

Utilizing Emojis in Law to Your Advantage



October 31, 2019

Lorman Education Services Webinar

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Designated as a Massachusetts Super Lawyer

Practice emphasizes all aspects of employment law, business litigation, anti-discrimination and workplace policies, trainings in the workplace.

Media coverage includes “Improved Equal Pay Law Bans Employers from Asking about Wage History,” WBUR Radio Boston (NPR), July 2018; “Lawmakers Help Ex-Logan Manager Revive 9/11 Disability Claim,” State House News Service, Boston, MA September 2018; “SJC rules ex-teacher guilty in child porn case can keep pension,” The Boston Herald, August 2014

Speaking Engagements include: “Dartmouth College’s Future of Work Symposium: Design your Life” moderator, January 2019; “What Can I Ask During the Interview? Do’s and Don’t’s Under the Mass. Equal Pay Act,” Boston, May 2, 2018; Business Forum Practical HR Solutions, presented by the Middlesex Chamber of Commerce, May 31, 2017; “Employment Law Updates: Joint Employer, Non-Competes and the Rising Toll of Harassment Claims,” 2016 Annual Meeting of the Massachusetts Defense Lawyer Association, May 2016; “Conducting Workplace Investigations,” co-presented with Jean Haertl of Safety and Respect at Work, October 2015, October 2016, October 2017 and October 2018.

Conducts regular seminars and workshops to assist business clients in designing policies that promote a professional work environment compliant with state and federal laws, as well as helping to reduce or prevent the incidence of disruptive employment-related claims including three-day seminar on how to conduct workplace investigations. Have presented workshops for national based organizations on proper internal investigation claims.

Education – J.D., Columbia University School of Law, B.A., cum laude, Dartmouth College

Agenda

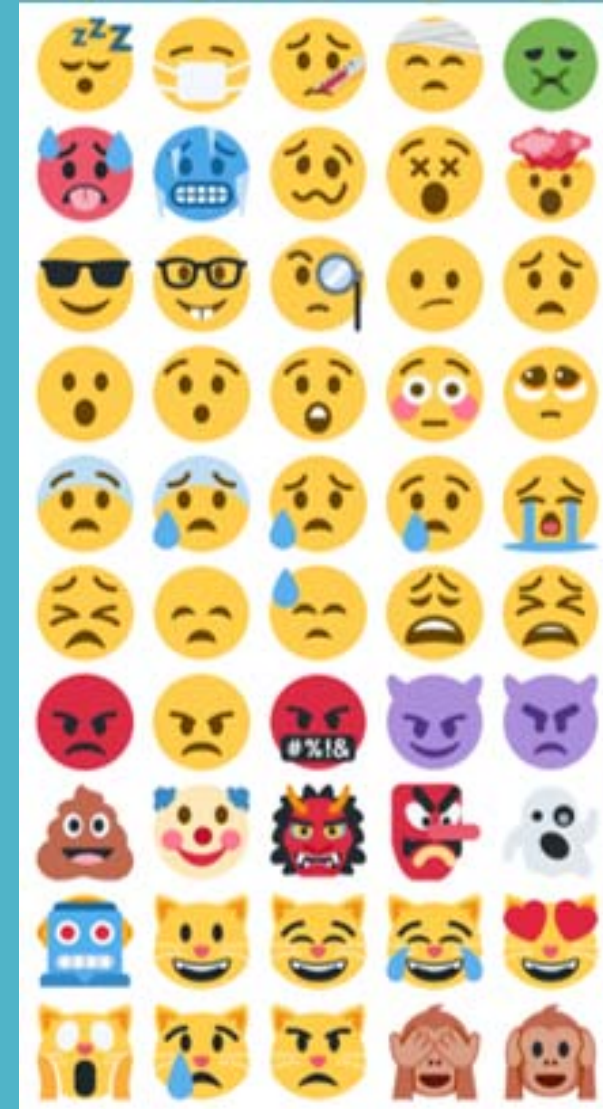


I. Overview – What Are Emojis and How Are They Used?

- A. Emojis Explained
- B. Distinguishing Emojis From Other Forms of Images
- C. Different Functions of Emojis
- D. Different Interpretations of Emojis

