



If it looks like a duck: Emojis, Emoticons and Ambiguity

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“I got an email once from an ex-girlfriend. It was completely innocuous, but she signed it with a “wink.” A semicolon and a right parenthesis. ;) I got into a six-hour argument

[with my wife] over this semicolon. Had it been a regular colon, two eyes open :) there’s no argument there. Wink? ;) All of a sudden: ‘you’re sleeping with her, aren’t you?’”¹

Emojis and emoticons are popping up in courts everywhere, and people are landing in hot water.² They can’t simply be overlooked by courts, because emojis and emoticons say a lot about the sender’s intent. Ignoring them in a document would be like calling a witness to the stand and ignoring his or her facial expressions and body language.³

While judges have always had to interpret ambiguous language, emojis offer something new. Emojis fail the “duck test:” If it looks like a duck, and quacks like a duck, then it is probably a duck.⁴ Emoji meanings can be so puzzling that a “duck” emoji may mean anything but a duck. This article is a primer on emojis, emoticons and ambiguity.

Emojis and Emoticons

Originating in Japan in 1998, emojis are small digital images used to express an idea or an emotion in electronic communications.⁵ The term emoji is Japanese for “picture character.” Picture (pronounced “eh”), and character (pronounced moh-jee).⁶ The most popular emoji today is “Face With Tears of Joy” 😄.⁷ The least popu-

lar is the aptly named “Squared CJK Unified Ideograph-6709” 囧.⁸

Emojis should not be confused with the much older emoticons.⁹ “Emoticons,” a blend of the words “emotion” and “icon,” are facial expressions made from keyboard characters you tilt your head to the left to read. The most common emoticons include “Wink” ;) “Frown” :-(“Face with Stuck-out Tongue” :p and “Surprise” :o.¹⁰

Kaomoji, which is Japanese for “face character,” is an emoticon variation: They are bigger, more complicated and do not require you to move your head to read them. Popular kaomoji expressions are: “whatever” -_(ツ)_/_, “doubt” (→_→), “angry” (>_<), “embarrassed” (#^.^#), and “confused” -\(^_0)/.¹¹

Bitmoji is a phone app that allows you to create a surprisingly accurate cartoon of yourself to add in emails and texts. Bitmojis are much larger than emojis, and the extra size gives Bitmojis a lot more personality and emotion to add to messages and on social media.¹²

Today, roughly 70 percent of the public uses some type of social media.¹³ Social media has changed many of the ways in which we communicate. For one thing, social media has increased our use of emojis. One report found that more than 92 percent of people use emojis on social media.¹⁴

Emojis have spread to the business world, where nearly half of workers add emojis to professional communications, and companies use them to increase sales and brand awareness.¹⁵ Taco Bell cooked up a highly publicized petition to introduce the 🌮 “Taco” emoji, and you can order your next Domino’s with the 🍕 “Slice of Pizza” emoji.¹⁶

Paradoxically for an article on emoji ambiguity, they are increasing in use because they help you to better express and be understood in the digital world.¹⁷ Emojis add human emotion into electronic communications, allowing us to write and interpret meanings beyond the actual words written.¹⁸

Contract Interpretation and Ambiguity

Emojis may revive the old saying “a picture is worth a thousand words,” but understanding them can be tricky. Because disputes can be won or lost deciphering terms in an agreement, it is helpful to review the basic rules governing contract interpretation.

Marital agreements are interpreted like any other contract.¹⁹ Basic interpretation begins with the plain language of the contract, because the contract language is the best evidence of the parties’ intent at the time they signed the contract.²⁰

Courts are not supposed to rewrite terms that are “clear and unambiguous.”²¹ As a general rule, evidence outside the contract language, which is known as parol evidence, is only allowed to be considered when the contract language contains an ambiguity.²²

Ironically, the “parol evidence rule” is itself ambiguous. The parol evidence rule is not a rule, or found in the Evidence Code, but is substantive law. The parol evidence rule states that evidence of a prior or contemporaneous oral agreement is inadmissible to vary or contradict the unambiguous language of a valid contract.²³

Anyone seeking to introduce extrinsic evidence, which is any evidence



outside a fully integrated contract, must first establish that a contract is ambiguous.²⁴ A contract is ambiguous when its language is reasonably susceptible to more than one interpretation.²⁵

Florida courts distinguish between latent and patent ambiguities. A latent ambiguity is when the language in a contract is clear, but some extrinsic fact creates a need for interpretation between two possible meanings.²⁶ In other words, a latent ambiguity is when an agreement is clear, but does not specify the rights or duties of the parties.

