

## THE LEGAL CONSEQUENCES OF DIGITAL COMMUNICATION LANGUAGE: NIGERIAN LAW IN FOCUS

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### Abstract

*The use of pictorial as well as character representations in online communications has become the acceptable norm. As some of these representations, referred to as emoticons, emoji, GIFs, Stickers, memes, pictures and such like are gaining recognition, so is the contention as to their legal consequences. Although, no certain and defined field of law has emerged to analyse or define in a systemic manner and with adequacy the legal implication of each form of such communication, emerging juristic principles have signified the readiness of the courts to treat them as creating legal consequences. Utilising the doctrinal approach, this paper considers the legal issues that may arise in their use within the context of the Nigerian legal system. By assessing judicial pronouncements in other jurisdictions, the paper makes suggestions on how to effectively deal with legal issues that may arise in relation to their use in Nigeria.*

**Keywords:** Emoji, Emoticon, Digital, Online, Communication, Copyright and Digital Dialect

### 1. Introduction

Communication is central to civilisation. The intricate nature of human interactions and interrelationships promote the use of other means of communication aside vocal spoken words.<sup>1</sup>These could be written

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<sup>1</sup> L Birch-Carriere, 'Say it with [a smiling face with smiling eyes]: Judicial Use and Legal Challenges with Emoji Interpretation in Canada,' [2019] (32) *International Journal of the Semiotics of Law*, 283-319.

words, facial expressions, body language and other complicated forms of communication that could be by form, nature or occurrence.<sup>2</sup> One of the limitations of spoken or written words is their peculiarity of being a record in a particular language or dialect which limits understanding to those who write in or speak that language, except where interpreted.<sup>3</sup> Since the tower of Babel,<sup>4</sup> man has never spoken one language, hence when agreements are reduced to writing; it is always limited by language and expression. As the internet world emerged, new forms of communication continued to evolve to meet the needs of a global and more inclusive world.

The computer age advanced electronic communication in both social and business communities that warrants the evolution of digital language suitable for the general use and devoid of inherent linguistic barriers.<sup>5</sup> Digital communication has thus developed its own dialect for communication and which utilises characters, forms and signs, paramount amongst which are emoticons, emojis, GIFs, stickers and memes. The use of these forms of digital communication, often referred to as wordless communication, has risen to the level that they could be regarded as digital dialect, thus acquiring such significant status a language has and with such identification; they are also regarded as proven communication medium. Every form of communication carries with it legal consequences, and thus the legal consequences of these digital communication means, collectively referred to in this paper as digital dialect, digital language or wordless communication, is the subject of this paper.

Digital dialects are lucid and mutually comprehensible signs and forms<sup>3</sup> designed to bridge communication gap. It consists of pictures,

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<sup>2</sup>A Mehrabian, 'Communication Without Words,' [Sept. 1968] *Psychol. Today* 53.

<sup>3</sup> KA Foltz and J Fray, 'Emoji Goes to Court: An Analysis of Emoji in Court Proceedings and Implications for Legal Practice,' [2020] (20) *Communication Law Review* 109-125.

<sup>4</sup> E Goldman, 'Emoji and the Law,' [2018] *Washington Law Review* 93.

<sup>5</sup> S Harrison, 'How Emojis Have Invaded the Courtroom,' [2019] *Slate*, <<http://slate.com/technology/2019/11/emoji-court-cases-crime-free-speech-contract-law.html>> accessed 27 July 2023; O Herzfeld, 'The Legal Implications of Emoji,' [2019] *Forbes* <<https://www.forbes.com/sites/oliverzfeld/2019/10/24/the-legal-implications-of-emoji/?sh=d573e4f6bbd4>> accessed 27 February 2024

keyboard characters and other representations used to convey emotions and thoughts and to enhance fast, appropriate and lucid online communication understandable to users from different backgrounds and particularly acceptable and mutually permitted between the users.

It has been estimated that up to 92% of online communications deploy the use of emoticons and emojis;<sup>6</sup>and it has become the ‘fastest growing form of language in history based on its incredible adoption rate and speed of evolution.’<sup>7</sup>The advent of digital dialect raises issues that are relevant for legal enquiry.<sup>8</sup> The questions that this paper sought to answer are basically as it relates to the legal status of such communications; the legal consequence of their use and finally, how evidence of such may be adduced in court. These shall be considered in a comparative manner for effective appreciation of the issues raised, most especially as digital laws and regulations are in the formation stage in Nigeria.