II. Emojis in the Courtroom

- A. Challenges in Discovery and Use of Emojis in the Courtroom
- B. Emojis As Criminal Evidence



Agenda

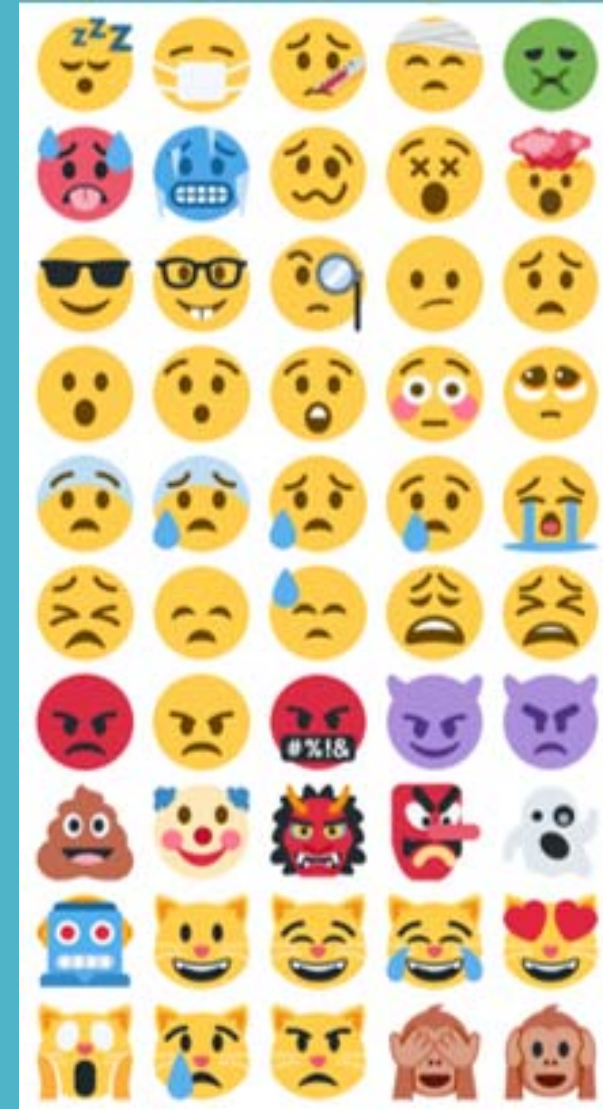


III. How Emojis Can Create Liability in the Workplace

- A. Emojis as Evidence
- B. 5 Emoji Mistakes to Avoid in the Workplace

IV. Emojis and Intellectual Property

- A. Emojis and Copyright
- B. Emojis and Trademark
- C. Emojis Across Platforms, Devices and Operating Systems
- D. How and Who Can Use Emojis
- E. Commercial Use of Emojis
- F. Potential Pitfalls of Emojis



I. What Are Emojis and How Are They Used?



I. What Are Emojis and How Are They Used?



An emoji is a “small digital image or icon used to express an idea, emotion, etc., in electronic communications.”



Twitter Data ✓
@TwitterData

Follow

What better way to celebrate
#WorldEmojiDay than with some 📊 ✨
data ✨ 📊?

These are the most used emojis on
Twitter the past year:



11:39 AM - 17 Jul 2018

**Emojis are
extremely popular
in every day life.
There are over
3,000 emojis.**

Unicode and Emojis







- Unicode uses “code points” composed of letters and numbers to express unique characters
- The “code points” are translated on screen into pictographs called “glyphs”
- The glyphs may look slightly different depending on where and how they are viewed, but they are coded to convey the same general image across platforms
 - These differences may be the source of ambiguity
- Even letters can be expressed through Unicode
 - The letter “A” is code point U + 0041
- Emojis have been part of the Unicode standard since 2010





Unicode Examples



Code	Emoji	Character Description
U +1F600		Grinning face
U + 1F603		Grinning face with big eyes
U + 1F604		Grinning face with smiling eyes
U + 1F601		Beaming face with smiling eyes

