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At Silk Road Trial, Lawyers Fight to Include Evidence They Call Vital: Emoji

By BENJAMIN WEISER JAN. 28, 2015

The trial of Ross W. Ulbricht, a California man charged with running an online black-market bazaar called Silk Road, had barely begun when an unusual objection was lodged.

At issue was a piece of information that Mr. Ulbricht's lawyer suggested was critically important, yet was omitted by federal prosecutors: an emoji.

And not just any emoji, or emoticon, as the symbol is sometimes called — it was the gold standard. A version of a smiley face.

The unusual debate, taking place out of the presence of the jury in Federal District Court in Manhattan, arose after a prosecutor finished reading the text of an Internet post. "I'm so excited and anxious for our future, I could burst," the prosecutor had read to the jury, making no mention of the smiling symbol that followed.

Eventually, the judge, Katherine B. Forrest, instructed the jury that it should take note of any such symbols in messages.

"That is part of the evidence of the document," she explained.

The trial of Mr. Ulbricht, which is in its third week, has been full of novel twists because of its high-tech intrigue. Mr. Ulbricht, 30, is accused of running the Silk Road website, where the government says several thousand vendors sold drugs and other illicit goods.

The eBay-like enterprise was run on a hidden part of the Internet called the Tor network, where online activity can be anonymous. Deals were made in Bitcoins, an electronic currency that is as anonymous as cash, and Mr.

Ulbricht used a pseudonym, Dread Pirate Roberts, in chats with his employees and other communications, the government has said.

But how chats and other messages and their symbols should be presented in court — and the larger question of how jurors should be educated about unfamiliar terms in a case steeped in web culture — has become a running subplot in the case.

And as criminal and civil cases increasingly involve evidence gathered from computers and cellphones, prosecutors and defense lawyers have been forced to adapt.

In the trial of Gilberto Valle, a New York City police officer accused in a plot to kidnap, torture, kill and eat women, prosecutors built their case through messages he left on fetish websites.

“The question of identity in the virtual world is a complicated one,” said Julia L. Gatto, the lawyer for Mr. Valle, whose conviction was overturned last year.

“In a typical case with an audio recording, somebody says, ‘I know that voice,’ ” Ms. Gatto said. “Here, the best you can do is say: ‘I know that style. I know he doesn’t capitalize his i’s or always uses a frowny emoticon.’ ”

Emoticons figure in a case currently pending before the United States Supreme Court in which an Allentown, Pa., man was convicted of making threats on Facebook after his wife left him. He had claimed that his postings were fictitious, and used emoticons like a face with its tongue sticking out to indicate “jest.”

Mr. Ulbricht has pleaded not guilty to narcotics trafficking conspiracy and other charges, and his lawyer, Joshua L. Dratel, has denied that he is Dread Pirate Roberts, the name of a character from “The Princess Bride.”

Before trial, Mr. Dratel asked that all chats, forum posts, emails and other Internet communications be shown to the jury, and not read aloud.

“Chats are designed to be absorbed through reading, not through hearing,” he said in court.

In a letter to the judge, he added that inflections — or the lack of an inflection — could distort a writer’s meaning.

And, he wrote, certain forms of writing — like repeated question marks (“???”), all capital letters, distorted words (like “soooo”) and emoticons — “cannot be reliably or adequately conveyed orally.”

Prosecutors disagreed, likening the chats to wiretapped conversations that are routinely played or read aloud for jurors.

But Judge Forrest noted the defense was arguing that wiretapped conversations were intended oral communication, while chats were not.

She ultimately held that the messages could be read in court, although she would also instruct the jury that there was no indication the messages had been communicated orally.

“The jury should read them,” the judge said. “They are meant to be read. The jury should note the punctuation and emoticons.”

Tyler Schnoebelen, a Stanford-trained linguist whose dissertation examined the meaning of emoticons, said he understood why a lawyer might object to an emoticon being skipped over because such symbols convey a lot about a writer’s intentions.

“If it’s a ‘winkie,’ there’s flirtatiousness or a sort of a fun to it,” Mr. Schnoebelen said. “With smiles, there might be a politeness or a friendliness. If there’s a ‘frowny’ face, it’s indicating you don’t like what’s happening.

“It would be strange to call a witness and hide their facial expression and have their words spoken by someone else.”

Prosecutors have since been citing emoticons when they appear in messages read to jurors.

In one example, a prosecutor read what the government says was an exchange between Mr. Ulbricht and an employee about what appears to be a computer program to track disputes between buyers and sellers on Silk Road. Mr. Ulbricht asks, “Are you ready to become judge jury and executioner?”

The employee replies: Yep :)

Then the prosecutor said, “And then there’s an emoticon.”

The issue of how and whether to explain difficult terms to jurors also arose early in the case.

Last month, Judge Forrest suggested that the parties devise a glossary for jurors, with terms like IP address, Bitcoin, Codebase, configuration files and Tor.

“I do think they need to understand this stuff in order to administer justice here,” the judge said at the time.

But Mr. Dratel seemed reluctant. “Obviously, I’m not inclined to help the government explain its case to the jury,” he said.

Neither Mr. Dratel nor the government would comment on their tactics, but legal experts said recently that the more confused the jurors were in a case, the harder it could be to win a conviction.

“The defense might be objecting to the glossary as part of a strategy of trying to complicate the evidence and making it less comprehensible for the jury,” said Dan Simon, a professor of law and psychology at the Gould School of Law at the University of Southern California.

Indeed, once testimony was underway and no glossary had been agreed upon, the judge again raised the issue of the jury’s comprehension of computer terms. Speaking out of the jury’s presence, she cited testimony by a federal agent about the so-called Tor browser, a tool used to search the hidden part of the Internet where Silk Road existed.

She said the term was “mumbo jumbo to most people on the jury right now.”

“I do think clarity of the evidence is important here,” she added.

But no glossary has been provided to the jurors, and in at least one instance, when the agent tried to explain “Bitcoin mining,” his answer seemed to stray toward mumbo jumbo.

“Bitcoin mining is the process of creating a Bitcoin,” he began, “and that is — someone that mines would generally use a computer to specifically run a series of — it is called algorithms — that will try to mathematically create this like perfect string which was of all the different transactions. It confirms them. Once it is confirmed it becomes a part of a block. Once you solve a block, you get a Bitcoin.”

It was unclear what the jury made of the answer; the trial continues.

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