## 2. Definition of terms

Certain terms are germane to this work. Some of the terms used to describe wordless communication like emoticon, emoji, GIFs, stickers and the likes have been used in a manner that it is difficult to differentiate between them. This part of the paper attempt to clearly define, and in some cases describe the terms and identify the differences where it exists.

### 2.1 Emoticon

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<sup>6</sup>Ineda.com; ‘Infographic: 92% Of World’s Online Population Use Emojis’ <<https://ineda.com/blog/2016/11/15/infographic-92...>> accessed 27 February 2024.

<sup>7</sup>*Emoji Is Britain's Fastest Growing Language as Most Popular Symbol Revealed*, The Telegraph, May 19, 2015, <<http://www.telegraph.co.uk/news/newstopics/howaboutthat/11614804/Emoji-isBritains-fastest-growing-language-as-most-popular-symbol-revealed.html>>accessed 27 February 2024

<sup>8</sup> Eric Goldman, ‘Surveying the Law of Emojis,’ [2017] *Santa Clara Univ. Legal Studies Research Paper*, 8.

Emoticons are computer characters adopted to communicate between parties. It has been given a judicial meaning and described as:<sup>9</sup>

A group of keyboard characters (as :-)) that typically represents a facial expression or suggests an attitude or emotion and that is used especially in computerized communications (as e-mail).

Emoticon is coined from two English words, *emotion* and *icon* and literally means emotion icon. It depicts symbolic representation of facial expression using keyboard characters, numbers, punctuation marks and letters arranged for communication purposes that gives it meaning and understanding in expressing mood, feeling, and reactions in an abridged form within context or in some instances, demand that the reader tilts his head<sup>10</sup> or view the message in some certain way to comprehend its purport. However, when emoticon is used in digital communications, the parties must be acquainted with its lucidity in passing information between them and communicating the meaning intended by the parties.

Historically considered to have been used as far back as 1982 in its modern form; and credited to Scott Fahlman who developed it as a language replacement;<sup>11</sup> the intent was to achieve typographical signs for emotions in a decipherable manner.<sup>12</sup> It has been contended that emoticons have been deployed in communication the past few

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<sup>9</sup>*US v Cochran*, 534 F.3d 631, 632; *State v Pischel*, 277 Neb. 412, 416 (2009); *People v Lesser*, 2011 WL 193460, \*2 n.3 (Cal. Ct. App. Jan. 21, 2011); *State v Jacques*, 332 Wis. 2d 804 n.2 (Wis. Ct. App. 2011)

<sup>10</sup> Goldman (n8).

<sup>11</sup> E Janssen, 'Hearsay in the Smiley Face: Analysing the Use of Emoji as Evidence,' [2018] (49) *St. Mary's Law Journal* 699-726; E Kirley and M McMahon, 'The Emoji Factor: Humanising the Emerging law of Digital Speech,' [2018] (85) (2) *Tennessee Law Review* 1-61.

<sup>12</sup> E Mystal, 'Is Emoji Law Going to be a Thing? Above the Law,' <<https://abovethelaw.com/2019/02/is-emoji-law-going-to-be-a-thing/>> accessed 27 July 2023; B Sullivan, 'What is the Evidentiary Standard for Emojis?' [2016] *The American Bar Association Journal* <[https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6656&context=faculty\\_scholarship](https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6656&context=faculty_scholarship)> accessed 27 July 2023.

centuries,<sup>13</sup> as pictorial communication is not exclusive to the electronic age and has grown since the development of hieroglyphics. Nevertheless, the use in electronic communication, which is relevant to this research, is recent.<sup>14</sup>

## 2.2 Emoji

Emoji is usually described rather than defined and could be pictogram, logogram, ideogram or smiley, used in electronic messages, for the purpose of conveying emotional feelings and gestural expressions. Typically, they convey emotions which would not be easily done through traditional words; reduce verbosity and breach linguistic barriers.

