

Emojis: Trademark, Copyright, Rights of Publicity and Other Considerations

THURSDAY, JUNE 13, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Eric Goldman

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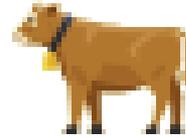
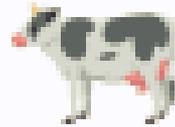
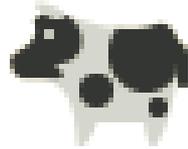
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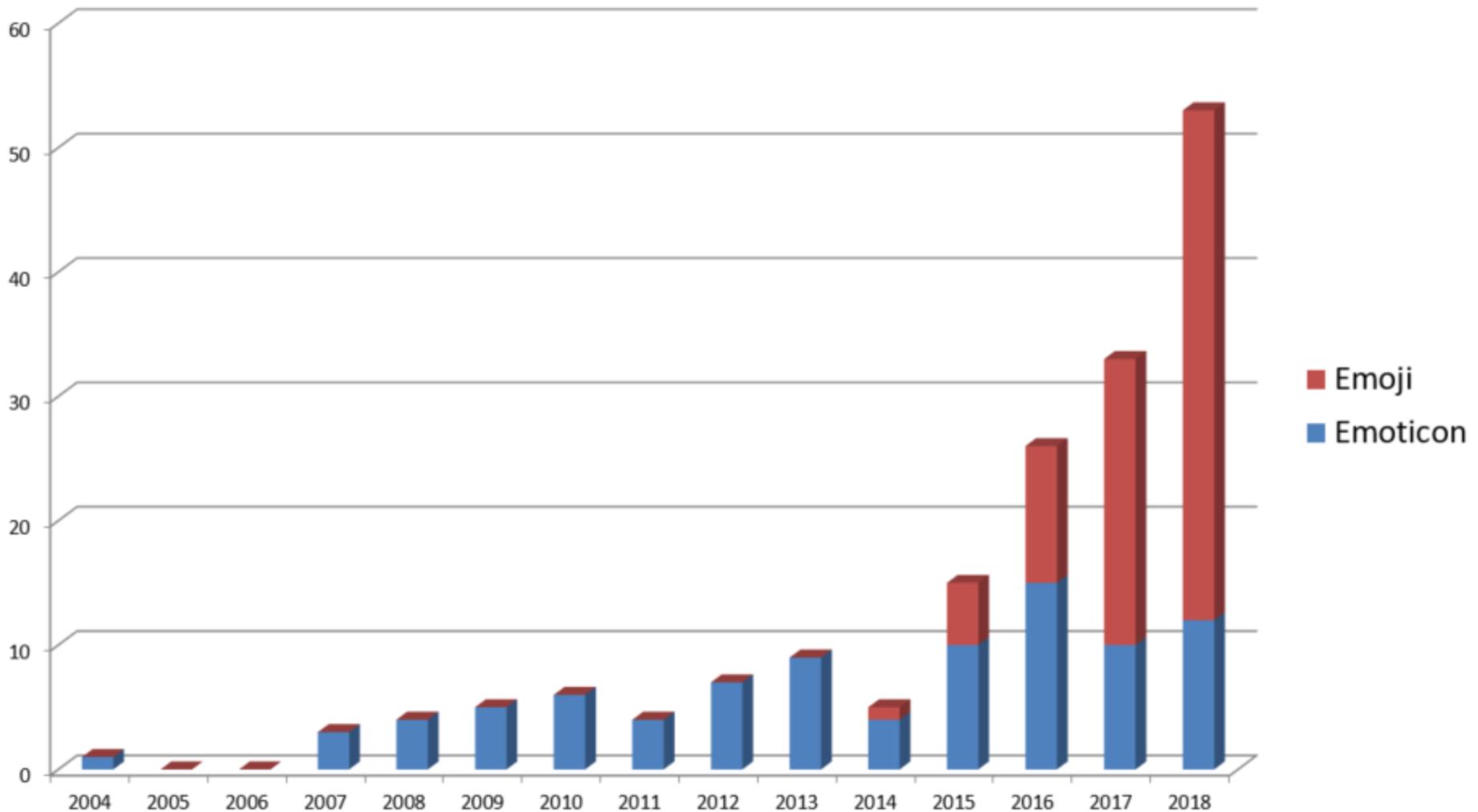
Definitions

