicode outlines have similar merger doctrine concerns.

In contrast, a Unicode emoji outline can be implemented in many ways. We’ve already seen this first-hand in the cow, astonished face, and pistol examples. Indeed, the fact that Unicode emoji outlines can be expressed so many different ways contributes to the confusion and misunderstandings discussed in Part II. As a result, platform-specific implementations of Unicode emoji outlines, as well as proprietary emojis, are less likely to encounter merger doctrine problems.¹⁶⁹

Scènes à Faire. The *scènes à faire* doctrine says copyright does not “protect stock characters, settings, or events that are common to a particular subject matter or medium because they are commonplace and lack originality.”¹⁷⁰ This means details in emojis that are stereotypical or to be expected may not contribute to copyrightability.¹⁷¹

For example, clown faces are often associated with a bulbous nose, exaggerated lipstick, and crazy hair.¹⁷² If we do not count those details towards the copyrightability determination, the details in the Unicode implementation of the clown face emoji look a lot less substantial. Thus, the *scènes à faire* doctrine undoubtedly contributes to the uncopyrightability of some Unicode outlines.

¹⁶⁸ Unicode’s design parameters are essential to this conclusion. There are countless ways to express a “face without mouth” in other contexts.

¹⁶⁹ Scall, *supra* note 12, at 391-92.

¹⁷⁰ COPYRIGHT COMPENDIUM, *supra* note 152, § 313.4(I).

¹⁷¹ See *Blehm v. Jacobs*, 702 F.3d 1193 (10th Cir. 2012) (“Nor can the Jake images infringe on the Penmen because the figures share the idea of using common anatomical features such as arms, legs, faces, and fingers, which are not protectable elements....Mr. Blehm’s copyright also does not protect Penmen poses that are attributable to an associated activity, such as reclining while taking a bath or lounging in an inner tube....These everyday activities, common anatomical features, and natural poses are ideas that belong to the public domain; Mr. Blehm does not own these elements.”).

¹⁷² See, e.g., *wikiHow to Be a Clown*, wikiHow, http://www.wikihow.com/Be-a-Clown#Getting_Your_Act_Together_sub (visited Feb. 28, 2017).

Similarly, yellow-colored emoji faces are standard and expected,¹⁷³ so yellow coloring may not add much to an emoji’s copyrightability. Still, other Unicode emoji outlines and many platform-specific implementations add details that are not standard or expected. As a result, it’s likely that many individual emojis—both Unicode outlines and platform-specific implementations—are copyrightable.

Ownership of Unicode-Defined Emojis. Assuming an individual emoji qualifies as copyrightable, who owns it? Copyrights to emoticons (for the few that are copyrightable) and proprietary emojis will be owned by their authors or employers/assignees.¹⁷⁴

Copyrights to Unicode-defined emojis are more complicated because there may be overlapping ownership interests between the Unicode outlines and the platform-specific implementations.

With regard to the Unicode outlines, the Unicode Consortium is cryptic about its ownership interests. Its on-site disclosures only address its non-ownership of the platform-specific implementations, saying that Unicode “is not a designer or purveyor of emoji images” and disclaiming ownership in each platform’s implementation of the outline.¹⁷⁵ What can we infer about the Unicode Consortium’s ownership position from this non-answer?¹⁷⁶ The options include:

- Emoji outlines are not copyrightable and thus in the public domain;
- Emoji outlines are copyrightable, but Unicode has dedicated any of its copyright interests to the public domain;
- Emoji outlines are copyrightable, but Unicode freely licenses the outlines to all comers.

¹⁷³ Lucia Peters, *Why Are Emoji Yellow? An Exploration of Default Options and Arbitrary Color Choices*, Bustle.com, Apr. 14, 2015, <https://www.bustle.com/articles/76283-why-are-emoji-yellow-an-exploration-of-default-options-and-arbitrary-color-choices>.

There has been a push to provide multiple skin tones options for face emojis, but that has created new controversies. See Paige Tutt, *Apple’s New Diverse Emoji Are Even More Problematic Than Before*, WASH. POST, Apr. 10, 2015, <https://www.washingtonpost.com/posteverything/wp/2015/04/10/how-apples-new-multicultural-emojis-are-more-racist-than-before/>.

¹⁷⁴ 17 U.S.C. § 201.

¹⁷⁵ *Emoji Images and Licenses*, Unicode.org, <http://www.unicode.org/emoji/images.html> (last updated June 3, 2016). Elsewhere, Unicode has said that they do not incorporate new emoji images that are “legally encumbered.” Bromwich, *supra* note 85.

¹⁷⁶ In January 2017, I submitted an inquiry about the ownership issues to Unicode through its onsite contact form, but I never received an acknowledgement or reply.

If the Unicode outlines are public domain, then the platforms can own their specific implementations of public domain works if they add sufficient original material to qualify for copyrightability.¹⁷⁷ If the Unicode outlines are copyrightable and Unicode hasn't disclaimed the copyrights, platforms can own their specific implementation as a derivative work of the Unicode outlines, subject to any terms of Unicode's license to create and disseminate the implementation.¹⁷⁸

Because platforms base their implementations on a Unicode outline, a platform's potential copyright ownership is limited to its idiosyncratic modifications or additions to the outline. In some cases, these changes won't be enough to qualify for a copyright that's separate from the copyright (or lack thereof) of the emoji outline. The Copyright Act's definition of a "derivative work" is internally inconsistent, but it does expressly require that the changes must, "as a whole, represent an original work of authorship."¹⁷⁹ Accordingly, minor variations to the emoji outline, such as the addition of a single color and slight changes to a few details, may be insufficient changes to make the platform's implementation its own work of authorship. Doctrines like merger and *scènes à faire* could further limit the scope of copyright in a platform's implementation of an emoji and, in extreme cases, render it entirely uncopyrightable. In contrast, platform implementations that significantly deviate from the Unicode outline have a greater likelihood of qualifying as a copyrightable derivative work owned by the platform (though at the cost of standardization and possible user understandability).

