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Keith Menscher

I. Introduction

I 😊 emojis can have a place in contracts and the world should agree. That is because, “[e]mojis are words too.”¹ In 2019, over ten-billion emojis² were sent every day.³ That figure comes from the approximately 92% of online users who use emojis on a daily basis.⁴ From what they were intended for to their use today, nobody could have projected the cultural transcendence of communication emojis have brought. As technology continues to advance and society becomes more digital by the day, will emojis become part of contract law?

The Oxford Dictionary defines emoji as a “small digital image or icon used to express an idea, emotion, etc., in electronic communications.”⁵ As it stands today, however, no legal definition for emoji’s exist, leaving courts to the whims of their own interpretation.⁶ Even with the technology community recognizing emojis as a digital language, the first of its kind,⁷ scholars argue that emojis are nothing more than digital complexities that create a presence of ambiguity and uncertainty.⁸ However, emojis are so far ingrained in society that using emojis is just a quicker

¹ Chris Matyszczyk, *Teen Arrested After Alleged Facebook Emoji Threats*, CNET (Jan. 25, 2015 12:44pm), <https://www.cnet.com/news/teen-arrested-after-alleged-facebook-emoji-threats/>.

² Emojis will be referred as “Emoji” or “Emojis” simultaneously.

³ Morgan Messick, *30 Emoji Statistics for Businesses*, ZOOMINFO (Feb. 3, 2020), <https://blog.zoominfo.com/emoji-statistics-for-businesses/>.

⁴ *Id.*

⁵ Oxford Dictionary; Eric Goldman, *Emojis and The Law*, 93 WASH. L. REV. 1227, 1231-32 (2018).

⁶ Tre Morgan, *A Legal Definition For Emoji’s*, The Law Offices of Randolph Morgan III (July 16, 2019), <https://tremorgan.com/a-legal-definition-for-emojis/>.

⁷ Arielle Padres, *The Wired Guide to Emoji: More Than Just Cute Pictures, These Digital Icons Are a Lingua Franca For the Digital Age*, WIRED (Feb. 1, 2018 09:23am), <https://www.wired.com/story/guide-emoji/>.

⁸ See e.g., Goldman, *supra* note 5, at 1246; Salena Larson, *Emoji Can Lead to Huge Misunderstandings, Research Finds Emoji Sometimes Mean What You Don’t Think They Mean*, DAILY DOT (Feb 29, 2020, 8:50AM), <https://www.dailydot.com/debug/emoji-miscommunicate/>.

way to communicate with emphasis attached.⁹ Because of this fact, my thesis is that unambiguous emojis exist.¹⁰

This comment will examine how acceptance can be demonstrated through the use of emojis. Acceptance in contracts, better understood as a manifestation of assent, is a fundamental principle of contract law because it is necessary to validate the formation of a contract.¹¹ Acceptance is important to analyze when it comes to emojis because it has — and likely will — continue to be a contentious issue in legal disputes regarding contracts.¹²

Part II of this comment will discuss emojis in a historical context, the laws that govern contracts, and recent cases in contract law involving emojis in both the US and abroad. Part III of this comment will analyze emojis in contract formation, specifically focusing on acceptance and interpretation of such. The reader will be provided with examples of ambiguous and unambiguous emojis and the impact they may have in these stages of contract formation.

Part IV will address ways to mitigate contemporary issues arising from the use of emojis in contracts. This comment will conclude with a review of facts and the authors objective finding regarding the use of emojis as a means of valid acceptance. Although this comment focusses on issues of acceptance, it is important to note that emojis potentially raise issues in other areas of contract law including writing requirements under the statute of frauds.


⁹ Elizabeth Kirley and Marilyn McMahon, *The Emoji Factor: Humanizing The Emerging Law of Digital Speech*, 85 TENN. L. REV. 517 (2018).

¹⁰ Larson, *supra* note 8 (“avoiding ambiguous emoji can take the confusion out of communication.”).

¹¹ City of Riviera Beach Gen. Empls. Ret. Sys., No. 2:15-cv-821, 2016 U.S. Dist. LEXIS 62422, at *20 (W.D. Pa. 2016).



¹² See e.g., Dahan v. Shacharoff, 30823-08-16 (Herzliya Small Claims Court Feb. 24, 2017); Sewell v. Daniel, No. 1:19-cv-5790, 2020 U.S. Dist. LEXIS 63609 (N.D. Ga. 2020); see also Eric Goldman, *Frequency of Courts’ References to Emojis and Emoticons Over Time*, TECHNOLOGY & MARKETING LAW BLOG, (Sept. 12, 2020 8:16PM), <https://blog.ericgoldman.org/archives/2017/06/frequency-of-courts-references-to-emojis-and-emoticons-over-time.htm>.

II. Contract Law and Emojis

It is as if  has gone in reverse, back to when symbols were the primary means to communicate with one another.¹³ As emojis have suddenly emerged as a universal digital language, recognized across the world, the law of contracts must catch up.¹⁴ Since the Roman era, contract law has been in place to protect those who wish to engage in transactions, regardless of the position either are in.¹⁵ These goals continue today, with contract law being the primary form of law protecting private ordering.¹⁶ Although contract law exists, with such widespread use of emojis, there are limited sources for courts to interpret whether an emoji can validate a contract.

A. Common Law of Contracts

An express bilateral contract is a type of agreement in which two parties come to terms under mutual assent to form an agreement.¹⁷ Unlike a unilateral agreement, where acceptance is when the performance is completed, a bilateral agreement requires assent to be formalized.¹⁸ With regard to express contracts, some Supreme Court justices define such contracts as “a compact between two or more parties and is either executory or executed.”¹⁹ In the justices’ view, a contract is either in the process of being executed or has already been executed.²⁰ To be executed, an

¹³ Padres, *supra* note 7 (“Think of them more like a primitive language. The tiny, emotive characters—from  to  to —represent the first language born of the digital world, designed to add emotional nuance to otherwise flat text.”).

¹⁴ Mark Davis, *Unicode & Emoji, Powerpoint slide, president and co-founder*, Unicode consortium.

¹⁵ Alan Watson, *The Evolution of Law: The Roman System of Contracts* (1984), https://digitalcommons.law.uga.edu/fac_artchop/496.

¹⁶ “The term ‘private ordering’ refers to the use of rules systems that private actors conceive, observe, and often enforce through extra-legal means.” Jorge L. Contreras, *From Private Order to Public Law: The Legal Frameworks Governing Standards-Essential Patents*, 30 HARV. J.L. & TECH. 211, 213 ((citing ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 123-27 (1991); Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 391, 324 (2002)).

¹⁷ City of Riviera Beach Gen. Empl. Ret. Sys., No. 2:15-cv-821, 2016 U.S. Dist. LEXIS 62422 at *20.

¹⁸ *Id.* (“Bilateral contracts involve two promises and are created when one party promises to do or forbear from doing something in exchange for a promise from the other party to do or forbear from doing something else.”).

¹⁹ Fletcher v. Peck, 10 U.S. 87, 136-137 (1810).

²⁰ *Id.*

“[o]ffer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made.”²¹

The long standing principle recognized under US Common law is that an enforceable contract is created only after an offer with valid consideration is accepted.²² When it comes to acceptance, for it to be effective, it “must be positive and unambiguous.”²³ Common law also recognizes that terms and conditions must also be unambiguous, where any word or phrase must carry with it a particular meaning that can only be understood in one way.²⁴ But with ambiguity in contracts, it does not mean that if something is ambiguous in one regard it is ambiguous in all regards.²⁵ With this in mind, it is widely recognized that a word or symbol may be “plain and unambiguous as to one or more matters, and yet be ambiguous with respect to other matters.”²⁶

B. The Law for Courts to Interpret

The expansion of technology is necessitating an expansion of contract law.²⁷ The laws of contracts are inconsistent with new digital capabilities, and some law makers recognized that without change, technology is on the verge of being out of reach in our current judicial system.²⁸ Because of this, many states have taken steps to enact new statutes to cover contracts formed over digital platforms.²⁹ As the modern economy moves more towards boilerplate agreements, a major

²¹ *Eliason v. Henshaw*, 17 U.S. 225, 228 (1819) (“Any qualification of, or departure from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.”).

²² *Robertson v. United States*, 343 U.S. 711, 713 (1952).