- Emoticons = emotion + icon
 - Kaomoji: `~_(\`ツ)_/~`
- Emoji = “picture word”
 - Unicode emojis = standard outlines but diverse implementations
 - Proprietary emojis (a/k/a “stickers”) = work only within a platform

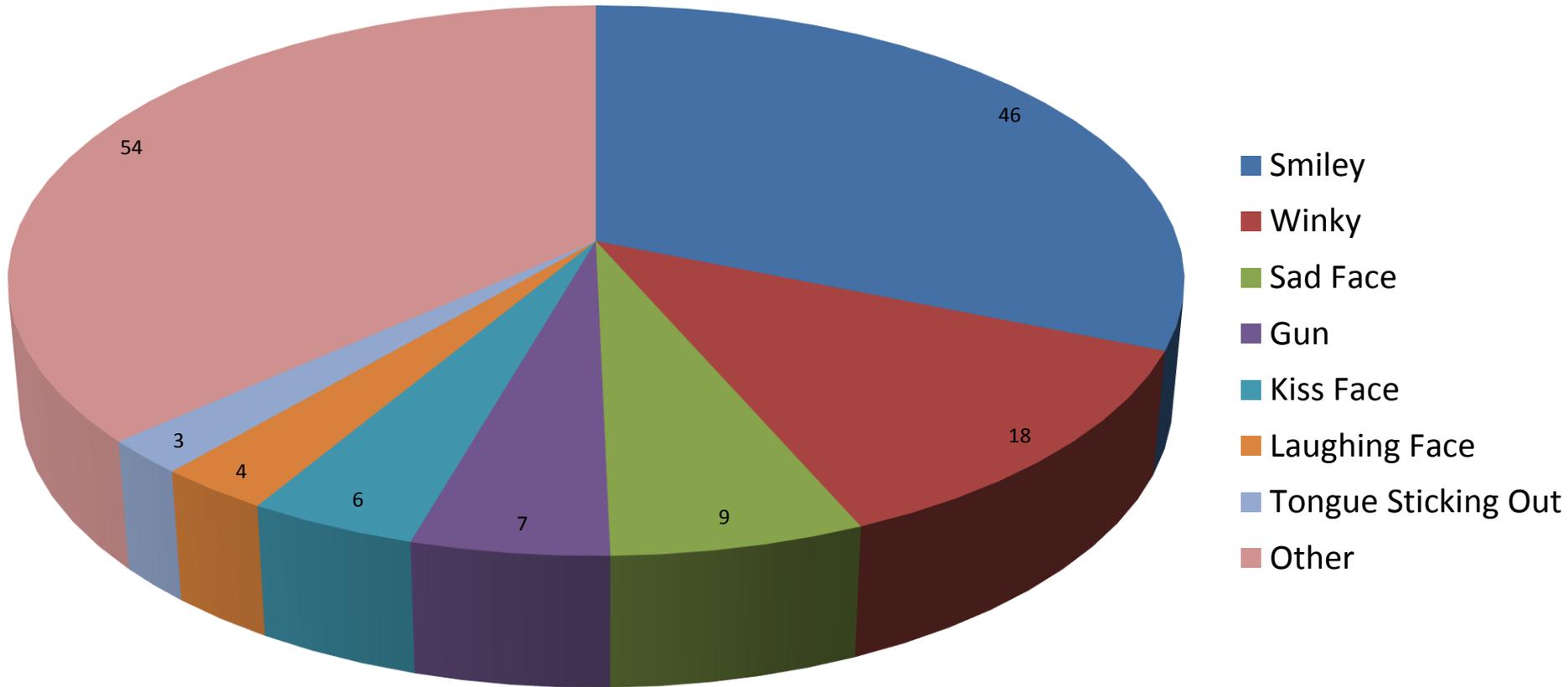
Emoji Depiction Diversity



Emoji References in Court



What Symbols Are Litigated?



