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Emojis and the Law

Eric Goldman
Santa Clara University School of Law, egoldman@gmail.com

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By Eric Goldman*

Emojis are an increasingly important way we express ourselves. Though emojis may be cute and fun, their usage can lead to misunderstandings with significant legal stakes—such as whether someone should be obligated by contract, liable for sexual harassment, or sent to jail.

Our legal system has substantial experience interpreting new forms of content, so it should be equipped to handle emojis. Nevertheless, some special attributes of emojis create extra interpretative challenges. This Article identifies those attributes and proposes how courts should handle them.

One particularly troublesome interpretative challenge arises from the different ways platforms depict emojis that are nominally standardized through the Unicode Consortium. These differences can unexpectedly create misunderstandings.

The diversity of emoji depictions isn't technologically required, nor does it necessarily benefit users. Instead, it likely reflects platforms' concerns about intellectual property protection for emojis, which forces them to introduce unnecessary variations that create avoidable confusion. Thus, intellectual property may be hindering our ability to

* Professor of Law and Co-Director of the High Tech Law Institute, Santa Clara University School of Law. Website: http://www.ericgoldman.org. Email: egoldman@gmail.com. Some of my favorite emojis include 😍 👍 💩 and the ¯_(ツ)_/¯ kaomoji.

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communicate with each other. The Article will discuss how to limit this unwanted consequence.

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Emojis are "the most important invention in the history of communication"[1]

Introduction

Emojis[2] are sparking a communications revolution. Emojis make it easy to incorporate visual imagery into text-based communications.[3] This makes emojis

[1] Gene, THE EMOJI MOVIE (Sony Pictures Animation 2017).

[2] "Emoji" and "emojis" are both acceptable plurals of "emoji." *See Emoji and Pictographs*, Unicode.org, https://unicode.org/faq/emoji_dingbats.html#1.05 (last updated Dec. 19, 2017) [hereinafter Unicode, *Emoji*]; Robinson Meyer, *What's the Plural of Emoji?*, THE ATLANTIC, Jan.

a powerful and efficient way to express ourselves.[4] The right emoji can convey emotional valence, cultural jokes or other valuable information to a message. As Prof. Vyvyan Evans has said, "Emoji enables and enhances our communicative smarts."[5] Emojis also make communicating fun.[6]

Perhaps not surprisingly, emojis are incredibly popular.[7] 92% of the online population uses emojis,[8] and 2.3 trillion mobile messages incorporated emojis in a single year.[9] The "face with tears of joy" emoji[10] has been used in nearly two

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6, 2016, https://www.theatlantic.com/technology/archive/2016/01/whats-the-plural-of-emoji-emojis/422763/. I prefer "emojis."

[3] VYVYAN EVANS, THE EMOJI CODE 102 (2017) ("Emoji enables, arguably for the first time, a multimodal component to text-based digital communications."); MARCEL DANESI, THE SEMIOTICS OF EMOJI 11 (2017) (emojis mainly "bolster[] the rapidity of reading by providing visual imagery to writing"); Rachel Scall, 😊 © 📕: *Emoji as Language and Their Place Outside American Copyright Law*, 5 N.Y.U. J. INTELL. PROP. & ENTER. L. 381, 385-88 (2016) (calling emojis "a new and unique way of communicating" with each other).

[4] DANESI, *supra* note 3, at 47.

[5] EVANS, *supra* note 3, at 231.

[6] *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"); DANESI, *supra* note 3, at 179 (quoting a student as saying: "I can sum up emoji in one word: fun"); Elizabeth Kirley & Marilyn M. McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, __ TENN. L. REV. __ (2018) (emojis are perceived as "light-hearted" and "comedic"); Monica A. Riordan, *Emojis as Tools for Emotion Work: Communicating Affect in Text Messages*, 36 J. LANGUAGE & SOC. PSYCH. 549 (2017), http://journals.sagepub.com/doi/pdf/10.1177/0261927X17704238 ("readers interpreted text messages with nonface emojis as having greater levels of positive emotion, specifically as having more joy, than messages without nonface emojis").

[7] EVANS, *supra* note 3, at 26 ("the adoption rate of Emoji is staggering"); *Emoji Is Britain's Fastest Growing Language As Most Popular Symbol Revealed*, THE TELEGRAPH, May 19, 2015, http://www.telegraph.co.uk/news/newstopics/howaboutthat/11614804/Emoji-is-Britains-fastest-growing-language-as-most-popular-symbol-revealed.html ("Emoji is the fastest growing form of language in history based on its incredible adoption rate and speed of evolution").

[8] 2015 Emoji Report, Em☺gi, Sept. 2015, https://emogi.com/documents/Emoji_Report_2015.pdf [hereinafter 2015 Emoji Report].

[9] 2016 Emoji Report, Em☺gi, Nov. 16, 2016, http://cdn.emogi.com/docs/reports/2016_emoji_report.pdf [hereinafter 2016 Emoji Report]. Facebook reports that over 5 billion emojis are used on its Messenger service every day. Facebook Messenger, July 17, 2017 at 10:09 am, https://www.facebook.com/messenger/posts/1421002601352749.

[10] 😂. Unless otherwise specified, all emoji depictions in this Article are Unicode outlines.

billion tweets.[11] Over time, increasingly it will feel "weird" and "creepy"[12] to write online messages *without* emojis.

We are still figuring out how emojis will impact human communication. As Clive Thompson observed, "it's exceedingly rare—maybe unprecedented—for a phonetic alphabet to suddenly acquire a big expansion pack of ideograms."[13] A major development in human communication like this will have many far-reaching effects on society—including the law.

Emoji-related legal issues generally will fall into two broad categories. First, emojis contribute to misunderstandings will that require judicial interpretation. Second, emojis raise questions about the scope of their protection under intellectual property (IP) laws.

This Article focuses on the intersection of those two issues: how IP protection for emojis may cause avoidable misunderstandings.

The story goes like this: emojis have several unusual technical and social properties that create the risk of misunderstanding. For example, emojis have "no fixed emotional resonance, clear dictionary definition, or established grammatical rules for interpreting them in the various contexts in which they appear."[14]

However, most significantly, emoji senders and recipients do not always see the same symbol (and don't know this fact). Indeed, if they communicate with each other across different devices, software programs, or operating systems (collectively, what I'll call "platforms"), senders and recipients see emoji depictions that are almost certainly not identical. The discrepancies might be minor and inconsequential, or they could lead to major misunderstandings with life-changing consequences.[15]

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[11] http://www.emojitracker.com/ (visited January 2, 2018). 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/.

[12] DANESI, *supra* note 3, at 131.

[13] 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/.

[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] *Cf.* Jesus Diaz, *A Cellphone's Missing Dot Kills Two People, Puts Three More in Jail*, GIZMODO, Apr. 21, 2008, https://gizmodo.com/382026/a-cellphones-missing-dot-kills-two-people-puts-three-more-in-jail ("the lack of a single dot over a letter—product of a faulty localization of the cellphone's typing system—caused a chain of events that ended in a violent blood bath").

The heterogeneity of platforms' emoji depictions (what this Article calls "cross-platform depiction diversity") is likely caused by IP protection for emojis. Individual emojis often qualify for copyright and trademark protection (as well as possibly other IPs), discouraging rival platforms from making identical emoji depictions—and driving cross-platform depiction diversity.

Thus, IP protection for emojis essentially forces platforms to introduce unnecessary variations to their emoji depictions; and these variations disrupt our ability to effectively communicate with each other. We can take several steps to reduce this unwanted consequence, including restricting the scope of IP protection for emojis, and encouraging platforms to do more to mitigate the consequences of emoji depiction diversity.

This Article proceeds in three parts. Part I defines emojis and compares them to emoticons, memes and GIFs. Part II looks at the special interpretative challenges created by emojis and proposes steps that courts, Unicode, and dictionary publishers can take to mitigate these challenges. Part III identifies how emojis may qualify for copyright and trademark protection. It explains how IP protection encourages proliferation of unnecessary modifications to emoji depictions that interfere with effective communication. It also suggests steps we can take to avoid that outcome. A short conclusion follows.

I. Emojis as Visual Content

A. What Are "Emojis"?

The word "emoji" comes from Japanese; it means "picture character."[16] Emojis are pictographs.[17]

The *Oxford English Dictionary* defines an emoji as a "small digital image or icon used to express an idea, emotion, etc., in electronic communications."[18] This definition has been frequently,[19] but not universally,[20] adopted by courts.

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[16] Unicode, *Emoji*, *supra* note 2. The fact that the words "emoticons" and "emoji" share the same "emo-" prefix is a coincidence. *Id.* For more background on emojis' Japanese origins, *see* GAVIN LUCAS, THE STORY OF EMOJI 43-46 (2016)

[17] 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.

Unicode's definition:

> Emoji are pictographs (pictorial symbols) that are typically presented in a colorful cartoon form and used inline in text. They represent things such as faces, weather, vehicles and buildings, food and drink, animals and plants, or icons that represent emotions, feelings, or activities.[21]

To supplement these definitions, it is helpful to isolate some key attributes of emojis:

- Emojis initially gain recognition in online communications, even when their imagery comes from offline sources (such as country flags).[22] Once identified as emojis online, the imagery can migrate offline.[23]

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[18] *Emoji*, OXFORD ENGLISH DICTIONARY, http://www.oed.com/view/Entry/389343 (visited Jan. 21, 2018); *accord* EVANS, *supra* note 3, at 19 (defining emojis as "a visual representation of a feeling, idea, entity, status or event").

[19] In re L.F., 2015 WL 3500616, *1 n.2 (Cal. Ct. App. June 3, 2015); 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); Murgia v. Commonwealth, 2017 Va. App. LEXIS 141, *12 n.2 (Va. Ct. App. May 30, 2017) ("An 'emoji' is a small digital image or icon used to express an idea or emotion in electronic communications"); *see also* Graham v. Prince, 2017 U.S. Dist. LEXIS 111521 *7 n.3 (S.D.N.Y. July 18, 2017) ("Emojis are small, stylized images used to express ideas and emotions or to depict objects in electronic communications"); 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"); Commonwealth v. Castano, 2017 Mass. LEXIS 758 n.2 (Mass. Oct. 6, 2017) (citing *Merriam-Webster*, an "emoji is 'any of various small images, symbols, or icons used in text fields in electronic communication (as in text messages, [electronic] mail, and social media) to express the emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc.'").

[20] 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).

[21] Unicode® Technical Standard #51, v. 5.0 (May 18, 2017), Unicode.org, https://www.unicode.org/reports/tr51/#Introduction [hereinafter Unicode #51].

[22] *See*, *e.g.*, Keith Houston, *Smile! A History of Emoticons*, WALL ST. J., Sept. 27, 2013, http://www.wsj.com/articles/SB10001424052702304213904579093661814158946.

[23] Several court opinions have used the term "emoticon" to describe pictographs in offline communications, including 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 in employee performance review); Commonwealth v. Bogle, 2013 Pa. Super. Unpub. LEXIS 2589 (Pa. Superior Ct. June 20, 2013) (handwritten sad face in letter).

- Emoji symbols are about the same size as the text characters they accompany.[24] Their size limits the amount of detail they can contain before they become too cluttered to decode.[25] Typically, emojis are static images, but they can be animated.[26]
- Users can express emojis in one of three primary ways: (1) users select the desired symbol from a palette of options; (2) the platform automatically converts keystrokes into emojis, such as converting keystrokes <3 into ❤️; or (3) based on users' keystrokes, platforms may "auto-suggest" emojis to replace or supplement words.[27] Eventually, we may have emoji keys on our physical keyboards or emoji-only physical keyboards.[28]

Emojis can be taxonomized into two classes: "Unicode-coded emojis" and "non-Unicode emojis." Sometimes, people equate "emojis" with only emojis defined by Unicode, but numerically, non-Unicode emojis are vastly more common.

Unicode-coded emojis.[29] The Unicode Consortium "provides a unique number for every character, no matter what the platform, no matter what the program, no

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[24] *See* Unicode #51, *supra* note 21 (Unicode's "emoji" definition contemplates that they will be "used inline in text").

[25] Luke Stark & Kate Crawford, *The Conservatism of Emoji: Work, Affect, and Communication*, SOCIAL MEDIA & SOCIETY, July-Dec. 2015, at 1, http://journals.sagepub.com/doi/pdf/10.1177/2056305115604853 ("an emoji must compress the face or object it represents into the most schematic configuration possible to achieve its symbolic effect.").

[26] For example, Apple's "animojis" let users include animation on about a dozen emojis that mimics their facial expressions. *E.g.*, *Animoji*, EMOJIPEDIA, https://emojipedia.org/animoji/ (visited Jan. 3, 2018). *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).

[27] Apple's emoji prediction feature is an example. *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 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/.

[28] *See*, *e.g.*, http://emojikeyboard.club/; DANESI, *supra* note 3, at 3. Emoji-only keyboards would likely supplement regular character keyboards, not replace them.

[29] *See generally* Scall, *supra* note 3, at 385-88.

matter what the language."[30] Platforms adopting Unicode's standards will recognize characters sent by other adopting platforms. 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 supplanted earlier character standardization efforts, such as ASCII.[31]

Like keyboard characters, Unicode standardizes emojis. This means every Unicode-coded emoji has a unique numerical value that will be recognized across all Unicode-adopting platforms. Some emojis are "embedded" and will function like text characters. However, most Unicode-coded emojis are not embedded. As of January 1, 2018, about 2,600 emojis have Unicode definitions.[32]

Despite Unicode's ambition, Unicode-coded emojis are only partially standardized. When Unicode codes an emoji, it provides "a representative glyph (in a black-and-white text presentation)" for that emoji.[33] This means platforms can implement the glyph with any color they want, and they do not have to adhere to the glyph's shape.[34] Thus, each platform's implementation of Unicode-coded emojis reflects their idiosyncratic style and other choices.[35]

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[30] *What is Unicode?*, Unicode.org (last updated Dec. 1, 2015), http://www.unicode.org/standard/WhatIsUnicode.html; Michael Erard, *How the Appetite for Emojis Complicates the Effort to Standardize the World's Alphabets*, N.Y. TIMES, Oct. 18, 2017.

[31] "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 definitions of characters, but for many more characters. *See generally* James A. Crippen, *Bits, Bytes, and Unicode: An Introduction to Digital Text for Linguists*, Apr. 3, 2010, http://www.drangle.com/~james/papers/bits-bytes-unicode.pdf. 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.

[32] Unicode #51, *supra* note 21. Many of these are emojis created by combining or modifying other emoji symbols.

[33] Unicode, *Emoji*, *supra* note 2.

[34] Unicode acknowledges that the "shape of the character can vary significantly." Unicode #51, *supra* note 21.

[35] For example, WhatsApp based its emoji set on Apple's emoji set, but then it made some perplexing variations, such as the "water pistol has turned orange, the ghost emoji no longer has lopsided eyes and the frying egg is now double-yolked." Alex Hern, *WhatsApp Makes Its Own Unique Emojis – That Look Similar to Apple's*, THE GUARDIAN, Oct. 3, 2017, https://www.theguardian.com/technology/2017/oct/03/whatsapp-unique-emojis-apple-ios-facebook-messenger [hereinafter Hern, *WhatsApp*].

This leads to cross-platform depiction diversity:[36]

> 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….[S]ince emoji render differently on different 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.[37]

As an illustration of cross-platform depiction diversity, this chart shows how various platforms implemented the cow emoji:[38]

The far left symbol is the Unicode-coded outline of the cow's shape. Like most Unicode-coded emojis, it does not specify any color. The other symbols represent the implementations of eight different platforms. Some platforms depict Holstein black-and-white spotting; others depict Jersey/Guernsey brown coloring. Some platforms depict a more rotund cow outline than Unicode's outline, and two platforms have rotated the cow so that it faces the viewer more. In some depictions, the cow's legs are spindly like the Unicode outline; others have chubbier or indistinct legs. Some platforms have added details to the Unicode outline, such as a bell around the cow's neck, clearly marked hooves, a nose ring, or a prominent udder. Why the platforms made these deviations from,

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[36] Other names for this phenomenon include "emoji gap," "emoji barrier," and "emojumble." Bianca Bosker, *How Emoji Get Lost In Translation*, HUFFINGTON POST, June 27, 2014, https://www.huffingtonpost.com/2014/06/27/emoji-meaning_n_5530638.html.