²³ *Sanders v. Ins. Co. of N. Am.*, 42 S.W.3d 1, 15 (Mo. Ct. App. 2001).

²⁴ *Friedman v. Virginia Metal Products Co.*, 56 So. 2d 515, 517 (Fl. 1952) (*citing* *Dorsey v. Clements*, 202 Ga. 820 (Ga. 1947)).

²⁵ *Dorsey v. Clements*, 202 Ga. 820, 821 (Ga. 1947).

²⁶ *Id.*

²⁷ 4 Corbin on Contracts § 23.1 (2020).

²⁸ See Moshe Berliner, *When a Picture is Not Worth a Thousand Words: Why Emojis Should Not Satisfy the Statute of Frauds' Writing Requirement*, 41 CARDOZO L. REV. 2161, 2189 (2020).

²⁹ See *Id.*

challenge is to adapt to and incorporate emojis into modern contract law. The current bodies of law most relevant to emojis are the state adopted Restatements, the UCC, and the UETA.

i. Restatement (Second) of Contract Law

Although the Restatements of contract law is not a body of law *per se*, it is widely adopted by states making it the purveyor of modern contract law.³⁰ The Restatements are adopted in two ways, either by the courts of the state or through state legislation.³¹ Under the Restatements, a contract or agreement may be accepted in multiple ways, including silence, performance, writing, or verbal communication.³² Because the offeror is the “master of his offer,” he himself can insist on a particular mode of acceptance which without, would not suffice as a valid manifestation of assent.³³ However, insistence on a specific mode of acceptance is not common, and without such insistence, an acceptance can be made in any way that is reasonable under the circumstances.³⁴

With the adopted Restatements, an acceptance is valid once it is sent out by the offeree.³⁵ Additionally, “[u]nless circumstances known to the offeree indicate otherwise, a medium of acceptance is reasonable if it is the one used by the offeror . . .”³⁶ This means, if an offeror requests assent via text, email, or any other electronic communication medium, a response through the same would likely be acceptable.³⁷ The Restatements do not prohibit modes of communication to

³⁰ See *Survey of How Courts Nationally Cite the American Law Institute’s Restatements: 50-State Survey* (Oct. 30, 2019), <https://www.primerus.com/files/Restatement%2050-State%20Survey%2010.30.19.pdf>.

³¹ Restatements may also be adopted partially. See *Riedel v. ICI Americas Inc.*, 968 A.2d 17, 20 (Del. 2009) (overruled on grounds other than for its dismissal to adopt a newer Restatement by *Ramsey v. Georgia S. Univ. Advanced Dev. Ctr.*, 189 A.3d 1255 (Del. 2018)).

³² RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981).

³³ RESTATEMENT (SECOND) OF CONTRACTS §30, comment a.

³⁴ RESTATEMENT (SECOND) OF CONTRACTS §30(2).

³⁵ RESTATEMENT (SECOND) OF CONTRACTS §63(a).

³⁶ RESTATEMENT (SECOND) OF CONTRACTS §65.

³⁷ *Id.*

manifest assent, to the contrary, the language of the Restatements leave open all possible means of acceptance.³⁸

The Restatements address signatures as well, defining such as “any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer.”³⁹ Overall, the Restatements focus on the components of a contract and how a properly executed contract exists or fails based on the parties expressed wishes or lack thereof. However, the adopted restatements can be also read in conjunction with other bodies of law, such as the UCC and the UETA.

ii. UCC

The UCC applies to the sale of goods.⁴⁰ Under Article 2 of the UCC, “(1) A contract for sale of goods may be made in any manner sufficient to show agreement, *including conduct by both parties* which recognizes the existence of such a contract . . .”⁴¹ Also like the Restatements, the UCC addresses writing requirements, that is, if a contract requires a signature, what effectively may satisfy such requirement.⁴² Under the UCC, what constitutes a valid signature to a contract can be, “. . .any symbol executed or adopted with present intention to adopt or accept a writing.”⁴³

Including “symbol” in the plain text of the law gives great deference to the notion that a mark as simple as an “x” can validate a contract while satisfying the signature threshold of the

³⁸ RESTATEMENT (SECOND) OF CONTRACTS §19 (“(1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act; and (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assent’s.”).

³⁹ RESTATEMENT (SECOND) OF CONTRACTS §134.

⁴⁰ Gary D. Spivey, *Applicability of UCC Article 2 to Mixed Contracts for Sale of Business Goods and Services: Manufacturing, Construction, and Similar Contracts*, 15 A.L.R. 7TH 7, at n. 6 (“[b]ecause of the limitation to transactions dealing with “goods,” Article 2 does not apply to contracts for services.”).

⁴¹ U.C.C. § 400.2-204 (AM. LAW INST. & UNIF. LAW COMM’N 1977).

⁴² U.C.C. § 1-201(b)(37) (AM. LAW INST. & UNIF. LAW COMM’N 1977) (emphasis attached).

⁴³ *Id.*

rule.⁴⁴ But the UCC was found to be difficult to apply with the emergence of new technology, so much so that lawmakers would enact additional laws to address electronic contracts, or contracts transacted through electronic means.⁴⁵

iii. UETA

State legislatures recognized the change in business norms and addressed digital contracts by adopting a new law, the Uniform Electronic Transactions Act (“UETA”).⁴⁶ “The National Conference of Commissioners on Uniform State Laws drafted the [UETA] to provide that electronic signatures and electronic contracts cannot be denied legal effect or enforceability solely because they are in electronic form.⁴⁷ The overall purpose of the UETA is to provide uniform rules governing electronic commerce transactions under the statute of frauds.⁴⁸ At this time, 47 states have adopted the UETA into their domestic laws, further supporting the notion that as it stands today, states have taken steps to account for new forms of digital communication.⁴⁹ “[...] in addition, Congress passed a similar law, the Electronic Signatures in Global and National Commerce Act (“E-SIGN”), which applies to transactions in interstate or foreign commerce.”⁵⁰

The UETA also overlaps with the UCC in regard to specific sections such as “§1-206 (statute of frauds), and Articles 2 and 2A (sales) [...]”⁵¹ The most significant part of a contract

⁴⁴ Elizabeth Macdonald, *Incorporation of Standard Terms in Website Contracting – Clicking ‘I Agree’*, 2011 JCL LEXIS 11, 13 (2011) (“Plainly, although an ‘x’ signature does very little else, it does make a visible mark. In the electronic context, visibility on the computer screen may be seen as sufficient to satisfy a requirement of writing.”).

⁴⁵ 2 Williston on Contracts § 6:10 (4th ed.); 2 Williston on Contracts § 6:41 (4th ed.).

⁴⁶ See Berliner, *supra* note 28, at 2189.

⁴⁷ *Id.*

⁴⁸ Sandra Norman-Eady, Chief Attorney, *Uniform Electronic Transaction ACT*, OLR RESEARCH REPORT (Nov. 27, 2000) (2000-R-1076); *An Overview of Electronic Signatures*, OTTEN JOHNSON ALERT (Dec. 2018), <https://www.ottenjohnson.com/news-events-resources/otten-johnson-alerts/2018-otten-johnson-alerts/an-overview-of-electronic-signatures>.

⁴⁹ See Berliner, *supra* note 28, at 2189.

⁵⁰ *Id.*

⁵¹ Norman-Eady, *supra* note 48.

that the UETA applies in respect to emojis would be a signature.⁵² The UETA defines signature as, “any symbol, sound, process, or encryption of a record in whole or in part, executed or adopted by a person or the person's electronic agent with intent to . . . (B) adopt or accept a term or a record.”⁵³ The UETA only becomes relevant, however, when the parties consent to conduct the transaction by electronic means.⁵⁴ The UETA’s definition of signature, similarly defined under the UCC, would be the most receptive to emojis because it applies to digital signatures.

C. Before Emojis

There is a long history of using symbols in contract law. For example, hieroglyphics and other symbols were used before the creation of the alphabet. “A reader of hieroglyphics would have had to have a working knowledge of about 600 characters to understand complex texts.”⁵⁵ As it relates to transactions, 5500 years ago in Mesopotamia, Sumerians used symbols to account for goods being traded.⁵⁶ Symbols used over time appear to be a development of the respected societies intellectual reach.⁵⁷ Although modern English contract law traces its roots to the 13th Century, symbols have been used to formally accept agreements since ancient Sumeria.⁵⁸ No different than today, symbols have been used to validate agreements in centuries past.⁵⁹

⁵² See R.J. Robertson, Jr., *Electronic Commerce on the Internet and the Statute of Frauds*, 49 S.C. L. REV. 787, 805 (1998).