n = 147

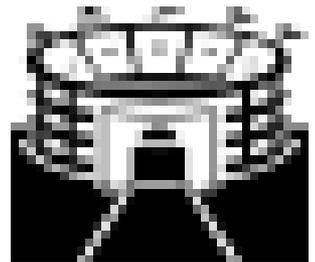
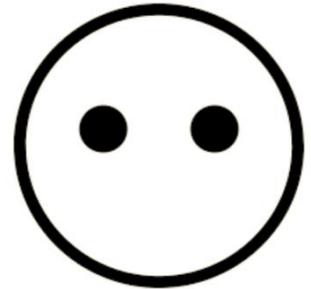
2 times: Angry Face, Blushing Face, Bomb, Crossing Fingers, Devil, Fists, Hearts, Skull, 100

1 time: Angel Next to Devil, Batting Eyelashes, Broken Hearts, Butt Cheeks, Cat, Clapping Hands, Confused, Cowboy, Crying Face, Dollar Sign with Wings, Dollar Signs, Drugs, Explosion, Face with Xs for Eyes, Fire, Forks/Knives, French Kiss, Frown, Gun Pointed at Head, Hitler, I Love You, Knives, Laughing/Crying, Lips, Mixed Smile, Needles, Nervous, Red Faced Smiley, Scissors, Smiley With Halo, Smirking Face, Smug, Surgical Mask Face, Train Wreck, Two Eyes, Zipper Mouth

Copyright

Protected by Copyright?

- The basis for conferring copyright protection over an emoji is straightforward: an emoji may be subject to copyright protection as a pictorial depiction.
- BUT:
- (i) some emojis are so simple that they do not have enough expression to constitute a work of authorship;
- (ii) some emojis are subject to the merger doctrine;
- (iii) for those that qualify as derivative works, changes may be so inconsequential that they do not qualify for protection



Copyright Registration

- Apple has registered over 1,000 of its individual emoji renderings.
- Not alone in companies registering emoji copyrights.

Fair Use

- Even if an individual emoji qualifies for protection:
 - Many courts will apply the fair use defense to authorize non-identical emojis
- Why?
 - Linguistic use of emojis

Kimberly Culp

Director
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- › On LinkedIn:



TRADEMARK & TRADE DRESS

TRADEMARK 101

- › Any person who shall, without the consent of the registrant--
 - › **(a)** use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
 - › **(b)** reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,shall be liable in a civil action by the registrant for the remedies hereinafter provided.

Emojis as Source Identifiers?



Emojis as Source Identifiers?



Trademark Registration

- › Yes, hundreds of emojis have been registered as trademarks.
- › Emoticons too, such as:
 - › :)
 - › ;)
- › Challenges to registering an emoji as a trademark include:
 - › Rarely used “in commerce”, especially if an emoji set is for *use* on a platform by others
 - › Trap of descriptive emoji