The term Emoji was derived from a compound Japanese word consisting of 'e' which means picture and 'moji' meaning character, literally meaning 'picture character.'<sup>15</sup>Emojis is therefore a 'small digital image or icon used to express an idea, emotion, etc., in electronic communications.'<sup>16</sup>They utilise facial expressions, objects, places, weather, animal, and any other article as may become acceptable as means of communicating. Emojis were said to have their root 1997 in Japanese mobile phones; but became popular upon been added to several mobile operating systems.<sup>17</sup>

It would appear that its popular usage does not only credit valid meaning to each emoji, it upgrades it to assume the character and value of spoken words and have been regarded as such. For example, the Oxford dictionaries identified *a face with tears of joy emoji* as the *word* of the year 2015.<sup>18</sup> In context, the implications of equating

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<sup>13</sup>A Stefan, 'The History of Emoticons and Emojis,' <<https://design.tutsplus.com/tutorials/the-history...>> accessed 26 June 2023

<sup>14</sup>Oxford Reference, 'Pictorial Communication - Oxford Reference' <[https://www.oxfordreference.com/.](https://www.oxfordreference.com/)>accessed 27 February 2024

<sup>15</sup>Britannica, 'What's the Difference Between Emoji and Emoticons?,' <<https://www.britannica.com/story/whats-the-...>>accessed 27 February 2024

<sup>16</sup>*In re L.F.*, 2015 WL 3500616; *People v Moya*, 2016 N.Y. Misc

<sup>17</sup>V Cheronoh, 'Four Ways in Which Japan Was a Trendsetter in Cell Phone Culture,' <[computing forgeeks.com/how-japan-set-phone-culture-trends/](https://www.forgeeks.com/how-japan-set-phone-culture-trends/)>accessed 27 February 2024

<sup>18</sup>Oxford Dictionaries Word of the Year is the tears of Joy Emoji, <[www.bbc.com/news/newsbeat-34840926](https://www.bbc.com/news/newsbeat-34840926)>accessed 27 February 2024

emojis with written words bear significant influence on electronic communications in commercial activities, and have dictated the pace for its legal recognition as capable of creating contractual obligations. Emojis can be divided into two categories: Unicode-defined emojis and proprietary emojis. The significance of the type of emoji utilised is that the Unicode standards enable emojis to be recognized across platforms. If both the sender's and recipient's platforms adopt a Unicode-defined emoji, a sender can send an emoji symbol that the recipient on other platforms can recognise. In the case of proprietary emojis, which are sometimes equated with stickers, the receiver may not recognise the sent emoji in the character in which it was sent as it may only appear as a blank square.

Described as 'unicode defined' and 'proprietary,' the technological compositions of both forms of emoji are at variance so also is the legal interpretation attached to them. The major difference between the two is the recognition of the *emoji* character without alteration when sent. It has been noticed that emoji could be 'rendered differently on different platforms,' as 'the emoji graphic sent by one person on one device may be quite different from what is seen by the recipient using a different device.'<sup>39</sup> The Unicode provides unique number for every character that makes for uniform reading irrespective of device, program, operating system, programme or language and replaces earlier attempts like ASCII.<sup>19</sup>

Emojis described as *proprietary* on the other hand does not have Unicode definition. Several platforms offer emojis that are not Unicode defined, such as snapchat's<sup>20</sup> and Facebook emojis.<sup>21</sup> This is also true of 'stickers.' It has accordingly been asserted that 'while there are only about 2,000 Unicode-defined emojis, there are countless

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<sup>19</sup>*Intellect Wireless, Inc. v HTC Corp.*, 910 F. Supp. 2d 1056, 1070 (N.D. Ill. 2012)

<sup>20</sup>M Brewis, 'How to Add Emoji Stickers to Snapchat Video: Pin Moving, Resizable Emoji to Snapchat Videos,' <<http://www.pcadvisor.co.uk/howto/social-networks/how-add-emoji-stickers-video-in-snapchat-3638263/>> accessed 27 February 2024

<sup>21</sup>B Esposito, *The Definitive Ranking of Every Facebook Sticker Pack*, BuzzFeed, (Feb., 2014) <<https://www.buzzfeed.com/bradesposito/the-definitive-ranking-of-every-facebooksticker-pack>> accessed 27 February 2024

more non-Unicode emojis.<sup>22</sup>The challenge with *proprietary* emojis is that different platforms may display them differently, hence making the meaning unstable and capable of separate interpretation by the sender and the receiver. Emojis may therefore appear different to the receiver from the manner it was sent by the sender due to character alteration, misrepresentation, replacement or even omission between different platforms. Accordingly, legal questions as to interpretation could revolve round whether the emoji appears uniform as sent by the sender or it appears differently to the receiver. This is more so in the case of proprietary emojis, which may not be displayed uniformly across platforms.