A patent ambiguity is a glaring one, and it is obvious from the face of the contract. Patent ambiguities usually arises from the use of defective, obscure or insensible language, or from two or more instances of language in the same instrument which contradict each other.²⁷

A major difference between patent and latent ambiguities is that extrinsic evidence is admissible to explain latent ambiguities, but is not admissible to interpret patent ambiguities, because it would allow courts to rewrite a contract.²⁸

There is an exception for introducing extrinsic evidence, which exists where the patent ambiguity concerns “identity, capacity, or the parties’ relationship with one another.”²⁹ Moreover, the “patent” and “latent” ambiguity distinction does not apply when determining the capacity of the parties to a contract.³⁰

Courts throughout the country take different approaches to extrinsic evidence when a contractual ambiguity is claimed.³¹ The rule differentiating between patent and latent ambiguities has been criticized.³² The growing trend is to admit parol evidence to probe the parties’ intent, irrespective of the type of ambiguity.³³

Petitioner’s Exhibit A: 😊

The inherent ambiguity of emojis and emoticons is why they are increasingly showing up in court. At the high-tech “Silk Road” trial,

Ross Ulbricht was charged with running an online, black market website that traded in drugs and murder. His pseudonym was: The Dread Pirate Roberts.

During the Silk Road trial, a New York federal judge had to rule on how to publish emoticons in evidence to a jury. Ulbricht’s attorney argued that chats, posts and emails in evidence should be shown to jurors, instead of merely read, because emoticons changed the messages’ meaning. The judge agreed, ruling: “[t]he jury should note the punctuation and emoticons.”³⁴

A Montana federal court found that a “Smiley” emoticon :) converted an email into a joke, and the email meant the opposite of what it said. A defendant claimed his attorney violated the attorney-client privilege and the Sixth Amendment by sending the prosecutor an email joking “stipulate that my client is guilty. :)” The court found the email frivolous because of the “Smiley” emoticon.³⁵

A New Jersey court also had to interpret the “Smiley” emoticon. An employee, terminated after an extended medical leave, claimed she was wrongfully fired.³⁶ Videos showed the employee carrying boxes while on leave. The employer argued the claim should fail because the employer thought the employee was abusing her leave. The court rejected the argument, noting in part, the employer’s emails used “Smiley” emoticons when discussing the firing.

A Michigan federal court had to rule on the impact of the “Face with Stuck-out Tongue” emoticon :P.³⁷ A law student investigated for online stalking and harassing sued after prosecutors dropped the charges. He claimed the investigation was without cause, arguing his messages shouldn’t have been taken seriously because of the :P emoticon. The judge held the emoticon did not “materially alter the meaning of the text message.”

A Michigan appellate court threw out a defamation case based on an

emoticon.³⁸ After a mountain of salt rock was stolen from city storage, a worker named Gus argued he was falsely accused of the theft in an online message board when a commentator wrote: “because Gus needs more tires to sell to get more money for his pockets :P.” The court found that use of the :P emoticon made it clear the commenter was joking.

An Israeli court awarded damages based on emojis. A prospective tenant sent a landlord a text in response to an ad stating: “Good morning 😊 we want the house 🧑🏫 🍷 🍷 🍷 🍷 🍷 just need to go over the details. . .” The landlord removed his ad, then the tenant disappeared. The court awarded the landlord 8,000 shekels after it found: “Although this message did not constitute a binding contract . . . [it] naturally led to the Plaintiff’s great reliance on the Defendants’ desire to rent his apartment.”³⁹

Is that a smile or something else? 😊

There are unique issues with emojis, rendering them hard to interpret. For one thing, there’s no definitive source as to what emojis mean. The Unicode Consortium is a non-profit trying to standardize emojis so they work across various operating systems.⁴⁰ However, Unicode is limited, and may not consider slang, cultural and geographic differences.⁴¹

Emojis are also small, making them hard to read. Within each emoji are subtle distinctions, making them easy to confuse. There are also a lot of the same type of emojis. For example, Unicode lists *hundreds* of “Smiley & People” emojis.⁴²

The confusion is not limited to their size and variety though. Interpreting an emoji can depend on what kind of device on which it is viewed. For example, a 24-inch computer monitor displays things differently than a four-inch phone screen.

