

“EMOJIS ARE PUTTING THE LAW TO THE TEST”

INTERVIEW: BARBARA ABRELL

50 Digital communication is prone to misunderstandings – and that especially applies when emojis are used. The popular pictograms are frequently understood in completely different ways, depending on age, gender, or cultural background. They are, therefore, increasingly becoming a subject for courts – for example, when contracts are concluded by e-mail or a messenger service or when posts are perceived as defamatory. Matthias Pendl, Senior Research Fellow at the Max Planck Institute for Comparative and International Private Law in Hamburg, has been researching the role of emojis in (private) law considering judgements from several jurisdictions around the world.

Researching emojis isn't something immediately associated with legal scholarship. Mr. Pendl, what motivated you to devote yourself to this research topic?

MATTHIAS PENDL Actually, a concern at the beginning was whether my rather quirky research interest would be well received in professional circles. Yet

there were a surprising number of prompts to pursue the topic: from my former boss, who used a 😊 in his e-mails whenever I had done my work well, to the experiences I had while clearing out my home before moving from Vienna to Hamburg. Many of my ads on the classifieds portal “Willhaben”, which is very popular in Austria, were commented on with emojis like 🍑 or with various emoji faces. As a lawyer, I asked myself: were these binding agreements? Then came the lockdown, and I suddenly had time to research something new.

As a means of communication, emojis often replace intonation, gestures, facial expressions, and other elements of body language. What are their strengths and weaknesses?

Emojis are so popular because they enrich communication with emotional touches. The difficulty, however, is that interpretation is not entirely straightforward – and this brings us straight to the legal problem. One and the same emoji can be understood in different ways depending on the context.

Could you perhaps give us a few examples of typical misunderstandings?

Sure. I have younger brothers. One of them recently explained to me that the face with tears of joy emoji 😂 is no longer used at all by his generation – Generation Z. When he's amused by something, he now sends a skull 💀 as a response, which means you're dying from laughter at what the other person said. I have advised him to be careful with this in WhatsApp – especially when he's sending messages to his grandparents... Communication between the sexes, meanwhile, frequently has implications in terms of labor law. Often, women no longer perceive emojis as funny, for example, when colleagues send them the supposedly harmless eggplant 🍆 emoji as a phallic symbol, or the peach emoji 🍑 as a suggestive reference to the human buttocks. A third example can be drawn from a recent email exchange with a guest researcher from China. I noticed that emojis I sent him didn't show up at his end at all. In addition to the misunderstandings that often occur when people from different cultures communicate,

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A multifaceted emoji: is someone lost in thought here; is he thinking about what has been said, is he questioning it, or does he perhaps think that it's questionable? Depending on the context, one and the same pictogram is interpreted quite differently.

Whether contracts are concluded via e-mail or messenger app, the interpretation of emojis can become the key issue.

IMAGE: GCO ACCORDING TO MPG

What do you say to this quote?



Perfect



Has a contract been concluded here?



EMOJIS, EMOTICONS & CO.

Emojis and emoticons are similar only at first glance. Emoticons consist of dots, dashes, brackets, letters, and numbers and – read sideways – result in a symbol that reflects a certain facial expression. The term is composed of the words emotion for “feeling” and icon for “symbol.” Well-known examples are the smiley face :-), the sad face :-(, the wink ;-), and the surprised expression :-O. In other cultures, completely different emoticons are often used; for example, Kaomojis in Japan, which also look completely different. A happy facial expression, for example, looks like this: ٩(●◡●)ε.

Emojis, on the other hand, are colorful pictograms or ideograms – such as 🍌 and 🍌. They are defined by uniform encoding, Unicode. This forms the technical basis for text and symbols in modern software and regulates their use in digital media. There are now also many animated emojis that, for example, roll their eyes or actively wink at you.

there are also technical hurdles in the use of emojis – especially when different e-mail programs are used.

What is the relevance of emojis in legal practice? Is there a trend you can observe?

Emojis are putting private law to the test: there is a growing number of court decisions in which emojis play an important role. This trend is evident in Germany as well, even though most of the published judgments in this country concern violations of personal rights or stem from labor law. One example is a case before the Regional Labor Court of Baden-Württemberg. The case concerned an extraordinary dismissal that was issued because of publicly viewable comments on Facebook. Among other things, it said in reference to a supervisor: “The fat 🍌 is going nuts!!! 😂😂😂” The court considered this to be a gross insult, but the dismissal had to be revoked due to the lack of a warning.

In matters like this, it makes sense that the courts are confronted with emojis. But do emojis also play a role in criminal law?