Compatibility of emojis across platforms may therefore become a legal question in need of resolution when interpretation is in issue. Admittedly, this question depends on whether what came up for interpretation is an emoticon, a Unicode defined emoji or a proprietary emoji. In case of an emoticon, it is generally compatible across platform although fonts may be displayed differently. When the emoji is Unicode defined, the outline and descriptions are uniformly recognised. In cases of proprietary emojis, most often, they are not compatible across platforms and the recipient may only view a placeholder or nothing at all.

Despite the fact that these highlighted issues make emojis not to be the preferred language for commercial transactions, its legal recognition as such has necessitated the resolution of the legal and evidentiary questions that may arise as a jettisoning of it as irrelevant to international commerce is no longer a valid argument.

The growth of emojis and emoticons appear rooted in the need to devise lucid means of communication online that would serve the purpose stenography once served. Besides, it is an advance communication that has the same meaning, usage and implication across cultural, linguistic and social barriers, thereby creating a universally acceptable language, beyond been a swifter manner of communication. The distinction between these two computer dialects is

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<sup>22</sup>B Barrett, 'How Lego Built a Social Network for Kids That's Not Creepy,' (Jan. 31, 2017), <<https://www.wired.com/2017/01/lego-life-social-network-kids>>accessed 27 February 2024

not always noticed, hence all of such internet language has come to be referred to as emojis. However, Emojis are subject to a wider range of depictions than emoticons because they can be literally anything, while emoticons are limited to keyboard characters.

Emoticon and emoji are realisation of a global communication through hieroglyphics, which in modern communications are contentiously regarded as wordless communication and categorised as emoticons, emojis, GIFs, Stickers, memes and pictures. The major difference between emoticons and emojis is not in usage as noticed earlier but rather in how they are generated.<sup>23</sup> Whereas emoticons are keyboard-generated, emojis are software-generated. However, as electronic networking continues to be a key determinant in human and commercial relationships, the legal implication of electronic languages continues to expound.<sup>24</sup>

### **2.3 Graphis Interchange Format (GIFs)**

GIFs<sup>25</sup> are short video clips adapted into a post to express an emotion; they are usually taken from a trending movie or show and may be depicted with words. A GIF is an image file that supports both animated and static images conveying emotions, reactions, action or simply to amuse or entertain. Unlike animated emojis, GIFs are real actions taken from other scenes to depict a present emotion. The legal implications of GIFs to that extent could be two-pronged, the legal implications between the users. Also relevant is the possibility of such a communication to infringe on a third party's right; which could be copyright infringement or infringement of privacy rights and liability in tort.

### **2.4 Memes**

Whereas GIFs are action images, memes are graphical images; photos or drawings; conveying or expressing emotions as part of online

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<sup>23</sup>*Ibid.*

<sup>24</sup>U Chioma, 'Emojis and the Law: Legal Issues Arising from the Use of Emojis on Social Media,' <[thenigerialawyer.com](http://thenigerialawyer.com)> accessed 27 February 2024

<sup>25</sup>A O'Leary, *Battle Over 'GIF' Pronunciation Erupts*, *NY Times Bits Blog*, (May 23, 2013), <<http://bits.blogs.nytimes.com/2013/05/23/battle-over-gif-pronunciation-erupts/>> accessed 27 February 2024



communication. Memes may draw from trending shows, they may also be generated and captions in such cases may be added to give it meaning and expression. Apart from the fact that there may be local restrictions on the interpretation of GIFs and memes in some cases, the legal issues associated with emojis are also associated with them.

### 2.5 Stickers

A **sticker** is a comprehensive illustration of a character representing an emotion, an action or an event. It could be cartoons, smiley-like emojis filled with body language and facial reaction. It is a mode of communication that utilises kooky animations.