An emoticon is “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 communications (such as email)”

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

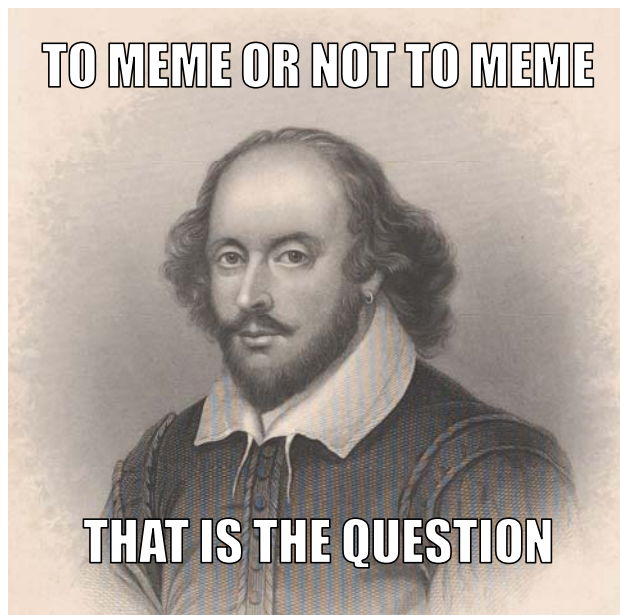


<https://www.piliapp.com/emoticon/>

Distinguishing Emojis from Emoticons, GIFs and Memes

A [meme](#) is “an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online through social media”

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



Distinguishing Emojis from Emoticons, GIFs and Memes

GIFs (short for “graphics interchange format”) are similar to memes, but are moving images, often short several second clips from movies, television shows, or other digital footage.

The video footage or moving animation of a GIF is typically looped – once the clip is finished, it repeats itself.

Distinguishing Emojis from Emoticons, GIFs and Memes

The Different Functions of Emojis

- Substitution
- Reinforcement
- Mixed Message
- Complement
- Emphasis
- Discourse Management







Different Interpretations of Emojis





- Emojis have no universal definition and are highly subjective
- An emoji that means one thing in a particular cultural context may mean something else entirely in another
- As emojis are more widely used, they may take on different meanings that depart broadly from what their image might suggest
- The intended meaning may not always be conveyed



Different Interpretations of Emojis

	Folded Hands	Originally intended as a “high-five” emoji, many have interpreted this to look like praying hands
	Pile of Poop	Can have a literal meaning or convey a sense of whimsy silliness, as it’s often rendered with a smiley face
	Winking Face	May refer to flirting, teasing, joking, or sarcasm depending on context
	Flame Emoji	Often used to describe a person or situation as “hot”

Different Interpretations of Emojis

	Dancing Emoji	Commonly used as a celebratory emoji
	Upside-Down Face	While it may seem like just a goofy smile, this emoji is commonly used sarcastically to indicate annoyance or frustration
	Smiling Face with Sunglasses	Used to convey a sense of cool, or confidence
	Hundred Points	Can mean “great job”, as in “100%”