[37] 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 (2016), http://www-users.cs.umn.edu/~bhecht/publications/ICWSM2016_emoji.pdf [hereinafter Miller, *Blissfully*]; *accord* Bosker, *supra* note 36 (calling the depiction diversity "highly irregular and even confusing"); *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).

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

or supplements to, the Unicode outline is not self-explanatory.[39] We'll revisit that question in Part III.

Over time, platforms' depictions of Unicode-coded emojis have moved towards convergence.[40] But as emoji implementations converge, it makes the platforms' small or immaterial deviations even more baffling.

Non-Unicode Emojis. Platforms routinely offer non-Unicode-coded emojis to their users. Some non-Unicode emojis look similar or identical to Unicode-coded emojis; other non-Unicode emojis have no Unicode-coded counterpart. There are less than 3,000 Unicode-coded emojis; the universe of non-Unicode emojis is surely much larger.[41]

Non-Unicode emojis come in two main forms. First, an online service may enable emojis that are recognized within its virtual premises. These are often called "stickers" or sometimes "bespoke emoji." Examples include Facebook's stickers,[42] Snapchat's stickers,[43] Twitch's Emotes,[44] Lego Life's emojis,[45] Grindr's "Gaymoji,"[46] and emojis in the financial sector.[47]

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[39] As another example of perplexing implementation choices, platforms differ on where the hamburger emoji places cheese and lettuce in relation to the meat patty. *See* tweet of Thomas Baekdal, Oct. 28, 2017, https://twitter.com/baekdal/status/924312294439444480.

[40] Jeremy Burge, *2018: The Year of Emoji Convergence?*, EMOJIPEDIA BLOG, Feb. 13, 2018, https://blog.emojipedia.org/2018-the-year-of-emoji-convergence/ (depicting several examples of specific emojis' evolution over time); Keith Broni, *Samsung Experience 9.0 Emoji Changelog*, EMOJIPEDIA BLOG, Feb. 15, 2018, https://blog.emojipedia.org/samsung-experience-9-0-emoji-changelog/.

[41] *See generally* 2016 Emoji Report, *supra* note 9 (discussing the rapid expansion of non-Unicode emojis on various platforms).

[42] *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.

[43] *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/.

[44] https://twitchemotes.com/.

[45] 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.

[46] Jeff Parsons, *These Are Grindr's New Custom Emojis - They're Called 'Gaymoji'*, MIRROR, Mar. 15, 2017, http://www.mirror.co.uk/tech/grindrs-new-custom-emojis-theyre-10032706.

[47] Mary Wisniewski, *When It Comes to Emojis, Banks Just ¯_(ツ)_/¯*, AM. BANKER, Mar. 29, 2018, https://www.americanbanker.com/news/when-it-comes-to-emojis-banks-need-to-learn-the-lingo.

Second, users may install software programs that let them communicate Non-Unicode emoji viewable by other users of that software wherever they are on the Internet. For example, the Bitmoji app allows users to create "personalized avatars" that function across multiple platforms that have integrated with the app.[48]

By definition, non-Unicode emojis do not honor the Unicode definitions, so other platforms are not likely to recognize them. For example, if I incorporate a Facebook sticker into a message that a recipient receives outside of Facebook, the sticker probably won't display properly to the recipient. In those circumstances, the recipient's platform may replace the incoming non-Unicode emoji with a placeholder (such as a white or black square);[49] or the platform may omit the unrecognized emoji without any indication.

To recap emoji compatibility:

- Unicode-coded emojis share a common outline and short description, but implementations can differ significantly across platforms. Therefore, senders and recipients on different platforms typically will not see identical depictions of an emoji.
- Non-Unicode emojis usually are not compatible across platforms, so recipients on other platforms will see a placeholder symbol replacing the non-Unicode emoji—or nothing at all.

B. Emojis Compared to Other Visual Content

Emoticons. The word "emoticon" is a portmanteau of the words "emotion" and "icon."[50] *Merriam-Webster Dictionary* defines emoticons as "a group of keyboard characters (such as :-)) that typically represents a facial expression or suggests an attitude or emotion and that is used especially in computerized

[48] *E.g.*, Alison Kruger, *The Inside Story of Bitmojis: Why We Love Them, How They Make Money, Why They Are Here To Stay*, FORBES, Mar. 24, 2016, https://www.forbes.com/sites/alysonkrueger/2016/03/24/the-deeper-meaning-behind-bitmojis-why-we-all-love-them-so-much/#6d059d404a43.

[49] *See* 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.").

[50] *Are Emoticons Words, Symbols, or What? Consider This Possibility...*, DICTIONARY.COM, http://www.dictionary.com/e/emoticon/.

communications (as e-mail)."[51] In other words, emoticons are letters, numbers and other standard keyboard characters sequenced into a pictograph.[52]

Emoticons are typically associated with facial expressions.[53] One of the best-known emoticons is the "smiley" :-).[54] Other popular "face" emoticons include the "winky" ;-) and the "sad face" :-(. However, emoticons can depict more than faces, such as the "heart" emoticon <3. Emoticons are a venerable part of online communications, dating back at least to 1982,[55] and hundreds of emoticons have been defined at some point.[56]

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[51] *Emoticon*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/emoticon (visited Jan. 23, 2018). Several courts have adopted that definition, including U.S. v. Cochran, 534 F.3d 631, 632 n.1 (7th Cir. 2008); 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).

[52] *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").

[53] *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").

[54] There is not consensus about whether emoticons have noses. *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; Tyler Schnoebelen, *Do You Smile with Your Nose? Stylistic Variation in Twitter Emoticons*, Sept. 1, 2012, https://repository.upenn.edu/cgi/viewcontent.cgi?article=1242&context=pwpl. I always include a nose-dash.

For more on the history of the smiley symbol, see DANESI, *supra* note 3, at 2-3; LUCAS, *supra* note 16, at 32-34.

Emoticons are sometimes generically called "smileys," but the smiley is one example of emoticons.

[55] *See*, *e.g.*, Houston, *supra* note 22. 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-

Most popular emoticons (such as the smiley or heart) have emoji analogues, and some platforms auto-correct selected emoticon keystrokes into outline drawings, such as converting the keystrokes :-) into the Dingbat symbol ☺.[57] However, most emojis do not have commonly-used emoticon equivalent.

Emoticons typically require a reader to tilt his or her head.[58] In contrast, kaomojis (**顔文字**)[59] do not require a head-tilt. A popular kaomoji is the "whatever" symbol ¯_(ツ)_/¯.[60]

Emojis and emoticons play similar functions in electronic communications; they supplement text communications with visual imagery. Because of this, sometimes the two terms are confused or treated as synonymous.[61]

However, emojis and emoticons have significant technical differences. First, emoticons are limited to imagery that can be created by standard keyboard characters. In contrast, as small graphical images, emojis can depict literally anything. Second, emojis usually look different across platforms, but emoticons

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1881-807405171. *Cf.* LUCAS, *supra* note 16, at 25-29 (discussing different pre-emoji efforts to create expressive symbols). The smiley iconography is even older, possibly dating back to 1700 B.C. Jason Daley, *World's Oldest Smiley Face May Decorate a Hittite Jug*, SMITHSONIAN, July 24, 2017, http://www.smithsonianmag.com/smart-news/worlds-oldest-smiley-face-found-hittite-jug-180964177.

[56] *See*, *e.g.*, DAVID W. SANDERSON (ED.), SMILEYS (1993) (defining about 650 emoticons).

[57] *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.

[58] SANDERSON, *supra* note 56, at 2 ("Not all smileys are turned counterclockwise, but most of them are").

[59] Kaomojis are sometimes called Japanese emoticons. *See* http://kaomoji.ru/en/. *See generally* LUCAS, *supra* note 16, at 30.

[60] Robinson Meyer, *The Best Way to Type ¯_(ツ)_/¯*, THE ATLANTIC, May 21, 2014, https://www.theatlantic.com/technology/archive/2014/05/the-best-way-to-type-__/371351/.

[61] *See*, *e.g.*, People v. Krasnoperov, 2015 Cal. App. Unpub. LEXIS 343 (Cal. App. Ct. Jan. 15, 2015) (referring to a "crossing fingers" 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," but 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 "handgun" and "explosion" emoticons).

will have consistent appearances because they consist of keyboard characters that are standardized across platforms.[62]

Despite their differences, emojis and emoticons offer raise similar interpretation issues. Although this article focuses on emojis, it will sometimes reference cases and academic research about emoticons where the similarities (e.g., the pictograph function) outweigh the differences (e.g., the cross-platform appearance).

GIFs and Memes. "GIFs"[63] are short video clips, usually come from popular TV shows or movies, and often captioned. "Memes" are photos or drawings of popular images that either come from TV shows or movies or develop popularity online.[64] "Meme generators" allow users to add their own caption to the image, which multiplies and iterates the meanings associated with the image.

People incorporate GIFs and memes into social media posts to express an emotion or make a joke. Thus, GIFs and memes often perform the same communicative functions as emojis using video or larger static images. Because they are often larger than any accompanying text, GIFs and memes are typically attached to the end of messages (or sent as standalone messages) rather than interspersed with the text. GIFs and memes raise some overlapping legal issues with emojis, but addressing those implications is beyond this Article's scope.

II. Emoji Misunderstandings

Courts regularly interpret communications. It's a core judicial function. Interpretation questions arise in virtually every legal doctrine and legal practice area, and common law court systems have centuries of expertise interpreting communications—including non-textual content such as signs, symbols, and logos.[65]

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[62] One minor qualification is that senders and recipients may use different display fonts to depict the standardized characters.

[63] There is a longstanding controversy over whether the "G" in "GIF" is 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/.

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

[65] *See* Kirley & McMahon, *supra* note 6 ("Legal interpretation of nonverbal messaging is not new to the judiciary, as seen in decisions involving American sign language, Pitman Shorthand, gang symbols, marketing logos, and tattoos").

Emojis are another type of content requiring judicial interpretation. Emoji-related misunderstandings are inevitable; "when two people consider the same emoji rendering, they may interpret both the sentiment and semantic meaning differently."[66] Already, dozens of court opinions have referenced emojis or emoticons, and the rate is accelerating.[67]

While emojis often raise routine interpretative issues,[68] emojis also can create some unexpected and novel challenges to judicial interpretative processes.[69] This part explains the communicative functions performed by emojis, surveys misunderstandings caused by emojis, and explains how courts should handle those challenges.

A. The Many Functions of Emojis

Emojis perform many different communicative functions. An emoji symbol might be used for different functions in the same message; or different emoji symbols might perform the same function in a single message. Thus, when interpreting an emoji, it's essential to determine the communicative function performed by the emoji.

Linguistics expert Prof. Vyvyan Evans enumerated six ways emojis act as "non-verbal cues" to "enhance meaning in face-to-face spoken interaction":[70]

For more on how courts analyze hand signs in gangs, *see* 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).

[66] Miller, *Blissfully*, *supra* note 37; *see generally* Amy Gesenhues, *Twitter Emoji Ad Targeting Is Still New Territory For Some Brands*, MARKETING LAND, Mar. 29, 2018, https://marketingland.com/twitter-emoji-ad-targeting-is-still-new-territory-for-some-brands-236907 (discussing the challenges advertisers face when targeting ads based on emojis used by Twitter users).

[67] Eric Goldman, *Frequency of Courts' References to Emojis and Emoticons Over Time*, TECH. & MKTG. L. BLOG (June 21, 2017), http://blog.ericgoldman.org/archives/2017/06/frequency-of-courts-references-to-emojis-and-emoticons-over-time.htm.

[68] 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").

[69] 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").

[70] EVANS, *supra* note 3, at 125-36; *see also* DANESI, *supra* note 3, at 141 ("by and large, emojis are meaning enhancers"); Eli Dresner & Susan C. Herring, *Functions of the Non-Verbal in CMC: Emoticons and Illocutionary Force*, 20 COMM. THEORY 249 (2010) (emoticons "help convey an

Communication Function	**Non-Emoji Example**	**Emoji Example**
Substitution	A head nod, a thumbs-up or an "OK" hand sign instead of a spoken "yes"	A smiley instead of the word "yes"
Reinforcement	A thumbs-up with a spoken "yes"	A heart emoji following a declaration of love
Mixed Message	Saying "that will be fun" in a monotone	An eye roll emoji signaling lack of sincerity
Complement	Indicating through finger motions how much liquid someone should pour into a glass	A smiley following the words "tough day" to provide emotional qualification of the text
Emphasis	Gesticulation or variation of vocal pitch	Repeating emojis, such as multiple hearts after a declaration of love[71]
Discourse management	Periodic head nods to signal that a listener is following the speaker	Emojis establish "social contact" and keep "the lines of communication open and pleasant."[72] Ex. 1: Conversation

important aspect of the linguistic utterance they are attached to: what the user intends by what he or she types"); Daantje Derks et al, *The Role of Emotion in Computer-Mediated Communication: A Review*, 24 COMPUTERS IN HUMAN BEHAVIOR 766 (2008) (discussing emoticon functions).

[71] *But see* Riordan, *supra* note 6 ("Multiple nonface emojis made little difference in interpretation").

[72] DANESI, *supra* note 3, at 19; *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"); Vyvyan Evans, *The Power of the Emoji, Japan's Most Transformative Modern Design*, CNN.COM, May 29, 2017, http://www.cnn.com/2017/05/29/design/emoji-digital-language/index.html?sr=twCNN053017emoji-digital-language0216AMVODtopVideo&linkId=38134991 (emojis play "a similar function in digital communication to that of gesture, body language and intonation in spoken interaction").

		"metacomment": a smiley can act as an "utterance opener" to add a cheerful tone to the message; or can be an "utterance ender" to ameliorate an abrupt ending to an online message.[73] Ex. 2: Punctuation:[74] a smiley between words can "break up" sentences, like a speaker might take a breath between sentences

Emojis may serve other functions beyond those identified in the chart. For example, it's been suggested that senders sometimes use emojis to help them construct their messages,[75] not to communicate the emoji's meaning to recipients.

Courts already categorize and apply emojis' functions using standard judicial interpretative tools.[76] Thus, courts can identify when "mixed message" emojis reverse the meaning of text. For example, one court determined that a smiley emoticon converted text into a joke, which caused the text to mean the exact opposite of what it said:

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[73] DANESI, *supra* note 3, at 19.

[74] *Id.* at 105; Dresner & Herring, *supra* note 70; Kris M. Markman & Sae Oshima, *Pragmatic Play? Some Possible Functions of English Emoticons and Japanese Kaomoji in Computer-Mediated Discourse*, Oct. 18, 2007, https://osf.io/preprints/socarxiv/qa764/download ("emoticons and kaomoji serve primarily as punctuating devices within text-based conversations").

[75] "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." Joseph B. Walther & Kyle P. D'Addario, *The Impacts of Emoticons on Message Interpretation in Computer-Mediated Communication*, 19 SOCIAL SCI. COMPUTER REV. 324, 343 (2001).

[76] *Cf.* Elonis v. U.S., 575 U. S. __ (2015) (interpreting whether an emoticon contributed to making an illegal threat); 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).

> 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.[77]

Another court correctly identified smileys as text supplements that enhanced the messages' 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.[78]

These two rulings, and others,[79] demonstrate that courts regularly interpret emojis successfully, including recognizing that a symbol (in the two cases, the smiley emoticon) can perform different functions. This supports a hypothesis that many emojis pose routine interpretative challenges to courts.[80]

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[77] United States v. Christensen, 2013 U.S. Dist. LEXIS 52464, *5 (D. Mont. Apr. 11, 2013).