### 3. Legal Recognition of Digital Communication Language

Legally, digital dialect is recognised as valid means of communication. Between users, the usage is recognised as capable of giving meaning to relationships and having effect on transactions. It can also create impressions and perceptions. They are communications to which emotions and expectations could be attached and as such are capable of eliciting certain commitments, modifying emotions and generating basis of beliefs that may shape relationship, reliance and transactions between parties. Digital dialect may lead to a representation, a misrepresentation, a believe, an impression and could also lead to character defamation. In *Dahan v Shacharoff*<sup>26</sup> it was held thus:

The text message sent by the defendant... included a smiley, a bottle of champagne, dancing figures and more. These icons convey great optimism. Although this message did not constitute a binding contract between the parties, it naturally led to the Plaintiff's great reliance on the Defendant's desire to rent his apartment...These symbols which convey to the other side that everything is in order were misleading.

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<sup>26</sup>Herzliya Small Claims Court, Feb. 24, 2017

This case creates the impression that those symbols are interpretable as language relevant to the transaction between the parties and which can possibly sway a party's emotion, judgement and conviction. Accordingly, where the subsequent action of the person sending them contradicts the notion already communicated, it would amount to misrepresentation. In that case therefore, the court awarded the misled landlord damages of over 2, 200 dollars.

In *Burrows v Houda*,<sup>27</sup> a certain Houda tweeted a link to a published article that reported a judge's suggestion that the claimant, Burrows' conduct be referred to the Law Society for potential disciplinary action. A comment to the tweet stated that: 'July 2019 story. But what happened to her since?' Houda then responded with a *zipper-mouth face* emoji. It was the judge's persuasion that most social media users would make adverse assumptions about Burrows as the tweet conveyed a range of false and defamatory claims, including that she had been disciplined due to misconduct.

Most times, however, the interpretation and context of wordless communication is not always apparent and courts have to look to the surrounding circumstances to interpret the communication. This analysis generally includes recourse to directories like *Emojipedia* for the meaning of emojis. It also comprises scrutiny of the accompanying text and whether the emoji materially alters the intended meaning of the message. Howbeit, the use of digital dialect carries with it recognisable legal consequences.

#### **4. The Legal Consequence of Digital Communication Language**

The use of digital communication language creates rights, impose responsibilities, determine liabilities and establish relationships that could have legal consequences. It could establish a contractual relationship, a filial relationship and could be the basis for representation and misrepresentation.

In *Stewart v Durham*,<sup>28</sup> Durham was sued for a claim of inflicting emotional distress upon Stewart, who was a potential female

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<sup>27</sup>(2020) NSWDC 485

<sup>28</sup>3:16-CV-744-CWR-LRA (S.D. Miss. Feb. 9, 2017)

employee. Durham had sent Stewart a picture of an engorged male organ along with the message, “Your [job] interview will be next week . . . . Can I get something for the interview?” As absurd as that was, the court came to the conclusion that even though the advance was ‘coarse, embarrassing, stupid, and as described by his counsel, “unbecoming of a married Christian father of twin boys,” the evidence does not show that it actually caused Stewart to suffer emotional distress.’ The court reviewed the surrounding evidence in reaching its verdict. The day after Durham sent the picture of the tumid male organ, Stewart replied, “you can get [a] hug and kiss after the interview!” Then she added, “Sooo I found myself thinking about you.” Durham called her “boo”; Stewart called him “Hun.” Durham wrote “I miss you,” Stewart responded “I miss you too” and sent an emoji blowing him a kiss. They went on with flirtations and she revealed that she had once participated in a threesome, and said further “I like stuff like that . . . so if you become my boo. Stuff like that comes with me.” Later she wrote, “we can ‘celebrate’ once I get the job!” along with three winking emoji, and invited Durham to join her and a friend for a drink at a local restaurant.

In *Commonwealth of Pennsylvania v Foster*,<sup>29</sup> the defendant, who was on probation for a drug-related conviction raised the suspicion of his probation officer when he posted photographs depicting guns, drugs and money along with three *pill* emojis. The issue that came before the court was as to the determination of whether probation is ineffective at rehabilitating Foster and stopping him from antisocial behaviour. The court found that by identifying with the pictures, Foster illustrates his propensity for violence, the glorification of drugs, lack of rehabilitation and antisocial conduct.