Emojis Can Be Combined to Make Sentences



Don't count your chickens before they hatch

Emojis Can Be Combined to Make Sentences



It's raining cats and dogs

Emojis Can Be Combined to Make Sentences

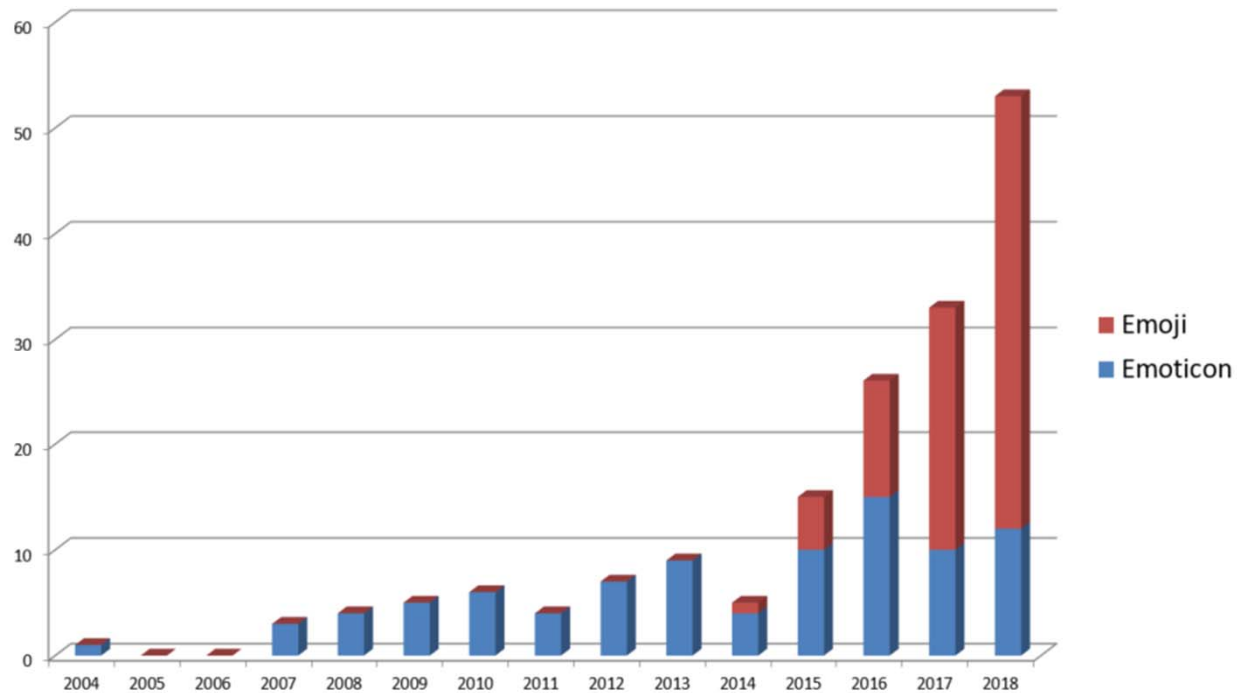


"Be the change you wish to see in the world" - Gandhi

II. Emojis in the Courtroom



References to “Emoji” are on the rise in court opinions



Source: <https://blog.ericgoldman.org/archives/2019/01/emoji-law-2018-year-in-review.htm>

Challenges in Discovery and Use of Emojis in the Courtroom

There have not yet been any substantive rulings interpreting emojis, but emojis and emoticons often make appearance in evidence.

Emojis present interpretation challenges in discovery and at court.

- Who determines what an emoji means?

Cross-platform communications leads to further discrepancies because not all platforms produce the same image for an intended emoji.

- A person sending an emoji does not always know or realize when the emoji appears differently to the receiver

Emojis as Criminal Evidence



U.S. v. Jefferson, 911 F.3d 1290 (10th Cir. Dec. 28, 2018)

- o A Facebook post that included the the [firearm emoji](#) was used as evidence that the defendant committed a string of convenience store robberies

U.S. v. Edwards, 2018 U.S. Dist. LEXIS 7456 (S.D. Ohio Jan. 17, 2018)

- o Defendant found guilty of witness intimidation after making a Facebook post that included pictures of a police informant accompanied by [a laughing face, rat and skull emojis](#)

U.S. v. Dailey, No. 17-cr-20740 2017 U.S. Dist. LEXIS 193962 (E.D. Mich. Nov. 27, 2017)

- o A social media post that included [emojis referencing guns and drugs](#) used as evidence to revoke a criminal defendant's bond