Yes, a big role, in fact. In the United States, there is an unfortunate number of reports involving threats of violence in schools through digital communication using emojis. In one case at the California Court of Appeal, for example, a minor had suggested in her tweets that she wanted to go on a rampage at her school. Her defense, that the numerous laughing emojis she had used were a sign that it was just a joke, was rejected by the court, which instead assumed that the threats were deliberate. Furthermore, the potential of emojis for making threats very often emerges after failed relationships. For example, a Frenchman, was reportedly given a custodial sentence for sending his ex-girlfriend a gun emoji 🍌, which the court considered a death threat. In California, a man was convicted of first physically abusing his for-

mer partner and then sending her the following text message: “You have 12 hours to find me, before I find you.” And he supplemented the message with various emojis that showed, among other things, bombs 💣, guns 🍌, knives 🍌, and needles 🍌.

Court rulings rarely depict the colorful pictograms; they simply use the word “emoji” – often written in square brackets – or “[laughing emoji],” “[sad emoji],” or “[astounded emoji].” What is the reason for this?

That is an important question to which I do not have a clear answer. I have never been a judge myself, so I simply don't know and can only make assumptions. It's probably just too cumbersome to include the colored pictograms – I know of only one case where a screenshot was used – especially since the judgments are mostly black and white when printed out.

Or because the judgment itself would appear less serious ...

Yes, that may be a concern as well. Emojis are sometimes considered not formal enough for legal language use, but that's something I find problematic. If emojis are crucial in a case, it is important to know what they actually look like, otherwise essential information will be lost.

You have examined court cases from seven different countries –

the USA, Canada, the UK, Australia, Germany, Austria, and Israel. Are there significant differences between the individual countries?

The data available is still too thin for a direct comparison. In Germany, for example, there have been hardly any studies on this so far, which is why I have attempted to fill this gap. In general, the discourse has progressed to different degrees: in the USA, in particular, but also in Canada, there is significantly greater awareness of the importance of emojis in communication. There – similar to Australia – the literature is also adopted in the judgments and the phenomenon is dealt with in more detail.

Social media platforms, messenger services, and even video platforms propagate the use of emojis, and some even reward it

by giving preference to posts that contain emojis. Is our communication suffering as a result?

Personally, I have developed a very positive attitude towards emojis. Through the enrichment of written language with emotional elements, our communication gains more than it suffers. But you'll probably get different answers depending on who you ask.

What do you think of the minimalist tendency to respond to a message with just an emoji?

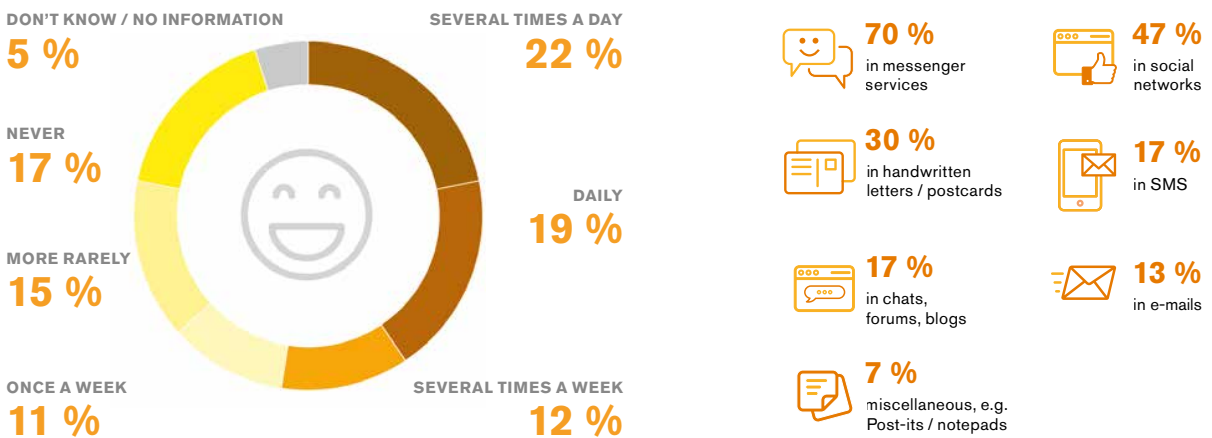
I don't see an overall trend here, but there are linguists who believe that emojis have the potential to form an alternative language. However, that – as far as I understand – is a very controversial field.

Many thanks for talking to us!



Use of emojis in Germany

IMAGE: GCO ACCORDING TO BITKOM RESEARCH 2021



The survey encompassed a total of 1004 people in Germany aged 16 and over. Source: Bitkom Research 2021

The survey encompassed 788 people in Germany who use emojis; multiple responses possible. Source: Bitkom Research 2021

The Bitkom association, which represents more than 2000 companies in the information and telecommunications industry, regularly conducts surveys on digital topics. The two surveys from the last year demonstrate how often Germans use emojis – not only in electronic media but also in handwriting.