¹⁷⁷ See, e.g., *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F. 2d 99 (2d Cir. 1951) (copyrightability of mezzotint engraving of public domain works); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486 (2d Cir. 1976) (copyrightability of banks depicting Uncle Sam, who is in the public domain).

¹⁷⁸ 17 U.S.C. § 103(a).

¹⁷⁹ 17 U.S.C. § 101.

This table recaps the copyright ownership possibilities:

	Platform Changes Copyrightable	Platform Changes Not Copyrightable
Unicode Owns Emoji Outline Copyright	Unicode owns emoji outlines; platform owns derivative work	Unicode owns emoji outlines; platform has no separate copyright interest
Emoji Outlines Not Protected by Copyright	Platform owns its implementation as modification of public domain material	Emojis are public domain

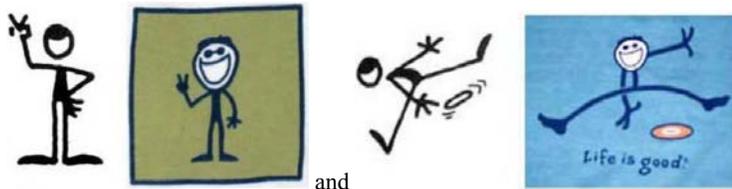
Unfortunately, it's not possible to further generalize about where any particular Unicode outline, or a platform's implementation of it, fits on this chart.

Infringement. If an emoji is copyrightable, then the copyright owner can enforce against both identical and “substantially similar” copying. However, with a copyrighted work that doesn't have a lot of details, courts will likely construe the copyright narrowly against non-identical copying. As a court said in a dispute over stick figure drawings, “we must be careful not to grant Mr. Blehm a monopoly over all figures featuring black lines representing the human form. Our analysis cannot be so generous as to sweep in all manner of stick figures as potentially infringing on his works.”¹⁸⁰ Therefore, in many cases, minor variations will legally distinguish between similar emojis.¹⁸¹

Fair Use. If the plaintiff establishes a prima facie case of infringement, the fair use defense may nevertheless excuse secondary uses.¹⁸² Fair use is an equitable multi-factor test that is fact-specific, so a proper fair use analysis will depend on the specific emoji and secondary use.

¹⁸⁰ Blehm v. Jacobs, 702 F.3d 1193 (10th Cir. 2012).

¹⁸¹ See, e.g., *id.*, carefully scrutinizing the small but significant differences to find no copyright infringement in the following two examples (and others):



¹⁸² 17 U.S.C. § 107.

Nevertheless, it's possible to make the general observation that secondary uses of individual emojis will qualify as fair in many circumstances. Emojis are small works of visual art, which means that they are not easily quoted without depicting the entire work. Furthermore, as discussed in subpart C, individual emojis play an important role in facilitating communication; and copyright law can undermine that role if it restricts the ability to reference an emoji for its accepted meaning or if it forces emojis with the same meaning to look substantially different. Fair use provides an essential doctrinal outlet to prevent those adverse consequences.

Copyrightability of Emoji Sets. Separate from the copyright protection for individual emojis, platforms may be able to claim copyright protection for emoji sets. Third party IP owners might also create their own proprietary emoji sets that they license to platforms, such as the Pusheen¹⁸³ or Peanuts¹⁸⁴ stickers on Facebook.

Copyright protects compilations when the selection, arrangement or coordination demonstrates sufficient authorship.¹⁸⁵ Simply mirroring Unicode's set would not create a new copyrightable compilation, but in some cases emoji sets are carefully curated for specified editorial objectives. For example, the children-focused social network Lego Life eliminated all emojis that could be construed as negative.¹⁸⁶ That kind of editorial curation might support a compilation copyright.

However, compilation copyrights provide only limited protection—perhaps as limited as only protecting against verbatim/near-verbatim copying of the original selection or arrangement of the compilation.¹⁸⁷ Thus, secondary users probably can develop non-identical emoji set compilations without infringing a compilation copyright.

Copyrightability of House Styles. Platforms also may be able to claim a copyright in their “house styles;” *i.e.*, the idiosyncratic design elements they use

¹⁸³ See, e.g., Taylor Hatmaker, *Facebook Tests Stickers in Comments*, The Daily Dot, Aug. 19, 2014, <https://www.dailydot.com/debug/facebook-stickers-comments-emoji/>.

¹⁸⁴ See, e.g., Devon Glenn, *Say It With Snoopy: Facebook Releases New Cartoon Sticker Packs*, AdWeek, July 17, 2013, <http://www.adweek.com/digital/say-it-with-snoopy-facebook-releases-new-cartoon-sticker-packs/>.

¹⁸⁵ COPYRIGHT COMPENDIUM, *supra* note 152, § 312.2.

¹⁸⁶ Barrett, *supra* note 43.

¹⁸⁷ See *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

consistently across their emoji set.¹⁸⁸ As two examples, Google implements Unicode-defined face emojis using a half-moon/“gumdrop” outline instead of Unicode’s circle shape; and Microsoft uses a thicker outline for its emojis than other platforms.¹⁸⁹

Functionally, a house style’s rulesets might be analogous to display fonts.¹⁹⁰ Both fonts and house styles reflect a way of modifying Unicode-standard characters for display. (Of course, proprietary emojis don’t need to be limited to Unicode-defined emojis).

If emoji house styles are the legal equivalent of fonts, they will not be copyrightable. Typefaces, defined as “a set of letters, numbers, or other symbolic characters with repeating design elements that are consistently applied in a notational system that is intended to be used in composing text or other combinations of characters,”¹⁹¹ are not copyrightable.¹⁹² Emoji house styles modify graphical images, not standard characters, but the rulesets are equally abstract. It seems more likely that house styles won’t independently be copyrightable, but emoji sets will be subject to a compilation copyright based, in part, on the house styles as a way of selecting, arranging and coordinating the individual emoji depictions. Thus, if someone sought to copy a platform’s house style, the distinctiveness of the platform’s emoji set might help the platform restrict the copying (or, at least, force enough differences to avoid the compilation copyright).