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

[79] *See* 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/HCJ/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"). For more on *McAlpine*, *see* Nicole Pelletier, *The Emoji That Cost $20,000: Triggering Liability for Defamation on Social Media*, 52 J.L. & POLICY 227 (2016).

[80] Because courts interpret novel or unfamiliar communication symbols as a matter of course, generalist judges should be able to handle emoji interpretations too. For these reasons, I disfavor

B. Factors Contributing to Emoji Misunderstandings

Nevertheless, emojis have numerous attributes that exacerbate the risks of misunderstandings. This subpart highlights some key attributes. While courts should be able to handle the interpretative challenges caused by these attributes, a heightened understanding of emojis' attributes will help get to the right result.

Visual Decoding

The small size of emojis can make them hard to decode.[81] Many emojis look similar, with only subtle distinctions between them.[82] Emoji designs likely will improve over time and screen resolutions will surely become better,[83] which will improve decoding accuracy. Until then, mistaken decodings can contribute to misunderstandings.[84]

For example, the Unicode-coded "smiling face with open mouth & smiling eyes" (below left) and "smiling face with open mouth & cold sweat" (below right) differ only by a tiny sweat bead on the face's right side:

A sender or recipient could reasonably miss the sweat bead,[85] which may cause reasonable senders and recipients to misunderstand each other.

Kirley & McMahon's suggestion to create a specialist court for emojis. Kirley & McMahon, *supra* note 6.

[81] Hannah Miller et al, *Understanding Emoji Ambiguity in Context: The Role of Text in Emoji-Related Miscommunication*, Eleventh International AAAI Conference on Web and Social Media, May 5, 2017, http://www.brenthecht.com/publications/icwsm17_emojitext.pdf [hereinafter Miller, *Emoji Ambiguity*] ("we rendered the emoji images in the survey at a size that corresponds with their typical size in common use (rather than enlarged versions for easier viewing). This proved difficult for some participants that took the survey on desktop monitors").

[82] For example, there are about a dozen smiling/grinning Unicode-coded emojis. *See* Unicode, *Full Emoji Data*, *supra* note 38; *see also* ICANN Security and Stability Advisory Committee, *SSAC Advisory on the Use of Emoji in Domain Names*, SAC095, May 25, 2017, https://www.icann.org/en/system/files/files/sac-095-en.pdf [hereinafter SSAC Report] ("Many emoji are visually similar and can be difficult to distinguish.").

[83] However, as display technology improves, the depictions of emojis will likely improve along with it. EVANS, *supra* note 3, at 207.

[84] A related risk: senders can make "typographical" errors when selecting emojis, i.e., a sender accidentally chooses the wrong emoji and doesn't catch the error before sending the message. Those errors might be due to the need for precise finger movements or a sender's mental error.

[85] There is also the risk that a party will mis-decode the sweat bead as a tear.

Emojis With Multiple Meanings

Like many words and other symbols, emojis routinely have multiple meanings. Some of that reflects ordinary linguistic evolution.[86]

Remarkably, emoji ambiguity is also intentional. Unicode prefers to adopt emojis that have multiple meanings.[87] It says emojis "add useful ambiguity to messages, allowing the writer to convey many different possible concepts at the same time."[88]

Thus, emojis routinely have multiple popular meanings.[89] For example, the "folded hands" emoji[90] was designed to symbolize please and thank you, but it also means "I'm praying" or "high five;"[91] and the syringe emoji[92] can mean

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Another example is the drooling face emojis, which "on a Samsung device looks like a terrified face in such a state of shock that a littlest bit of spit — so faint, it would be hardly visible if you were to see it scrolling through your Twitter feed — has leaked from its mouth." Madison Malone Kircher, *Jessica Chastain Learns the Hard Way That Not All Emoji Look the Same on Different Platforms*, SELECT/ALL, Feb. 2, 2018, http://nymag.com/selectall/2018/02/jessica-chastain-accidentally-tweets-drooling-face-emoji.html. The Sleepy Face emoji poses similar problems, as the Unicode outline 😪 has a snot bubble that is almost imperceptible and easily mistaken for a tear.

[86] EVANS, *supra* note 3, at 198 ("Emojis, like words, develop new meanings, sometimes far removed from their cultural origins."); Steinmetz, *supra* note 49 (quoting Tyler Schnoebelen as saying "Language changes and emojis are changing").

[87] EVANS, *supra* note 3, at 222-23 ("the more meanings an emoji can potentially have, then, self-evidently, the stronger the case for approving it").

[88] Unicode #51, *supra* note 21.

[89] For more 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/.

[90] 🙏. This emoji is usually called "person with folded hands," but few platforms depict it with more than hands. The Apple iOS 6.0 implementation is more typical: 🙏

[91] *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; EVANS, *supra* note 3, at 98.

[92] 💉. Some platforms depict blood drops on the needle.

donating blood, getting shots, "blood brothers," or tattoo issues.[93] Small groups routinely develop their own idiosyncratic meanings, such as two spouses who "use the Easter Island head [emoji][94] to connote absurdity."[95] Some meanings are not readily apparent to outsiders, 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."[96]

Multiple emoji meanings pose a special problem because no definitive reference source catalogs the disparate meanings.[97] Unicode provides a short description of every emoji it defines,[98] but Unicode acknowledges that its descriptions "may not encompass all the possible meanings of an emoji character, and in some cases may even be misleading."[99] Unicode does not attempt to catalog any slang usage. The leading supplement, Emojipedia[100] inconsistently

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[93] *See* Schnoebelen, *supra* note 68; DeFabio, *supra* note 89 (saying this emoji is used for "everything from blood donation, to drugs, to tattoos").

[94]  . Unicode's official name for this symbol is "Moai." It represents a statue in Japan, but many platforms depict it like a moai rock sculpture from Easter Island.

[95] Thompson, *supra* note 13 (noting that "friends use [emojis'] malleability to invest specific emojis with their own private meanings"); *see also* Jennifer Romig, *Commenting by Emoji: A Tentative Glossary for Legal Writing Professors* (2015), https://works.bepress.com/jennifermromig/1/ (a satirical paper offering idiosyncratic meanings of emojis for legal writing professors to use when providing feedback on student papers).

[96] Hess, *supra* note 14. The article discusses the "Emoji Sentiment Ranking," available at http://kt.ijs.si/data/Emoji_sentiment_ranking/; *see* Petra K. Novak et al, *Sentiment of Emojis,* PLoS ONE, Dec. 7, 2015, https://doi.org/10.1371/journal.pone.0144296.

One possibility is that the panda's negative connotation reflects the "sad panda" meme. *Sad Panda*, Know Your Meme, http://knowyourmeme.com/memes/sad-panda. At the same time, most platforms depict the panda as smiling.

[97] EVANS, *supra* note 3, at 196 ("neither Unicode nor anyone else stipulates what a specific emoji means"). In contrast, emoticons have been catalogued in books (*e.g.*, SANDERSON, *supra* note 56; SETH GODIN, THE SMILEY DICTIONARY (1993)) and online directories (*see*, *e.g.*, *List of Emoticons*, WIKIPEDIA.ORG, https://en.wikipedia.org/wiki/List_of_emoticons (visited January 31, 2018)). However, beyond the most popular emoticons, most emoticons do not have widespread recognition.

[98] Unicode, *Full Emoji Data*, *supra* note 38. Of course, non-Unicode emojis lack even this minimal infrastructure.

[99] Unicode, *Emoji*, *supra* note 2. Elsewhere, Unicode says its descriptions "often do not reflect the current practice for interpretation of the character." Unicode #51, *supra* note 21.

[100] http://emojipedia.org/.

includes some slang definitions of emojis.[101] Other resources, such as the "Emoji Dictionary,"[102] are not very helpful. Recently, a traditional dictionary publisher, Dictionary.com, began publishing definitions and explanations of emojis,[103] but as April 2018, their resource only covered about two dozen emojis.[104]

The absence of emoji dictionaries creates extra interpretative challenges, such as:

- *New Emojis*. New emoji symbols are constantly emerging, and each one will have a transitional period before it achieves widespread consumer recognition.
- *Combined Emojis*. Unicode allows some emoji combinations or modifications to change colors (such as skin tones) or genders. This expands the universe of emojis to create symbols recipients may not recognize or understand. Further, as illustrated with the Jolly Roger example below, the combination or modification may fail technically, causing senders and recipients to see different things.
- *Unsophisticated User Groups*. Emojis are still working through the adoption curve, so some user communities still are not familiar with them. There also may be generational differences in emoji usage.[105]

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[101] For example, Emojipedia's definition of the "100" emoji 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.

💯 *Hundred Points*, EMOJIPEDIA, http://emojipedia.org/hundred-points-symbol/ (visited January 23, 2018).

[102] THE EMOJI DICTIONARY, https://emojidictionary.emojifoundation.com. It calls itself the "first crowdsourced Emoji resource on the web" and allows users to submit their own definitions of emojis; but it also describes itself as a "tongue and cheek art movement," and its sponsor, the "World Translation Foundation," has the confidence-sapping acronym "WTF."

[103] Katy Steinmetz, *A Major Dictionary Has Officially Added Emoji*, TIME, Mar. 6, 2018, http://time.com/5186512/emoji-dictionary/.

[104] *Emoji*, DICTIONARY.COM, http://www.dictionary.com/e/emoji/ (visited April 1, 2018).

[105] *See*, *e.g.*, DANESI, *supra* note 3, at 126.

- *Depiction Diversity*. Due to platform-specific emoji implementations, users must learn multiple variations of each symbol; and this means users will routinely encounter unfamiliar variations. It's like having to learn a dozen different spellings of the same word, where each spelling is correct only on one platform.

Unsettled Grammar Rules

When multiple emojis are sequenced together, we do not have clear rules for interpreting the sequence.[106] As Prof. Evans explained, the "emerging Emoji grammar is some considerable way from a true grammar…I might know how to use and send emojis, [but] I don't know how to combine them in a way that is grammatical."[107] Without universally accepted grammar rules, senders and recipients could reasonably apply different grammar rules to emoji sequences that lead to misunderstandings.[108]

Face Emojis

Face emojis deserve special consideration because they represent a majority of emoji usage[109] and pose extra interpretative challenges.[110] Face emojis are a major way that senders signal mixed messages, such as facetiousness, sarcasm, or parody. However, those mixed messages are easily misconstrued in the best of

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[106] *See id.* at 77-93 (discussing emoji grammar rules).

[107] EVANS, *supra* note 3, at 90-91. Emoji grammar rules will become more settled over time. DANESI, *supra* note 3, at 79-80.

[108] *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").

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

[110] Kohske Takahashi et al, *Is ☺ Smiling? Cross-Cultural Study on Recognition of Emoticon's Emotion*, 48 J. CROSS-CULTURAL PSYCHOLOGY 1578 (2017), http://journals.sagepub.com/doi/pdf/10.1177/0022022117734372; *see also* Miller, *Blissfully*, *supra* note 37 (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'"); DANESI, *supra* note 3, at 62-66 (discussing additional interpretative considerations for face emojis).

circumstances, and they are especially risky given the inherent ambiguity of facial expressions codified in face emojis.[111]

For example, the following image depicts Apple's "unamused face" emoji. If a sender uses it, what emotion was the sender trying to communicate?

If you're not sure, you're not alone.[112] A survey revealed that people considered this emoji to signal "disappointment," "depressing," "unimpressed" or "suspicious."[113] With such a disparate range of possible emotional meanings, the risks of misunderstanding are high.

The "unamused face" emoji's ambiguity 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"[114] ranking in the top 3 on 4 of the 5 platforms tested.[115]

People also routinely disagree on whether a face emoji indicates positive or negative emotional valence. The same survey indicated that 25% of the time, people did not agree whether an emoji's emotional valence was positive, neutral, or negative.[116] For Microsoft's implementation of "smiling face with open mouth

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[111] Walther & D'Addario, *supra* note 75. *Cf.* Hess, *supra* note 14 (discussing particular difficulties interpreting the winky and tongue-sticking-out emoticons).

[112] *See* Mike Cherney, *Lawyers Faced With Emojis and Emoticons Are All ¯_(ツ)_/¯*, WALL. ST. J., JAN. 29, 2018, https://www.wsj.com/articles/lawyers-faced-with-emojis-and-emoticons-are-all-1517243950 (discussing a law firm's attempt to decode the symbol).

[113] Miller, *Blissfully*, *supra* note 37.

[114] The Unicode outline: ☺.

[115] Miller, *Blissfully*, *supra* note 37.

[116] *Id.*; *see also* the Tigwell & Flatla study discussed *infra* note 171.

and tightly closed eyes,"[117] "44% of participants labeled it as negative and 54% labeled it as positive, indicating a clear lack of consensus."[118] Given these statistics, the sender and recipient would attach different emotional meanings to that particular symbol about half of the time.

People have difficulty decoding facial expressions even in optimal circumstances. With their prevalence, face emojis will cause many misunderstandings.

C. Emoji Dialects

As the prior subpart indicated, emojis can have multiple meanings and convey different emotional valences. This subpart takes a closer look at some of the reasons why emojis mean different things in different communities, and how those factors can further exacerbate emoji misunderstandings.

Culture-Specific Meanings

Prof. Evans observes that "just as language reflects cultural knowledge and variation, so too do emojis."[119] Thus, accurately decoding emojis requires an understanding of the cultural context surrounding the conversation.[120] Where the sender and recipient have different cultural knowledge, misunderstandings are likely to follow.[121]

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[117]  Microsoft subsequently 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. The redesigned emoji still seems ambiguous, but perhaps it is less likely to be interpreted as negative.

[118] Miller, *Blissfully*, *supra* note 37.

[119] EVANS, *supra* note 3, at 197.

[120] *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/; DANESI, *supra* note 3, at 122 ("The objective of the emoji code of providing a visual cross-cultural language is proving to be more difficult than was at first contemplated. The initial premise was based on the assumption that visually based symbolism is more free from ambiguity than language. But this is turning out to be a specious assumption."); EVANS, *supra* note 3, at 98 ("the iconic basis for an emoji can be a matter of cultural difference"); LUCAS, *supra* note 16, at 19 (giving examples of culturally-specific emoji meanings).

[121] Miller, *Blissfully*, *supra* note 37 ("it is likely that emoji usage and interpretation is culturally dependent"); Takahashi, *supra* note 110. *See generally* Arthur W. Samansky, *Samansky: Eliminate Emojis From All Company Correspondence*, LIBN.COM, Jan. 17, 2018,

A few examples of culture-specific meanings for emojis:

- The face mask emoji[122] might symbolize illness in Japan and bank robbery in the U.S.[123]
- The eggplant emoji[124] can be a phallic reference in the U.S.[125]
- In Western cultures, cat emojis are associated with domestic companions; in other cultures, cats are viewed as sacred or edible.[126]
- Canadians use the poop emoji[127] as an ironic commentary about the world's overall crummy state.[128]

A metonym is "a word, name, or expression used as a substitute for something else with which it is closely associated."[129] Using the phrase "White House" to reference the U.S. president is a metonym.[130] Emojis frequently act as

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https://libn.com/2018/01/17/samansky-eliminate-emojis-from-all-company-correspondence/ ("in-house lawyers and external legal counsel should urge development of company rules to prohibit these pictures in workplace-related activities. Emojis, and their emoticon cousins – despite all the reasons for their popularity – should have no place in business communications in the global and culturally diverse environment").

[122]  .

[123] 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.

[124]  . Apple's implementation:  .

[125] *Eggplant Emoji*, Know Your Meme, http://knowyourmeme.com/memes/eggplant-emoji (visited Feb. 4, 2018); Bromwich, *supra* note 108 (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 87.

[126] DANESI, *supra* note 3, at 123.

[127]  . Apple's implementation:  .

[128] DANESI, *supra* note 3, at 119 (Canadian usage of the poop emoji "reflects a kind of sardonic sense that can be translated as 'the world is shitty no matter what' reflecting stereotypically a supposed Canadian hubris based on ironic stoicism").

[129] *Metonym*, OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/metonym (visited January 24, 2018).