In *Ghanam v Does*,<sup>30</sup> the court had to analyze the facts and circumstances surrounding a defendant’s use of the *sticking out tongue* emoticon within a communication in a defamation case. Also, in *Commonwealth v Danzey*,<sup>31</sup> the Pennsylvania court upheld the conviction of a defendant for stalking and harassment that was based

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<sup>29</sup>J-6-2019, (Pa. Aug. 20, 2019)

<sup>30</sup>SC: 148726 (Mich. Dec. 23, 2014)

<sup>31</sup>Pa. Super. Ct. 2019

in part on a social media post whose wording demonstrated the defendant's state of mind, revealing his criminal intent, despite the words being accompanied by the common *smiley face* emoji.<sup>32</sup>

There are various legal challenges that may result from the use of digital communication language. Goldman<sup>33</sup> has identified and analysed nine attributes of emojis that will require special consideration by courts. These according to him are size, novelty, lack of directory, infrequent grammar rules, dialects, means of conveying emotions, intra party version incompatibilities, cross-platform depiction diversity and cross-platform omissions. According to him,<sup>34</sup> since emojis are small size and sometimes similar, identification and typification of usage and meaning becomes difficult. To that extent, even the screen from which it is displayed may make deciphering the meaning difficult. This is especially so in respect of face emojis with similar looks and subtle difference that requires mastering and making misidentification possible. Accordingly, evidence of how it displayed, the familiarity of the recipient with emojis and such like factors could be relevant issues. In *Lightstone RE LLC v Zinntex LLC*,<sup>35</sup> the court was of the view that a meeting of the mind and also intention is necessary to establish that communication languages create obligations between parties.

There is no reported case in which the effect of wordless communication is considered in Nigeria. However, digital communication is universal and there is the possibility that when cases arise on such issues, the cases analysed above and other cases from other jurisdictions would be of persuasive influence.

## **5. The Nature of Evidence in Cases on Digital Communication Language**

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<sup>32</sup> J Breinholt and M Brewer, 'Troublesome Emojis in Criminal Cases,' [2020] *Technology & Marketing Law* <<https://blog.ericgoldman.org/archives/2020/01/troublesome-emojis-in-criminal-cases-guest-blog-post.htm>> accessed 28 May 2023)

<sup>33</sup> Goldman, (n4)

<sup>34</sup> *Ibid*

<sup>35</sup> 2022 N.Y. Slip Op 32931(U) (Kings Cty. 2022)

In Nigeria, electronic evidence is receivable to establish the veracity of a fact in issue. Accordingly, when any wordless means of communication is utilised, the parties thereto can give evidence of same as electronically generated evidence as provided for by the Evidence Act 2011 as amended.<sup>36</sup>In *Continental Sales Limited v R. Shipping Inc.*<sup>37</sup> in which arbitration notice was given by e-mail even though such a means was not expressly provided for in the applicable law, the Court of Appeal was of the view that where parties have demonstrated willingness to accept service by a certain means, communications received or sent by that means is most certainly admissible as proof of the facts contained therein. This could be used to demonstrate that acceptance of digital communication language as part of previous communications and response to such could constitute acceptance within the Nigerian law.

There are however judicial decisions in other jurisdictions relevant to this issue. In *South West Terminal Ltd. v Achter Land & Cattle Ltd.*,<sup>38</sup> the King's Bench for Saskatchewan in Canada rules that a "thumbs-up" emoji can create contractual obligations. The court posits that it cannot obstruct progress of 'technology and common usage. This seems to be the new reality in Canadian society, and courts must be prepared to address the challenges that may arise from the use of emojis and similar forms of communication.'

The significance of this case is that all forms of digital communication may be relevant as electronic evidence to establish legal rights, responsibilities and liabilities. Despite the certainty as to its validity and enforceability in contract, there are certain issues that will still determine its enforceability. These will include the context in which it was used; the intention of the party, the likelihood of misunderstanding, ambiguity, geographical location, accepted usage and the spread of usage.

Accordingly, emojis to be used by parties are to be defined between the parties and the platform ascertained. In addition, it should be

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<sup>36</sup>S. 84, 93, 108, 109, 119.

<sup>37</sup> [2013] 4 NWLR (Pt. 1343) 67

<sup>38</sup> 2023 SKKB 116

explicit as to when it is used to buttress text, to contradict text, to complement text to explain text; or to interpreted text. Whereas emojis ordinarily are admissible evidence so long as they can satisfy the rules of evidence, such as relevance;<sup>39</sup> the circumstances would determine its acceptance and enforcement.