B. Trademarks in Emojis.

Trademark law can protect “any word, name, symbol, or device,”¹⁹³ and this broad scope easily encompasses emojis. For example, although “there is evidence of the widespread, ornamental use of the smiling face design that would lead

¹⁸⁸ *Cf.* *Blehm v. Jacobs*, 702 F.3d 1193 (a series of stick figure drawings are copyrightable because “each Penman follows a seemingly uniform standard to achieve a unique expression”).

¹⁸⁹ Unicode, *Full Emoji Data*, *supra* note 40.

¹⁹⁰ Scall, *supra* note 12, at 392-94.

¹⁹¹ COPYRIGHT COMPENDIUM, *supra* note 152, § 313.3(D).

¹⁹² 37 C.F.R. § 202.1(e).

¹⁹³ 15 U.S.C. § 1127.

As an example of how symbols can be broadly trademarkable, the University of Texas claims to own the “hook-em horns” hand signal. Kristin Finan, *UT to Doughnut Shop: Yeast and Desist*, AUSTIN AMER.-STATESMAN, Aug. 26, 2016, <http://www.hookem.com/story/ut-doughnut-shop-yeast-desist/>.

consumers to believe that it is not serving a trademark function,¹⁹⁴ it is possible to develop protectable trademark interests in a smiley face.¹⁹⁵ Unlike copyrights, the limited expressive content of an individual emoji does not pose any obstacle to trademark protection. Trademarked emojis also can be created by brand owners who incorporate existing trademark designs or logos into “branded emojis” with a platform’s cooperation.¹⁹⁶

The Trademark Office has already registered emoji trademarks. On January 20, 2017, I conducted a search in the TESS database¹⁹⁷ for “emoji” and identified 385 records.¹⁹⁸ Most of those are pending trademark applications; I counted only 62 actual registrations. Of those, most are word marks with no design elements; and the few with design elements¹⁹⁹ usually incorporated an emoji within the design rather than constituting an actual emoji itself. Still, I found a couple of trademark registrations of emojis, including a key²⁰⁰ and a winking face.²⁰¹ Undoubtedly, other emoji-like designs have been registered without using the term.²⁰²

¹⁹⁴ Wal-Mart Stores, Inc. v. Loufrani, 2009 WL 873129 (TTAB Mar. 20, 2009).

¹⁹⁵ Indeed, Wal-Mart has obtained trademark registrations for its smiley face logo. *Id.*

¹⁹⁶ See, e.g., Alexandra Bruell, *Branded Emojis Coming to Messaging Apps*, WALL ST. J., Sept. 23, 2016, <https://www.wsj.com/articles/branded-emojis-coming-to-messaging-apps-1474624800>; David Cohen, *Twitter Touts Branded Emojis*, Adweek, Sept. 12, 2016, <http://www.adweek.com/digital/twitter-touts-branded-emojis>.

¹⁹⁷ <http://tmsearch.uspto.gov/bin/gate.exe?f=search&state=4806:m0vdgq.1.1>.

¹⁹⁸ Search results on file with the author.

¹⁹⁹ Registration No. 4997234 (July 12, 2016) (Kisseemoji); Registration No. 4942877 (April 19, 2016) (I ♥ Emoji); Registration No. 4884274 (Jan. 12, 2016) (I Am Cardboard); Registration No. 4870069 (Dec. 15, 2015) (Emogi); Registration No. 4860908 (Nov. 15, 2015) (Christian Emojis); Registration No. 4842853 (Oct. 27, 2015) (Volleez); Registration No. 4810852 (Sept. 15, 2015) (Emoji Icons); Registration No. 4742444 (May 26, 2015) (Guess the Emoji); Registration No. 4536604 (May 27, 2014) (Emoji);

²⁰⁰ Registration No. 5048843 (Sept. 27, 2016):



²⁰¹ Registration Nos. 4942364 (April 19, 2016) & 4942363 (April 19, 2016):



²⁰² See, e.g., Registration No. 3078614 (Apr. 11, 2006) (“A SQUARE WITH A SAD FACE IN THE MIDDLE”):

While emojis fit within the scope of trademark protection, emojis become trademarkable only when they are used to distinguish goods or services in the marketplace (the “use in commerce” requirement).²⁰³ The use in commerce requirement provides a major gatekeeping function to trademark law’s protections. Making editorial uses of emojis, such as platforms providing emoji sets to their users or users adding emojis to non-commercial communications, will not satisfy the use in commerce requirement. Instead, to claim trademark protection for an emoji, the putative trademark owner must actually display the emoji as part of promoting a marketplace offering, such as merchandise branded with the emoji or in advertising copy for a good or service.²⁰⁴

Similar to copyright ownership of emojis, determining the owner of an emoji trademark can involve several complicated considerations. The use in commerce requirement means that trademark ownership accrues to whomever makes the requisite commercial use, and that can be a different party than the emoji’s copyright owner (or author/creator, if that person is different). However, if the emoji is protected by copyright law, then the putative trademark owner likely needs permission from the copyright owner, or else the trademark-qualifying commercial activities might simultaneously constitute copyright infringement.

It’s also possible for multiple parties to have trademark interests in the same emoji. Trademark rights usually accrue only in the product niche(s) where the use in commerce occurred. If different parties use the identical emojis but in different industries, they could both obtain protectable trademark rights in their respective niches. Such overlapping ownership interests are common in trademark law; there are hundreds of trademark owners in words like “Apple,” “National” or “Sun.”

Ownership of an emoji trademark will restrict other parties from using the emoji in their own product promotion efforts. This restriction covers the use of both identical and confusingly similar emojis.²⁰⁵ It is unclear how to apply



²⁰³ 15 U.S.C. § 1127.

