



Legal Protection of Digital Emojis under Intellectual Property Regimes: An Analytical Study of Copyright and Trademark Law

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Abstract:

Digital emojis have become a central feature of contemporary digital communication, extending beyond emotional expression to encompass creative, commercial, and advertising uses. This expansion has raised legal questions regarding their legal characterization and the extent to which they may be protected under intellectual property regimes.

This study examines the legal protection of digital emojis under copyright and trademark law, highlighting the distinction between standardized, functional emojis and those reflecting creative originality or commercial distinctiveness. Using an analytical and comparative approach, the research evaluates the Algerian legal framework in light of international conventions and comparative legal practices. It seeks to identify the limits of existing protection mechanisms and the challenges posed by the absence of explicit legal regulation for digital expressive symbols, emphasizing the need for legal adaptation to evolving forms of digital creativity

Keywords: Digital emojis, digital creativity, copyright law, trademark law, intellectual property.

المخلص:

أصبحت الرموز التعبيرية الرقمية (Emojis) من الوسائل الأساسية للتواصل في البيئة الرقمية المعاصرة، حيث لم يعد دورها مقتصرًا على التعبير العاطفي، بل امتد ليشمل الاستخدامات التجارية

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والإعلانية والإبداعية. وقد أفرز هذا الواقع إشكالات قانونية تتعلق بتحديد طبيعتها القانونية ومدى قابليتها للحماية في إطار أنظمة الملكية الفكرية.

تهدف هذه الدراسة إلى تحليل إمكانية حماية الرموز التعبيرية الرقمية بموجب نظام حق المؤلف ونظام العلامات التجارية، مع التمييز بين الرموز المعيارية ذات الطابع الوظيفي والرموز التي تتجسد فيها عناصر الإبداع والتميز التجاري. وتعتمد الدراسة منهجا تحليليا مقارنا يستند إلى التشريع الجزائري في ضوء الاتفاقيات الدولية والممارسات المقارنة، بغرض إبراز حدود الحماية القانونية والتحديات المرتبطة بتنظيم الإبداع الرقمي في ظل غياب نصوص تشريعية صريحة.

الكلمات المفتاحية: الرموز التعبيرية الرقمية، الإبداع الرقمي، حق المؤلف، العلامات التجارية، الملكية الفكرية.

Introduction:

Over the past two decades, the digital space has witnessed radical changes in modes of expression and communication, one of the most notable manifestations of which has been the widespread use of digital emoticons (emojis). With their visual diversity and multiple communicative functions, these symbols have become a constant feature of digital discourse, used in private conversations, commercial advertisements, artistic content, and even political campaigns and social advocacy.

They have transcended their original function as tools for expressing emotions to become a means of communication with complex cultural, commercial, and aesthetic connotations.

This widespread use has raised increasing legal issues regarding how to protect these symbols from unauthorized use and determine who has the right to control their use, especially when they are the result of creative work or are used as a distinctive element in a commercial product or service. While legal opinion is divided on whether emojis should be classified as literary or artistic works protected by copyright, another school of thought argues that they can be protected as trademarks if they meet the conditions of distinctiveness, availability, and commercial use.

In this context, the following question arises:



To what extent are digital emojis protectable under copyright and trademark law?

This study aims to analyze the legal framework for the protection of digital emojis by examining the extent to which these symbols are protectable under both copyright and trademark law, while addressing the most prominent practical and legal issues associated with this, given the absence of explicit provisions in many national legislations, particularly in Arab countries.

The study also adopts a comparative analytical approach that links international practices and national trends in order to provide a balanced legal perspective that takes into account the nature of digital creativity and its artistic and commercial implications.

We have divided the study into two sections. The first section deals with **the eligibility of digital emojis for protection under intellectual property regimes (Section I)**, and the second section deals with **the legal basis for the protection of digital emojis (Section II)**.

THE FIRST TOPIC: Eligibility of digital emojis for protection under intellectual property regimes

Determining the eligibility of a particular subject matter for protection under intellectual property regimes is an essential step in understanding whether it falls within the scope of legal protection and whether it meets the substantive requirements set forth in international and national laws.

In this context, digital emojis, as a new form of expression in the digital environment, raise questions about their legal nature, the functions they perform, and the extent to which they are subject to classic legal systems for the protection of intellectual creations.

Therefore, this study aims to examine the legal nature of digital emojis and analyze their technical and functional characteristics, in order to assess the extent to which they are eligible for protection under intellectual property regimes.



The analysis is structured into two main subsections: the first focuses on the legal nature of these symbols (Subsection 1), while the second explores their potential protection under copyright and trademark law (Subsection 2).