Name That Movie



RIGHTS OF PUBLICITY

Right of Publicity 101

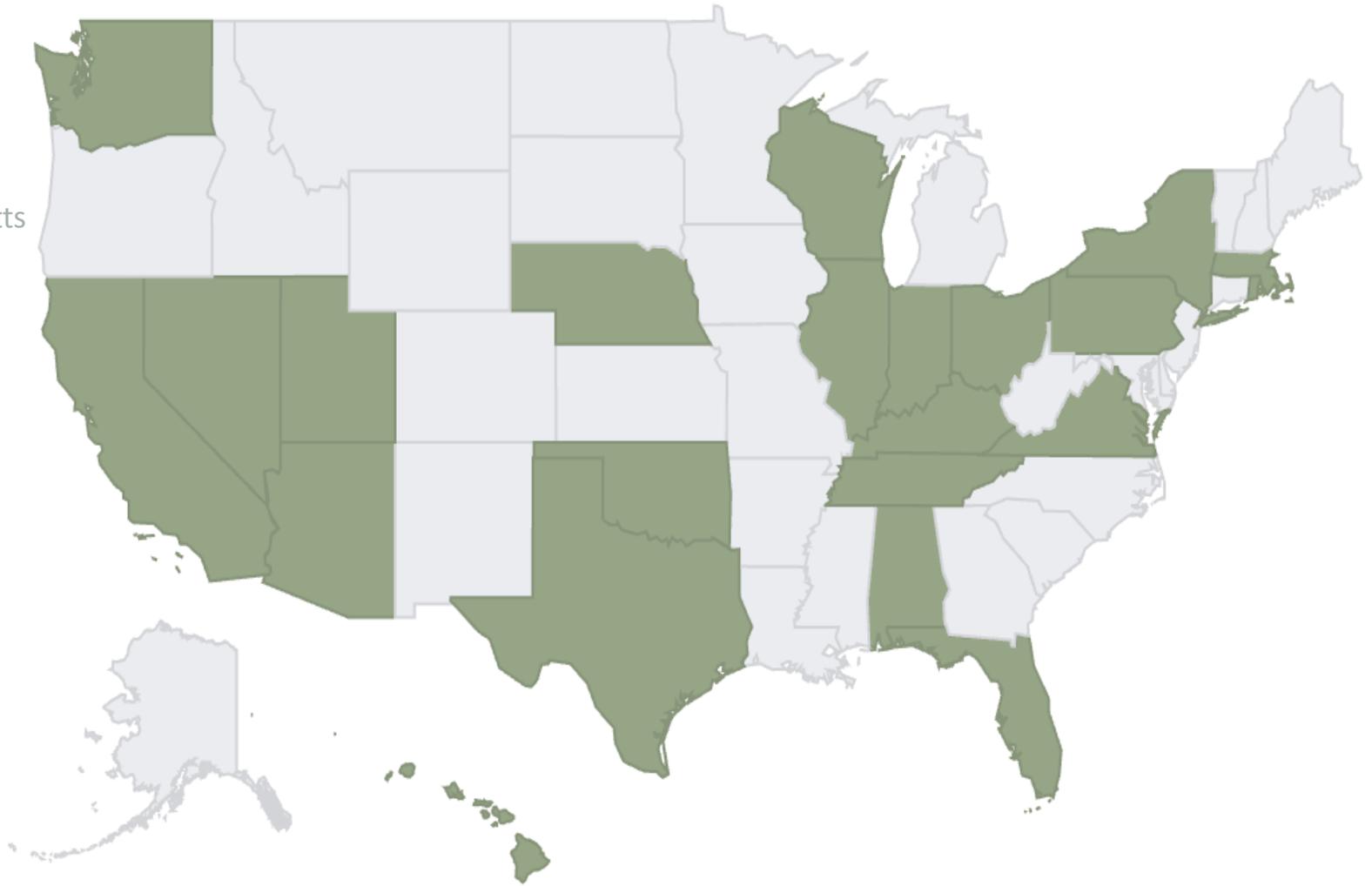
Restatement (Third) of Unfair Competition §46.

"One who appropriates the [1] commercial value of a person's identity by [2] using without consent [3] the person's name, likeness, or other indicia of identity [4] for purposes of trade is subject to liability."

WHAT IS THE RIGHT OF PUBLICITY?

- › Derived from the right of privacy (right to be left alone)
- › Right of an individual to control the commercial use of their name, image, likeness, etc.
- › Protects against unauthorized commercial exploitation
- › State by State; no federal right of publicity statute
- › Common Law and Statutory
- › Commonly Paired with Lanham Act claim
 - › Distinction: consumer confusion
- › California Civil Code §§3344 and 3344.1
- › New York Civil Rights Law, Article 5, §§50, 51

- ✓ Arizona
- ✓ California
- ✓ Florida
- ✓ Hawaii
- ✓ Illinois
- ✓ Indiana
- ✓ Kentucky
- ✓ Massachusetts
- ✓ Nebraska
- ✓ Nevada
- ✓ New York
- ✓ Ohio
- ✓ Oklahoma
- ✓ Pennsylvania
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- ✓ Texas
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- ✓ Wisconsin