²⁰⁴ Trademark use in commerce occurs “on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto...and on services when it is used or displayed in the sale or advertising of services....” 15 U.S.C. § 1127 (some formatting omitted).

²⁰⁵ Trademark confusion considers the similarity of a trademark’s sight, sound, and meaning. *See, e.g.,* AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341 (9th Cir. 1979). Even if the trademarks have the

trademark law’s confusingly similar legal standard to situations like the platform-specific implementations of Unicode-defined emojis; if the Unicode standardization works properly, the platform-specific implementations *should* look similar, creating possible collisions among emoji trademark owners that we’ll consider in the next subpart.

Although emojis can be and already are protected by trademark law, most everyday usage of emojis—such as a user adding an emoji to a non-commercial social media message—typically will not constitute trademark infringement. Trademark law usually requires the alleged infringer to be using the trademark commercially. However, because trademark law’s boundaries of commerciality aren’t always clear and as the number of emojis protected by trademark law grows rapidly, we are going to see an expansion of trademark disputes over when it’s OK to use identical or confusingly similar emojis.

Apart from the trademarkability of any individual emoji, a platform’s house style can be trademarkable (most likely as trade dress). House styles help define the platform’s “family of trademarks”²⁰⁶ and would give the platform a basis to enforce against both copies of emojis displayed by the platform as well as novel emojis that nevertheless reflect the house style (the latter would be like brand extensions).

C. Problems Caused by Emoji Ownership

As the prior two subparts discussed, copyright and trademark law will protect emojis. This will lead to an ever-growing thicket of IP rights involving emojis. IP thickets are not new, but this particular thicket has unusually important implications for human communication. Because of the stakes involved, it will be crucial that the key players in the IP system, including the Copyright Office, Trademark Office and courts, carefully apply IP law to emojis. This subpart provides two reasons why those IP institutions should rigorously scrutinize all IP claims for emojis and, where possible, interpret IP laws narrowly to exclude emojis as much as possible.²⁰⁷

same meaning (i.e., are intended to communicate the same emotion), differences in “sight” could nevertheless cause consumers to distinguish the two depictions. (The “sound” element should be irrelevant in the context of emojis).

²⁰⁶ See 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:61 (4th ed.) (discussing trademark families in the context of word marks).

²⁰⁷ Scall, *supra* note 12, at 401 (“society would benefit most if emoji were categorically denied copyright protection”).

Problem #1: Propertizing Atomistic Unit of Communication. Emojis are an irreducibly small building block of human communication. It's not possible to divide emojis into subcomponents and effectively communicate meaning. This makes emojis analogous to words and short phrases, which are also building blocks for larger communications like sentences and paragraphs and also cannot be further reduced into smaller units without becoming meaningless.²⁰⁸ Indeed, because they both function as the smallest building block of communication, words and emojis can substitute for each other.²⁰⁹

Copyright law does not protect words and short phrases.²¹⁰ Yet, copyright often will protect emojis. Obviously, it's easy to distinguish between words as text and emojis as images, but this valorizes images²¹¹—perhaps overly so. Given their virtually identical function, this dichotomous legal treatment does not make sense. Providing copyright protection for emojis provides copyright owners with an unprecedented level of control over how people talk with each other. It's just as ridiculous as saying Microsoft can own the word “windows”²¹² and collect payment for, or block usage of every instance of, the word in every context.

We've never had a situation before where the building blocks of communication can be copyrighted—and, indeed, it's probable that copyright ownership of the smallest units of communicative building blocks is historically unprecedented in human civilization. However, the advent of copyrightable emojis leads us to this result. It's not clear how such ownership might distort future human communication, or how much power will arrogate to the owners of copyrighted emojis, but it's also hard to see how the development of this IP thicket will translate into any benefits for emoji development or human communication.²¹³

²⁰⁸ Cf. Justin Hughes, *Size Matters (Or Should) In Copyright Law*, 74 *FORDHAM L. REV.* 575 (2005).

²⁰⁹ As discussed above, some platforms suggest emojis as “auto-corrections” to substitute for typed words. See *supra* note 31.

²¹⁰ COPYRIGHT COMPENDIUM, *supra* note 152, § 313.4(C) (“Words and short phrases, such as names, titles, and slogans, are not copyrightable because they contain a de minimis amount of authorship”).

²¹¹ See generally Rebecca Tushnet, *Worth a Thousand Words: The Images of Copyright*, 125 *HARV. L. REV.* 683 (2012).

²¹² Cf. *Microsoft Corp. v. Lindows.com, Inc.*, 64 U.S.P.Q.2d 1397 (W.D. Wash. Mar. 15, 2002) (discussing whether “Windows” was generic for trademark law purposes).

²¹³ Scall, *supra* note 12. Similar issues arise with memes and GIFs, though the underlying material may be more clearly copyrightable than individual emojis. See Caitlin Dewey, *How Copyright Is*

Courts can relax some of this tension by broadly applying fair use doctrines to emojis; and as discussed above, fair use principles will often favor reuse of emojis. However, relying on fair use is suboptimal,²¹⁴ defendants often bear the burden to establish an affirmative defense, and fair use’s doctrinal fuzziness increases the possibility of plaintiff hold-up games (to extract settlement fees below the cost of litigation) and increases the odds that the parties can’t reach mutually agreeable settlements.

It would be a much better outcome if copyright’s gatekeeping function—copyrightability, combined with the merger doctrine and *scènes à faire*—screened out the emoji copyright claims in the first instance. This might be achieved if the Copyright Office and the courts are appropriately skeptical towards emoji copyrights.