⁵³ *Id.*

⁵⁴ J.B.B. Investment Partners, Ltd. V. Fair, 232 Cal. App. 4th 974, 988 (Cal. App. Ct. 2014).

⁵⁵ OpenLearn Free Educational Course: A brief history of communication: hieroglyphics to emojis, <https://www.open.edu/languages/brief-history-hieroglyphics-emojis/content-section-4> “The birth of writing.” [hereinafter referred as “OpenLearn”].

⁵⁶ Michael A. Patterson & S. Brooke Barnett-Bernal, *A Lawyer’s Guide to Emoji: What you need to know* (Nov. 25, 2019), <https://www.longlaw.com/about-our-firm/recent-news/a-lawyers-guide-to-emojis-what-you-need-to-know>.

⁵⁷ OpenLearn, *supra* note 55.

⁵⁸ Mary Ellen Power, [Infographic] *ESIGN DAY – Symbols, Seals and Signatures – How ESIGN came to be*, ONESPAN BLOG (Jun. 30, 2014), <https://www.onespan.com/blog/infographic-esign-day-symbols-seals-and-signatures-how-esign-came-be>.

⁵⁹ *Id.*; see also Contract, *Common law*, BRITANNICA, <https://www.britannica.com/topic/contract-law/Common-law>.

Immediately preceding emojis, people used emoticons. Many people used emoticons with much of the same purpose as they would with emojis, before emojis even existed.⁶⁰ Emoticons are “intimately connected” to emojis where rather than pictures, “[e]moticons are spelled out with type:” :).⁶¹ Although there is a debate on exactly when the first use of an emoticon was,⁶² what emoticons were used for are very similar as an emoji, to convey a thought or feeling.⁶³ As the predecessor of the emoji, emoticons could only convey very basic features, most depicted happy faces, frowning faces and grinning faces of sorts.⁶⁴

The primary difference between emoticons and emojis as described by one court is that emojis are a pictograph whereas an emoticon is a representation of a facial expression.⁶⁵ Facial expressions communicated through emoticons can convey a feeling, even an emotion, just as much as our literal facial expression can without speaking a word;⁶⁶ but still, facial expressions are limited.⁶⁷ Because of this, it was only a matter of time before the effectiveness and popularity of emoticons would lead to more.

D. The Emoji — Then and Now

In 1996, emojis were created in Japan by Shigetaka Kurita whose idea behind the emoji

⁶⁰ Drake Baer, *Emoticons have basically saved human communication*, BUSINESS INSIDER (Sep. 24, 2015 12:50PM), <https://www.businessinsider.com/emoji-were-invented-33-years-ago-heres-why-theyre-so-crucial-today-2015-9>.

⁶¹ *Id.*

⁶² Compare Tim Slavin, *The History of Emoticons*, BEANZ (May 2014), <https://www.kidscodecs.com/history-of-emoticons/>, with Mary Bellis, *Who Invented Emoticons and Emoji?*, THOUGHTCO. (July 28, 2019), <https://www.thoughtco.com/emoticons-and-emoji-1991412>.

⁶³ Bellis, *Supra* note 62.

⁶⁴ See Baer, *supra* note 60.

⁶⁵ *Enjaian v. Schlissel*, No. 14-cv-13297, 2015 U.S. Dist. LEXIS 68511, at n.9 (E.D. Mi. 2015).

⁶⁶ Maria Gendron, Debi Roberson, Jacoba Marietta Van Der Vyver and Lisa Feldman Barrett, *Perceptions of Emotion From Facial Expressions are Not Culturally Universal: Evidence From a Remote Culture*, US NATIONAL LIBRARY OF MEDICINE NATIONAL INSTITUTE OF HEALTH (2014) (“One of the most widely accepted scientific facts in psychology and human neuroscience is that there are a small number of emotions (anger, sadness, fear, etc.) that are expressed on the face and universally recognized.”), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4752367/#R15>.

⁶⁷ *Id.*

was to create a fun and new way for society to communicate digitally.⁶⁸ Fast-forward fifteen years, Kurita’s dream is truly realized.⁶⁹ Apple releases iOS 11⁷⁰ creating the first emoji Keyboard and opening the world to the use of emojis.⁷¹ From this point forward, what once were just fun and sporadic icons used between close friends, transcended into digital symbols that read as if they were words. “In 2018 alone, 157 new emojis were released by Unicode.”⁷² Due to the issues presented by the complexity of interpreting emojis, many scholars have posited that the consistent expansion of emojis only add to further ambiguity of an emojis true meaning.⁷³ This, however, is inconceivable when balancing the consistency and usage rate of emojis in society today.⁷⁴

If emojis presented such complications in terms of interpretation, then at most, it must be attributed to communication between those unfamiliar with either the culture of the party using it or some similar circumstance. Today, emojis are used to bridge communication gaps between parties, no matter the context of the conversation at hand.⁷⁵ Not only that, but due to the wide range of popularity in the world, companies have become successful from selling real world emoji products depicting the very emojis that are most commonly used.⁷⁶ Even the President of the Oxford Dictionary, Caspar Grathwohl, has recognized the significant emoji transcendence, so

⁶⁸ Padres, *supra* note 7.

⁶⁹ *Id.*

⁷⁰ IOS 11 is a mobile operating system that Apple uses for its iPhones and is rival to Google’s Android.

⁷¹ Jeff Blagdon, *How Emoji Conquered The World: The Story of The Smiley Face From the Man Who Invented*, The VERGE (Sept. 12, 2020 6:25PM), <https://www.theverge.com/2013/3/4/3966140/how-emoji-conquered-the-world>; Adam Sternbergh, *Smile, You’re Speaking Emoji: The Rapid Evolution of a Wordless Tongue*, NY MAG (Nov. 16, 2014 9:00PM), <https://nymag.com/intelligencer/2014/11/emojis-rapid-evolution.html>.

⁷² Berliner, *supra* note 28, at 2175.

⁷³ *Id.*

⁷⁴ Em😊 Research Team, *2016 Emoji Report* (Nov. 16, 2016) (stating that 2.3 Trillion mobile messages that include Emojis will be sent in 2016), https://cdn.emogi.com/docs/reports/2016_emoji_report.pdf [*hereinafter* referred as “Em😊”].

⁷⁵ Berliner, *supra* note 28, at 2167.

⁷⁶ See Edward T. Brawley, *Emoji(R): The Other Tech Monopoly*, 2 CARDOZO INT’L COMP. POL’Y & ETHICS L. 217, 220 (2018).

much so, he awarded the smiley emoji as the 2015 Oxford Dictionary word of the year.⁷⁷ People who send several or more messages per day, which is about everybody in modern society, include emojis in 56% of their messages.⁷⁸

Emojis are so widely recognized, a restaurant in London created an all emoji menu.⁷⁹ With emojis consistently expanding, it was only a matter of time until interpretation issues involving emojis would reach the courts. There have been over 33 court cases since 2009, and possibly more, that have involved emojis or the emoji predecessor, the emoticon.⁸⁰ Like the 600 plus characters in hieroglyphics, there are over 3,136 emojis in use and that number continues to grow.⁸¹

E. How Courts Interpret Emojis

Courts have already been presented with a plethora of issues involving the use of emojis.⁸² Many legal disputes involving emojis typically involve threats and other criminal conduct, Intellectual Property issues, and contracts.⁸³ Although not common, the courts who already faced emoji issues in contract disputes have provided, to a degree, some guidance for future issues involving emojis in contracts. Additionally, contract disputes involving emojis have also not been merely relegated to domestic courts — the emerging issue has received international attention as

⁷⁷ Katy Steinmetz, *Oxford's 2015 Word of the Year Is This Emoji*, TIME (Nov. 16, 2015 2:08PM), <https://time.com/4114886/oxford-word-of-the-year-2015-emoji/>.

⁷⁸ Em 😊, *supra* note 45.

