



FALL 2018 E-NEWSLETTER

At Digital Mountain we assist our clients with their computer forensics, e-discovery, and cybersecurity needs. For this E-Newsletter, we discuss memes and emojis and their impact on our industry.

Emojis and Emoticons in the Courtroom

Research suggests that most, if not up to ninety percent, of information the brain processes is visual data. We are by nature visual thinkers. This makes sense if you think back to the hunter-gatherer stage of our evolution: ripe fruits tend to be vibrant colors but turn dull as they spoil, dark skies during the day indicate harsh weather, and a smiling, happy face is generally not a threat. As we created more complex cultures, we continued developing visual representations that are easily processed: religious symbols, traffic signs, even bodily movements such as shoulder shrugs, eyebrow raises, and high fives. Hence, is it any surprise that emojis and emoticons have come not only to proliferate our casual communications, but that they are finding their way into the courtroom as well? In this article, we look at how emojis and emoticons are becoming important evidence, and, how this should inform the way we communicate.



😊 and o_o Are Not the Same

There are a variety of ways to insert graphic symbols into an electronically produced document, but the two we're concerned with in this article are emojis and emoticons. Emojis are ideograms, graphic symbols that represent correlative ideas. Ideograms include letters and numbers, as well as traffic control signs, currency symbols, and basically any symbol which is shorthand for a larger concept. The word emoji comes to us from Japanese words meaning "picture character." The classic yellow smiley face is probably the best-known emoji, although, in 2015, the face crying tears of joy was of the Oxford English Dictionary's "Word of the Year."

Emoticons, the precursors to emojis, are ideograms constructed from keyboard numbers, letters, and symbols. Emoticons began as simple representations of facial expressions, but with the availability of various keyboard glyphs, such as those found on Japanese and Korean language keyboards, emoticons have expanded to include shrugs, animal faces, and bowing movements. The major difference between the two types of ideograms is that emojis, despite graphic

disparities across platforms, are fairly standardized pictures. A smiley face via Apple is a smiley face via Firefox, albeit slightly altered. Emoticons can vary widely in their creation. For example, the smiley face emoticon can be created in more than fifteen variations, while the correlating emoji tops out at about seven.

Legally, the idea that emojis and emoticons have evidentiary standing has been gaining momentum apace with their popularity and use in communication. One groundbreaking case which drew attention to emoticons' importance as an element of communication was *US v. Ulbricht*, 79 F. Supp. 3d 466 Dist. Court, SD New York (2015), famous as the Silk Road online black market case, in which the question of whether online chats should be read aloud to the jury or if the jury should read transcripts of the online chats which included, "a fair number of nonverbal parts of these communications, symbols, emoticons, things like that, all of that which is not necessarily communicable in an oral context," (source: trial transcript published at <https://antiloop.cc/sr/trial/>). Judge Katherine Forrest, agreeing that there is a difference between verbal and non-verbal communication, noted the emoticons as relevant to the jury's understanding of the online chats:

I will then give a limiting instruction stating that these were originally written. They were in no sense -- there is no indication that they were orally communicated. The jury should understand that. The jury should read them. They are meant to be read. The jury should note the punctuation and emoticons. (Source: trial transcript published at <https://antiloop.cc/sr/trial/>).

The Ambiguity Doesn't End There

Ambiguity for emojis and emoticons isn't limited to the graphic form, but extends to the meaning of the symbols, as well. The question of meaning is primarily what the courts address when ideograms enter evidence. When one of these ideograms accompanies a text, the author is generally clarifying or reinforcing the tone of the message, however, not all courts agree to the degree to which that is accomplished. In *Elonis v. United States*, 135 S. Ct. 2001 (2015), the Supreme Court remanded a case wherein Plaintiff Elonis argued that a Facebook post which contained threatening language could not be construed as a credible threat because he included an emoji of a face sticking out its tongue, thereby reducing threatening language to the level of a joke and removing any intentionality. While not the only reason the Supreme Court remanded the case to the appeals court, the ambiguity created in the text was relevant enough to send the case back. At the appeals level, the conviction of Mr. Elonis was upheld, and the emoji was not found to have mitigated sufficiently the threat conveyed in the written words.

In a case where the court specifically found clarity in an emoticon, the Michigan Appeals Court decided against a plaintiff suing for defamation based on critical posts made about the plaintiff's job performance as a city employee. The decision for *Ghanam v. Does*, 845 N.W.2d 128 (2014) finds that the joking tone of the following post was made clear by the emoticon, "They are only getting more garbage trucks because Gus needs more tires to sell to get more money for his pockets :P." About which the court wrote:

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.