[130] EVANS, *supra* note 3, at 183-87.

metonyms. The "see no evil" monkey emoji (one of the wise monkey emojis)[131] can represent the concept of willful blindness or a decision not to take any action. In discussions about cellphones, a skull emoji[132] symbolizes how being without connectivity is like death.[133]

Emoji metonyms depend on cultural knowledge. Without that background, outsiders will misunderstand the reference. For example, Japanese users may use a bank emoji, some versions of which contain the letters "BK,"[134] to express the concept of "bakkureru," slang for evading one's responsibility.[135] Properly deciphering this usage requires knowing the meaning of "bakkureru" and its cultural significance, its association with the acronym BK, and the association between the bank emoji and BK.

Cultural considerations also affect how people assign emotional valence to emojis. Of "the 20 most frequently used emoji, nearly all are hearts, smilies, or hand gestures—the ones that emote."[136] However, emojis struggle to convey emotion clearly.[137] 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."[138] As just one 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."[139] Thus, when emojis are used to signal emotion—their most popular application—they create significant risk of cross-cultural misunderstanding.

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[131]  .

[132]  .

[133] Schnoebelen, *supra* note 68.

[134] An example (Apple's iOS 6.0):  .

[135] Unicode, *Emoji*, *supra* note 2.

[136] Thompson, *supra* note 13.

[137] *See* Walther & D'Addario, *supra* note 73.

[138] Hess, *supra* note 14.

[139] *Emotional Pictures*, University of Albany News Center, Nov. 9, 2016, http://www.albany.edu/news/74747.php (discussing research by Prof. Laurie Beth Feldman); *see also* Takahashi, *supra* note 110 ("☺ does not necessarily look smiling to everyone.").

Platform-Specific Meanings

While the formation of geographic and cultural emoji dialects might seem inevitable, it may be less obvious that emoji dialects also form within platforms.

Platforms are natural boundaries for dialect formation because the platform's software provides common user experiences and shared cultural reference points. Emojis accelerate this process because each platform implements emojis (Unicode-coded or not) differently.[140] The differences between emoji depictions can prompt the development of platform-specific meanings for emojis that users on other platforms do not understand.

A celebrated platform-specific slang example is Apple's peach emoji,[141] which became a euphemism for human "butts."[142] Because other platforms implement the peach emoji differently,[143] the peach emoji won't develop that association. Anyone unfamiliar with the Apple platform idiosyncratic meaning may misunderstand the associated message.

A platform's "auto-suggest" also contributes to platform-specific dialect formation by making suggestions unrelated to the Unicode short description. For example, Apple's iOS suggests the "hugging face" emoji[144] when users type "jazz hands" or "hugs."[145] Based on this auto-suggest, the "hugging face" emoji

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[140] Scall, *supra* note 3.

[141] 🍑. For a short time, Apple indicated it would move away from a butt-like depiction, but it abandoned that plan. *See* Romain Dillet, *Apple Brings Back the Peach Butt Emoji*, TECHCRUNCH, Nov. 15, 2016, https://techcrunch.com/2016/11/15/apple-brings-back-the-peach-butt-emoji/.

[142] *Peach Emoji*, KNOW YOUR MEME, http://knowyourmeme.com/memes/peach-emoji (visited Jan. 31, 2018). Twitter users also use the peach emoji for butt and others meanings than the fruit. *See* https://blog.emojipedia.org/content/images/2018/01/peach-emoji-usage-twitter-emojipedia-1.jpg.

[143] *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:

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[144] 🤗.

[145] 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 Ziccarelli for educating me about this jazz hands/hugs example.

might develop these meanings, while platforms without equivalent auto-suggestions will not develop these additional meanings.

D. Depiction Discrepancies

The prior subpart described several emoji attributes that can lead to reasonable senders and recipients misunderstanding each other. In all of these examples, the misunderstanding can occur although the senders and recipients are seeing the identical emoji symbol.

This subpart turns to a different and more troubling problem where emoji senders and recipients see different things *and do not realize this discrepancy.* There are three technological circumstances where this phenomenon occurs: (1) when the sender and recipient are on the same platform but using different generational versions of its software, (2) when the sender sends a Unicode-coded emoji to a recipient on a different platform, and (3) when the sender sends a platform's non-Unicode emoji to a recipient on a different platform.

Intra-Platform Discrepancies

Platforms routinely revise and evolve their emoji implementations. For example, iterations of the "Grinning Face With Smiling Eyes" emoji[146] on the Apple, Google and Microsoft platforms have, over time, looked like this:[147]

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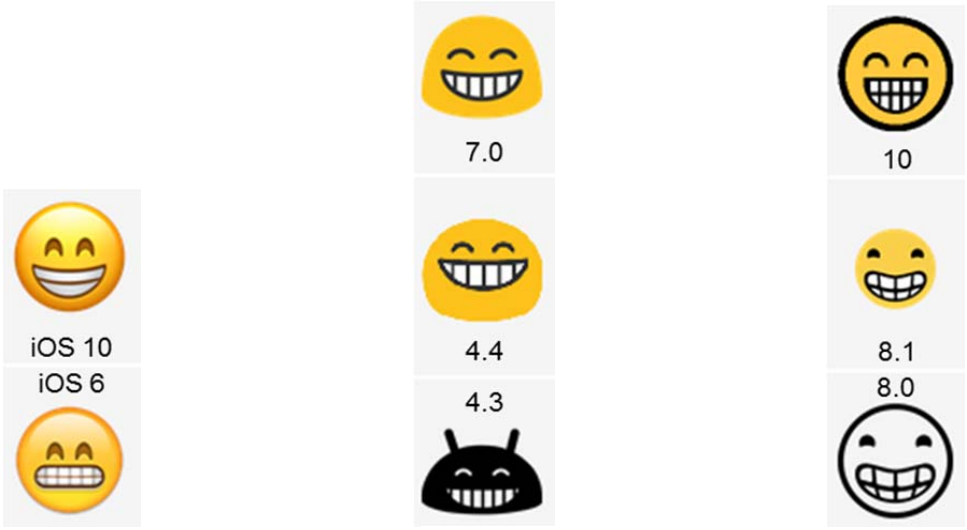
[146]  .

[147] *See* http://emojipedia.org/grinning-face-with-smiling-eyes/.



Apple *Google* *Microsoft*

(Note: These figures get older from top to bottom)

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 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), they should see the same depiction of the platform's emoji implementation.

In contrast, if the sender and recipient use different versions of the platform's operating system, the emoji implementation seen by the sender and recipient 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. On the Android platform, this phenomenon even has a name: "Android fragmentation."[148]

This discrepancy—silently introduced by the platform and possibly unknown to the sender and recipient—can lead to misunderstandings.[149] In the iOS 6.0/10.0 example, one study showed that people interpreted the iOS 6.0 implementation as meaning "ready to fight"[150]—a very different meaning than the short description ("grinning face with smiling eyes") or the sender's likely meaning of the iOS 10.0 version.

Cross-Platform Discrepancies

As discussed earlier, each platform implements Unicode-coded emojis idiosyncratically, which leads to cross-platform depiction diversity. The cow emoji illustrated the phenomenon, but every Unicode-coded emoji has similar platform-specific discrepancies—some of which are unpredictable or even baffling.[151] To show how wacky this situation has gotten, consider the depiction diversity *within Facebook-owned properties*: "Facebook and Messenger now use one unique emoji set (unless you're on iOS), WhatsApp uses a second (if you're running the Android beta) and Instagram uses whatever the default is on the phone."[152]

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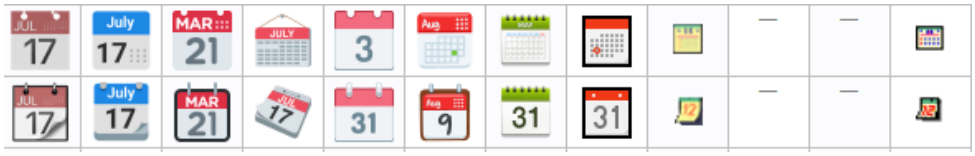
[148] *E.g.*, Luke Larsen, *Can Google Solve Android Fragmentation for Good?*, PASTE MAG., May 19, 2017, https://www.pastemagazine.com/articles/2017/05/can-google-solve-android-fragmentation-for-good.html.

[149] Miller, *Emoji Ambiguity*, *supra* note 81.

[150] As depicted *supra*, Apple has changed this emoji implementation since this study was conducted.

[151] One baffling example: the platforms depict the Unicode-coded "calendar" (top) and "tear-off calendar" (bottom) emojis with different dates from each other (and within the same platform, some depict the calendar and tear-off calendar with different dates). Why?



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

For what it's worth, Apple picked July 17 because that's the date iCal for Mac was first announced in 2002, and Twitter picked March 21 because that's the date of its founding. *See* 🗓 *Calendar*, EMOJIPEDIA, https://emojipedia.org/calendar/ (visited Apr. 6, 2018).

[152] Hern, *WhatsApp*, *supra* note 35.

Unicode acknowledges the problems caused by cross-platform depiction diversity. With respect to "[d]irection (whether a person or object faces to the right or left, up or down)," it says "a change in direction can change the meaning: when sending 'crocodile shot by police', people expect any recipient to see the pistol pointing in the same direction as when they composed it."[153] Otherwise, it might be interpreted as a threat on law enforcement if the pistol is pointed towards the police officer. However, Unicode only encourages, not requires, platforms to depict the pistol pointing left.

This discretion means platforms can implement Unicode-coded emojis in ways that can have substantially different meanings than the implementations on other platforms. In turn, when Unicode-coded emojis travel across platforms, and the recipient platform substitutes in its emoji implementation for the emoji as depicted on the sender's platform, the result can be that the substitution changes the message's meaning. In other words, cross-platform depiction diversity can create misunderstandings that would not exist for any other reason.[154] Furthermore, neither the sender's nor the recipient's platform indicate that the substitution has occurred, so both senders and recipients may be unaware that they are seeing something different than their communication partner.

Some examples to illustrate this phenomenon:

Example #1: "Grinning Face with Smiling Eyes." We already discussed the Unicode-coded "grinning face with smiling eyes"[155] emoji, which creates the potential for intra-platform misunderstandings as platforms have evolved its design in ways that may change its meaning.

This emoji also can cause trouble across platforms due to cross-platform depiction diversity. A survey[156] revealed that people thought Google's

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[153] Unicode #51, *supra* note 21.

[154] *See* Kirley & McMahon, *supra* note 6 (referring to "cross-platform confusion"). *Cf.* Miller, *Blissfully*, *supra* note 37 ("communication across platform is even more prone to misconstrual than within-platform").

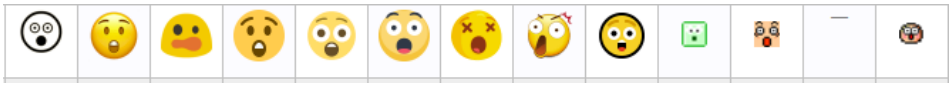
As just one real-life example, Jessica Chastain tweeted a drooling face emoji using iOS, where the emoji symbol looks horrified and the drool is barely noticeable, and then discovered that the Samsung implementation made the drool more conspicuous in a way that created unexpected and unwanted sexual connotations. *See* tweet of Jessica Chastain, Feb. 1, 2018, 3:12 p.m., https://twitter.com/jes_chastain/status/959202943340765184/photo/1.

[155]  .

[156] Miller, *Blissfully*, *supra* note 37.

implementation[157] meant "blissfully happy" but thought Apple's implementation meant "ready to fight."[158] Accordingly, a Google sender using the Grinning Face with Smiling Eyes emoji may inadvertently communicate a physical threat to any Apple recipient.

Example #2: "Astonished Face." This chart shows how platforms implemented the Unicode "astonished face" emoji:[159]



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,[160] a depiction typically associated with death,[161] so a Facebook Messenger user receiving this emoji could take it as a threat.[162] Samsung's implementation is to the immediate right of Facebook Messenger's, and it might be more associated with anger, shock or annoyance than astonishment.

Implementation diversity increases the likelihood that senders and recipients on different platforms will see different depictions and decode the symbols differently in ways that lead to misunderstandings.

Example #3: "Pistol." This chart shows how platforms have implemented the Unicode "pistol" emoji:[163]

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157  .

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

159 Unicode, *Full Emoji Data*, *supra* note 38.

160 Although not reflected on this chart, a few other platforms also depict Xs-as-eyes in their implementations, including LG, Mozilla and Emojidex. *See* 😵 *Astonished Face*, EMOJIPEDIA, http://emojipedia.org/astonished-face/ (visited Jan. 31, 2018).

161 *Wingding Eyes*, TV Tropes, http://tvtropes.org/pmwiki/pmwiki.php/Main/WingdingEyes (visited Jan. 25, 2018); Commonwealth v. Castano, 478 Mass. 75 (2017) (an emoji with Xs for eyes treated as evidence that a murder had taken place).

162 Other interpretations could include illness, exhaustion, or sleeping.

163 Unicode, *Full Emoji Data*, *supra* note 38.

The Unicode outline is again on the far left. Unlike the astonished face, the pistol implementations are fairly similar—except for Apple's (second from the left), which intentionally substituted a water pistol for a firearm pistol.[164]

Like the prior examples, Apple's idiosyncratic implementation creates the possibility that an Apple sender intends a fun message and a non-Apple recipient interprets the message as a physical threat.

Apple's pistol emoji implementation has garnered criticism. As Prof. Jonathan Zittrain observed, Apple's substitution "breaks the conceptual compatibility that Unicode is meant to establish."[165] It's also easy to see how Apple users could develop a platform-specific slang meaning for the pistol emoji unknown to users on other platforms.

Apple's pistol divergence is not an unusual situation. There are many other examples where a single platform's emoji implementation—for no apparent good reason—substantially deviates from the otherwise relatively homogeneous implementations of other platforms. For example, Samsung implements the "person bouncing ball" emoji with a player spinning a basketball (and thus no bouncing) and the "cookie" emoji with a depiction of two crackers.[166] All of these divergences—where a platform "goes rogue" from all other platforms—creates substantial misunderstanding possibilities and establishes the potential for platform-specific slang.

Example #4: *The Jolly Roger.* The fourth and final example of cross-platform depiction diversity comes from Unicode itself:[167]

> The set of supported emoji sequences may vary by platform. For example, take the following emoji zwj[168] sequence:

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[164] *E.g.*, 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/.

[165] 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.

[166] *See* Alex Hern, *Why Are Samsung's Emojis Different From Everyone Else?*, THE GUARDIAN, Sept. 6, 2017, https://www.theguardian.com/technology/2017/sep/06/why-are-samsung-emojis-different-from-everyone-else [hereinafter Hern, *Samsung*].

[167] Unicode #51, *supra* note 21.

On a particular platform, it can be shown as a single image:

However, if that combination is not supported as a single unit, it may show up as a sequence like the following, and the user sees no indication that it was meant to be composed into a single image:

The integrated pirate-flag image (sometimes called the "Jolly Roger")[169] is often used as a metonym for pirate-related connotations. However, a recipient who receives the grey flag and skull-and-crossbones emojis might legitimately interpret the message as a physical threat. Other failed "ZWJ" combinations or emoji modifications could have similar consequences.[170]

A 2016 study demonstrates the unnecessary risks of misunderstanding from cross-platform depiction diversity.[171] The researchers asked survey respondents

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[168] "ZWJ" stands for "zero width joinder," which allows the combination of emoji symbols or the modification of their designs. *Id*. In this case, the grey flag and the skull-and-crossbones emojis are being combined into a single emoji.

An analogous issue arises with Unicode characters that had been coded before Unicode coded emojis, such as the chess pawn. When Unicode codes the emoji, platforms can select between the legacy Unicode character or the new emoji depiction, meaning that senders might see the character and recipients might see the emoji (or vice-versa). *See* Jeremy Burge, *A Chess Piece is Emojified*, EMOJIPEDIA BLOG, Feb. 15, 2018, https://blog.emojipedia.org/a-chess-piece-is-emojified/.