⁷⁹ Raisa Bruner, *How Emojis Have Completely Revolutionized Communication From Tears of Joy to Bacon*, TIME (July 15, 2016 6:31PM), <https://time.com/4408803/how-emoji-have-completely-revolutionized-communication-from-tears-of-joy-to-bacon/>.

⁸⁰ Scott Moise, *The Scrivener: Emoji and Emoticons in Legal Writing*, 30 S. CAROLINA LAWYER 60, (2019).

⁸¹ Katharina Buchholz, *The History of the 5 Billion Emojis Used Every Single Day*, WORLD ECONOMIC FORUM (Sep. 30, 2020), <https://www.weforum.org/agenda/2020/09/emoji-numbers-facts-social-media-how-many-twitter-facebook-instagram/>.

⁸² See *Doe v. Western New England University*, 2017 WL 113059 (D. Mass. Jan. 11, 2017).

⁸³ See Eric Goldman, *supra* note 12.

well.⁸⁴ Despite judicial differences, courts have found that in some circumstances, emojis do show intent and can be recognized to mean a specific thing.⁸⁵

What seems to be the most relevant example of a court addressing emojis in a contract took place in Israel.⁸⁶ In the case of *Dahan v. Haim*, heard by the Herzilya Small Claims Court in Israel, Yaniv Dahan placed an online advertisement on Yad2, an Israeli classified advertisement site, about his available apartment.⁸⁷ The issue that came before the Court was “whether or not emojis could prove intent in this landlord tenant case.”⁸⁸ Here, the judge determined that,

“[t]he combination of these – the festive icons at the beginning of the negotiations, which created much reliance with the prosecutor, and those smileys at the end of the negotiations, which misled the Plaintiff to think the defendants were still interested in his apartment – support the conclusion that the defendants acted in bad faith in the negotiations.”⁸⁹

The rationale of the court’s decision is that although the series of emojis sent individually did not have a specific meaning, sending the emojis collectively was enough to show intent and “optimism.”⁹⁰

In England, the London High Court was faced with a matter involving an emoticon, the predecessor of the emoji and whether a specific Icon used in a tweet amounted to defamation.⁹¹

The judge in that case posited that the use of such symbol must be weighed against the “equivalent

⁸⁴ See *Dahan*, 30823-08-16 (Herzliya Small Claims Court Feb. 24, 2017).

⁸⁵ See e.g., *Id.*; *Ragunauth v. Bisailon*, 2016 WL 3451762 (Conn. Superior Ct. June 1, 2016).

⁸⁶ See *Dahan*, 30823-08-16.

⁸⁷ Carly Ben-Yishay, *Judge In Israel Has Ruled That Emoji Can Prove Intent in a Landlord/Tenant Case*, AELJ BLOG (Feb. 10, 2019) (citing *Dahan*, 30823-08-16 (Herzliya Small Claims Court Feb. 24, 2017)), <https://cardozoaelj.com/2019/02/10/judge-israel-ruled-emoji-can-prove-intent-landlordtenant-case/#ftn17>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ The emojis sent by the prospective tenant and analyzed by the court were 🍷 🍷 🍷 . . . 😊 . . . 🍷 🍷 []. *Dahan*, 30823-08-16.

⁹¹ *Kirley and McMahon*, *supra* note 9 (citing *McAlpine v. Bercow*, [2013] EWHC 1342 (QB)).

non-verbal behavior” of the parties.⁹² The court noted in its decision that digital icons are not beyond the “comprehension of non-digital speakers as their meaning could be clarified through the use of extrinsic aids like newspaper accounts.”⁹³

Based on the widespread use of emojis, it was inevitable courts would not be spared from issues involving emojis.⁹⁴ But in addition to validation and interpretation issues, at least one court has posited that emojis and text messages are seen as, and should be considered as, only casual and, “strikingly devoid of formality.”⁹⁵ Eric Gordan — a frequent contributor to technology journals across the country — created a spread sheet to highlight all cases he found involving emojis and emoticons.⁹⁶ Gordon found that a majority of cases involving emojis touch upon matters involving violence or harassment with some mention to contracts.⁹⁷ Additionally, as another scholar pointed out, because courts have begun entering emojis into evidence, attorneys who dismiss emojis as “mere cartoon characters” do so “at their own peril.”⁹⁸

In matters involving emojis used to make threats, courts have found that emojis can be understood as valid threats depending on the context.⁹⁹ The question that seems to be asked is whether or not a reasonable person can construe the emoji as a threat.¹⁰⁰ This position gives substance to the fact that emojis have been recognized to show intent and, more importantly, emojis can have the same power as words. Expanding further, the view that an emoji may be a

⁹² *McAlpine*, [2013] EWHC 1342 (QB).

⁹³ *Id.*

⁹⁴ Goldman, *supra* note 12.

⁹⁵ *Bardales v. Lamothe*, 423 F. Supp. 3d 459, 472 n.9 (M.D. Tenn. 2019).

⁹⁶ Goldman, *Supra* note 12.

⁹⁷ *Id.*

⁹⁸ Tanya M. Kiatkulpiboone and Andrea W. Paris, *Emoji and Deciphering Intent in The Digital Age*, 59 ORANGE COUNTY LAWYER 42, 43 (2017), <http://www.marketwired.com/press-release/survey-finds-78-percent-of-american-workers-are-emotionally-disconnected-at-work-1912036.htm>.

⁹⁹ See e.g., *Ragunauth v. Bisailon*, 2016 WL 3451762 (Conn. Super. Ct. 2016); *State v. McBride*, 2016 IowaApp. LEXIS 1246 (Ia. Ct. App. Nov. 23, 2016).

¹⁰⁰ See *In re L.F.*, 2015 WL 3500616 (Cal. Ct. App. June 3, 2015).

threat depending on a reasonable viewpoint largely impacts emoji disputes in general, which no doubt will spill over in other disputes involving emojis.

In a contract dispute that involved the use of a thumbs-up emoji, the court addressed the question of whether a waiver of obligations was created after the emoji was used to agree.¹⁰¹ Although the focus of the issue was not about the emoji itself, one can subtly interpret from the court's decision that a thumbs-up emoji sent to accept an offer is acceptable in contract law.¹⁰²

In a more recent case, a court was presented with an issue involving a thumbs up emoji sent through text.¹⁰³ Respondent argued that the thumbs up emoji sent by petitioner was an "acquiesce" in an agreement between the parties.¹⁰⁴ The court, however, found that the emoji was "neither (1) 'statement[s] with the requisite formality' that demonstrate petitioner's acquiescence; nor (2) display a "consistent attitude of acquiescence over a significant period of time."¹⁰⁵ Overall, the court found that the emoji did not show "by a preponderance of the evidence," proof of petitioners acceptance.¹⁰⁶

In a case from Florida, although not specifically dealing with an emoji, the court was presented with an issue regarding a picture that depicted a thumbs up gesture, sent in response to an offer.¹⁰⁷ That court found that the characterization of the thumbs up was "grossly mischaracterized," but also reasoned that analyzing the non-verbal communication was unnecessary as a picture is not a writing.¹⁰⁸ The rationale from this court's opinion can subtly

¹⁰¹ *Sewell*, No. 1:19-cv-5790, 2020 U.S. Dist. LEXIS 63609.

¹⁰² *Id.*

¹⁰³ *Bardales*, 423 F. Supp. 3d at 472.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Paul v. Raytroniks Inc.*, No. 18-20698, 2018 U.S. Dist. LEXIS 66840 (Dist. Ct. S.D.F, Miami 2018).

¹⁰⁸ *Id.*

give a nod to a thumbs up emoji, as no other reasonable conclusion could be drawn from a written gesture as such to mean anything other than assent.¹⁰⁹

Although contract disputes involving emojis are scarce, questions involving emojis in law is anything but new.¹¹⁰ There appears to be a rationale from the courts that seems to be shared across international jurisdictions;¹¹¹ that is, how an emoji may be interpreted can lead to either the validation or invalidation of a contract.¹¹² Courts use their best efforts in applying the relevant laws when facing emojis, and most seem to come against a favorable finding, however, the courts consistent analysis leaves open the fact that emojis can constitute acceptance.¹¹³ This raises the proceeding question of whether or not there are differences in emojis to truly change the context of the emoji itself.