Problem #2: Exacerbating Depiction Diversity. In Part II(B), we saw how emojis can look different across different platforms, and how this depiction diversity can lead to misunderstandings and confusion. It’s less clear *why* platforms make divergent implementations of Unicode-defined outlines given that the platforms all start from the same source material. Possible hypotheses include:

- The divergences reflect the platform’s normative values, like Apple’s decision not to display a realistic pistol and substitute a squirt gun for it.
- The divergences reflect typical/standard user interface experimentation. Platforms are constantly experimenting with different ways of improving user interfaces within their services, so it should not be surprising to see platforms explore localized solutions and act like “laboratories of experimentation.”²¹⁵ If this hypothesis is true, it might even have the salutary effect of causing the best (or most effective) implementations to emerge from the “lab” and become adopted more widely.
- The divergences reflect the platform’s house style, which may serve purposes other than UI optimization. For example, a platform’s house

Killing Your Favorite Memes, WASH. POST, Sept. 8, 2015, <https://www.washingtonpost.com/news/the-intersect/wp/2015/09/08/how-copyright-is-killing-your-favorite-memes> (discussing a copyright lawsuit over the Awkward Penguin meme).

²¹⁴ Cf. Eric Goldman, *Want To End The Litigation Epidemic? Create Lawsuit-Free Zones*, Forbes, Apr. 10, 2013, <https://www.forbes.com/sites/ericgoldman/2013/04/10/want-to-end-the-litigation-epidemic-create-lawsuit-free-zones> (discussing the properties of well-designed immunities and safe harbors, attributes not present in the copyright fair use doctrine).

²¹⁵ Cf. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”).

style may reflect a desire to create a distinctive look-and-feel within the platform as part of catering to, or building brand loyalty among, the platform's customers.

Another hypothesis: depiction diversity is attributable to the IP rights thicket. In other words, platforms may deliberately make their emoji implementations look different to (a) potentially claim IP protection for their idiosyncratic implementations, or (b) more likely, reduce the risk of possible IP infringement exposure to someone else. If protected by IP, emojis protect against both identical copying and similar variations (in copyright law, the test is "substantially similar," in trademark law it's "confusingly similar"). Thus, platforms worried about potentially being sued for IP infringement have incentives to make their implementations sufficiently distinguishable from all others; and they may be reacting to these legal concerns based on the perception of risk, even if the actual risk of litigation is low.²¹⁶ If this hypothesis is true, then IP law is causing the proliferation of unnecessary differences in emoji implementations that reduce IP risk but increase potential user confusion/misunderstanding.

Accordingly, IP law can thwart the communicative potential of emojis. First, emojis have the theoretical capacity to cut across existing language barriers and be understood by speakers of diverse languages²¹⁷ (or even people who are illiterate). However, if IP law drives unnecessary implementation diversity, it causes a "language" barrier where each platform's dialect may not be comprehensible on other platforms.²¹⁸ Second, IP is generally supposed to help

²¹⁶ See generally James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (discussing examples of how industry participants make decisions about IP based on industry "custom," which may be more conservative than the actual law).

²¹⁷ 2015 Emoji Report, *supra* note 5 (giving examples, such as "Emoji Flashcards for International Travel," of how emojis could enable universal communication across borders and existing languages); see also Gretchen McCulloch, *A Linguist Explains Emoji and What Language Death Actually Looks Like*, The Toast, June 29, 2016, <http://the-toast.net/2016/06/29/a-linguist-explains-emoji-and-what-language-death-actually-looks-like/> ("Emoji are a universal language the same way that pointing at stuff and grunting is a universal language. Useful, under a certain set of circumstances!").

²¹⁸ Scall, *supra* note 12, at 394 ("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.").

improve social welfare,²¹⁹ but preventing the standardization of emojis across platforms adds unnecessary communication “friction” with minimal or no countervailing social benefits accruing to the IP owners. To communicate effectively across platforms, we will have to learn dozens of different variations of the same “words,” or we’ll suffer the frustrations and social losses occasioned by misunderstandings attributable to the depiction diversity.

There are reasons to be hopeful that this problem will sort itself out. Part II(C) discussed the possibility that platforms will make cross-licenses or Unicode will play a more active role in brokering cross-industry permissions. There are also individual efforts—such as those by EmojiOne²²⁰ and Twitter²²¹—to provide free licenses to emoji sets. Perhaps this ethos will sweep the industry and everyone will freely share their emojis; or perhaps platforms will choose to piggyback on one of these free-to-use licenses rather than continuing to maintain their own idiosyncratic implementations. Either approach could lead to increased standardization rather than increased depiction diversity. Otherwise, the relevant IP institutions may need to curb IP’s role in emojis as a way of fostering communicative standardization.

IV. Emojis and the Judicial System

This article now shifts to its third and final major topic: how the court system will handle emojis as they increasingly appear in court proceedings.

A. Emojis in Court Opinions

In preparing this article, I gathered a dataset of all cases I could find in Westlaw and Lexis containing the word “emoticon” or “emoji.” This dataset is subject to the many known limitations of researching cases in Westlaw and Lexis, such as the limited percentage of opinions that make it into the electronic

²¹⁹ Cf. U.S. CONST., ART. I, SEC. 8, CL. 8, explaining that Congress can enact a copyright statute “To promote the Progress of Science and useful Arts.”

²²⁰ EmojiOne describes itself as a “complete, independent, open-source emoji set.” *Frequently Asked Questions*, EmojiOne, Dec. 16, 2015, <http://emojione.com/faq/>. “The use of our emoji are 100% free (with proper attribution) for any purpose under a ‘Free Culture’ Creative Commons license.” *Id.*

²²¹ Mike Davidson, *Open Sourcing Twitter Emoji for Everyone*, Twitter, Nov. 6, 2014, <https://blog.twitter.com/2014/open-sourcing-twitter-emoji-for-everyone>.

databases. In total, I found 80 opinions dated December 31, 2016 or earlier containing the term “emoticon” or “emoji.” I have posted the dataset publicly.²²²

This count of 80 opinions likely understates the actual number by a lot.²²³ First, I did not search for any synonyms of “emoticon” and “emoji.” For example, emoticons are sometimes called “smileys,” and surely that search term would have yielded additional relevant results.²²⁴ However, “smiley” has other meanings and is sometimes used as a personal name, so a Westlaw or Lexis search for “smiley” yields over 10,000 results.²²⁵

Second, I could not search Westlaw and Lexis using the emoticon character, such as a query “:-)” for the smiley.²²⁶

Third, the electronic databases do not allow search queries using images, so it’s impossible to search for emojis in their graphical format. However, it probably would not have made much of a difference to my searches because, as I’ll discuss in a moment, court opinions rarely display the actual emoji at issue.