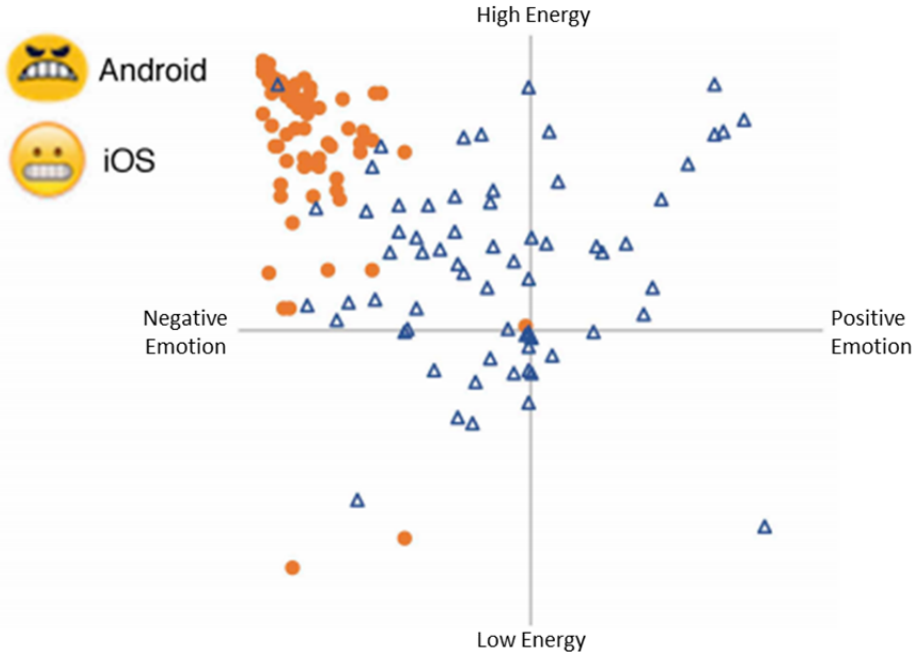
[169] *See* M.R. Reese, *The Ultimate Pirate Branding Symbol – the Origin of the Jolly Roger*, ANCIENT ORIGINS, Feb. 20, 2015, http://www.ancient-origins.net/history/ultimate-pirate-branding-symbol-origin-jolly-roger-002696?nopaging=1.

[170] *See* SSAC Report, *supra* note 82, §2.3 (discussing some problems created by ZWJ and modified emojis).

[171] Garreth W. Tigwell & David R. Flatla, *"Oh, That's What You Meant!": Reducing Emoji Misunderstanding*, MobileHCI '16 Adjunct, Sept. 6-9, 2016, http://delivery.acm.org/10.1145/2970000/2961844/p859-tigwell.pdf.

to plot emoji symbols on a grid based on two attributes: whether the emoji represented high or low energy (the vertical axis) and whether the emoji conveyed positive or negative emotion (the horizontal axis). The survey then compared the platforms' different implementations of the common emoji symbol to see how respondents ranked them differently.

The following chart is the plot map for the "grimacing face" emoji.[172] The orange circles represent users' assessments of the Android 5.0 implementation; the blue triangles represent users' assessments of Apple's iOS 8.0 implementation:[173]



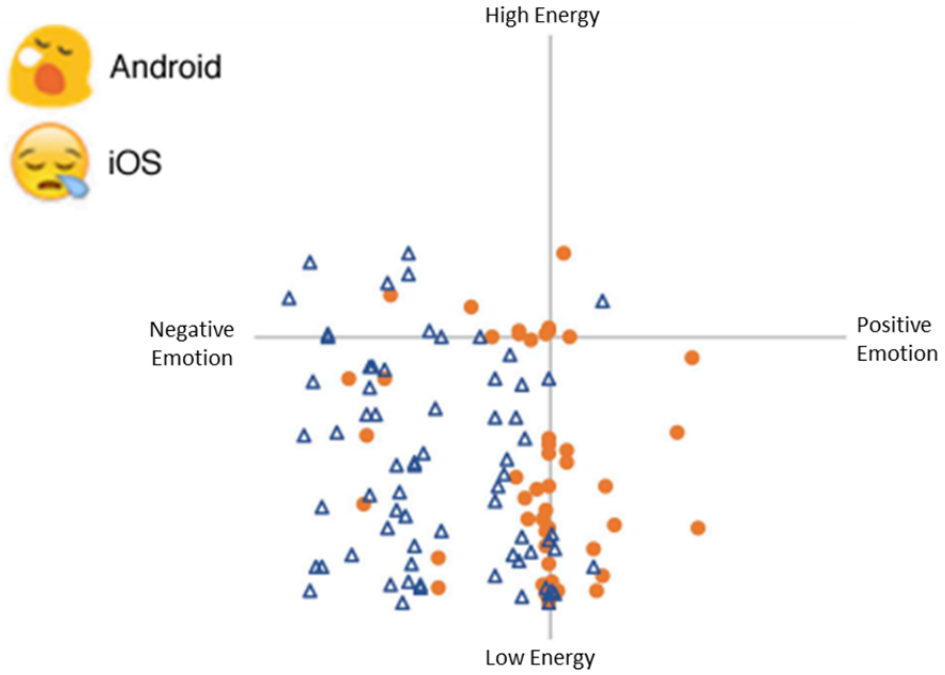
As this chart indicates, most users characterized the Android implementation as high energy and negative emotion. In contrast, the iOS implementation had

[172] Emojipedia warns about this emoji: "Appearance differs greatly cross-platform. Use with caution." *Grimacing Face*, EMOJIPEDIA, https://emojipedia.org/grimacing-face/ (visited Jan. 25, 2018). Other emojis that display this Emojipedia warning include Astonished Face, Dizzy Face, Face with Rolling Eyes, Flushed Face, Ghost, Grinning Face with Smiling Eyes, and Pistol.

[173] Tigwell & Flatla, *supra* note 171.

placements in all four quadrants. Though most users characterized it as high energy, there was a split of opinion about whether it was positive or negative. Thus, an Android sender intending to communicate a high energy/negative emotion message with the grimacing face emoji had a substantial chance of sending a positive emotion, and possibly low energy, message to iOS recipients.

The "sleepy face" emoji[174] had similar problems:[175]



On both platforms, most users characterized the sleepy face emoji as no or low energy. However, most users characterize the iOS implementation as negative emotion, while the Android implementation is more frequently characterized as no or positive emotion. This discrepancy in perceived emotional

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[174] Unicode's outline: .

[175] Tigwell & Flatla, *supra* note 171.

valence between the two implementations creates substantial grounds for sender/recipient misunderstanding.[176]

Collectively, these plot maps reinforce the risks that Unicode-coded emojis traveling between platforms will look differently to senders and recipients, and will be understood differently by them. The results will be avoidable misunderstandings attributable to cross-platform depiction diversity.

Cross-Platform Omissions

The Jolly Roger example illustrated another potential risk due to technology mediation of emojis: that an emoji will render properly on one platform and not another. Improper rendering will routinely occur when non-Unicode emojis travel across platforms.[177] In some circumstances, the recipient of a non-Unicode emoji from another platform will get an indication—such as an empty or black square—that a non-Unicode emoji was omitted.[178] Otherwise, the recipient will not be notified of the omission.[179] Thus, the received message does not display potentially essential parts of the sender's expression—without any warning to the recipient. The risk of misunderstanding in those circumstances is high.

E. Interpreting Emojis

The prior subpart identified numerous ways that senders and recipients may attach objectively reasonable but different meanings to the same emojis, creating misunderstandings.[180] How will the law resolve these misunderstandings?

Emojis as Evidence

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[176] *Cf*. John M. Kelly, *Emojiology: 😴 Sleepy Face*, EMOJIPEDIA BLOG, Mar. 1, 2018, https://blog.emojipedia.org/emojiology-sleepy-face/ (discussing how the Sleepy Face emoji is often confused with the Sleeping Face, the Face with Tears of Joy, and other emojis).

[177] Undisclosed omissions can also occur when recipients use screen readers, which may omit emojis if alternative text isn't provided. *See generally 'Loudly Crying Face': Your Cute Emojis Are Spoiling Social Media For Blind Users*, CBC.ca, Jan. 19, 2018, http://www.cbc.ca/radio/spark/381-the-bad-design-behind-hawaii-s-missile-scare-internet-freedom-in-iran-and-more-1.4491385/loudly-crying-face-your-cute-emojis-are-spoiling-social-media-for-blind-users-1.4491393.

[178] Miller, *Blissfully, supra* note 37 ("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.").

[179] *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).

[180] Miller, *Blissfully*, *supra* note 37 (giving examples of where this has happened).

Every interpretation depends critically on the admissible evidence, so before discussing substantive law, we need to consider what evidence is relevant and how it will be presented.

Any interpretation should evaluate the context for the communications in question,[181] including the entire exchange of messages. This context might indicate, for example, that the parties developed an idiosyncratic meaning for the emoji that should be used instead of any prevailing meanings for the emoji. Also, the emoji must be considered in conjunction with any associated text[182] (and if it's in a string of emojis, in conjunction with those other emojis), not in isolation. Factfinders should be careful about presuming the meaning of any specific emoji; the parties should be allowed to present evidence of its meaning.[183]

Because of cross-platform depiction diversity, any emoji interpretation must be based on the emoji versions actually seen by the parties. Because emojis depictions evolve over time, this may require research to find out what emojis looked like at the relevant time period. Furthermore, often the interpretation will need to consider two (or more) versions of each emoji: the version seen by the sender plus the version(s) actually seen by recipients. This is true even if the sender and recipients were on the same platform because they may have been on different software versions of the platform's software.

Presenting this evidence to the factfinder raises an additional concern. For example, in the "Silk Road" trial,[184] prosecutors orally read text messages to jurors and skipped any reference to the emojis, but the judge eventually required prosecutors to orally characterize the emojis.[185] Was there a better way to handle this?

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[181] *See generally* Lyrissa B. Lidsky & Linda Riedemann Norbut, *#I🔫U: Considering the Context of Online Threats* (paper draft) (discussing how true threat cases should, and often do, draw interpretative inferences from the context surrounding the speech).

[182] *See* Miller, *Emoji Ambiguity*, *supra* note 79 ("text can increase emoji ambiguity as much as it can decrease it."). *Cf.* Boulger v. Woods, 2:17-cv-00186-GCS-EPD (S.D. Ohio Jan. 24, 2018), https://www.scribd.com/document/370061556/Boulger#from_embed (a question mark after an apparently factual statement in a tweet helped defeat a defamation claim).

[183] *See* People v. George, 2018 WL 1100942 (Cal. App. Ct. March 1, 2018) (declining to take judicial notice of an emoticon's meaning).

[184] U.S. v. Ulbricht, 14-cr-68 (S.D.N.Y.).

[185] *See* John G. Browning & Gwendolyn Seale, *More Than Words: The Evidentiary Value of Emoji*, 57 DRI FOR DEF. 34 (Oct. 2015).

Ordinarily, criminal defense counsel "want a complete, unedited version of an online communication considered as evidence rather than one without emojis."[186] However, that creates the risk that the factfinder also will see material that would distract or bias the jurors.[187] Oral characterization of emojis may be imprecise and could be affected by vocal inflections.[188] Excluding emojis from trial evidence hinders accurate interpretations.[189] While every option has potential problems, courts are most likely to make the most accurate interpretations when the factfinder can see emojis with its own eyes.

The Law of Misunderstandings

Once the proper emoji evidence is before the interpreter, then the matter turns to the applicable substantive law. Most legal doctrines have internal doctrinal tools to resolve misunderstandings. For example, in criminal law, a sender's subjective definition of an emoji might negate a high scienter requirement like intent—even if the recipient decoded a different meaning from the emoji, and even if the sender's subjective definition was objectively unreasonable. If an emoji, in context, is capable of multiple reasonable meanings, that might further protect the sender from any knowledge or even recklessness scienter requirements.

Contract law also has a celebrated doctrinal tool for resolving misunderstandings, typically illustrated by the classic "Peerless" case.[190]

The following hypothetical might illustrate the emoji equivalent of two ships with the name "Peerless." In the course of contract negotiations, the sender responds to a contract offer with text that could be interpreted as acceptance (such as "OK" or "awesome")[191] but adds a Unicode-coded emoji intended to

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[186] *Id.*; *see also* State v. Nickell, 2018 WL 1158897 (Mo. Ct. App. March 6, 2018) (an unsuccessful appeal saying the omission of emojis from Facebook evidence violated the best evidence rule).

[187] *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.

[188] 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.

[189] *Id.*

[190] Raffles v. Wichelhaus, 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

[191] *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

send a mixed message of sarcasm, and reasonable senders would interpret that emoji as communicating sarcasm. Because the recipient platform implements the emoji differently, the recipient sees a different emoji depiction that does not communicate sarcasm in the same way. Because of the undisclosed emoji depiction substitution, the recipient reasonably does not perceive the sender's intended sarcasm, the recipient believes the sender accepted the offer, and the recipient detrimentally changes her position based on that belief.

Now what? Restatements 2d of Contracts § 20 says:[192]

> (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
>
> > (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.

In the hypothetical, the parties' misunderstanding is attributable to the intermediation of technology, i.e., cross-platform depiction diversity of emojis combined with the undisclosed emoji substitution. Because the technology caused the different meanings attached to the emoji, and neither sender nor recipient realized it, § 20 indicates the contract fails. That would be an unfortunate outcome for any party that detrimentally relied upon the apparent contract formation.

Energy Co., 983 F. Supp. 2d 338 (S.D.N.Y. 2013) (emailed response "Dope!" did not constitute a license grant).

[192] RESTATEMENT (SECOND) OF CONTRACTS § 20 (1979).

However, if one party knows about cross-platform depiction diversity and the other does not, § 20(2) indicates the knowing party may lose.[193] Thus, the parties' respective knowledge about how emojis work will be a relevant inquiry.

What about situations, like the cross-platform omission, where the emoji is omitted but the recipient gets some notice of its omission, like a black or white square? Courts could say that the indicator puts the recipient on inquiry notice to investigate the omission; in which case their failure to do inquire would result in them taking responsibility for the misunderstanding. However, many recipients would view the indicator as a glitch, not a prompt to clarify the sender's meaning. Thus, a reasonable person likely would not inquire, and it would be unfair to impose an inquiry obligation when a reasonable person wouldn't actually inquire.

F. A Case Study: Does a Chipmunk Emoji Indicate Contract Formation?[194]

A 2017 ruling from Israel[195] makes a nice case study for this part's discussion. A prospective tenant responded to an apartment advertisement in an Israeli online classified ads site with the following text message:

Translated into English:[196]

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[193] *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).

[194] This subpart is adapted from Gabriella Ziccarelli & Eric Goldman, *How a Chipmunk Emoji Cost an Israeli Texter $2,200*, TECH. & MKTG. L. BLOG (May 25, 2017), http://blog.ericgoldman.org/archives/2017/05/how-a-chipmunk-emoji-cost-an-israeli-texter-2200.htm.

[195] Dahan v. Shacharoff, 30823-08-16 (Herzliya Small Claims Ct. Feb. 24, 2017), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2518&context=historical.

> Good morning 😊 Interested in the house 🐓👯✌️🍼🐿️🍾 Just need to discuss the details… When's a good time for you?

In reliance on the messages, the landlord believed the tenant would rent the apartment and took it off the market. The parties started negotiating the lease, and one of the prospective tenant's messages said:

> It's just that we're moving the entire house to storage on Tuesday so we're a little busy.. No worries! I will update Nir :) [Nir was the prospective tenant's co-tenant]

A subsequent message from the prospective tenant:

> Tuesday we're moving the apartment. Maybe Wednesday? By then Nir will have corrected the contract :)

The lease did not get signed Wednesday. Instead, the tenant "ghosted" the landlord. The landlord put the apartment back on the market and found another tenant.