III. How Emojis Can Create Workplace Liability

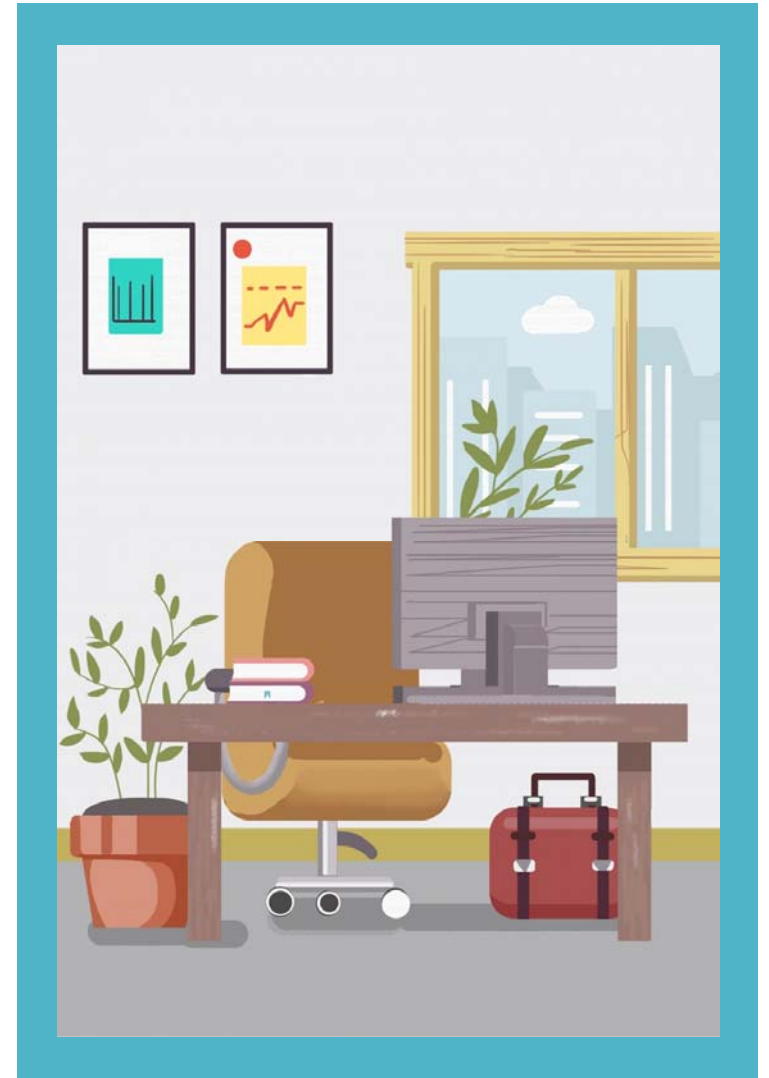


Given What We Now Know...

It's no surprise that emojis can create liability in the workplace.

The innocent intent behind an emoji-filled message can be misinterpreted.

Or, emojis that are culturally understood to be inappropriate, can be deployed to harass.



Emojis as Evidence

In employment lawsuits



Lema v. BTS Holdings, No. A-3465-16T1, 2019 N.J. Super. Unpub. LEXIS 150 (N.J. Superior Ct. App. Div. Jan. 18, 2019)

- o A terminated employee brought suit alleging that she was fired after reporting her co-worker for harassing her.
- o Part of the reported harassment included sending [heart emojis](#) over a social media app.
- o Plaintiff was awarded \$70,403.59, including legal fees.

Emojis as Evidence

In employment lawsuits



Gatter v. IKA-Works, No. 16-953, 2016 WL 7338770 (E.D. Pa. Dec. 19, 2016)

- o A terminated employee brought suit alleging that her employer created a hostile work environment on a company-sponsored trip
- o Plaintiff presented a text with a [winky emoji](#) from the Company's President's wife as evidence that the company encouraged Plaintiff to enter into a relationship with the President's son while on the trip

Emojis as Evidence

In employment lawsuits



Bellisle v. Landmark Medical Center, No. 14-266-M-LDA, 2016 WL 4987119 (D. R.I. Sept. 15, 2016)

- o Former employee brought suit alleging discrimination
- o Plaintiff, a lesbian, claimed text messages between herself and a coworker contained the [scissor emoji](#) as references to her sexual orientation

Emojis as Evidence

In employment lawsuits



Murdoch v. MedJet Assistance, No. 2:16-CV-0779-VEH, 2018 U.S. Dist. LEXIS 33400 (N.D. Ala. March 1, 2018)

- o An employee was terminated following a pattern of deficiencies in performance and discipline from a superior
- o The employee brought a sexual harassment suit against her employer
- o The court determined that messages from Plaintiff with [smiley face emojis](#) were among evidence that the “flirtatious banter” was not unwelcome

5 Emoji Mistakes to Avoid in the Workplace

It was just a joke! I didn't mean it!