Legal issues do arise in respect of GIFs like emojis and emoticons. However, the issues as regards GIFs and Memes would likely relate more with copyright and intellectual property. This would occur where the user creates the GIF materials that are the copyright of another person without authorization. In such cases, the original content owner could maintain an action against the user. That this does not however arise from daily usage of GIFs and memes does not mean it is not a possibility.

In *Lenz v Universal Music Corp.*,<sup>40</sup> one Stephanie Lenz posted on YouTube in February 2007 a clip of her 13-month-old son dancing to the Prince song 'Let's Go Crazy.' In June 2007, Universal Music Corp., the holders of the copyright sent YouTube a takedown notice for copyright infringement. YouTube obliged, removed the video and notified Lenz who countered it, claiming fair use. She insists the video be reposted and YouTube obliged. Lenz went on later to sue Universal for misrepresentation under the DMCA, and sought a declaration of non-infringement. The District Court for the Northern District of California held that copyright owners must consider fair use before issuing DMCA takedown notices. Thus, the district court denied Universal's motion to dismiss Lenz's claim. The court however denied Lenz's claim of misrepresentation. This is on the ground that even though Universal Music Corp should have considered good faith before accusing her of copyright infringement, the company did not have to argue that it had not exercised bad faith under the DMCA. Besides, Lenz had suffered no significant damages from Universal's notice to YouTube to take down the video. Upon further appeal to the Ninth Circuit Court of Appeals in 2015, the circuit court affirmed

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<sup>39</sup> J Dedman, *Can Emoticons Beat the Hearsay Rule?* Abnormal Use, (Sept. 30, 2015), <<http://abnormaluse.com/2015/09/can-emoticons-beat-the-hearsay-rule-2.html>>accessed 27 February 2024

<sup>40</sup> 801 F.3d 1126 (9th Cir. 2015)

the district court, holding that copyright holders have a "duty to consider—in good faith and prior to sending a takedown notification—whether allegedly infringing material constitutes fair use."

Section 54 of the Nigerian Copyright Act, 2022 stipulates that where an infringement occurs, notice of the infringement may be made to the relevant service provider requesting the service provider to take down or disable access to any infringing content or link to the content. Such a notice amongst others must be accompanied by a declaration on oath that the complainant believes that the use of the material in the manner complained of is not authorised by the owner of copyright, his agent or the law. Section 55 provides in details how such content may be reloaded. However, the Copyright Commission is vested with powers to determine whether such a content may be reloaded or not, where there is a dissatisfaction as to action taken by the service provider.

It would appear that the quantum of usage that would be tagged fair use would be based on each case determined by the content so used; the proceeds from such a use; the effect on the original content, creator's earnings or claim to the content and other considerations that would arise based on the peculiarities of each case. Again, the use of GIFs and memes may also generate issues that impugn on the character and personality of individuals.

## 6. Conclusion

The language of technology is growing and not all people are adapted to it, hence, some of the emojis could still be confusing with limited means of determine their meaning. Although there are online directories, it may not have described all the possible meanings of digital communication language. Goldman<sup>41</sup> illustrated that 'Unicode short descriptions routinely do not reflect slang meanings that have emerged.'<sup>42</sup>

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<sup>41</sup>*Ibid*

<sup>42</sup>CR DeFabio, *Instagram Hashtags could be the Best Guide to Emoji Meaning We've Ever Had*, Fusion, May 1, 2015, <<http://fusion.net/story/127904/instagramhashtags-could-be-the-best-guide-to-emoji-meaning-weve-ever-had/>> accessed 27 February 2024

The question of grammatical rules to be adopted when using a combination of emojis also emerges as an issue; even though efforts at adopting concessions are emerging,<sup>43</sup> that does not adequately address the issue. This also gets complicated by the interjection of dialects into emojis, which may not be of wide usage. Emojis are to convey emotions and expressions, and primarily used as such, Goldman<sup>44</sup> asserts that the ‘simple designs of emojis don’t leave much room for nuanced emotional expression.’<sup>45</sup> This has led to the observation that “efforts to build a unified emotional context for hundreds of emojis used by millions of people around the world have failed.”<sup>46</sup> Goldman contends that intra-platform version incompatibility is one of the few challenges that are synonymous to the use of emoji. He states:

The technological implementation of emojis causes the sender and recipient to see different things *and not realize that they are seeing different things*. In other words, emoji technology will directly cause misunderstanding and confusion by changing the sender’s meaning without disclosure.