Despite the dataset’s limitation, it still may provide some helpful insights into emojis in court. At minimum, it’s clear that the court system soon will be encountering more cases involving emojis. This graph showing the number of court opinions each year containing the word “emoticon” or “emoji”:

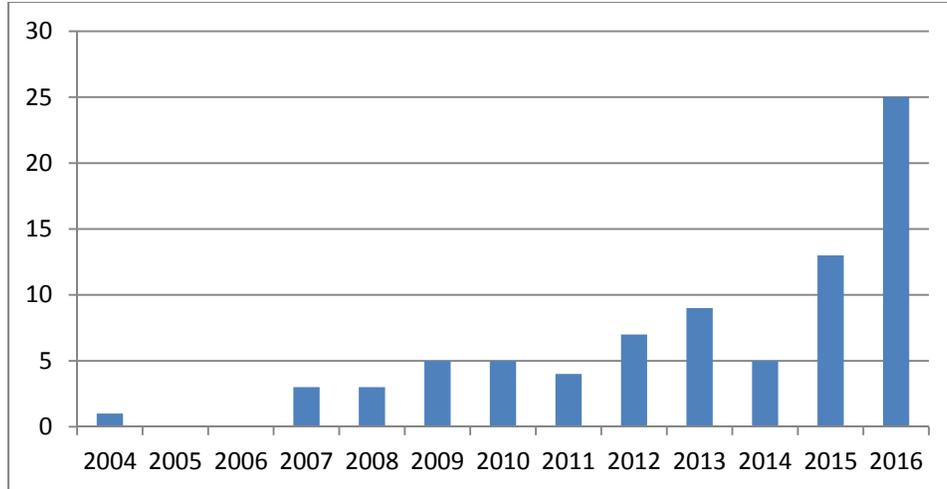
²²² <http://www.ericgoldman.org/Resources/emojisandthelawworksheet.xlsx>.

²²³ Cf. Eli Hager, *Is an Emoji Worth 1,000 Words?*, The Marshall Project, Feb. 2, 2015, <https://www.themarshallproject.org/2015/02/02/is-an-emoji-worth-1-000-words> (discussing 8 criminal cases involving emojis—none of which are in my dataset).

²²⁴ For example, the term “smiley face” returns over 300 results in Westlaw, some of which may have met this article’s parameters. See, e.g., *People v. Balegno*, 2016 IL App (3d) 140113-U ¶ 32 (Ill. App. Ct. Feb. 1, 2016) (“Defendant noted that ‘ha ha’ and ‘lmao’ (referring to ‘laughing my ass off’) and smiley faces appeared often in the text messages”); *People v. Herrera*, 2015 WL 4920075 (Cal. App. Ct. Aug. 18, 2015) (“Yadira invited Ramirez, adding ‘a smiley face’ to the text message”). Other searches using more pinpointed queries may yield similar results.

²²⁵ It would be possible to reduce the number of search results using one or several well-crafted Boolean search queries, but that effort was beyond the scope of this article.

²²⁶ For example, while doing other research, I stumbled across *Fry v. Robinson*, 2017 WL 416974 (6th Cir. Jan. 31, 2017), <http://www.opn.ca6.uscourts.gov/opinions.pdf/17a0087n-06.pdf>. That opinion displays smiley emojis three times: “i want you dont you want me or want to be in me lol ☺,” “yes i will call you then i want u 4sure ☺” and “we could have a lot of sex ☺ happy times.” However, because the opinion does not use the phrase “emoticon” or “emoji,” it did not show up in my database queries; and when I tried searching for the “☺” character in Westlaw, Westlaw simply didn’t recognize it. It’s likely there are other cases like this one.



Over 30% of the total case references occurred in 2016, and about half of the case references occurred in the last two years. This exponential growth rate suggests we have just begun to see emoji-related issues in courts.

B. Will Opinions Display Emojis?

Judicial opinions rarely include visual depictions of the litigation subject material,²²⁷ even when visual issues are an essential part of the court's analysis.²²⁸ In keeping with that phenomenon, few court opinions have displayed emojis.²²⁹ By my count, less than a dozen court opinions have displayed an emoticon or emoji.²³⁰ In the other cases in the dataset, the opinion described the

²²⁷ Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. 1687, 1718 (2014).

²²⁸ See *id.* at 1724 (giving an example of an opinion that used 1,500 words to describe the course of three rivers, something a map could have done more efficiently).

²²⁹ See Karen A. Henry & Jason Harrow, *Exhibit A — Winky Face: Emoticon Evidence Enters Courts*, Law360, Nov. 17, 2015, <https://www.law360.com/articles/727700/exhibit-a-winky-face-emoticon-evidence-enters-courts>.

²³⁰ Of those cases, most displayed emoticons. I believe only two cases in the dataset displayed emojis: *Parcel Mgmt. Auditing & Consulting, Inc. v. Dooney & Bourke, Inc.*, 2015 U.S. Dist. LEXIS 22247 (D. Conn. Feb. 25, 2015) (smiley) and *State v. Shepherd*, 2017 Ohio App. LEXIS 328, *17 n.2 (Ohio Ct. App. Jan. 30, 2017), <http://www.supremecourt.ohio.gov/rod/docs/pdf/12/2017/2017-Ohio-328.pdf> (winky). In both cases, the emoji only appears in the original court opinion, not in Lexis, which redacted the emojis without indicating the omission. For example, in *Shepherd*, Lexis displayed footnote 2 this way: 2. .

emoji textually (e.g., describing it as a “smiley emoticon”) or simply omitted the emoji (saying “emoji omitted” or something similar).²³¹

The court’s failure to display the applicable emoji strips the opinion of some essential meaning. Textually characterizing the emoji can mask important nuances. For example, many emojis can be described similarly. At least a dozen different Unicode emojis are characterized as “smiling” or “grinning,”²³² but each communicates different meanings. If an opinion textually characterizes an emoji as “smiling,” which one of these dozen options is the judge referring to?