- Emojis are oversimplified pictures, so the recipient can interpret the message in a way never intended by the sender
- For sex harassment cases and other such claims, a joking intent does not save a company from liability
- Think before you send: how would a reasonable recipient interpret the message?

Mistake

1

5 Emoji Mistakes to Avoid in the Workplace

Ambiguous Messages

- Emojis can be easily misinterpreted
- Can be used as evidence in discrimination cases where intent is required
- Messages can boomerang back when a law suit is filed and employees are forced to defend their intent in court

Mistake

2

5 Emoji Mistakes to Avoid in the Workplace

Too Much Kissy Face

- Two emojis prominently feature hearts – an emoji with hearts as eyes and a second that is blowing a kiss
- These can easily be interpreted to mean something sexually suggestive, regardless of intent

Mistake

3

5 Emoji Mistakes to Avoid in the Workplace

Texting Too Fast

- Most senders do not take the time to resend and correct their images
- Some images automatically populate
- Others are available in every skin tone, and making a mistake like choosing the “wrong” skin color could implicate a race based claim

Mistake

4

5 Emoji Mistakes to Avoid in the Workplace

Trying for sarcasm

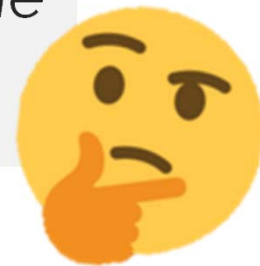
- Texters combine emojis in creative ways, leading to further differing interpretations
- The Poop Emoji is prevalent in today's society and can be combined to create a number of meanings beyond "dissatisfaction", what it is normally used to express
- Tone doesn't always translate well over text, so sarcasm can be difficult to capture

Mistake

5

Best Practice for Employers

In short, ambiguous and easily misinterpreted emoji-speak does not contribute to a productive workplace and should only be shared between friends outside of work. Although employers likely cannot outright ban the use of emojis, discouraging the use of any and all emojis in work communications will be a step in the right direction away from the courthouse.



IV. Emojis and Intellectual Property





Emojis and Intellectual Property



Emojis are everywhere – on nearly every platform, on nearly every device.

But this near-universal use does not mean that emojis are not protected by copyright and trademark laws.



Emojis and Copyright



Copyright law gives the copyright holder the ability to control the use of their work.

- Copyright protections in the US are granted to “original works of authorship” including “pictorial” and “graphic” works. See [17 U.S.C. § 102\(a\)\(5\)](#).
- Original works are independently created and show a “modicum of creativity”. Feist Pub., Inc. v. Rural Telephone Service Co., 499 U.S. 340, 346 (1991).
- In order to establish a claim for copyright infringement, the Plaintiff must prove (1) that it owns a valid copyright in its work, and (2) that the Defendant copied protected aspects of the work’s expression. Feist Pub., Inc. v. Rural Telephone Service Co., 499 U.S. 340, 345-46 (1991).



Emojis and Copyright



Emojis, as graphic representations, may fall within copyright guidelines.

- Because emojis use Unicode, it's easy to think they might be a “font” – they are, after all, standardized across platforms.
- Fonts and typefaces are generally not protected by copyright laws.
- But emojis are visually more complex, and they can be individualized by their creator enough that they show a “modicum of creativity” and thus qualify for copyright protections.



Emojis and Copyright



Emojis are commonly copyrighted.

- Many companies, including Apple, Samsung, and Facebook, hold the copyright to their emoji sets
- Not many commercial infringement lawsuits have been brought yet, but companies, including Apple, have started to crack down on the use of their emojis without permission



Emojis and Trademarks

TM

Emojis may also be subject to trademark protections.

- In addition to copyrighting their unique emoji, companies are filing trademarks for the same emoji
- [15 U.S.C. § 1127](#): “The term ‘trademark’ includes any word, name symbol, or device, or combination thereof used . . . to identify and distinguish [] goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown”

Emojis Across Platforms, Devices and Operating Systems

Platforms seeking to avoid intellectual property infringement and create their own intellectual property implement Unicode emojis in unique manners.