The small claims court judge awarded the landlord approximately $2,200 in damages, explaining (paragraph breaks inserted):

> This is the place to refer once again to those graphic symbols (icons) sent by Defendant 2 to the Plaintiff. As stated, they do not, under the circumstances, indicate that the negotiations between the parties have matured into a binding agreement.
>
> However, the sent symbols support the conclusion that the defendants acted in bad faith. Indeed, this negotiation's parties' ways of expression may take on different forms, and today, in modern times, the use of the "emoji" icons may also have a meaning that indicates the good faith of the side to the negotiations.
>
> The [emoji laden] text message sent by Defendant 2 on June 5, 2016, was accompanied by quite a few symbols, as mentioned.

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[196] All translations from Hebrew to English are from Ido Kenan, 🐓👯✌️🍼🐿️🍾*Show Intention to Rent Apartment, Says Judge*, ROOM404 (May 17, 2017), http://room404.net/eng/%F0%9F%92%83%F0%9F%8F%BB%F0%9F%91%AF%E2%80%8D%E2%9C%8C%EF%B8%8F%E2%98%84%EF%B8%8F%F0%9F%90%BF%EF%B8%8F%F0%9F%8D%BE-show-intention-to-rent-apartment-says-judge/.

> These included a "smiley", a bottle of champagne, dancing figures and more. These icons convey great optimism. Although this message did not constitute a binding contract between the parties, this message naturally led to the Plaintiff's great reliance on the defendants' desire to rent his apartment. As a result, the Plaintiff removed his online ad about renting his apartment.
>
> Even towards the end of the negotiations, in the same text messages sent at the end of July, Defendant 2 used "smiley" symbols. These symbols, which convey to the other side that everything is in order, were misleading, since at that time the defendants already had great doubts as to their desire to rent the apartment.
>
> The combination of these – the festive icons at the beginning of the negotiations, which created much reliance with the prosecutor, and those smileys at the end of the negotiations, which misled the Plaintiff to think the defendants were still interested in his apartment – support the conclusion that the defendants acted in bad faith in the negotiations.
>
> Even if I assume that the reason for the withdrawal from the negotiations was justified, the defendants should have notified the Plaintiff on 8 July, 2016 that they are not sure of their desire to rent the apartment, and that the Plaintiff should consider his steps accordingly. The defendants "dragged" the Plaintiff, "lulled" him, until he found himself close to the beginning of the lease period without having found a renter.

The Israeli court concluded that the parties did not form a contract, and U.S. courts would likely reach the same conclusion about that. However, the Israeli court awards relief to the landlord due to an obligation for prospective contracting parties to negotiate in good faith.[197] U.S. law rarely imposes that obligation, so this case would likely reach a different outcome in the U.S.

Applying Israeli law, the court says the emojis "support the conclusion that the defendants acted in bad faith." That conclusion seems dubious. While the prospective tenant's messages suggest some stalling, the emojis themselves do not necessarily demonstrate bad faith.

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[197] Contracts (General Part) Law, 5733-1973, 27 LSI 117 (1972-1973) at § 12. I am grateful to Amit Elazari for her help understanding the applicable Israeli law.

The court says that the smiley in the first message ["Good morning 😊"] helps "convey great optimism." In light of the multiple functions of emojis, the smiley probably did no such thing. The emoji might be emphasizing the "good" in "good morning;" or more likely, the emoji is performing discourse management to set a cheerful tone or as punctuation.

The message also has six sequenced emojis: a dancing woman (also called the red dress woman or salsa dancer); two women with bunny ears (also called the dancing girls emoji); the victory hand (also called the peace sign emoji); a comet; a chipmunk; and a bottle with popping cork. The court treats these emojis as reinforcing, i.e., amplifying the prospective tenant's enthusiasm for the lease.

Do the emojis reinforce the text? We lack some key pieces of information.

First, we do not know the exact versions of the emojis seen by the landlord and prospective tenant. Unlike most opinions, the court included emojis in the opinion. However, the court does not confirm that the emojis depicted in the opinion were the versions either party saw.[198] The emojis versions seen by the prospective tenant may have contradicted any perceived bad faith.

Second, the court assumes that the six emojis might have celebratory or optimistic meanings, but this assumption is incomplete. We do not know the emojis' meanings in Israel or the context of real estate lease transactions.

In the U.S., the champagne bottle, dancing woman and the women with bunny ears emojis sometimes signal celebration or joy. But what about the other three emojis? The judge cannot overlook them when interpreting the message; any more than the judge could ignore words in the text. The remaining three emojis do not clearly convey optimism about the transaction. The victory or peace hand signal *might* stand for victory in the sometimes-arduous search for housing, but other explanations are possible. In context, the comet and (especially) the chipmunk do not have a single obvious implication.

Third, we do not know how to interpret the emoji sequence. The emojis may be independent of each other, they may be sequenced to tell a story, or one or more emojis might modify the other emojis? If one or more emojis serves the mixed message function, it might completely reverse the message's meaning. So, the mystery about the comet and chipmunk meanings takes on greater

[198] My understanding is that Israeli small claims courts have relaxed evidentiary standards that may contribute to this. *See* Israel Courts Act, 5744-1984, 1123 LSI 198 (1984), §62.

importance. If one or both were intended to signal sarcasm or negativity, the court interpreted the message wrong.

The lack of definitive grammar rules increases the speculative nature of this discussion. Does the order of the emojis matter? Perhaps the comet modifies the chipmunk—or, given that Hebrew is read right to left, vice versa?

With respect to the two later text messages, the court probably incorrectly decoded the emoticons' function. The smiley emoticons might have been intended to signal that the deal was still on. Another plausible reading is that they were used as discourse management to blunt what the landlord might have interpreted as bad news (the prospective tenant's continued delays). Alternatively, the emoticons may have signaled embarrassment over the delay, or the usage may have been facetious.

Despite the court's dubious interpretation of the emojis and emoticons, the court's conclusion may be correct. Buyers (in this case, the prospective tenant) often string along vendors (in this case, the landlord), forcing vendors to decide if they should wait for the buyer or move on. To keep the landlord from pursuing other tenants, the prospective tenant signaled continued interest through repeated positive expressions of interest. The emojis and emoticons were essentially irrelevant to that conclusion; the court probably should have found bad faith even if the text messages had no emojis or emoticons.

G. Reducing Emoji Misunderstandings

So far, this part has enumerated many ways that emojis can create misunderstandings. However, misunderstandings are routine with new communications media. Typically, these problems fade over time through a combination of improved user sophistication (including education), voluntary industry initiatives, and incremental legal responses. This subpart looks at options that could help reduce misunderstandings.

The Platforms' Role

Currently, consumers have few good technical options if they want to reduce the risk of cross-platform misunderstandings.[199] Instead, they are functionally dependent on platforms to address this issue for them.

[199] For example, consumers can "jailbreak" their phones to install emoji sets from other operating systems (a process also called "rooting"), but this requires some technical sophistication and risks voiding the phone's warranty. *See* David Nield, How to use iOS emojis on Android, TechRadar,

To reduce misunderstandings, platforms could license each other's emoji implementations and then show users how their messages will look on the recipient's platform.[200] For example, a sender's platform could warn the sender that the recipient will see a different emoji implementation and 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.[201]

Even better, if the platforms cross-license, a platform could deliver the emoji depiction that the sender sent, rather than substituting in the recipient platform's emoji implementation. This would eliminate the confusion that comes from the sender and recipient seeing different things. It might also reduce the development of platform-specific dialects.

Some platforms, including EmojiOne[202] and Twitter,[203] have made their emoji sets available for free licensing. Thus, other platforms can already have the capacity to show incoming EmojiOne and Twitter emojis as the sender saw them.

The availability of freely-licensed emoji sets has other advantages. It might inspire emulation by other platforms, perhaps leading to an outcome where all platforms freely cross-license. Alternatively, perhaps one of the freely-licensed emoji sets will be adopted by many or most platforms rather than continuing to build and maintain their own idiosyncratic implementations, effectively eliminating cross-platform depiction diversity.

Legal regulation could accelerate resolution of misunderstandings caused by cross-platform depiction diversity. At its core, platforms' emoji substitution

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Aug. 5, 2016, https://www.techradar.com/how-to/phone-and-communications/mobile-phones/how-to-use-ios-emojis-on-android-1326089.

[200] Third-party software could also perform this function, but only for users who choose to install it. *See* Emojily (https://play.google.com/store/apps/details?id=com.hollinsky.emojily&hl=en), which lets Android users "input a string of text and emoji, and it will show you what an iOS user would see."

[201] *See* Miller, *Blissfully*, *supra* note 37 (suggesting that platforms could do more to help recipients see the version that the sender saw).

[202] EmojiOne has described 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.* However, more recent versions of the EmojiOne sets are not "open source"/free-to-use.

[203] Mike Davidson, *Open Sourcing Twitter Emoji for Everyone*, TWITTER (Nov. 6, 2014), https://blog.twitter.com/2014/open-sourcing-twitter-emoji-for-everyone.

constitutes a form of misrepresentation. In effect, the recipient's platform puts "words" into the sender's mouth that the sender didn't utter. If confusion results, arguably it's the platform's fault. The law could fix that.

There are relatively few comparable circumstances where senders and recipients misunderstand each other solely due to intermediating technology. Though not directly analogous because of human intervention, a similar issue came up often in the telegraph context.[204]

Telegraphy providers mediated messages between senders and recipients, and sometimes their operators made transmission errors that led to recipients getting incorrect messages without either the senders or recipients realizing it.[205] When a telegraph operator introduced errors into the messages, it could be liable for those errors in some situations.[206] However, courts often mitigated the sting of liability through limits on damages.[207]

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[204] In response to drafts of this article, a number of people suggested an analogy to Google Translate or other electronic translation services. If a person voluntarily runs messages through an automated translator and gets inaccurate translations back, that person has taken the risk. That's also true if a sender or recipient voluntarily configures their technology to automatically translate their outgoing/incoming messages. The more apt analogy would be if technology automatically but surreptitiously translated inbound/outbound messages without disclosing the intermediation to either side. I'm not aware of any legal cases addressing that circumstance, nor do I know of any technology currently doing this.

[205] A common fact pattern involved the telegraphy provider mistransmitting a seller's price quotation, prompting the recipient to place an order at the incorrect low price.

[206] *E.g.*, Romualdo P. Eclavea, *Transmission of Messages—Errors*, 59 CAL. JUR. 3D TELEGRAPHS & TELEPHONES § 37 (Nov. 2017 updates) ("A telegraph company contracts for accuracy when it agrees to send the very message delivered to it. The recipient of a message has the right to rely on it as correct and to act on it provided that there is nothing to put the recipient on inquiry, and he or she is honestly deceived."); Russell Davis et al, *Erroneous Transmissions*, 103 N.Y. JUR. 2D TELECOMMS § 116 (Nov. 2017 updates). *Cf. Telegraph Company as Agent of Sender so as to Bind Him as Against Addressee by Mistake in Transmitting Message*, 42 A.L.R. 293 (1926) ("In a number of jurisdictions the courts have accepted the so-called English rule that a telegraph company is not the agent of either party to a telegraphic message, and that, accordingly, if a message is erroneously transmitted, the sender is not bound by the error, but is entitled to stand on his message as delivered for transmission"). *See generally* WILLIAM L. SCOTT & MILTON P. JARNIGAN, A TREATISE UPON THE LAW OF TELEGRAPHS, ch. 4 (1868).

[207] Often, courts cited the classic English case Hadley v. Baxendale (1854) 9 Exch. 341, 156 Eng. Reprint, 145, 5 Eng. Rul. Cas. 502, as the basis for limiting the telegraph operator's damages to a refund of fees, not consequential damages. *E.g.*, *Measure of Damages for Failure, Delay, or Mistake in Transmitting or Delivering Telegram in Cipher*, 55 A.L.R. 1146 (1928).

If platforms are analogizable to telegraphy providers, we might have some basis for holding platforms liable for the undisclosed emoji substitution. That legal liability would prompt the platforms to make immediate changes.

While legal liability is an interesting thought, it's probably not the solution. First, platforms might skirt the issue by providing unhelpful warnings or imposing contract limitations. Second, such liability might squelch platform experimentation with emoji designs, stifling innovation. Third, and most importantly, Part III will explain the IP risks driving cross-platform depiction diversity, which possibly exposes platforms to liability for copying other platforms' depictions. Unless the IP risks are ameliorated, legal liability for emoji substitution may effectively force platforms into a no-win-situation where they face legal risks no matter what they do.

Even if they do not face legal risks for emoji substitution, platforms should do more to eliminate potential cross-platforms misunderstandings. Otherwise, their inaction hinders our ability to communicate effectively with each other and degrades user trust. Platforms also can easily do more to prevent intra-platform discrepancies[208] and cross-platform omissions.

Unicode's Role

Unicode's attitude about cross-platform depiction diversity is, at best, lackadaisical. Unicode 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.[209]

Unicode apparently thinks those outcomes aren't its problem. Yet, Unicode could, and should, be a catalyst to avoiding them.[210]

1) Unicode could provide more detailed and specific outlines, which might inhibit platform deviations. Unicode could also specify emoji colors.

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[208] *See* Florence Ion, *EmojiCompat For Android A Work In Progress*, EMOJIPEDIA BLOG, Mar. 13, 2018, https://blog.emojipedia.org/emojicompat-for-android-a-work-in-progress/ (describing how Google created an Android library to help app developers effectuate intra-platform compatibility).

[209] Unicode, *Emoji*, *supra* note 2.

[210] *See* Miller, *Blissfully*, *supra* note 37 (suggesting that Unicode should do more to standardize platform implementations).

2) Unicode could sanction platforms that make implementations with material variations from the official Unicode outline, such as Apple's water gun implementation of a pistol firearm. At minimum, if a platform's implementation substantially changes an emoji's meaning, Unicode should require the platform to stop using the Unicode-assigned number to that emoji. In other words, Apple can offer its users a water gun emoji; it just can't do so using Unicode's unique number assigned to the pistol emoji.

3) Unicode could coordinate licenses between platforms to let each other use their emoji implementations. This would let platforms show the senders' emoji depictions to recipients.

Dictionaries' Role

We urgently need authoritative emoji dictionaries. Without them, it's not possible to look up an unfamiliar emoji's meaning.[211] Also, it will be challenging to establish an emoji's historical meaning, such as a 2025 court case interpreting an emoji's 2018 meaning.

The small and tentative move by Dictionary.com has been a helpful start. Ideally, other traditional dictionary publishers will recognize emojis' importance and expand their existing dictionaries to cover them.[212] To supplement traditional dictionaries, we also need a crowdsourced dictionary (like Urban Dictionary)[213] that can capture the wide-ranging slang meanings of emojis.

III. How Intellectual Property Causes Emoji Misunderstandings

The prior part explained how misunderstandings can arise from emojis. Some of those misunderstandings are caused by the heterogeneity of emoji depictions, i.e., cross-platform diversity depiction. Standardization of emoji depictions would reduce or eliminate some factors contributing to misunderstandings, though other factors would remain. In a sense, emoji depiction standardization would eliminate some "easily" avoidable misunderstandings, and that would improve emojis' communicative functions.

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[211] Reverse Google image search (https://support.google.com/websearch/answer/1325808?hl=en) does not resolve any ambiguity about meaning. Instagram also allows searches of emojis accompanied by a hashtag, but it doesn't resolve meaning ambiguity. DeFabio, *supra* note 87.

[212] Any emoji dictionary must have a reverse image search to be useful.

[213] https://www.urbandictionary.com/.

Accordingly, this part considers an antecedent question: why aren't all emoji depictions standardized? What value does cross-platform depiction diversity serve? Standardized emoji symbols would seemingly reduce or eliminate many misunderstandings. Meanwhile, platforms incur costs to create and maintain their own proprietary implementations.[214] Why have emoji sets veered towards heterogeneity and proliferation rather than standardization?