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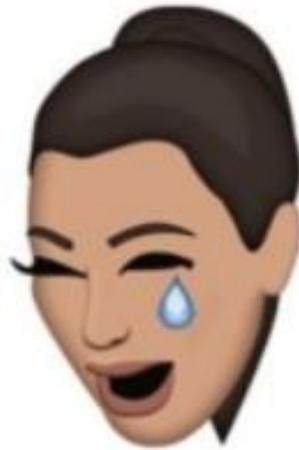
CARR McCLELLAN

California Civil Code §3344

- › No requirement of consumer confusion
- › Damages
 - › Actual damages (but no less than \$750)
 - › Any profits
 - › Attorney's fees and costs.
- › Defenses
 - › use in connection with any news, public affairs, or sports broadcast or account, or any political campaign
 - › First Amendment

Associated with a Single Person

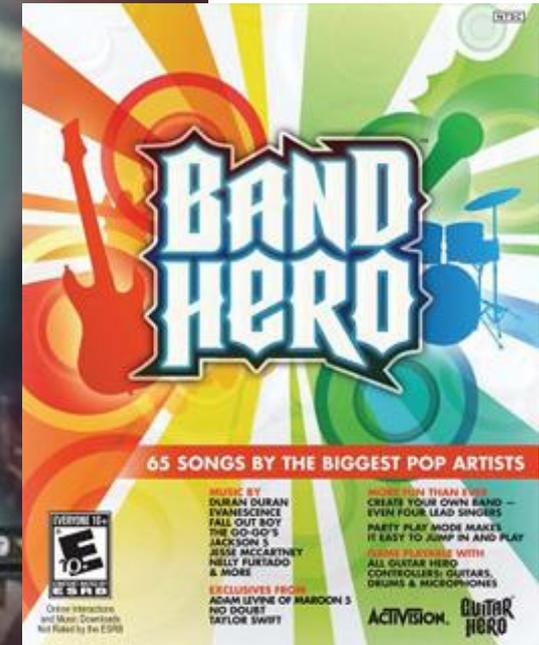
- › Bitmoji – allows people to create emojis of themselves
- › Apple's Memoji
- › Custom-developed emojis (such as for celebrities)
 - › KIMOJI:



Lohan v. Take-Two Interactive Software 31 N.Y. 3d 111 (Mar. 29, 2018)



No Doubt v. Activision Publ'g, Inc. 192 Cal.App.4th 1018 (2011)



ENFORCEMENT ISSUES

Trolls

EXHIBIT A



DVF Studio, LLC v. VeryMeri Creative, Inc., Case No. 13-CIV-8943



v.



The Emoji Movie



Gab-Cos Designs, LLC v. Alison Lou, Case No. 16-cv-20685

- › Declaratory relief action after plaintiff received a cease and desist letter on alleged jewelry emoji copyrights



v.



Graham v. Prince, 265 F. Supp. 3d 366, (S.D.N.Y. July 18, 2017)



Graham's *Rastafarian Smoking a Joint* (Fig. 1)



Prince's *Untitled* (Fig. 2)

Thank You

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Interpretation Issues

Emoji Interpretation (1)

Searching Megan C.'s Samsung cell phone, the police found an Instagram conversation from April 29, 2017, with someone named "Drissy_Boo" or "Drissy_Bo," as well as text conversations with someone named "Drissy." The Instagram conversation began with Drissy_Bo asking, " 'Where are you at?' " The response was " '[i]n the valley,' " and Drissy_Bo replied, " 'Trying to come get you ma.' " He asked, " 'Where yo nigga at?' " and she responded, " 'I don't have a nigga . . . then come to the valley, then.' " He asks, " 'How old is you? Is you ready to be down?' " Miller, who also testified as an expert in the areas of pimping, pandering and prostitution, testified that the second question was "getting more specific to human trafficking," which became more clear when Megan C. asked, " 'down for what?' " and Drissy_Bo replied, " 'down for yo crown' with a crown emoji." This phrase and emoji are "specific to commercial . . . sexual exploitation": The crown signifies that the "pimp is the king," asking "[a]re you ready to be down and support me as your king?" Another message said, "Teamwork make the dream work" (with emojis of high heels and bags of money), to which she replied, " 'Ain't that the truth.' " Miller testified that the "teamwork" phrase was "almost like a bumper sticker for human trafficking," so common that it had "Internet memes"; the high heels represented prostitutes wearing fancy shoes; and the money meant "wear your high heels to come make some money."...