Relying on emojiopedia,<sup>47</sup> he contends that the ‘Grinning Face with Smiling Eyes’ emoji shows different iterations on the Apple, Google and Microsoft platforms. This problem is closely related to cross-platform depiction diversity. Using the cow emoji to illustrate, Goldman depicts the cross-platform diversity in using of Unicode-defined emojis. Because emojis are interpreted in light of the emotions it communicates through pictorial illustrations, misinterpretation and misrepresentation may deny the parties a

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<sup>43</sup> K Steinmetz, ‘Here Are Rules of Using Emoji You Didn’t Know You Were Following,’ (July 17, 2014) *Time*<<http://time.com/2993508/emoji-rules-tweets/>> accessed 27 February 2024

<sup>44</sup>Goldman, (n4)

<sup>45</sup>*Ibid*

<sup>46</sup>*Ibid*

<sup>47</sup>Grinning Face with Smiling Eyes, <<http://emojiopedia.org/grinning-face-with-smiling-eyes/>> accessed 27 February 2024



mutual understand of the message it delivers.<sup>48</sup>He concluded that cross-platform omissions may also arise as a problem due to cross-platform compatibility. This is most associated with proprietary emojis, where in some instances, the receiver only gets indication that the message contains an emoji, but which is omitted and only replaced by an empty or black square.<sup>49</sup>

The challenges stated above are presently associated with the use of digital communication and truly make their use undesirable in cross-border businesses or in any communication that has legal consequences. One way to avoid it is to expressly exclude its use by agreement, but where this is not done, obviously, it would be an issue if used within commercial transaction. Despite the challenges associated with digital communication language, the legal validity of the use of emojis in commercial transactions has been ascertained.

However, wordless communications have become an accepted part of the digital age. As have been demonstrated in this paper, there are decipherable legal consequences to the use of such means of communication. Whereas there may not be adequate legal provision to resolve all issues that may arise in the use of such means of communication, effective utilisation of available laws has helped in resolving such issues when they arise. Additionally, the state of the law holds any user of digital communication responsible for the potential meaning of such communication. Accordingly, liabilities where necessary have been established in respect of such communication.

## 7. Recommendations

Although the rationale behind the use of digital communication language is to effectively communicate emotions, reduce time and space in communication and convey appreciable and valuable sentiments, contractual obligations, tortious liabilities and copyright infringement amongst other major issues of law may arise from the use of such communications. In some instances, no such legal outcome is intended; or at least, no knowledge that such can result is possessed by

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<sup>48</sup> Goldman, (n4)

<sup>49</sup>*People v Lesser* (2011) WL 193460

parties later called to answer legal and legitimate questions in respect of such communications.

One may argue that the use of emojis in a commercial transaction is like the use of multiple languages to consummate a singular agreement; the implication of which may be misleading, except where there is mutual understanding as to the usage. It is therefore apposite to state that in any communication that can create contractual or binding obligations, parties should be careful to either make the use of such communications as emoji either part of their communication or to expressly exempt the use so as not to create unnecessary legal obligation unintended. Again, where a particular emoji, emoticon or such like has been used and the receiving party does not understand the meaning, immediate clarification should be made before any further response to the communication. Again, as have been seen, platforms can vary meaning of emojis. Parties who intend to create contractual obligations when using such should endeavour to deal with platform compatibility before placing reliance on the use of such means of communication.

Also, as has been demonstrated, Memes and GIFs may result in a copyright breach; the user must understand the basic purports of the Copyright Act 2022 and avoid such breaches. Uses within the exception of infringement must be adhered to. Only fair use is acceptable. Where there is the need to exceed such use, permission must be sought. However, rather than limiting resolution of controversies that may arise from breaches of online content to the Commission, the Copyright Act ought to make ADR paramount in resolving such disputes in line with the Constitution of the Federal Republic 1999 (as amended).<sup>50</sup>

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<sup>50</sup>S 19(d).