These questions are a great emoji mystery. It's only possible to speculate about why cross-platform depiction diversity exists. Some possible hypotheses:

- Platforms historically developed and maintained their own emoji sets. Thus, the current diversity could be an artifact of historical decisions,[215] and eventually the industry will migrate towards future standardization that we just have not reached yet.
- Platforms deviate from Unicode's standards to advance their brands, such as Apple depiction of the headphones emoji as Apple EarPods.[216]
- The divergences reflect a platform's normative values, such as Apple's decision to display a squirt gun instead of a realistic pistol.
- The divergences reflect platform experimentation with user interfaces and design. Platforms constantly tinker with their user interfaces to improve their user experiences. In theory, experimentation by multiple platforms might help the most effective implementations to emerge[217] and then become adopted as industry-wide standards.
- Platforms adopt and maintain house styles to create a distinctive look-and-feel within the platform that acts as a product differentiator and customer retention feature.[218] As evidence of this hypothesis, Japanese

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[214] Benjamin Mayo, *App Review Rejecting Apps That Use Apple Emoji For User Interface Icons*, 9TO5MAC, Feb. 2, 2018, https://9to5mac.com/2018/02/02/apple-rejecting-apps-with-emoji/ ("Using a custom emoji set adds engineering complexity, can bloat app binary file size with additional resources, and third-party emoji sets are costly to create and/or license").

[215] Unicode's initial emoji set cobbled together several precedent emoji sets. Bosker, *supra* note 36. That created a transitional period where platforms progressively adopted Unicode's emoji set. However, this does not explain why they each did so idiosyncratically, nor does it explain why greater standardization hasn't taken place since then. For discussion about other emoji precedents, such as Dingbats, Webdings, and Wingdings, *see* LUCAS, *supra* note 16.

[216] Bosker, *supra* note 36.

[217] *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").

[218] *See* Bosker, *supra* note 36 (offering some evidence in support of this hypothesis).

> telecom company DoCoMo invented emojis but was denied Japanese copyright protection for their emoji set; yet DoCoMo's competitors chose to implement their own emoji sets rather than adopt DoCoMo's public domain emoji set.[219] Furthermore, some platforms may view emoji-related features, such as Apple's animoji function, as key competitive differentiators that increases consumer loyalty.[220] Because decoding differently depicted emojis takes time and mental energy, and because consumers may become emotionally attached to particular ways that emojis look, a platform could even view emoji set customization as a way of locking-in consumers who would incur those costs to switch to rivals.

It's possible to find some support for each hypothesis, and it's likely that the real story is a combination of hypotheses rather than just one. However, this part emphasizes another hypothesis: that cross-platform depiction diversity is caused by an IP rights thicket surrounding emojis. Individual emojis are potentially protectable under several intellectual property rights,[221] including copyright, trademark, design patents,[222] and publicity rights.[223] What if emoji depictions proliferate to navigate around this thicket of IP rights?

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[219] Jeff Blagdon, *How Emoji Conquered the World*, VERGE, Mar. 4, 2013, https://www.theverge.com/2013/3/4/3966140/how-emoji-conquered-the-world; LUCAS, *supra* note 16, at 45.

[220] Jeremy Burge, *Apple's Emoji Crackdown*, EMOJIPEDIA BLOG, Feb. 6, 2018, https://blog.emojipedia.org/apples-emoji-crackdown/.

[221] Unicode implicitly acknowledges this possibility: "All copyrights, trademarks and/or service marks associated with the emoji designs appearing on this website are the property of their respective owners. Any use of such copyrights, trademarks or service marks, including the reproduction, modification, distribution or republication of same without the prior written permission of the owner, is strictly prohibited." *Emoji Images and Licenses*, Unicode.org, http://www.unicode.org/emoji/images.html (last updated July 7, 2017).

For an overview of IP protection for emojis, *see* Eric Goldman & Gabriella E. Ziccarelli, *Intellectual Property Protection for Emojis*, WIPO MAG., ___ (forthcoming 2018).

[222] Emoji designs have appeared in issued design patents. *See*, *e.g.*, Water Float, US D793512 (a water flotation device where one side features a winky emoji design); Portion of a Display Panel with Smiley-face Icon, US D703224; Portion of a Display Panel with an Ambiguous Facial Expression Icon, US D703683; Display Screen with Icon, US D682882 (depicting four face emojis with the caption "frenemies"); Display Screen with an Icon, US D645880. There are likely hundreds of others.

[223] Unicode-coded emojis may not depict anyone living or dead, so they are unlikely to create publicity rights issues. However, users of the Bitmoji app [https://www.bitmoji.com/] can make customized emojis of people's faces, creating potential publicity rights issues.

The story goes like this: platforms deliberately make their emoji implementations look different from everyone else's implementations to (a) become eligible for IP protection for their idiosyncratic implementations, or (b) more likely, reduce the risk of being sued for IP infringement by someone else.[224] Copyright and trademark protection applies both to verbatim copying and similar variations (in copyright law, the test is "substantially similar," in trademark law it's "confusingly similar"). Thus, platforms seeking to avoid IP infringement will need to make their implementations sufficiently different from the implementations of all other platforms;[225] and platforms may be basing their decisions on their perceptions of risk, even if the actual risk of litigation is low.[226]

As evidence of the plausibility of this hypothesis, we have seen occasional efforts to enforce IP rights in emojis. For example, in 2018, Apple shut the door to its app store for apps that made specified unwanted uses of Apple's emoji set, citing its copyright interests.[227] Apple's move forced all of offending app developers to create their own emoji sets or adopt someone else's emoji sets. In other words, Apple's move discouraged app developers' efforts to standardize on Apple's emoji set.

Thus, if this story is correct, then IP law causes the proliferation of unnecessary differences in emoji implementations that reduce IP risk but increase user misunderstanding. In other words, IP is hindering emojis as tools for effective communication.

This part will review copyright and trademark protection for individual emojis and for emoji sets. It will then discuss the problems created by IP protection and possible ways to ameliorate these unwanted consequences.

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[224] Apple allegedly conditions apps' entry into its app store on adopting non-Apple emojis. "Apps must replace usage of Apple emoji with custom icons, or nothing at all, if they want their app to be approved." Mayo, *supra* note 214.

[225] *See* Hern, *Samsung*, *supra* note 166 ("every individual operating system needs to design its own emoji because the little glyphs are copyrighted, so it won't do to simply use the same ones as your competitor").

[226] *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 how industry participants make decisions about IP based on industry "custom," which may be more conservative than actual law).

[227] Karissa Bell, *Apple Is Telling Developers To Stop Using Emoji In Their Apps*, MASHABLE, Feb. 7, 2018, https://mashable.com/2018/02/07/apple-rejecting-apps-over-emoji; Burge, *supra* note 220.

A. Copyright for Individual Emojis.

Individual emojis may be protectable as copyrightable works. Copyright law protects "pictorial, graphic, and sculptural works,"[228] including "two-dimensional art."[229] As two-dimensional art, individual emoji designs presumptively qualify for copyright protection.[230] The U.S. Copyright Office has registered many individual emojis.[231]

Nevertheless, sorting through the scope of copyright protection for emojis is complicated. It is impossible to categorically describe which individual emojis qualify for copyright protection.

Overview of Copyrightability. Copyright applies to two-dimensional art, even fairly simple renderings. For example, corporate logos are copyrightable if they satisfy "the requisite qualifications for copyright" and embody "some creative authorship in its delineation or form."[232] 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.[233]

Individual emoticons are very simple graphical images. The most popular emoticons are just two or three keyboard characters. These simple emoticons

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[228] 17 U.S.C. § 102(5).

[229] 17 U.S.C. § 101.

[230] Scall, *supra* note 3, at 390; *compare* Ashton v. U.S. Cop'y Off., 1:16-cv-02305-APM (D.C. D.C. Mar. 8, 2018) (suggesting that pictograms, which should include emojis, do not qualify as "literary works").

[231] Eric Goldman, *Copyright Registrations for Emoticons and Emojis*, TECH. & MKTG. L. BLOG (May 31, 2017), http://blog.ericgoldman.org/archives/2017/05/copyright-registrations-for-emoticons-and-emojis.htm.

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

[233] COPYRIGHT COMPENDIUM, *supra* note 232, § 313.3D.

probably lack enough "pictorial expression" to become works of authorship. In contrast, extremely complicated emoticons might clear the threshold.

Copyrightability of Emojis. Although emojis frequently have more detail than emoticons, emojis may be quite simple. For example, Unicode's "face without mouth"[234] is one circle with two dots. In contrast, other Unicode-coded emojis are quite detailed, such as "clown face,"[235] "lion face,"[236] "bento box"[237] and "stadium."[238]

Typically, individual characters in a typeface are not copyrightable. The Copyright Office Compendium says that the Copyright Office "typically refuses claims based on individual alphabetic or numbering characters."[239] But despite their common oversight by Unicode, emojis are far more than characters in a typeface. Most emojis are original pictorial art; and emojis routinely contain more design elements, and impart more meaning, than individual letter or number characters. Therefore, emojis should not be considered equivalent to individual typeface characters for copyright purposes.

Though Unicode emoji outlines are intentionally simple by design, most outlines are sufficiently detailed to qualify for copyright protection. Even simple emojis, such as most face emojis, are probably copyrightable. More complex emojis are highly likely to be copyrightable.[240] Platform-specific

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239 COPYRIGHT COMPENDIUM, *supra* note 232, §906.4.

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

implementations of Unicode outlines often add color and additional details to the outline, which increases their copyrightability, even if the associated Unicode outline is not.

Even if a work is copyrightable, there are many other considerations to determine if the work can be successfully enforced and by whom.

Idea/Expression and Merger. Copyright protects only the expression of ideas, not the ideas themselves.[241] This principle is called the "idea/expression dichotomy," and represents the primary dividing line between patents, which protect ideas, and copyright, which protects expression. As glyphs, emojis express ideas; they don't constitute the ideas themselves. Therefore, presumptively emojis should be on the expression side of the idea/expression dichotomy.

However, 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."[242]

Many emojis are visual metaphors,[243] and there are limited visual clues that would successfully communicate the metaphor. Indeed, a Unicode-coded emoji must be "generic enough to relate to a category of entities…[but] not be too general so that it fails to relate to the category in question."[244]

Recall the "face without mouth" emoji. Within Unicode's design parameters,[245] there are only a few ways to express this idea. Many other Unicode outlines, especially face emojis, may pose similar merger doctrine problems.

In contrast, platforms can implement most Unicode emoji outlines in many ways. We've already seen this first-hand with the cow, astonished face, and pistol examples. This is the basis of the cross-platform depiction diversity discussed in this Article. As a result, platform-specific implementations of

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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.*

[241] 17 U.S.C. §102(b).

[242] COPYRIGHT COMPENDIUM, *supra* note 232, § 313.3(B).

[243] EVANS, *supra* note 3, at 94-95.

[244] *Id.* at 225-26.

[245] Unicode's design parameters are essential to this conclusion. There are countless ways to express a "face without mouth" in other contexts.

Unicode emoji outlines, and non-Unicode emojis, are less likely to have merger doctrine problems.[246]

Scènes à Faire. The s*cènes 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."[247] Thus, details in emojis that are stereotypical or routine may not contribute to copyrightability.[248]

For example, clown faces often have a bulbous nose, exaggerated lipstick, and crazy hair.[249] If we disregard those details in the Unicode clown face emoji, the remaining details look less substantial. Indeed, to make Unicode outlines widely understandable, the designs frequently rely on routine or stock elements.[250] Thus, s*cènes à faire* undoubtedly prevents the copyrightability of some Unicode outlines. Similarly, yellow-colored emoji faces have become standard,[251] so yellow coloring may not contribute to an emoji's copyrightability.

However, other Unicode emoji outlines and many platform-specific implementations add details that are not standard or routine and thus are not limited by s*cènes à faire*.

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[246] Scall, *supra* note 3, at 391-92.

[247] COPYRIGHT COMPENDIUM, *supra* note 232, § 313.4(I).

[248] *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."); *see also* Design Basics, LLC v. Lexington Homes, Inc., 858 F.3d 1093 (7th Cir. 2017) (no copyright protection for "attributes driven by consumer expectations").

[249] *See*, *e.g.*, *wikiHow to Be a Clown*, WIKIHOW, http://www.wikihow.com/Be-a-Clown#Getting_Your_Act_Together_sub (visited Jan. 31, 2018).

[250] *See* DANESI, *supra* note 3, at 71-79 (deconstructing how many popular emojis reflect common and to-be-expected visual metaphors).

[251] 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.

Face emojis now have multiple skin tones options, but that creates new concerns. *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/.

Putting the copyrightability issues together, it's likely that many individual emojis—Unicode outlines, platform-specific implementations, and non-Unicode emojis—are copyrightable.

Ownership of Unicode-coded Emojis. Assuming an individual emoji qualifies as copyrightable, who owns it?[252] In the case of Unicode-coded emojis, answering the question requires parsing overlapping ownership interests between Unicode outlines and platform-specific implementations.

With regard to ownership of Unicode outlines, the Unicode Consortium does not expressly state its position. It says that Unicode "is not a designer or purveyor of emoji images" and disclaims ownership in each platform's implementation of the outline.[253]

What can we infer about the Unicode Consortium's ownership position? It's not clear which (if any) outlines were created by Unicode; the remainder presumably were created by third parties and provided to Unicode under unspecified license terms.

In terms of Unicode outlines' copyright status and ownership, the options include:

- Unicode emoji outlines are not copyrightable and thus in the public domain;
- Unicode emoji outlines are copyrightable, but Unicode (or its licensors) has dedicated any of its copyright interests to the public domain;
- Unicode's emoji outlines are copyrightable, but Unicode (and its licensors) freely licenses the outlines to all comers.

How does this affect platforms' claims for copyrightability of their implementations of Unicode outlines? If the Unicode outlines are public domain,

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[252] Copyrights to emoticons (for the few that are copyrightable) and non-Unicode emojis will be owned by their authors or employers/assignees. 17 U.S.C. § 201.

[253] *Emoji Images and Licenses*, Unicode.org, http://www.unicode.org/emoji/images.html (last updated July 7, 2017). Elsewhere, Unicode has said that they do not incorporate new emoji images that are "legally encumbered." Bromwich, *supra* note 108.

With respect to fonts, Unicode says "The fonts and font data used in production of the Unicode Standard may not be extracted, or used in any other way in any product or publication, without permission or license granted by the typeface owner(s)." *Font Contributors Acknowledgement*, Unicode (last updated Nov. 20, 2017), https://www.unicode.org/charts/fonts.html. This page doesn't mention emojis, and there's no independent way to determine if any of the emoji designs are intended to be covered by this statement.

platforms still could have copyrights in their implementations if they add sufficient original material to qualify for copyrightability.[254]

If Unicode outlines are copyrightable and Unicode and its licensors haven't disclaimed the copyrights, platforms can own their specific implementation only as derivative works of the Unicode outlines, subject to any license terms permitting creation and dissemination of the implementations.[255]

In this circumstance, Unicode and its licensors could require platforms to conform strictly to the outlines as a condition of creating derivative works. This might reduce or eliminate cross-platform depiction diversity because unauthorized implementations would expose the platforms to copyright infringement.

However, a strict copyright enforcement position alternatively might *exacerbate* cross-platform problems in one of two ways. If a platform felt it needed to create idiosyncratic emoji depictions (for whatever reason), it might opt-out of Unicode altogether and convert to non-Unicode emojis. Or, a platform might feel compelled to make such radical changes to the Unicode outlines that it cannot be accused of copying or creating derivative works of those outlines, leading to more situations like Apple's water gun implementation of the pistol emoji outline. Perhaps Unicode's relaxed copyright position about derivative works does more good than harm.

Because platforms base their implementations on Unicode outlines, platforms can only claim copyright for their idiosyncratic modifications or additions to the outlines. To be copyrightable, a "derivative work" must have changes that, "as a whole, represent an original work of authorship."[256] Accordingly, minor variations to the emoji outline, such as the addition of a single color and slight changes to a few details, may not be enough to make the changes copyrightable. Doctrines like merger and s*cènes à faire* could further limit the copyrightability of a platform's emoji implementation. 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).

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[254] *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).

[255] 17 U.S.C. § 103(a).

[256] 17 U.S.C. § 101. The statutory language has some internal inconsistencies that sometimes suggest broader copyright protection than that.