Emojis are created so quickly, people may not know what they are sending and receiving. Apple recently

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announced the release of hundreds of new emojis.⁴³ As new emojis are introduced, it takes time to learn their meanings. There are also regional, cultural, platform and slang differences that can change over time.⁴⁴

In the Israeli case, the prospective tenant used a sequence of emojis. A string of emojis requires the reader to identify each emoji and then decipher the sentence as a whole. There are no grammatical rules such as: “👁️ before ε except after 🗨️” to explain whether a “Chipmunk” emoji gets placed before a “Comet” emoji in sentences starting with a “Ballerina” emoji.

A few other examples show how the meanings of seemingly obvious emojis can have more than one interpretation for various reasons, rendering them ambiguous:



The “Thumbs Up Sign” emoji is a positive gesture in the United States, and an accepted way to signal approval. But, in many countries, the “Thumbs Up Sign” emoji is considered obscene.⁴⁵



The “Open Hands” emoji is a way of saying “stop” and “back off” in the United States. However, the “Open Hands” emoji, originally from Japan, represents openness in Japan.



The “Folded Hands” emoji was originally designed to symbolize “please” and “thank you,” and it still does in Asia. However, in the United States it means: “I’m praying,” and is frequently and mistakenly used as a congratulatory “high-five.”⁴⁶



The “Pile of Poo” emoji is a pun on the Japanese word for excrement (unko), which starts with the same “oon” sound as the word for “luck.” The emoji is complimentary in Japan.⁴⁷ In the United States though,

the emoji is definitely not complimentary. Strangely, Canadians use the emoji the most.



The “Eggplant” emoji is based on a species of Japanese eggplant that is longer and thinner than the American variety.⁴⁹ Unlike pizza, you will not be able to order one at Food Fair using the “Eggplant” emoji anytime soon. That’s because the “Eggplant” emoji is a phallic reference in the United States.⁵⁰ The emoji is banned on some forums.⁵¹



Owners of iPhones use the “Peach” emoji as a euphemism for the buttocks because of how it appears on their phones. Samsung, Google and others companies vary the design of their “Peach” emojis. While emojis are standardized by Unicode, variations exist.⁵² Since “Peach” emojis vary slightly on different types of phones and applications, users may not see or know of other associations.⁵³

Conclusion

The “duck test” doesn’t work for emojis because you can’t understand their meaning just by looking at them. People use emojis in ways that have nothing to do with the physical objects they represent, or even what typographers intended. It’s okay, you’re not the only one who can’t figure this one out: 🤖.⁵⁴ After all, emojis’ inherent ambiguity is one reason why they’re increasingly becoming evidence in court.

Open your 🧐. Emojis are taking over the 🌐. Grab a 🖋️ and 📄 this down, or 📧 this article. To 🗨️ effective advocates for our 🗨️, and make our law practices 🗨️, we can’t 🗨️ from, or 🗨️ away from these 🗨️ hieroglyphs. It’s 🗨️ to 🗨️ up on emojis, or you will be 🗨️.