Furthermore, even if the judge may not think the differences between similar emojis matter, readers of the opinion—including appellate courts or other courts trying to cite the opinion—might feel differently. For example, consider these passages (cites omitted):

Mr. Hiller was the author of the web posting at Exhibit VV-388, which was admitted into evidence. In that web posting on February 10, 2005, Mr. Hiller, referring to a roll cage he purchased, stated in part: “Have my cage now sitting in my living room (wife's real happy about that)...I feel like a kid at Christmas that can't go outside and play with his new toy (emoticon omitted).” The roll cage was sitting in the living room in pieces. This web posting is probative of Mr. Hiller's state of mind at the time and contradicts his claims that he was in constant, disabling and incapacitating pain at that time....

Mr. Hiller was the author of the web posting at Exhibit VV-266, which was admitted into evidence. In that web posting on March 17, 2005, Mr. Hiller stated, in response to a web posting by “1BLKJP” about the posts on the new roll cage Mr. Hiller installed on his Jeep: “Just found that part out...Man my shins hurt (emoticon omitted).” This web posting is probative of Mr. Hiller's range of motion getting in and out of his lifted Jeep

Fry v. Robinson, 2017 WL 416974 (6th Cir. Jan. 31, 2017), did not appear in my dataset as discussed in note 226 *supra*. However, the opinion displayed the smiley emoji three times and Westlaw properly displayed it too.

²³¹ *E.g.* Gonzalez v. Texas, 2017 WL 360690, *5 n.7 (Tex. App. Ct. Jan. 25, 2017) (“Neither party has placed any significance of the emojis and we have accordingly not reproduced them in this opinion.”)

²³² Unicode, *Full Emoji Data*, *supra* note 40.

Rubicon and it contradicts his claim that he was in unrelenting disabling pain at that time.²³³

The court omitted emoticons from both quotes, yet these quotes were probative of the litigant’s “state of mind” and feelings of pain. As illustrated in Part II(A), the omitted emoticons may have changed the meaning of the text, possibly even reversing its meaning. Without seeing the emoticons in question, we’re left to wonder how the emoticons might have altered or negated the probative value of these quotes. As a result, judges should not omit the emoji from an opinion or try to describe it textually. Instead, judges should let emojis speak for themselves.²³⁴ In the case of Unicode-defined emojis, where the sender and recipient may have seen different versions, judges should display both versions.

Incorporating animated emojis into opinions creates an additional challenge. Sometimes, the animation adds essential meaning to the emoji; in those situations, presenting only a static image of the emoji will omit that meaning.²³⁵ This problem isn’t unique to animated emojis; the same issue arises with all audio and video content. In these circumstances, judges often will describe the animation textually, but preferably judges will include a link to the animated emoji. Electronic versions of the opinion could incorporate the animated emoji directly into the file.

C. Searchability

As previously noted, Lexis and Westlaw do not allow for searches for emoticons and emojis in their native format. Among other problems, Lexis and Westlaw do not enable searches for emoticons because the characters used to create emoticons conflict with their Boolean search operators.²³⁶ These electronic databases also do not offer image searches of judicial opinions.²³⁷ For example, if

²³³ Hiller v. United States, 2007 U.S. Dist. LEXIS 85536, *23-25 (N.D. Cal. Sept. 28, 2007).

²³⁴ Henry & Harrow, *supra* note 229 (“courts should be encouraged to include actual emojis and emoticons in their opinions when possible... it will soon become imperative to show the characters themselves so that the reader can understand the information conveyed by the emoji”).

²³⁵ Cf. State v. Jacques, 332 Wis. 2d 804 (Wis. Ct. App. 2011) (a defendant unsuccessfully argued that printouts stripped out animations that would have supported his defense).

²³⁶ This is a fixable problem. Cf. Karen Lostritto, *Improvements to Searching for Special Characters in Programming Languages*, Google Blog, Mar. 2, 2017, <https://blog.google/products/search/improvements-searching-special-characters-programming-languages/>.

²³⁷ Porter, *supra* note 227.

a searcher wanted to do an image search to find court opinions discussing the “grinning face” emoji,²³⁸ there would be no way to do so.²³⁹

As more court opinions discuss and analyze emojis, litigants may want to search for precedent cases interpreting specific emojis. As an example, imagine a litigant wanted to find all of the opinions addressing when incorporating a weapon emoji (e.g., a gun, knife, or bomb) in a social media post constituted a criminal threat.²⁴⁰ Our current caselaw databases cannot handle that task adequately. A keyword search might yield some results, but like my development of the dataset, any search almost certainly would be incomplete. In contrast, as more opinions display emojis, an industrial-grade image search tool would be essential to achieve comprehensive results. The electronic caselaw database providers should invest in developing the robust search tools we need.²⁴¹

²³⁸ Because the Unicode-defined emojis and the platform-specific implementations may look different, a comprehensive search would include all of the diverse implementations.

²³⁹ Even general purpose search engines like Google are still wrestling with emojis. See Barry Schwartz, *Google Brings Back Emojis In The Search Results Snippets For Relevant Queries*, Search Engine Land, February 17, 2017, <http://searchengineland.com/google-brings-back-emojis-search-results-snippets-relevant-queries-269624>.

