



In the criminal trial of Ross W. Ulbricht who was recently convicted of money laundering, narcotics trafficking and computer hacking in the Federal District Court in Manhattan, prosecutors and defense counsel dealt with the growing debate over the admissibility of emoji emoticons, and unusual punctuation(s) in text and other electronic messages, i.e., smiley faces, frowns, triple "???", , etc., when presenting such evidence.

Mr. Ulbricht was accused and ultimately convicted of masterminding the "Silk Road," an e-bay like enterprise run on the hidden part of the Internet called the Tor network, where online activity can be anonymous. See <http://nyti.ms/1yyo36w> (1/28/2015). The Silk Road, it was argued, became a major thoroughfare for drug trafficking and other illicit goods. (*Id.*) It was alleged that Mr. Ulbricht used a pseudonym, Dread Pirate Roberts, in chats with fellow employees and other communications. (*Id.*) Further, consumers on the Silk Road utilized "Bitcoins" for their purchases. Bitcoins are an electronic currency that is as anonymous as cash.

When it came time to presenting text and other electronic messages, prosecutors and defense counsel disagreed over their presentation to the jury. The prosecution argued that such messages were akin to wiretaps and that the messages could simply be read aloud to the jury much like juries of the past listened to wiretap recordings and the voice of the utterer was then identified by a foundational witness. (*Id.*) According to the prosecution there was no need for the jury to read these messages which of course contained emoji and/or emoticons, in essence, arguing them worthless.

The defense, on the other hand, argued that these messages were meant to be read, including the emoji and/or emoticons, i.e., , , , etc., as a "wink" emoticon, for example, could represent some sort of flirtation or lack of seriousness when read in the context of an entire text message. (*Id.*) In the end, the judge allowed the messages to be both read aloud to the jury and then allowed the jury to actually read the messages, including the emoji and emoticons, "The jury should read them," the judge said. "They are meant to be read. The jury should note the punctuation and emoticons." (*Id.*)

### Implications for litigation in the future

As electronic evidence and messages continue to become part of the foundational fabric in both criminal and civil litigation, it can be expected the admissibility of the "entire" message will continue to be debated. Its impact will be far reaching whether related to employment or commercial litigation, or in the criminal context as was the case here. We will continue to monitor further developments in this emerging evidentiary area.



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