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Endnotes

- ¹ Gary Gulman, *Undone by a semicolon*, Comedy Central Records (2012).
- ² Mike Cherney, *Lawyers Faced with Emojis and Emoticons Are All “(ಠ_ಠ)”*, Wall Street Journal (Jan. 29, 2018).
- ³ For the witness comparison, see Benjamin Weisser, *At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji*, New York Times, (Jan. 28, 2015).
- ⁴ See *The Florida Bar v. Neiman*, 816 So. 2d 587, 599 (Fla. 2002).
- ⁵ *The People v. L.F.*, A142296, at note 2 (Cal. Ct. App. Jun. 3, 2015).
- ⁶ Yuri Kageyama, *Shigetaka Kurita: The man who invented the emoji*, Toronto Star (Sep. 21, 2017) (Kurita designed the original set of emojis in 1998 for a Japanese phone carrier whose mobile internet service limited messages to 250 characters, requiring some kind of shorthand.)
- ⁷ The emoji means “crying tears of joy”, and was named “word of the year” by the Oxford English Dictionary in 2015. See Elise Moreau, *What Are the Most Popular Emojis Used on Social Media?* Lifewire (Sep. 12, 2017) <https://www.lifewire.com/what-are-the-most-popular-emoji-3485892>.
- ⁸ The emoji means “to own”, “possess”, or “Not Free of Charge”. See *Ten emoji basically no one ever uses*, Swiftkey.blog (Jan. 12, 2016) available at <https://blog.swiftkey.com/ten-emoji-basically-no-one-ever-uses/>
- ⁹ The ancient Hittites used smiley emoticons on their pottery at least 4,000 years ago. See Amanda Borschel-Dan, *History’s ‘oldest smile’ found on 4,000-year-old pot in Turkey*, The Times of Israel, (Jul. 19, 2017).
- ¹⁰ See *U.S. v. Cochran*, 534 F.3d 631, 632 (7th Cir. 2008).
- ¹¹ Eric Goldman, *Surveying the Law of Emojis*, Santa Clara University School of Law, Legal Studies Research Papers Series, No. 8-17, (May 1, 2017).
- ¹² Brenda Stolyar, *Thanks to Bitmoji Deluxe, my Bitmoji now gives me anxiety*, Digital Trends (Feb. 12, 2018) available at <https://www.digitaltrends.com/features-category/my-bitmoji-gives-me-anxiety/>
- ¹³ Pew Research Center, *Internet and Technology, Social Media Fact Sheet*, (Jan. 12, 2017).
- ¹⁴ Brandy Shaul, *Report: 92% of Online Consumers Use Emoji (Infographic)*, Adweek (Feb. 5, 2018).
- ¹⁵ Lydia Dishman, *The Business Etiquette Guide To Emojis*, FastCompany, (Jul. 14, 2016) (advising “Do: Use emojis to infuse your emails ... with personality. Don’t: constantly send your straight-laced boss smileys, cakes, and beer mugs when she never responds with even the simplest smile.”).
- ¹⁶ Rock McCormick, *Now you can use emoji to order pizza*, The Verge (May 13, 2015) available at <https://www.theverge.com/2015/5/13/8596849/use-emoji-to-order-dominos-pizza>
- ¹⁷ *Id.*
- ¹⁸ J.J. O’Donoghue, *Emoji: The evolution of emoticons*, Japan Times (Sep. 17, 2016).
- ¹⁹ See *Reilly v. Reilly*, 94 So.3d 693, 696 (Fla. 4th DCA 2012).



²⁰ See *Taylor v. Taylor*, 1 So. 3d 348, 350 (Fla. 1st DCA 2009).
²¹ See *Cole v. Cole*, 95 So.3d 369, 371 (Fla. 3d DCA 2012).
²² See *Duval Motors Co. v. Rogers*, 73 So. 3d 261, 265 (Fla. 1st DCA 2011).
²³ See *King v. Bray*, 867 So. 2d 1224, 1226 (Fla. 5th DCA 2004).
²⁴ See *Levitt v. Levitt*, 699 So.2d 755, 756 (Fla. 4th DCA 1997).
²⁵ See *Pan Am. W., Ltd. v. Cardinal Commercial Dev., LLC*, 50 So. 3d 68 (Fla. 3d DCA 2010).
²⁶ See *Riera v. Riera*, 86 So. 3d 1163 (Fla. 3d DCA 2012).
²⁷ See *Barrington v. Gryphon Investments*, 32 So.3d 668 (Fla. 2d DCA 2010).
²⁸ See *Nationstar Mortgage Co. v. Levine*, 216 So. 3d 711, 715 (Fla. 4th DCA 2017).
²⁹ See *Id.*
³⁰ See *Stein v. Miss Franie's, Inc.*, 417 So. 2d 726 (Fla. 1st DCA 1982).
³¹ See *Gilman v. John Hancock Variable Life Ins. Co.*, WL 23191098 (Fla. 15th Cir. Ct. 2003) (finding a few states refuse to consider extrinsic evidence, most states construe ambiguities against the drafter as a "last resort" "tie-breaker" and some states resolve ambiguities by extrinsic evidence without any presumptions.).
³² See *Landis v. Mears*, 329 So. 2d 323, 325-26 (Fla. 2d DCA 1976).
³³ See *Nationstar Mortgage Co. v. Levine*, *infra* n. 23. See also *Emergency Associates of Tampa, P.A. v. Sassano*, 664 So. 2d 1000, 1003 (Fla. 2d DCA 1995)(holding parol evidence should be