III. How Emojis and Contracts can Coexist in Harmony

Many scholars discuss the issues emojis have in a legal context, consistently addressing interpretation issues arising from the ambiguity emojis bring.¹¹⁴ Emojis, however, are not prohibited by any inference or plain reading of contract law. Although it has been proclaimed by the courts that emojis are purely casual lines of communication, “devoid of formality,” such reasoning is *devoid of reality*.¹¹⁵ This is because studies have shown that “76% of American workers have used [an] emoji in professional communications.”¹¹⁶ This statistic is sufficient alone

¹⁰⁹ The idea that the court discussed the picture and the intended meaning of it may implicate that had the thumbs up been in writing, as a thumbs up emoji can be considered, it would have been a valid form of acceptance. *See Id.*

¹¹⁰ *See* Goldman, *supra* note 12.

¹¹¹ Compare *Ragunauth*, 2016 WL 3451762, with *Dahan*, 30823-08-16.

¹¹² *See e.g., Raytroniks Inc.*, No. 18-20698, 2018 U.S. Dist. LEXIS 66840; *Dahan*, 30823-08-16.

¹¹³ *See e.g., Bardales*, 423 F. Supp. at 472; *Raytroniks Inc.*, No. 18-20698, 2018 U.S. Dist. LEXIS 66840; *Sewell*, No. 1:19-cv-5790, 2020 U.S. Dist. LEXIS 63609.

¹¹⁴ Goldman, *supra* note 5, at 1240-41.

¹¹⁵ *Contra* Bardales, 423 F. Supp. 3d at 472 n.9.

¹¹⁶ Kiatkulpiboone & Paris, *supra* note 98, at 43 (citing *Survey Finds 78 Percent of American Workers Are Emotionally Disconnected at Work*, MARKET WIRED (May 20, 2014)).

to reject the notion that emojis cannot be used formally, debunking the position that seems to be pre-dated and an unreasonable analysis.

The law of contracts can be boiled down to an offer and acceptance.¹¹⁷ With acceptance, the analysis of such is an objective one, and the interpretation of an emoji must rest with what a reasonable third party would believe it to be.¹¹⁸ An evaluation of acceptance will show that emojis are not only not precluded, but discreetly included.

A. Emojis as Acceptance

Any conclusion that emojis cannot constitute acceptance would be contrary to both the common law and common sense. After the components of a contract are in order, the only thing left is the acceptance of the proposed contract.¹¹⁹ In order for an acceptance to be valid, it must be clear and unambiguous.¹²⁰ An example of a clear and unambiguous acceptance would simply be the words: “I accept. Another example of an acceptance, but this time accompanied by an emoji: “I accept👍.” In the latter example, the thumbs up emoji is used as an emphasis, or better said, an unnecessary second statement of agreeance. Take away the text and we are left with: “👍”; it is difficult to imagine a world where a thumbs up in response to a clear and unambiguous offer is not treated as the same.¹²¹

Even if acceptance requires a signature on a contract rather than just a textual response, the UETA and UCC allow for a signature to be a symbol.¹²² This is expressly stated in the plain text

¹¹⁷ See generally 2 Williston on Contracts § 6:10 (4th ed.).

¹¹⁸ Kevin Werbach and Nicolas Cornell, *Contracts Ex Machina*, 67 DUKE L.J. 313, 368 (2017).

¹¹⁹ *Robertson*, 343 U.S. at 713.

¹²⁰ *State Line Bag Co., LLC v. CompanionLabs Sys.*, No. 4:17-CV-00737, 2018 U.S. Dist. LEXIS 142550, at *15 (W.D. Mo. 2018) (citing *Kunzie v. Jack-In-The-Box, Inc.*, 330 S.W. 3d 476, 484 (Mo. Ct. App. 2010)).

¹²¹ Maciej Duszynski, *Emoji In Work-Related Email Communication [2020 Study]*, HR FUTURE (Apr. 24, 2020 2:11PM) (stating that a survey of 1,000 people found that “messages were just as clear (or unclear) whether or not they employed emojis.”), <https://www.hrfuture.net/talent-management/culture/emoji-in-work-related-email-communication-2020-study/>.

¹²² *J.B.B. Investment Partners, Ltd.*, 232 Cal. App. 4th at 988.

of the law itself.¹²³ The critical question when measuring a party's words or conduct as acceptance is whether the signals sent by the offeree objectively manifest the parties intent to be bound.¹²⁴ This rhetoric is based on the “parties' objective intent and what a reasonably prudent person would have been led to believe from the actions or words of the parties.”¹²⁵ But regardless of this theory, “whether a written contract containing emojis can satisfy the statute of frauds is a question that has yet to be considered by US Courts.¹²⁶

Courts evaluate acceptance objectively, leaving a place through the judicial process to find emojis as proof of intent to be bound.¹²⁷ Because there is no law that makes mention or brings into question emojis, any analysis that rejects an emojis place in contracts ignores the common law and the most commonly adopted restatement, where an acceptance can be as informal as the individual wishes.¹²⁸ A 👍 is an easy and quick way to say yes to an offer just as much as a 🗨️ emoji may be used to convey the opposite.¹²⁹

This message is supported by Arthur Corbin who states that “[t]here are different modes of expressing assent.”¹³⁰ Corbin outlines multiple different means of accepting a contract, touching on the idea that a contract may be accepted “[. . .] by words in any language, by words written or spoken.”¹³¹ As noted earlier, emojis are considered a digital language,¹³² which further gives a nod that should an offeree offer an emoji in response to an offer, such emoji can and should be

¹²³ *Id.*; UETA.

¹²⁴ *State Line Bag Co., LLC.*, 2018 U.S. Dist. LEXIS 142550, at 16 (*citing Kunzie*, 330 S.W.3d at 484).

¹²⁵ *Id.* (*citing Computer Network Ltd. V. Purcell Tire & Rubber Co.*, 747 S.W.2d 669, 675 (Mo. Ct. App. 1988)).

¹²⁶ Berliner, *supra* note 28, at 2191.

¹²⁷ Werbach & Cornell, *Supra* note 118, at 368 (discussing electronic contracts and “[t]he fact that parties submit their cryptographic private keys” shows their intent to be bound based on an objective analysis).

¹²⁸ *Copelin v. Insurance Co.*, 76 U.S. 461, 465 (1869) (the Court states a valid acceptance does not need to be expressly made).

¹²⁹ *Meaning of 🗨️ Emoji*, EMOJIS.WIKI, <https://emojis.wiki/thumbs-down/> [*hereinafter referred as “Meaning of”*].

¹³⁰ 1 Corbin on Contracts § 1.19.

¹³¹ *Id.*

¹³² Padres, *supra* note 7.

used as an acceptance. Granted, some emojis would be too far removed from a specific meaning, or a meaning that can be diligently inferred, however, this will not always be the case as discussed in *Bardales* and even *Dahan*.

As a renowned scholar of contracts, Corbin under his modern theories seemingly leaves a place for emojis in his analysis of acceptance, where he posits, “[t]hrowing up one’s hat is usually an expression of joy; but it may be made to express assent to an agreement to sell land for ten thousand dollars.”¹³³ Emojis, like symbols and words, are used to translate a message, and because the world is exposed to emojis in digital communications, it is not like the offeror must have access to some private system of symbols of the offeree.¹³⁴ The idea here is that an acceptance is merely an expression, and that expression does not have to be in the same manner the offer was offered, so if an emoji is used, an offeror would undoubtedly have good resources should they be unclear, what such an emoji may mean.¹³⁵ This sentiment is supported in *McAlpine*, where the court expressly stated that the meaning behind digital icons can be found through available extrinsic aids should a party need clarification.¹³⁶

As it is best understood, “[. . .] evidence of a party’s subjective misunderstanding has no bearing on the definiteness of an agreement, which is an objective inquiry.”¹³⁷ Based on the underlying rationale of the courts and the plain reading of contract law, emojis clearly can constitute acceptance.

¹³³ *Id.*

¹³⁴ See 4 Corbin on Contracts § 23.1 (“If Samuel Pepys had signed a memorandum written in his personal hieroglyphic and was the party to be charged thereon, the statutory requirements would be satisfied if the other party could obtain in almost any way Pepys’ own private key to his private system of symbols.”).

