

**When is an eggplant evidence of sexual harassment?: Interpreting emoji evidence in the courtroom**

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Emojis, also known as the small picture-like icons used in online communications, revolutionized digital speech and enhanced text-based conversations with visual depictions. Ranging from smiley faces to weather, food, sports, symbols, and flags, nowadays there is practically an emoji for everything. Originally created in late 90s for Japanese mobile phones, emoji started gaining popularity in North America in the 2010s after being added to popular cell phone and computer operating systems.<sup>1</sup> Today, emoji is used across a variety of platforms, including iOS and Android operating systems, as well as social media platforms like Facebook and Twitter. In addition to being seen frequently in online communications, emoji's recent boost in popularity has also resulted in an increasing number of emojis showing up in court.<sup>2</sup> With transcripts of online communications now being accepted as a common form of evidence in court, the number of US court decisions referencing emoticons or emojis has increased exponentially, nearly doubling each year since 2016.<sup>3</sup> While there have not been any cases decided solely on emoji evidence, given the significant increase in emojis appearing in the courtroom, it may only be a matter of time.

One of the first issues presented by emoji evidence involves both determining admissibility and assessing the importance of having an emoji admitted into evidence. While some may argue that an emoji is immaterial and need not be admitted into evidence, recent case

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<sup>1</sup> Adam Sternbergh, "Smile, You're Speaking EMOJI", *New York Magazine* (17 November 2014), online: <<https://nymag.com/intelligencer/2014/11/emojis-rapid-evolution.html>>.

<sup>2</sup> Eric Goldman, "2019 Emoji Law Year-in-Review" (23 January 2020), *Technology & Marketing Law Blog*, online: <<https://blog.ericgoldman.org/archives/2020/01/2019-emoji-law-year-in-review.htm>>.

<sup>3</sup> *Ibid.*

law has emphasized the importance of including the emojis in evidentiary transcripts. This was demonstrated in the high profile US trial of Ross Ulbricht, creator of the illicit drug marketing website, Silk Road.<sup>4</sup> In the 2015 Silk Road trial, the prosecutor read aloud an online post which said “I’m so excited and anxious for our future, I could burst”, omitting the smiley face emoji which followed the message. Defence counsel argued that the jury should be provided with full transcript of the conversations, given that the smiley face provided meaningful context to the text message. The judge presiding the case determined that the jury should be provided with transcripts. She also specifically instructed the jury to take note of any symbols in messages, noting that the emojis comprised part of the evidence. The Silk Road case sets a clear precedent emphasizing the importance of admitting emoji evidence into the courtroom.

With the increasing number of emojis appearing in court, judges and juries are now being faced with another new issue – emoji interpretation. One of the main issues posed by emoji evidence is the lack of standardization of emojis, given that emojis look different across different platforms. The organization Unicode creates emoji codes, allowing different operating systems and platforms to create their own versions of the standard Unicode emojis.<sup>5</sup> Some legal experts, including leading emoji expert Professor Eric Goldman, suggest that one way of minimizing miscommunications and misinterpretations is to develop a set of standardized emojis that are used across all platforms universally. In his article “Emojis and the Law”, Goldman discusses how these cross-platform discrepancies can lead to miscommunications that must be taken into account in the courtroom. The emoji that someone sent may look entirely different than the emoji

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<sup>4</sup> Benjamin Weiser, “At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji”, *New York Times* (28 January 2015), online: <<https://www.nytimes.com/2015/01/29/nyregion/trial-silk-road-online-black-market-debating-emojis.html>>.

<sup>5</sup> Goldman, *supra*, note 2.

the person received. When it comes to interpreting emoji evidence, these discrepancies in emoji depiction have shown significant difficulty.

Emoji evidence also presents courts with another issue - cultural interpretation. A clear example of this is the eggplant emoji. While the eggplant emoji has a phallic connotation in the US, this is not the case across the globe.<sup>6</sup> What may be viewed as an innocent fruit emoji in one culture may be interpreted as a rude sexual advance by someone of another culture. The different cultural meaning of an emoji poses a risk of an emoji being misconstrued or misinterpreted in court. Another example is the face mask emoji which commonly symbolizes illness in Japan, and bank robbery in the United States.<sup>7</sup> Clearly, the lack of cultural consensus over what each emoji actually means leaves room for misinterpretation. The fact that emojis can be interpreted with such different meanings poses a significant issue when emojis are being used as evidence. Cultural differences in emoji perception as well as the emoji discrepancies across platforms create issues with interpretation of emojis in the courtroom.

How, then, do we deal with emoji interpretation when using emojis as evidence? Do we need experts in court to interpret emojis? Law professors Elizabeth Kirley and Marilyn McMahon suggest it would be beneficial to have “digital speech experts” to act as expert witnesses in court.<sup>8</sup> Goldman, on the other hand, suggests that emojis are too context-specific for a linguist to interpret. In a 2019 interview with CNN, Goldman discussed a prostitution case where a sex-trafficking expert was brought in to explain how a particular series of emojis amounted to evidence of prostitution. The emojis in question were the crown, high heels, and bags of money. In Goldman’s interview, he stated “we might not think twice about a crown

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<sup>6</sup> Goldman, *supra*, note 2.

<sup>7</sup> *Ibid.*

<sup>8</sup> Kirley, *supra*, note 3.

emoji, but in the sex-trafficking world, it added context”.<sup>9</sup> Goldman argues that linguists lack the contextual knowledge to properly interpret emojis in these specific cases. As it stands, courts remain unclear as to who should be interpreting emojis, and emoji evidence is handled on a case-by-case basis.

Emoji evidence is a relatively new phenomenon that is expanding rapidly. Recent case law has emphasized the importance of having emojis admitted into evidence. Although an increasing number of emojis are being seen in court each year, given the novelty of emoji evidence, it remains unclear exactly how courts will treat emojis. As courts become more familiarized with emojis and continue to use emojis as evidence, this is no doubt an area of the law which will be expanding rapidly in the coming future.

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<sup>9</sup> Krystle Callais, “Emojis are increasingly coming up in court cases. Judges are struggling with how to interpret them”, *CNN* (8 July 2019), online: <[https://www.wpsdlocal6.com/news/emojis-are-increasingly-coming-up-in-court-cases-judges-are/article\\_b31001c2-6af8-5030-8ed8-19f08764920a.html](https://www.wpsdlocal6.com/news/emojis-are-increasingly-coming-up-in-court-cases-judges-are/article_b31001c2-6af8-5030-8ed8-19f08764920a.html)>.