admissible "irrespective of any technical classification of the type of ambiguity present.".)
³⁴ Debra Cassens Weiss, *Emoticons matter, judge rules in Silk Road trial*, ABA Journal (Jan. 30, 2015).
³⁵ *U.S. v. Christensen*, CR 06-085, U.S. Dist. Montana (Apr. 11, 2013)
³⁶ See *Apatoff v. Munich Re Am. Servs.*, No. 11-7570, 2014 U.S. Dist. LEXIS 106665 (D.N.J. Aug. 1, 2014).
³⁷ See *Enjaian v. Schlissel*, 14-CV-13297 U.S. Dist., E.D. MI (May 27, 2015).
³⁸ See *Ghanam v. Does*, 845 N.W.2d 128 (Mich. Ct. App. 2014).
³⁹ Ephrat Livni, "Emojis prove intent, a judge in Israel ruled" Quartz Media, (May 19, 2017) available at <https://qz.com/987032/emojis-prove-intent-a-judge-in-israel-ruled/>
⁴⁰ The Unicode Consortium is a non-profit founded to develop, extend and promote use of standards which specify the representation of text in modern software products and other standards, including emojis and emoticons. See <http://www.unicode.org/consortium/consort.html>
⁴¹ Amanda Hess, *Exhibit A: :-)* Slate (Oct. 26, 2015) available at http://www.slate.com/articles/technology/users/2015/10/emoticons_and_emojis_as_evidence_in_court.html
⁴² <https://unicode.org/emoji/charts/full-emoji-list.html>
⁴³ Apple Newsroom, (Oct. 6, 2017) available at <https://www.apple.com/newsroom/2017/10/apple-reveals-new-emoji-coming-to-iphone-and-ipad-including-i-love-you/>

⁴⁴ Prof. Laurie Beth Feldman, *Emotional Pictures*, University of Albany News Center (Nov. 9, 2016) available at <http://www.albany.edu/news/74747.php>.
⁴⁵ Rachel Thompson, *These emoji have offensive double meanings in some countries*, Mashable (Aug. 17, 2017) available at https://mashable.com/2017/08/17/emoji-culture-world/#zP_G6H6xkmbq
⁴⁶ Ellen Rule, *Breaking: Praying Hands emoji still not a High-Five*, Acclaim, available at <https://www.acclaimmag.com/culture/breaking-praying-hands-emoji-still-high-five/>
⁴⁷ Alice Gordenker, *Golden Poop*, Japan Times (Mar. 20, 2007).
⁴⁸ Arwa Mahdawi, *What your country's emoji use says about you*, The Guardian, (Apr. 22, 2015).
⁴⁹ Alexandra Sifferlin, *Eat This Now: Japanese Eggplant*, Time, (Aug. 5, 2013).
⁵⁰ <http://knowyourmeme.com/memes/eggplant-emoji>
⁵¹ David Goldman, *Instagram blocks 'offensive' eggplant emoji hashtag*, CNN (Apr. 29, 2015).
⁵² Meghan Neal, *What the Emoji You're Sending Actually Look Like to Your Friends*, Motherboard (Nov. 12, 2015) available at https://motherboard.vice.com/en_us/article/78kzn9/what-the-emoji-youre-sending-actually-look-like-to-your-friends
⁵³ Alex Fitzpatrick, *Apple Just Saved the Peach Emoji*, Time (Nov. 15, 2016).
⁵⁴ "Person Gesturing OK" Emoji.

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