¹³⁵ 1 Corbin on Contracts § 4.13.

¹³⁶ See *McAlpine*, [2013] EWHC 1342 (QB).

¹³⁷ *Moe’s Home Collection, Inc. v. Davis St. Mercantile, LLC*, No. 05-19-00925, 2020 WL 3637623, at *10 (5th Cir. 2020).

B. Interpreting Acceptance by Emoji

When a party communicates an acceptance, a question must be asked when a dispute exists to the legality of the valid formation of a contract: whether or not that communication can be interpreted to be acceptance. Interpretation is not something we should find as the root cause of emoji issues because, “[d]ecoding pictures as part of communication has been at the root of written language since there was such a thing as written language.”¹³⁸ But albeit the aforementioned facts, emojis still will likely be subject to judicial interpretation.¹³⁹ This in of itself should not be a basis to discourage or even dismiss the strength of emojis in communication.

Like any language, depending on where the person is or where they are from, that same language may be different.¹⁴⁰ Words, like emojis, can have different meanings, so there is no real distinction between emojis and text in this regard.¹⁴¹ In society today, new words are created, trend, and are given new meaning.¹⁴² This is what emojis are in the digital world.¹⁴³ Like words, people can misinterpret the emotion and meaning in emojis quite significantly.¹⁴⁴ Although much like any form of communication, it is always critical to consider how an emoji may be “received or interpreted” by the other party.¹⁴⁵

¹³⁸ Sternbergh, *supra* note 71.

¹³⁹ Goldman, *supra* note 5, at 1240.

¹⁴⁰ Gabriella Zicarelli and Eric Goldman, *How a Chipmunk Emoji Cost an Israeli Texter \$2,200*, TECHNOLOGY & MARKETING LAW BLOG (May 25, 2017), <https://blog.ericgoldman.org/archives/2017/05/how-a-chipmunk-emoji-cost-an-israeli-texter-2200.htm>.

¹⁴¹ Berliner, *supra* note 28, at 2167.

¹⁴² Andy Bodle, *How New Words Are Born*, THE GUARDIAN (Feb. 4, 2016 4:00AM) (“English speakers are adding new [words] at the rate of around 1,000 a year.”), <https://www.theguardian.com/media/mind-your-language/2016/feb/04/english-neologisms-new-words>.

¹⁴³ Padres, *supra* note 7.

¹⁴⁴ Larson, *supra* note 8.

¹⁴⁵ Eric Begun, *Your Emoji Just Formed a Contract*, King Fisher Law Firm (Feb. 12, 2018), <https://www.king-fisher.com/your-emoji-use-just-formed-a-contract/>.

It appears that the majority of scholars who have analyzed emojis in law find them a poor choice of communication with no place in our legal system.¹⁴⁶ This is difficult to consider when, “in the future, as the world becomes increasingly digital and increasingly globalized, emojis will become important tools for translation and communication—a lingua franca for the digital age.”¹⁴⁷ However, despite the projection of emoji reach, some scholars have gone as far as suggesting attorneys advise their clients never to use emojis in contracts, “period.”¹⁴⁸ The idea behind emojis being so convoluted that it becomes a legal nightmare is predicated on the different meanings emojis may have depending on the circumstances. Some of the most important circumstances are the differences between geographical locations or the platform the parties are using.¹⁴⁹

As one scholar wrote when comparing US courts to Israel, “US law would probably agree with the [Israeli] court’s conclusion that no contract [was] formed.”¹⁵⁰ However, such prediction and negativity towards emoji use almost seems to be a rejection of change as well as a delay in acceptance of the inevitable. The facts are there,¹⁵¹ emojis are at the fingertips of every electronic communication user and attorneys will inevitably be faced with clients who use them. And as concerns are warranted, one way to quell fear is to point out that some emojis will not present such interpretation issues.

¹⁴⁶ Terence S. Nunan and Marlena M. Moore, Department, *The Last Word*, 33 PROBATE & PROPERTY 64, (2019).

¹⁴⁷ Padres, *supra* note 7.

¹⁴⁸ Nunan, *supra* note 146.

¹⁴⁹ See Goldman, *supra* note 5, at 1234; see also Zicarelli & Goldman, *supra* note 140.

¹⁵⁰ Zicarelli & Goldman, *supra* note 140 (discussing the holding in *Dahan*, 30823-08-16 and whether US courts would agree).

¹⁵¹ Em😊ji, *supra* note 74 (stating that 2.3 Trillion mobile messages that include Emojis will be sent in 2016).

C. Ambiguous and Unambiguous Emojis¹⁵²

“Every year, official arbiters of online expression at the Unicode Consortium¹⁵³ consider new ways for vocabulary-deficient people to express themselves online.”¹⁵⁴ The process for adding new emojis to the Unicode official list is so extensive and drawn out, that consideration for new emojis begin being looked at over a year out from the approval process.¹⁵⁵ There is no doubt that emojis may be ambiguous, but so are words, and like words, some emojis may *also* be unambiguous.¹⁵⁶

i. Emojis With Ambiguous Meanings

Some emojis will be patently ambiguous.¹⁵⁷ These type of emojis are ambiguous by design.¹⁵⁸ One example of an ambiguous emoji is the 🍆; the eggplant emoji will have a variety of meanings regardless of the circumstances.¹⁵⁹ The 🍆 on its surface is a vegetable, and one may use such an emoji while discussing what is on the menu, at the same time, it may be used to portray a part of the male anatomy.¹⁶⁰ Thus, such an emoji would be impossible to attach any specific

¹⁵² The author introduces only a limited about of emojis to illustrate the difference between ambiguous and unambiguous emojis. There are over 3,000 emojis in existence and the existence of other emojis with the same power as those presented is likely.

¹⁵³ “The Unicode Consortium is a non-profit corporation devoted to developing, maintaining, and promoting software internationalization standards and data, particularly the Unicode Standard, which specifies the representation of text in all modern software products and standards. The Unicode Consortium actively develops standards in the area of internationalization including defining the behavior and relationships between Unicode characters.” <https://unicode.org/consortium/consort.html>.

¹⁵⁴ Chris Mills, *This is the First Look at New Emoji Coming Next Year*, BGR, (Aug. 9, 2018 10:01PM), <https://bgr.com/2018/08/09/new-emoji-unicode-12-0-update-ios-android/>.

¹⁵⁵ *Id.*

¹⁵⁶ Larson, *supra* note 8.

¹⁵⁷ Esther Rivers, *How People Interpret Emojis Differently Will Amaze You*, LIFEHACK (Jan. 5, 2021), <https://www.lifehack.org/388903/how-people-interpret-emojis-differently-will-amaze-you>.

¹⁵⁸ *Id.*

¹⁵⁹ See Hamza Shaban, *Your Honor, It's an Eggplant: Lawyers Call for Guidance on Interpreting Emoji*, THE WASHINGTON POST (Feb. 22, 2019 12:09PM) (discussing that Emojis like the eggplant can mean different things depending on the circumstances), <https://www.washingtonpost.com/technology/2019/02/22/your-honor-its-an-eggplant-lawyers-call-guidance-interpreting-emoji/>.

¹⁶⁰ Sternbergh, *supra* note 71 (“Emoji can somewhat magically function as pictograms and ideograms at the same time. The most straightforward example is the Eggplant emoji. On one level, it looks like an eggplant and can be

meaning, unless of course both parties have a history of attaching a specific meaning to that emoji.¹⁶¹

Another example of an ambiguous emoji may be the 😊. Although this emoji itself is not ambiguous, the meaning intended by sending the smiley face can change depending on the circumstances.¹⁶² The fact that it has so many meanings may be a reason why 😊 was named the most used emoji in 2015, also making it difficult to imagine any person who is unfamiliar with it.¹⁶³ Because there is no single categorical meaning where the 😊 may fall under, the smiley face a prime example of an ambiguous emoji.

Two additional emojis, the 🙌 or 🙏 are also examples of ambiguous emojis.¹⁶⁴ Both emojis can mean praise, a high five, praying, good job, etc.¹⁶⁵ The possibilities of interpretation make both emojis a catalyst for ambiguity like the other aforementioned emojis. What appears to make emojis ambiguous is the fact that they carry with them different categories for which their meanings may be attached.

ii. Emojis With Unambiguous Meanings

As it stands today, emojis are the most used system of communication on Earth.¹⁶⁶ With this in mind, it is difficult to imagine that there are not at least some emojis with unambiguous

used to communicate “eggplant.” On another level, it looks (kind of) like a penis and can be used to communicate all manner of lascivious intent, especially when combined with a peach.”)