Different platforms may also use their emojis to express their own values or promote their own products.

For example, Apple recently made the decision to remove its standard gun emoji and replace it with a water gun and many designers followed suit.



Emojis Across Platforms, Devices and Operating Systems



Emoji	iOS	Google	Samsung
Winking Face	A golden circle with darker brown eyes, eyebrows and mouth.	A bright yellow circle with a black mouth and eyes. The winking eye is connected to its eyebrow.	A golden circle with black eyes. The mouth is slightly open and shows a red tongue. The open eye is a perfect circle.
Dog Face	A white dog with long brown ears and a brown spot over the right eye	A golden shiba inu with pointed ears and a smiling mouth.	A brown dog with darker brown ears. The bottom half of the dog's face is a lighter brown.

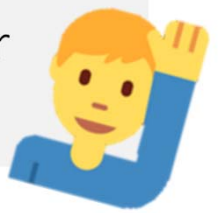
How And Who Can Use Emojis



Companies buy, license, or create the fonts on their system, including emojis

Personal use is often allowed and is by design of the system, e.g. texting or emailing using an Apple or Samsung cell phone, posting on a social media platform, etc.

Limitations – and potential legal issues – arise when emojis are used for commercial purposes



Commercial Use of Emojis



1. [“License”](#) - Contact the copyright holder and reach some kind of deal to license the emoji for the specific use – e.g., reach out to Apple to use their emoji
2. [“Open source”](#) or free emoji platform – Some platforms allow for free use – but be careful – some are free for personal use but require a license and payment for commercial purposes.
3. [Stock photo website](#) – allow for the purchase of an image for any use
4. [Create your own emoji](#) and use it as you see fit (but beware of creating an exact replica or “ripoff” of a pre-existing emoji, or “derivative works” that use or rearrange copyrighted elements)



Twitter (Open Source)



- In November of 2014, Twitter announced they were open sourcing their emoji
- This allows for use of “Twemoji” without any restriction other than including the license
- Which is what we have done here in this presentation! (see the end of this presentation for license agreement)



Potential Pitfalls of Emoji Use



- Use of “free” emoji for a use that is not permitted (see EmojiOne – free for personal use but a closer look reveals that a license is required for commercial use)
- Use of emoji in an advertisement
- Advertising on social media – use of the platform’s emoji for commercial purposes may be restricted – even within that platform
- Many businesses set up their own Facebook or Instagram to communicate and interact with consumers/customers
- Use of emoji in a product – Example: clothing emblazoned with an emoji