Limited image search functionality can also pose challenges for e-discovery. See Gabriella E. Zicarelli, *What You Don’t Know Can Hurt You: How Nonverbal Communication in Technology Is Disrupting Litigation*, Inside Counsel, June 13, 2016, <http://www.insidecounsel.com/2016/06/13/what-you-dont-know-can-hurt-you-how-nonverbal-comm>.

²⁴⁰ See Nicolás Medina Mora, *How A Post-9/11 Law Can Get You Arrested For Your Emoji Choices*, BuzzFeed, Jan. 29, 2015, <https://www.buzzfeed.com/nicolasmadinamora/how-a-post-911-law-can-get-you-arrested-for-your-emoji-choic> (a man was arrested for threatening police based on tweets that included “nigga run up on me, he gunna get blown down 🚔👮🏻🔫” and “fuck the 83 104 79 98 73 PCTKKKK 🚔👮🏻🔫”); Cf. *Ragunauth v. Bisaillon*, 2016 WL 3451762, *2 (Conn. Superior Ct. June 1, 2016) (discussing whether sending a gun emoji constituted cyberstalking); Henry Samuel, *Frenchman Jailed For Three Months For Sending Ex-Girlfriend Gun Emoji*, The Telegraph, Mar. 31, 2016, <http://www.telegraph.co.uk/news/2016/03/31/frenchman-jailed-for-three-months-for-sending-ex-girlfriend-gun/>.

²⁴¹ See Porter, *supra* note 227, at 1781 (“databases should include images wherever they appear in legal documents, from briefs and articles to judicial opinions; they should also work toward supporting image searches”).

D. Presentation of Emojis as Evidence²⁴²

Emojis ordinarily should be admissible evidence so long as they can satisfy the ordinary rules of evidence, such as relevance.²⁴³ However, how should they be presented to juries or other factfinders?

In the “Silk Road” trial,²⁴⁴ prosecutors orally read text messages to jurors. Initially, the prosecutors simply skipped any reference to the emojis, but the judge eventually required the emojis to be orally characterized in these recitations.²⁴⁵

Was there a better way to handle this? Ordinarily, criminal defense counsel “want a complete, unedited version of an online communication considered as evidence rather than one without emojis.”²⁴⁶ However, letting juries review the evidence themselves, and see the emojis in context, creates the possibility that the jury will be exposed to adjacent evidence that cannot be redacted but would distract or bias the jurors.²⁴⁷ If the messages are read orally, then the reader will characterize the emojis (possibly imprecisely), and the reader’s vocal inflections could influence the interpretation.²⁴⁸ Excluding emojis from trial evidence would potentially mislead juries.²⁴⁹ So every option has potential problems.

Still, excluding emojis from the factfinder’s consideration usually should be the worst choice. It strips the messages of essential content and meaning. Similarly, orally characterizing an emoji masks the nuanced differences between emojis. Therefore, unless it is absolutely impossible to redact overly prejudicial information from the content around the emojis, factfinders should get to see emojis with their own eyes.

²⁴² See Browning & Seale, *supra* note 28 (recounting examples).

²⁴³ Jim Dedman, *Can Emoticons Beat the Hearsay Rule?*, Abnormal Use, Sept. 30, 2015, <http://abnormaluse.com/2015/09/can-emoticons-beat-the-hearsay-rule-2.html> (discussing how emoticons may be helpful at overcoming hearsay objections to associated content).

²⁴⁴ U.S. v. Ulbricht, 14-cr-68 (S.D.N.Y.).

²⁴⁵ See Browning & Seale, *supra* note 28.

²⁴⁶ *Id.*

²⁴⁷ See Dylan Woolf Harris, *Judge Rules Shooting Defendant's Internet Posts Are Evidence*, ELKO DAILY FREE PRESS, Dec. 11, 2014, http://elkodaily.com/news/local/judge-rules-shooting-defendant-s-internet-posts-are-evidence/article_5a527f2b-c83c-5050-a70b-33fe900bf704.html.

²⁴⁸ Benjamin Weiser, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, N.Y. TIMES, Jan. 28, 2015, <https://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html>.

²⁴⁹ *Id.*

Conclusion

The Internet has proven that people love to communicate with each other. Emojis are a valuable supplement to the human-to-human communication tools we've already developed.²⁵⁰ They let us express our emotions and make visual jokes and references that aren't possible with text.²⁵¹ This, in turn, expands our ability to express ourselves online and helps us express ourselves with more precision²⁵²—which makes the Internet both more effective and more fun.²⁵³

As is typical for any emerging technology, our judicial system will require a transition period to learn how best to deal with emojis. Knowing where our online communications are going, we have the opportunity to build the necessary infrastructure—both doctrinal and technological—to prepare for the coming emoji onslaught.

²⁵⁰ See McCulloch, *supra* note 4 (“we're using emoji as a supplement to language, not replacing it entirely”).

²⁵¹ 2015 Emoji Report, *supra* note 5 (quoting Steven Pinker as saying that emojis “convey some communicative force that would not be obvious just from the arrangement of words on a page”).

²⁵² See 2015 Emoji Report, *supra* note 5 (some of the popular reasons why people use emojis include these statements: “They help me more accurately express what I am thinking” and “Emojis are a better fit than words for the way I think”); Marissa Lang, *Emojicon Brings Familiar Text-Message Characters To Life*, SAN FRANCISCO CHRON., Nov. 6, 2016, <http://www.sfchronicle.com/business/article/Emojicon-brings-familiar-text-message-characters-10597165.php> (quoting Pradyumna Sathishkumaar as saying emojis “make conversation more meaningful and personalized. It changes the tone of a conversation, and it can really change someone's mood in a way you can't always do with just words.”).

²⁵³ See Megan Farokhmanesh, *How An Emoji Goes From Pitch To Product*, The Verge, Dec. 19, 2016, <http://www.theverge.com/2016/12/19/13927588/emoji-creation-process-paul-hunt-designer-adobe-unicode-interview> (quoting Paul Hunt as saying: “one of the great things about emoji is that they are so fun. I think that's why people love them so much”).