This table recaps the copyright ownership possibilities for Unicode-coded emojis and platform-specific implementations of them:

	Platform Changes Copyrightable	**Platform Changes Not Copyrightable**
Unicode/Licensors Own Emoji Outline Copyright	Unicode/licensors own emoji outlines; platform owns derivative works	Unicode/licensors owns emoji outlines; platform has no separate copyright interests
Emoji Outlines Not Protected by Copyright	Platform owns its implementation as modification of public domain material	Emojis are public domain

Infringement. If an emoji is copyrightable, then the copyright owner can enforce against both identical and "substantially similar" copying. However, for copyrighted works with few details, courts usually 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."[257] In many cases, minor variations to emojis will be enough to avoid infringement claims.[258]

Fair Use. If the plaintiff establishes a prima facie case of infringement, the secondary use may still be excused as fair use.[259] Fair use is an equitable, multi-factor, and fact-specific defense, so its availability will depend on the specific circumstances.

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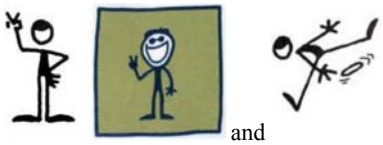
[257] Blehm v. Jacobs, 702 F.3d 1193 (10th Cir. 2012).

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



and

[259] 17 U.S.C. § 107.

Still, it's likely many secondary uses of individual emojis will qualify as fair.[260] Emojis are small works of visual art, which means that they are not easily referenced without depicting the entire work. Furthermore, as discussed below, individual emojis play an important role facilitating communication; and copyright law can undermine that role if it restricts the ability to reference an emoji for its accepted meaning or forces depiction diversity that exacerbates misunderstandings.

Conclusion on Copyright. Many individual emojis are eligible for copyright protection, though doctrines like the idea/expression dichotomy, merger, s*cènes à faire*, and fair use make it hard to predict exactly when emoji copyrights could be successfully enforced. It's also unclear if the copyright owner would be Unicode, a platform, both or neither.

B. Trademarks in Emojis.

Trademark law can protect "any word, name, symbol, or device."[261] This broad scope includes emojis. For example, although "there is evidence of the widespread, ornamental use of the smiling face design that would lead consumers to believe that it is not serving a trademark function,"[262] it is possible to develop protectable trademark interests in a smiley face.[263] At the same time, widely recognized emojis could be categorically generic;[264] or if they become trademarked, they are at constant risk of genericide when consumers interpret the symbols for their generic meaning rather than as source identifiers of any individual vendor.

Unlike copyrights, the limited expression in an individual emoji does not inhibit trademark protection (so the face without mouth emoji could qualify for trademark protection). The U.S. Trademark Office has issued trademark

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[260] *Cf.* Michael Adelman, *Constructed Languages & Copyright: A Brief History and Proposal for Divorce*, 27 HARV. J. L. & TECH. 543, 556-58 (2014) (discussing fair use for "constructed languages").

[261] 15 U.S.C. § 1127.

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

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

[264] *See* Viestinnan Keskusliitto ry v Mattila, KHO, 2012:64, unreported KHO, (Fin), Finnish Supreme Administrative Aug. 13, 2012—Mattila (the :) emoticon was generic and unregistrable); Lena Marcinoska, *From Smiley to Sad Faces—Registering Emoticons as Trademarks*, INTA BULL., Dec. 15, 2017, https://www.inta.org/INTABulletin/Pages/Registering_Emoticons_as_Trademarks_7221.aspx.

registrations for emoji designs.[265] Also, brand owners can create or license non-Unicode emojis (sometimes called "branded emojis") incorporating their trademarked designs or logos.[266]

Emojis become protectable trademarks only when they distinguish goods or services in the marketplace (the "use in commerce" requirement).[267] The use in commerce requirement plays a crucial gatekeeping role in trademark law. Using emojis in editorial contexts, such as platforms providing emoji sets to their users or users adding emojis to their 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 their marketplace offerings, such as in advertising copy.[268]

The use in commerce requirement also means that trademark ownership accrues to whomever makes the requisite use in commerce, and that may be a different party than the emoji's copyright owner. However, if the emoji symbol is also copyrighted, then the putative trademark owner likely needs permission from the copyright owner to avoid committing copyright infringement.

Trademark rights usually accrue only in market niches where the owner made a use in commerce. Accordingly, multiple parties can have trademark rights in the same emoji design, just like there are many overlapping trademark owners for terms like "apple," "national," "sun," and "united."

An emoji trademark will restrict other parties from using that emoji symbol in their own product promotion efforts. This restriction covers the use of both identical and confusingly similar emojis.[269] It is unclear how to apply trademark

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[265] Eric Goldman, *Trademark Registrations for Emojis*, TECH. & MKTG. L. BLOG (June 12, 2017), http://blog.ericgoldman.org/archives/2017/06/trademark-registrations-for-emojis.htm; Markinoska, *supra* note 264 (registrations for emoticons).

[266] *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.

[267] 15 U.S.C. § 1127.

[268] 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…." *Id.* (some formatting omitted).

[269] 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 same meaning (i.e., are intended to communicate the same emotion), differences in "sight" could

law's "confusingly similar" legal standard to situations like the platform-specific implementations of Unicode-coded emojis. If Unicode standardization worked properly, platform-specific implementations *should* look similar to each other.

Although emojis are protectable by trademark law, most uses of emojis—such as users adding an emoji to their non-commercial social media messages—typically will not constitute trademark infringement. Trademark law usually requires that the alleged infringer used the trademark commercially. However, because trademark law's definition of commercial activity is unclear, and as the number of emojis protected by trademark law grows rapidly, there will be increasing trademark disputes over identical or confusingly similar emojis.[270]

C. Ownership of Emoji Sets

In addition to individual emojis, emoji sets may be protectable as well.

Copyrightability of Emoji Sets. Platforms may be able to claim copyright protection for their emoji sets.[271] Third party IP owners might also create emoji sets using their existing brands and then license those sets to platforms, such as the Pusheen[272] or Peanuts[273] stickers on Facebook.

Copyright law views emoji sets as compilations, and compilations are protectable when their selection, arrangement or coordination demonstrates sufficient authorship.[274] Simply mirroring Unicode's emoji set would not create a copyrightable compilation, but some emoji sets are highly curated. For example, the children-focused social network Lego Life eliminated all emojis that could be construed as negative.[275] That kind of editorial curation might support a compilation copyright.

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nevertheless cause consumers to distinguish the two depictions. (The "sound" element should be irrelevant in the context of emojis).

[270] *E.g.*, Kim Masters, *Frowny Face: Sony Pictures Faces Legal Spat Over 'The Emoji Movie'*, HOLLYWOOD REP., June 1, 2016, https://www.hollywoodreporter.com/news/frowny-face-sony-pictures-faces-898523.

[271] However, it's worth noting that the very first emoji set, by DoCoMo, was denied copyright protection in Japan due to its simplicity. LUCAS, *supra* note 16, at 45.

[272] *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/.

[273] *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/.

[274] COPYRIGHT COMPENDIUM, *supra* note 232, § 312.2.

[275] Barrett, *supra* note 45.

However, compilation copyrights provide only limited protection—perhaps only protecting against verbatim (or near-verbatim) copying of the compilation's selection, arrangement, or coordination.[276] Thus, secondary users probably can develop non-identical emoji set compilations without infringing a compilation copyright.

Copyright Protection for House Styles. Platforms also may be able to claim a copyright in their "house styles;" *i.e.*, the idiosyncratic design elements they use consistently across their emoji set.[277] As two examples, Google used a half-moon/"gumdrop" outline instead of Unicode's circle outline;[278] and Microsoft uses a thicker outline for its emojis than other platforms.[279]

A house style's rulesets perform the same function as typefaces.[280] Typefaces are 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."[281] Both typefaces and house styles modify Unicode-standard characters for display. (Of course, non-Unicode emojis aren't limited to Unicode-coded emojis). Emoji house styles modify graphical images, not standard characters, but the rulesets are equally abstract. Typefaces are not copyrightable,[282] so that might suggest that emoji house styles are not copyrightable either.

More likely, house styles won't be independently copyrightable, but they may contribute to the copyrightability of individual emojis and might help bolster the copyrightability of emoji sets as compilations.

Trademark Protection for House Styles. Apart from the trademarkability of any individual emoji, a platform's house style can be trademarkable (most likely as

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

[277] *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").

[278] Elizabeth Stinton, *Say Goodbye to the Blob. Google's New Emoji Have Arrived*, WIRED, Sept. 1, 2017, https://www.wired.com/story/google-emoji-redesign/.

[279] Unicode, *Full Emoji Data*, *supra* note 38.

[280] Scall, *supra* note 3, at 392-94.

[281] COPYRIGHT COMPENDIUM, *supra* note 232, § 313.3(D).

[282] 37 C.F.R. § 202.1(e); Jacqueline D. Lipton, *To © or Not to ©? Copyright and Innovation in the Digital Typeface Industry*, 43 U.C. DAVIS L. REV. 143 (2009); Blake Fry, *Why Typefaces Proliferate Without Copyright Protection*, 8 J. ON TELECOMM. & HIGH TECH. L. 425 (2010).

trade dress) because it defines the platform's "family of trademarks."[283] This trademark could restrict others from commercially replicating the house style, even on emojis that the trademark owner has not implemented.

D. Emoji Ownership Hinders Communication

As this part has shown, emojis will qualify for copyright and trademark protection. This creates an ever-growing thicket of IP rights around emojis. IP thickets are not new, but this particular thicket has unusually important implications for human communication. Because of the stakes involved, the key players in the IP system, including the Copyright Office, Trademark Office and courts, must apply IP law to emojis with heightened care and thought. This subpart explains why those IP institutions should interpret IP laws to exclude emojis as much as possible.[284]

IP law thwarts emojis' communicative potential in several ways. First, emojis have the capacity to transcend existing language barriers and be understood by speakers of diverse languages[285] (or even illiterate people). However, if IP law drives unnecessary depiction diversity, it creates a new "language" barrier of platform-specific dialects.[286]

Second, IP's monopoly-style protection is generally justified by its production of social welfare benefits,[287] but preventing the standardization of emojis across platforms undermines human communication with few or no

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[283] *See* 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:61 (4th ed.) (discussing word mark trademark families).

[284] Scall, *supra* note 3, at 401 ("society would benefit most if emoji were categorically denied copyright protection").

[285] 2015 Emoji Report, *supra* note 8 (giving examples, such as "Emoji Flashcards for International Travel," of how emojis could enable universal communication across borders and existing languages); DANESI, *supra* note 3, at vii (emojis allow "people from different linguistic and cultural backgrounds to communicate and interact with each other more concretely, thus making it possible to facilitate intercultural communication by transcending the symbolic barriers of the past…"); *id.* at 169 ("emojis are products of an increasingly expanding global culture, where a common ground of symbolism is developing and spreading throughout the culture"); EVANS, *supra* note 3, at 20 ("Emoji is, today, incontrovertibly the world's first truly universal form of communication.").

[286] Scall, *supra* note 3, 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.").

[287] *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."

countervailing social benefits accruing to the IP owners.[288] To communicate accurately across platforms, people must learn the meaning of many different variations of the same "words;"[289] or suffer the frustrations and social losses occasioned by misunderstandings due to the depiction diversity.[290] Thus, IP should facilitate standardization of emojis, but instead it's causing forking.

Like words and short phrases, emojis cannot be divided into smaller components that communicate the same meaning. (Indeed, emojis and words/short phrases can substitute for each other).[291] Thus, like words and short phrases, emojis act like communication building blocks for larger messages like sentences and paragraphs.[292]

That makes IP protection for emojis more of a doctrinal anomaly than a routine application of the doctrines. Trademark law protects words and short phrases, but only against limited commercial activity. Copyright law does not protect words and short phrases at all.[293] Yet, trademark and copyright often will protect emojis, despite their analogous status as key expressive building blocks.[294] Property-like control over the smallest building-block units of communication is historically unprecedented in human civilization.[295]

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[288] *Cf.* Jeanne Fromer, *An Information Theory of Copyright Law*, 64 EMORY L.J. 71 (2014) (discussing how copyright law can advance, or impede, clear and efficient communications).

[289] Another analogy might to imagine that each platform depicted letter and number characters slightly differently. This is reminiscent of the decoding challenge we now face when trying to read old English texts when letter "s" had a short and long form, depicted by the symbol ſ or ſ.

[290] *See* Kirley & McMahon, *supra* note 6 ("if every digital platform had to create its own computer code for emoji in order to avoid infringing another platform's copyright, then users on different platforms would never be able to send each other emoji").

[291] For example, platforms may auto-suggest emojis as substitutes for typed words. *See supra* note 27.

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

[293] COPYRIGHT COMPENDIUM, *supra* note 232, § 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").

[294] See, *e.g.*, DANESI, *supra* note 3, at 51-52.

[295] Viestinnan Keskusliitto ry v Mattila, KHO, 2012:64, unreported KHO, (Fin), Finnish Supreme Administrative Aug. 13, 2012—Mattila (rejecting trademark protection for the :) emoticon because of its widespread use and recognition and analogizing the symbol to the @ symbol).

Providing IP protection for emojis provides IP owners with an unprecedented degree of control over how people talk with each other.[296] It's as troubling as saying Microsoft can own the word "windows"[297] and collect payment for, or block usage of every instance of, the word in every context. "Weaponizing" words—and their emoji equivalents—through IP protection can substantially harm free speech and communication generally. Courts and the Copyright and Trademark Offices can de-weaponize emojis by applying appropriate skepticism to IP protection for emojis[298]—and appropriately respecting emojis' importance to how we communicate.

Conclusion

Emojis are an exciting and important addition to our communicative toolset.[299] They are a new way of expressing ourselves.[300] In particular, by filling in gaps of our existing communications options, emojis have the capacity to help us communicate more precisely.[301] As Prof. Vyvyan Evans said, "Emoji actually

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[296] *Cf*. EVANS, *supra* note 3, at 63 ("Emoji is unlike a natural language in that it is controlled by powerful multinationals whose representatives sit on the various Unicode committees.").

[297] *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).

[298] Preferably through boundary-setting doctrines like merger and s*cènes à faire* than via defenses, like fair use, that impose the burden of proof and high costs on defendants. *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).

[299] 2015 Emoji Report, *supra* note 8 (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"); 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.").

[300] Tigwell & Flatla, *supra* note 171 ("Emoji extend the ways in which people can express themselves").

[301] *See* 2015 Emoji Report, *supra* note 8 (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"); DANESI, *supra* note 3, at 15 (emojis provide "nuance in meaning to the tone of the message"); EVANS, *supra* note 3, at 33 ("72 per cent of British eighteen to twenty-five-year-olds believe that Emoji makes them better at expressing their feelings").

enables users to better express their emotions, and even appears to help them become more effective digital communicators."[302]

Unfortunately, the law seems destined to thwart emojis' communicative potential. Instead of emojis improving the precision of our communications, emojis increase our misunderstandings—because intellectual property law is forcing unnecessary and unhelpful depiction variations. As one commentator said: "We're living in a scary new world, one where we cannot trust that emoji we're sending is truly the emoji that will be delivered."[303]

Fears about the trustworthiness of emojis—which are based on legitimate concerns—will perniciously inhibit our expressive activities. If we embrace emojis as building blocks of human communication, the legal path becomes clear. We want to encourage standardization and reduce discrepancies, and that will require minimizing the effects of IP thickets on emojis.

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[302] EVANS, *supra* note 3, at 138.

[303] John-Michael Bond, *You May Be Accidentally Sending Friends a Hairy Heart Emoji*, ENGADGET, Apr. 30, 2014, https://www.engadget.com/2014/04/30/you-may-be-accidentally-sending-friends-a-hairy-heart-emoji/; *see also* Tigwell & Flatla, *supra* note 171 ("Misinterpretation of messages because of different emoji understanding could lead to a communication breakdown, and in some cases may damage relationships. Furthermore, a more positive CMC experience can be achieved if the differences in people's interpretations are reduced.").