¹⁶¹ Supermax Trading Co. v. Strategic Solutions Group, No. 16183, 1998 Del. Ch. LEXIS 66, at *7 (Del. Ch. 1998) (“primary goal of contract interpretation is to satisfy the reasonable expectations of the parties at the time they entered into the contract, a process which “often requires a court to engage in an analysis of the intent or shared understanding of the parties” at the time of the contract.”).

¹⁶² Philip Bates, *What Does This Emoji Mean? Emoji Face Meanings Explained*, MUO (Stating that although not frequently, the smiley face Emoji can be used “following a mild insult or criticism” or to insult), <https://www.makeuseof.com/tag/emoji-english-dictionary-emoji-faces-meaning-explained>.

¹⁶³ Steinmetz, *supra* note 77.

¹⁶⁴ See Sternbergh, *supra* note 71.

¹⁶⁵ *Id.*

¹⁶⁶ Brawley, *supra* note 76, at 225.

meanings.¹⁶⁷ It has been said, “[d]epending on the circumstances, using an emoji or emoticon to respond to another party’s email or message may have the same effect as if precisely crafted words had been used.”¹⁶⁸ The best example of an unambiguous emoji is the 👍. The thumbs-up emoji is known to mean “[l]ike”; “thumbs up”; and “yes.”¹⁶⁹

👍 is one of the earliest emojis ever used and has minimal differences between platforms.¹⁷⁰ Similarly, the 👎 emoji can also be categorized as unambiguous. The thumbs-down emoji is the opposite of the thumbs up and means “dislike”; “disapproval”; or not agreeing.¹⁷¹ But even the unambiguity of the thumbs up is not absolute, that is because in countries such as Italy, Greece, Iran and Afghanistan, people interpret it as a sign of disrespect.¹⁷² But this conflict is more *de minimis* than anything because any agreement between parties with conflicting views of the thumbs up more than likely will not be making binding agreements in such an informal way.

Unlike ambiguous emojis, unambiguous emojis are limited in the categories they may be used for. However, with different cultures and platforms to consider, an unambiguous emoji may become ambiguous, posing an additional complications for emoji interpretation.

iii. Differences Depending on the Geographical Location

The geographical location of users carries a variety of factors in disrupting an otherwise straight forward conversation.¹⁷³ One example was highlighted in regard to users in Japan, the

¹⁶⁷ Mike Cherney, *Lawyers Faced With Emojis and Emoticons are All --\ () _/--*, DOW JONES INSTITUTIONAL NEWS (Jan. 29, 2018), <https://search.proquest.com/docview/1992187373?accountid=13793>.

¹⁶⁸ Begun, *supra* note 145

¹⁶⁹ 🖱️ *Thumbs Up Emoji Meaning: A thumbs-up gesture indicating approval*, EMOJIPEDIA <https://emojipedia.org/thumbs-up/> [*hereinafter referred as “Thumbs Up Emoji”*].

¹⁷⁰ *Id.*

¹⁷¹ Meaning of, *Supra* note 129.

¹⁷² Caroline Morse Teel, *10 Innocent Gestures You Shouldn’t Use Overseas*, SMART TRAVEL (Mar. 19, 2014) (“[t]he thumbs-up signals approval in the U.S. . . . but in Afghanistan, Iran, parts of Italy, and Greece, it means “up yours.””), <https://www.smartertravel.com/10-innocent-gestures-you-shouldnt-use-overseas/>.

¹⁷³ *Id.*

birthplace of the emoji, where individuals there will give different meanings to emojis than what is used in the United States.¹⁷⁴ This is because, emojis develop meanings based on the region and “even with the same geography, different subcommunities assign different meanings to individual emojis.”¹⁷⁵ This, however, would be the same principle as a Japanese speaking person trying to communicate with an English speaking person. One would not understand the other unless either spoke the other’s language. An emoji bridges this gap because some emojis represent a gesture that are universally known to mean one thing or idea.¹⁷⁶ Thus, an emoji can have the opposite effect of what has become a focal point of concern.

iv. Differences Between Platforms

Thanks to the variety of platforms, the emojis you send may look different to the intended recipient.¹⁷⁷ “Another significant issue that affects emoji interpretation is their digital nature, which makes them easily susceptible to technological changes and glitches.”¹⁷⁸ Another prime example of complications platforms have on the interpretation of emojis is if a user has a device with expired software, an emoji in this situation would appear as a “blank box, leaving the recipient with no immediate way of determining what the sender intended, and the sender with the assumption that the recipient received the message.”¹⁷⁹

The issue with platforms and the reason these changes occur is because “each platform’s implementation of Unicode-coded emojis reflects their idiosyncratic design choices.”¹⁸⁰

¹⁷⁴ Larson, *supra* note 8 (“[a]nother angle that we think is interesting is that emoji can be interpreted differently depending on the culture that you’re in, Miller said. ‘Emoji originated in Japan, and some of them have transferred over, and we’ve heard stories of emoji meaning different things here than they do in Japan. And I’m sure there are other cultures that have different interpretations.’”).

¹⁷⁵ Zicarelli & Goldman, *supra* note 140.

¹⁷⁶ Sternbergh, *supra* note 71.

¹⁷⁷ Larson, *supra* note 8.

¹⁷⁸ Berliner, *supra* note 28, at 2173.

¹⁷⁹ *Id.*

¹⁸⁰ Goldman, *supra* note 5, at 1234.

Regardless of the platform, some emojis have virtually no difference in their character. Emojis such as a 👍, 🗨️ and 😊 are so universal that no matter the platform, any user would be able to distinguish it. Studies conducted have made use of scales that represent the average differences of an emoji's character across platform boundaries.¹⁸¹ Those studies are very broad and do not appear to single out specific emojis.¹⁸² So on a scale from -5 to 5, an outcome of a 2¹⁸³ in differences shown between platforms would speak for all emojis, rather than the question of the few emojis that are unambiguous.¹⁸⁴

Regardless of the possible interpretation issues that may arise, the analysis to determine whether an emoji constitutes assent begins with the parties themselves.¹⁸⁵ Courts have recognized that parties to a contract may use “symbols” to convey their message “provided parties share this weird meaning.”¹⁸⁶ The courts' rationale could be attributed to emojis, in as much that parties to a contract may use emojis to convey their message if the person they are doing business with would understand that emoji to mean the same thing.¹⁸⁷ This also means that if an emoji can reasonably mean something different to the parties involved, that emoji will not conform to the party's definition unless it is commonly accepted as such.¹⁸⁸ Thus, using 👍 to convey acceptance would

¹⁸¹ Hannah Miller, *Investigating The Potential for Miscommunication Using Emoji*, GROUPLENS (Apr. 5, 2016), <https://grouplens.org/blog/investigating-the-potential-for-miscommunication-using-emoji/>.

¹⁸² *Id.*

¹⁸³ This study suggests that on average, emojis are significantly different between platforms, however, this is also based on every emoji in existence and used, and in 2020, there were approximately 3,136. *See* Buchholz, *supra* note 81.

¹⁸⁴ *Id.*

¹⁸⁵ *Tko Equip. Co. v. C & G Coal Co.*, 863 F.2d 541, 545 (7th Cir. 1988) (“Under the prevailing will theory of contract, parties, like Humpty Dumpty, may use words as they please . . . If they wish the symbols ‘one Caterpillar D9G tractor’ to mean ‘500 railroad cars full of watermelons,’ that’s fine—provided parties share this weird meaning.”).