Exemplary IP Case

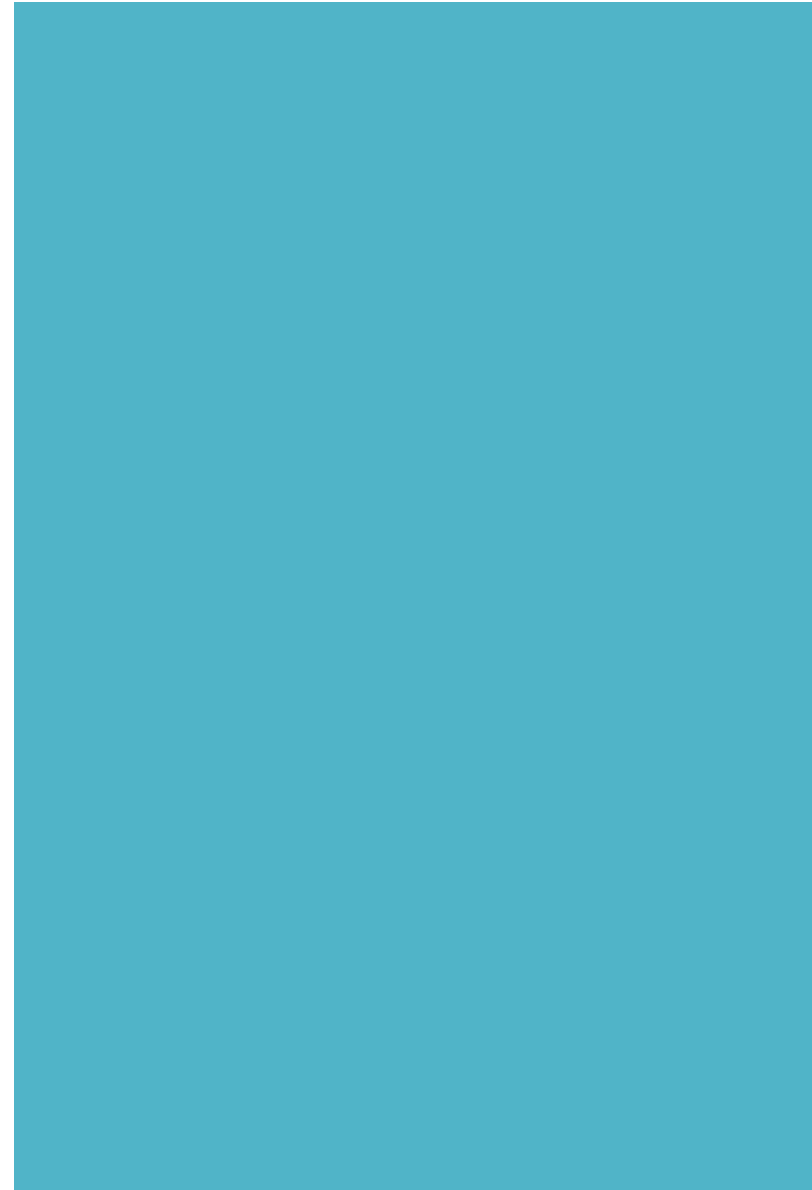
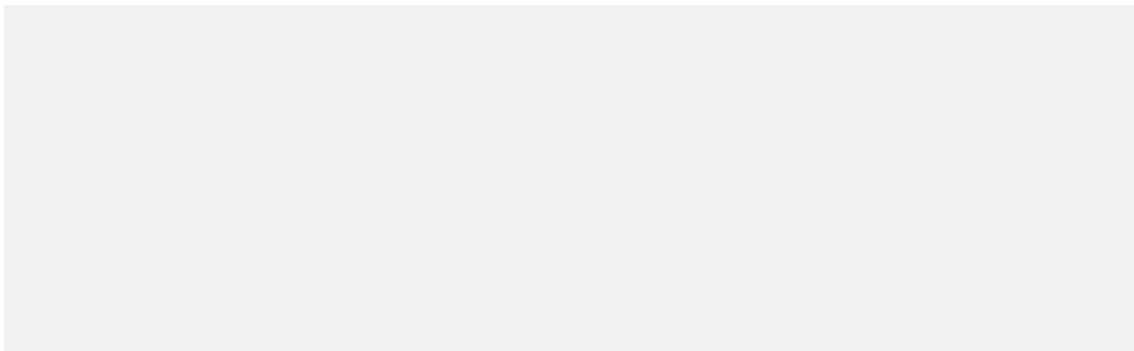
Kangaroo Manufacturing, Inc.

Kangaroo filed trademark and copyright infringement claims, among other related claims. Kangaroo's claims were based on the alleged unauthorized use of emoji beach balls which were owned by Kangaroo. The alleged copyright infringement related to sales listings on Amazon which displayed images of the emoji beach balls, to distribute counterfeit emoji beach balls.

Kangaroo brought lawsuit against Amazon.com Inc.— entity which runs Amazon.com. See Kangaroo Mfg. Inc. v. Amazon.com Inc., No. CV-17-01806-PHX-SPL, 2019 WL 1280945, at *1 (D. Ariz. Mar. 20, 2019) (case ongoing)

Kangaroo also sued IF Merchandise, LLC for the sale, which was settled, and IF Merchandise later sued Kangaroo for an alleged violation of the settlement agreement. See IF Merch., LLC v. Kangaroo Mfg., Inc., No. 3:17-CV-01230 (VLB), 2019 WL 4306996, at *1 (D. Conn. Sept. 11, 2019) (case closed)

Acknowledgments



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