Emojis and Emoticons in the Workplace 😊

Workplace or professional communications feature heavily in harassment, breach of contract, and other legal matters because in the course of business the courts have determined it is our words, primarily our written words, that matter. Now with emojis and emoticons showing up more often in professional and workplace communications, the courts are taking them into account. A survey of cases in which emojis and emoticons in workplace communications are admitted into evidence shows that courts are not shying away from interpreting them as part and parcel of workplace communication. In *Mooneyhan v. Telecommunications Management, LLC., D/B/A NewWave Communication*, 1:16 CV 118 ACL Dist. Ct. ED Missouri, (2017), the court found that the plaintiff's inclusion of smiley face emoticons in her email reinforced her words about liking her job, thus undermining her charges of hostile work environment and constructive discharge. To clarify, the plaintiff's email did not mention any of the complaints of harassment later alleged, and plaintiff did not follow the company's handbook procedures for reporting.

A Global Trend

Emojis and emoticons are becoming ubiquitous – if there are electronic communications, there are smiley faces, rocket ships, and thumbs both up and down. A breach of contract case out of Israel has received global attention for its reliance on emojis as potentially creating a binding agreement. In a brief text to a prospective landlord, a tenant included such emojis as a smiley face, a dancing woman, a champagne bottle, a hand giving the peace sign, and a chipmunk, along with the text indicating that the woman was interested in discussing the details of the rental, and asking for a convenient time. The prospective tenant subsequently declined to execute a lease, after the landlord had removed his ad and stopped showing the property. In a reliance case, which is similar in the US for breach of contract and detrimental reliance, the landlord sued. The judge interpreted the emojis as conveying “great optimism,” and although the emojis nor the text created a contract by themselves, the judge found, “These symbols, which convey to the other side that everything is in order, were misleading.” The importance of this ruling is that emojis and emoticons are being interpreted as communication modifiers at the same level as exclamation points or parenthetical statements.

Don't Just 🙄(ツ)🙄 Emojis and Emoticons Off

There's no ambiguity on the fact that courts are looking at emojis and emoticons as part of written evidence. Equally clear is that these ideograms are becoming increasingly pervasive both in casual and workplace correspondence. Rather than fight the trend, perhaps the best way for organizations to deal with them is to address their use proactively:

1. Acknowledge that emojis and emoticons are easy to use and popular, however, they do not communicate in a clear, unambiguous, and professional fashion.
2. Train employees to understand that emojis and emoticons may carry different meanings in different cultures. For example, the fist emoji in the US is interpreted as a positive, “I'm with you,” symbol. In other cultures, the fist conveys an impending threat that one might use in anger.
3. Ensure that the use of emojis used to harass or denigrate is viewed the same as explicit language, images, and other forms of communication.
4. If your company conducts training on workplace communications, or has a written policy, address the use of emojis and emoticons.
5. Understand that even if the company places an outright ban on emojis, you'll be hard pressed to enforce it. Rather than taking a hardline stance, convey the reasons they are undesirable in professional communication.

With emojis and emoticons becoming so pervasive, there's no doubt we'll be seeing new ones for a long time to come. If an emoji translator can (and did) translate Melville's *Moby Dick* into emojis, we're not likely to see the end of them soon. Our brains are just too attracted to a smiling yellow face to give up on them now. What we can do is try to make sure that we're using our words clearly, and hopefully, the illustrations we add will enhance the message without necessitating a judge's translation..

Please direct questions and inquiries about cybersecurity, computer forensics and electronic discovery to info@digitalmountain.com.

UPCOMING INDUSTRY EVENTS

MASTERS CONFERENCE

Washington, DC: October 23-24, 2018

THE SEDONA CONFERENCE WORKING GROUP ON ELECTRONIC DOCUMENT RETENTION & PRODUCTION (WG1) 2018 ANNUAL MEETING

Los Angeles, CA: October 25-26, 2018

TODAY'S GENERAL COUNSEL, "THE EXCHANGE" EDISCOVERY

Houston, TX: November 1, 2018

"THE EXCHANGE" DATA PRIVACY AND CYBERSECURITY FORUM

Washington, DC: November 1, 2018

"THE EXCHANGE" DATA PRIVACY AND CYBERSECURITY FORUM

DALLAS, TX: November 1, 2018

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Digital Mountain, Inc. Founder and CEO, Julie Lewis, will be presenting at various upcoming industry events. Please send requests for speaker or panel participation for her to marketing@digitalmountain.com.

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