Many of the questions and answers appellant presents as objectionable involved Miller telling the jury that particular words or phrases were "specific to" or had a specific meaning in the world of pimping and prostitution, such as "ready to be down," "down for yo crown," "teamwork make the dream work," emojis for money and high heels and "bust dates."

People v. Jamerson, 2019 Cal. App. Unpub. LEXIS 940 (Cal. App. Ct. Feb. 6, 2019)

Emoji Interpretation (2)

After T.R.'s testimony, she and Officer Rios met in the courtroom vestibule. T.R. held her cellphone. She was shaking and upset. She told Officer Rios, "Look at this. Please take me home." Officer Rios observed a Facebook post on T.R.'s cellphone. The post, from "Sowe Beeh" (later identified as Smith), consisted of a photograph and the comment "#RteNow yah lookn [emojis representing two pairs of eyes] at the bitch [emojis of three fingers pointed down at the photograph] dat tld on the homie Baby Ticc [three emojis of a thumb and forefinger making a circle, plus four rat emojis] #T[.]W[.] [four gunshot and three gun emojis] share my post." T.W. was T.R.'s Facebook username...

The comments on the photograph referenced the "bitch" who had told on Washington. The comments contained emojis of rodents. The later comments, following T.R.'s other name, "[T.W.]," included gunshot emojis, gun emojis, and the statement, "share my post." The four gunshot emojis and three gun emojis were evidence Smith was seeking to encourage other viewers of his Facebook page to shoot T.R. His comments included three emojis, each representing a hand with the thumb and forefinger touching and the other fingers pointed up, representing the letter "b," a symbol of the Bacc Street Crips. The jury could have reasonably concluded from the photograph and comments that Smith intended to communicate that T.R. was a despised female who had told on Washington, and she was therefore a "rat" or snitch whom members of the gang should kill to assure she did not testify against Washington at his trial.

People v. Smith, 2019 Cal. App. Unpub. LEXIS 1691 (Cal. App. Ct. March 12, 2019)

eyes ----->



<-----**nostrils**

Interpretation Challenges (1)

- Visually small and similar + platforms constantly change them 
- Designed to have multiple meanings 
- Unsettled grammar [see next slide]
- Perform a variety of communicative functions
- Dialects (language, cultural, regional, platform-specific) 

Interpretative Challenges (2)

יום א', 5 ביוני

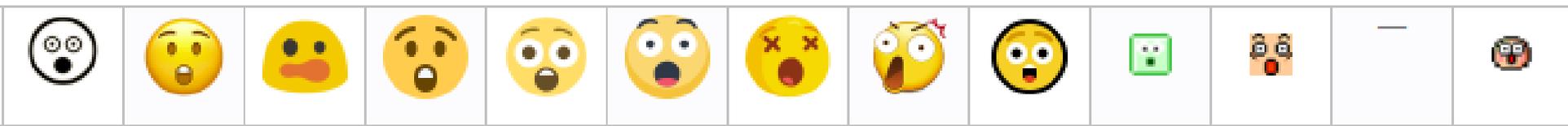
בוקר טוב 😊 רוצים את הבית 🍷🍷👩
רק צריך לשבת על הפרטים...
מתי מתאים לכם?

9:00

Rough Translation: “Good morning” [smiley] “Interested in the house” [emoji string] “Just need to discuss the details...when is a good time for you?”

Interpretation Challenges (3)

- Technology mediation changes the depiction without disclosure
 - Intra-Platform Version Incompatibilities
 - Cross-Platform Depiction Diversity/Failed ZWJ
 - Cross-Platform Omissions



Thank You



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