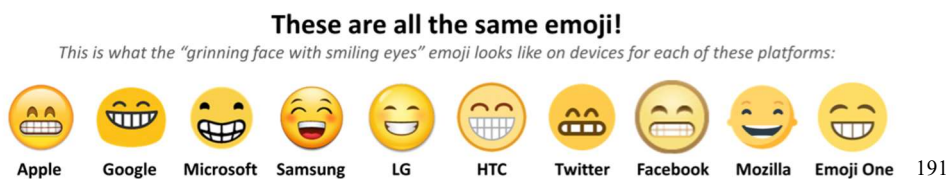
¹⁸⁶ *Id.*

¹⁸⁷ *See Id.*

¹⁸⁸ *Id.* (citing *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814-16 (7th Cir. 1987)).

be straight forward where universally, this emoji means only limited things, but all reasonably would fall under the category of agreement.¹⁸⁹

Interpretation of emojis under this context would then rest on the platforms both parties are using, leading to a question of how many variables there are between emojis on different platforms.¹⁹⁰ Below is an example of a commonly used emoji, the grinning face, across several platforms:



Although maybe not significantly different, there are strong differences between that of Apple and Samsung and even Emoji One.¹⁹² It could be argued that Apple shows a grinning or even concerned face, whereas Samsung is a happy and joyous face. However, this is but one view, and it would not be irrational for the reader to see something different. This is the very issue that emojis bring and why so many scholars argue that emojis have no place in contract law. Scholars would be right if emojis were limited to the exemplified circumstances discussed above, however, other emojis exist with far less inferences available.¹⁹³

With the concern over platform difference looming, thumbs up enthusiasts have very little to be concerned with. The only real differences between platforms is the detail of the hand itself:



¹⁸⁹ With the exception of a few countries. See *Thumbs Up Emoji Meaning*, *supra* note 169.

¹⁹⁰ Larson, *supra* note 8.

¹⁹¹ Miller, *supra* note 181.

¹⁹² *Id.*

¹⁹³ Larson, *supra* note 8.

¹⁹⁴ *Thumbs Up Emoji Meaning*, *supra* note 169.

illustrated above regarding the grinning face emoji, the contours of the thumbs up emoji remains vastly unchanged across platforms.¹⁹⁵

The objective interpretation of the emoji sent as a response to an offer will always and should always be based on the specific emoji sent, rather than focusing on the act of sending an emoji itself. This is because, not all emojis are the same. It is likely that if an offer is sent and the offeree responds with a 🙌 or 🙏, as seen in *Dahan*, or 🙌 or 🙏, a court will be exposed to an expression that is more in line with optimism rather than assent.¹⁹⁶ This is because the different categories of expression they may display. On the other hand, a response with a narrower meaning emoji such as the 👍 or 🙋, would leave courts with less possibilities to analyze. Between some emojis similarities across platforms and geographical locations, evidence of unambiguous emojis exist and are fully capable of constituting acceptance.

IV. What Should be Done

The ambit of contention is clearly how an emoji can be interpreted as well as how it is interpreted. This can be attributed to not only the growing use of emojis but also the consistent additions of new emojis every year.¹⁹⁷ “As with all other writing systems, [emojis] have developed along with technology as human civilization finds further ways to extend its intellectual reach.”¹⁹⁸ The interpretation issues can only mean that the existing language of contract law is unreliable to meet new technological mediums people use to communicate. Legislatures must reach into their arsenal to find a solution in order to mitigate what courts will inevitably be faced with, outdated plain language that does not adequately address newer methods of communication.



¹⁹⁵ *See Id.*

¹⁹⁶ *See Dahan*, 30823-08-16; Ziccarelli & Goldman, *supra* note 140.

¹⁹⁷ Mills, *Supra* note 154.

¹⁹⁸ OpenLearn, *supra* note 55.

Because emojis have become a societal norm, rather than leaving the interpretation of emojis in contract law to the whims of a particular judge or court, states should adopt language, specifically addressing digital icons or emojis as a valid acceptance, not just a signature. Emojis are digital words that should be treated as such, and again, as technological capabilities expands, so should the law. It can be found apparent that courts use an objectively reasonable standard to determine or conclude disputes involving emojis. This process will no doubt become more complex as more technology is introduced and the means of communication changes.

There are a limited amount of emojis that would unambiguously constitute a definitive response on their own. Like  or , legislatures have the power to effectuate particular emojis as sufficient modes of acceptance in contracts. By addressing emojis in law, it lays out a concrete standard that will result in both expedited judicial proceeding's and just results. Additionally, such action would also limit the use of particular emojis and symbols in contract law and therefore, likely to mitigate such disputes in general. Laws such as the UETA as well as the E-digital signature act already address symbols over electronic platforms¹⁹⁹ — likely covering emojis — as a form of signature, but a more fluent standard is necessary in terms of formation.

To accomplish this, state legislatures can include clarifications to the existing adopted restatements. Although there is a consistent emergence of new means of communication, legislatures have the ability to put a marker at this point for courts today, and the future, to interpret emojis in contract disputes involving acceptance. The clarifications can be minimal and still have a large impact, for one, it would make clear that a uniform approach is desired, and that the wide use of emojis are likely to increase in time. Scholars themselves while analyzing modern law and

¹⁹⁹ See Berliner, *supra* note 28.

acceptance have expressed scenarios that subtly relate to emojis, such as Corbin’s example of a “thrown up hat” constituting assent.²⁰⁰

Without such brightline legislation, “[u]nless the author of the email or message is careful, casually sending a ‘smiley face’ emoji in response to an email putting forth a proposal or offer to do business could be the same as stating, ‘I consent to the terms.’”²⁰¹ This very fact is why lawyers in other countries are looking for guidance from the judiciary due to the increasing disputes arising from the use of emojis.²⁰² Essentially, “[r]equiring certain contracts to be evidenced by a traditional “writing” and “signed” by the party to be charged [. . .] raise[s] barriers to the effective use of electronic media.”²⁰³ Although the UETA and similar laws exist to a signature, courts appear willing to give emojis the status of a “signed writing [. . .] apart from any special legislation,” however, there clearly is no guarantee of a uniform “judicial analysis.”²⁰⁴

V. Conclusion

Emojis have become a universal digital language, used as communication just as often as regular text. As more and more contracts are completed digitally, the more plausible it is to find an emoji. Courts, both domestic and international, recognize that an emoji can display the intent of the party after analyzing the possible meanings.²⁰⁵ Contract laws that touch upon

²⁰⁰ Although not specifically referencing emojis, Corbin’s example highlights that certain expression, as emojis signal, can constitute acceptance. See 1 Corbin on Contracts § 1.19.

²⁰¹ Peter J. Glantz, Esq., *The Legal Impacts and Effects of Using Emojis and Emoticons*, YONKERS TIMES (Apr. 18, 2018), <http://yonkerstimes.com/the-legal-impacts-and-effects-of-using-emojis-and-emoticons/>.

²⁰² Shaban, *supra* note 159 (“lawyers in Britain are urging the judiciary to issue guidance on the interpretation of the digital symbols.”).

²⁰³ 4 Corbin on Contracts § 23.1A.

²⁰⁴ *Id.* (“[w]hile modern courts are sometimes willing to accord an electronic record the status of a “signed writing” to satisfy a statutory requirement apart from any special legislation, there was no assurance of a uniform judicial analysis.”).

²⁰⁵ See e.g., Ragonauth, 2016 WL 3451762; *Dahan*, 30823-08-16.

communication where emojis are relevant make no inferences to their inadmissibility.²⁰⁶ Based on these facts, it is difficult to support the idea that emojis are too complex to have one meaning.

In a world of objectiveness, the meaning of particular emojis are widespread enough that specific meanings are likely present. If intent continues to be interpreted differently depending on the court an emoji is presented in, decisions will continue to be mixed, further frustrating legitimate contract disputes. Every emoji can have a meaning or can have multiple meanings depending on all parties involved.

The meaning behind any response to an offer must be weighed against the totality of the parties conduct and past words when a contract formation is questioned. There is no reason why such a procedure only applies to words, rather than universally recognized emojis. Without a clear response by legislatures, the more complicated emojis become for judicial interpretation. Amending existing contract law to include emojis can settle any confusion in future disputes that involve them. Unambiguous emojis clearly exist, and while scholars and the courts battle of an emojis effectiveness, the battle itself weighs in favor of a place for emojis in contracts.

While emoji use continues to expand across digital platforms, the question remains: will emojis become part of contract law?

²⁰⁶ See *e.g.*, RESTATEMENT (SECOND) OF CONTRACTS (AM. LAW INST. 1981); U.C.C. § 400.2-200 *et. seq.* (AM. LAW INST. & UNIF. LAW COMM'N 1977).