FIRST REQUIREMENT: Legal Nature of Digital Emojis – Between Artistic Expression and Functional Use

Digital emojis (Emojis) have become one of the most prominent tools of contemporary expression in the digital environment. They have evolved from simple symbols used to convey emotions in text messages into complex visual media employed in artistic, media, commercial, and even legal contexts.¹

This evolution raises a fundamental question in the field of intellectual property: can these symbols be regarded as “works” of a creative nature, deserving protection under copyright law? Or are they merely functional communication tools that do not qualify as legally protected works?

To answer this question, we must first analyze the nature of these symbols in terms of form, content, and function.

We find that emojis are small digital images used to express different feelings, thoughts, and concepts in digital communication. They have become an integral part of how we communicate online and are widely used in text messages, social media, email, and other communication platforms.

The word “emoji” is of Japanese origin and is composed of two syllables: the first, “e” (絵), means “picture,” and the second, “moji” (文字), means ‘character’ or “symbol.” These two syllables have been combined to form a single term, “emoji,” which refers to the small symbol or image used in electronic messaging.²

This term is an example of Japanese language borrowing in English, as it has become universally adopted to visually express feelings and thoughts in digital communications.

Some emojis, especially those designed by artists or corporate design teams, may reflect a level of originality and creativity that qualifies them for protection as artistic or applied works.

Other emojis, especially standardized emojis such as standardized emojis (traditional yellow emojis), which are created according to uniform technical



standards under the supervision of the Unicode Consortium, may be considered closer to functional tools of a technical nature, which weakens their chances of obtaining protection based on the personal nature of creativity.³

Therefore, distinguishing between artistic emojis and functional emojis is a first step toward understanding the limits of their copyrightability, an issue that remains the subject of ongoing legal and judicial debate in various legal systems.⁴

Digital emojis are two-dimensional digital graphics that are widely used as functional communication media.

However, when designed in a particularly creative manner, they acquire artistic dimensions that make them eligible for copyright protection. According to the WIPO report, some emojis may be classified as protected works if they have creative originality and distinctive visual expression, but simple or standard emojis are often excluded due to their limited options or because they are simple technical tools.⁵

SECOND REQUIREMENT: Eligibility of Digital Emojis for Protection under Copyright and Trademark Law

With the increasing prevalence of digital emojis in everyday use and commercial activities, questions have arisen regarding their eligibility for legal protection under intellectual property regimes, specifically within the frameworks of copyright and trademark law.

In terms of copyright, emojis raise the question of whether they are original creative works or merely standard communication elements that do not qualify as protected works.

The scope of copyright could include protection for emojis, whether they are individual emojis, sets of emojis, or the design patterns used to display them.

In principle, emojis can be considered graphic works that are protected by copyright. However, this protection is often limited, as many emojis are very simple, which means they do not meet the originality requirement necessary to obtain legal protection.



In addition, emojis face legal restrictions due to their functional and communicative nature; the expression of certain meanings allows only a limited number of possible visual forms, which leads to the fusion of the idea with the expression and the exclusion of protection. Furthermore, emojis' reliance on culturally predictable or common elements means that many of their details fall within the scope of necessary elements that are not covered by copyright.

It should also be noted that the Unicode standard, which regulates the definition of emojis, is based primarily on the principle of public availability, which reduces the possibility of claiming exclusive ownership of these symbols. Accordingly, the versions adopted by different platforms are often limited applications or developments of the original standards and only benefit from protection within the limits of the substantial creative modifications added by the platform in question.

However, some exclusive emojis that show a clear degree of creativity can meet the conditions for protection, especially when they reflect distinctive artistic choices.⁶

Some studies suggest that symbols designed by artists or technology companies in a distinctive visual style can be classified as “pictorial works,” provided that they embody a degree of personal creativity and are not limited to functional or purely technical forms.

However, the possibility of protection is hampered by a number of legal restrictions, including what is known in American jurisprudence as the “merger doctrine,” which states that the idea and the way it is expressed sometimes merge in such a way that protection cannot be separated from the idea itself. There is also the principle of “scènes à faire,” which excludes from protection those elements that are necessary to express ideas that are general or predictable in nature, such as a smiling face or a red heart, which are difficult to consider as unique personal creations.⁷

As for the possibility of protecting emojis as trademarks, some practical applications, particularly in the United States and the European Union, have shown that this is possible if the conditions of distinctiveness and use in the market are met⁸.

An emoji can be registered as a trademark if it is used to indicate the source of a product or service and is sufficiently distinctive to distinguish it from common symbols.



Some companies have registered emojis as trademarks, such as Smiley's famous yellow smiley face, and have been able to enforce legal protection against unauthorized use.

However, emojis that are widely available and freely used in the digital space, particularly those included within the Unicode Standard, are difficult to subject to trademark protection due to their general nature and lack of association with a specific product or service.

It follows that the eligibility of emojis for protection under copyright and trademark law depends on the nature of the symbol and the context in which it is used. Emojis that embody personal visual creativity or are employed in distinctive commercial contexts may benefit from dual protection, whereas standard or generic symbols generally fall outside the scope of protection or enjoy only limited protection. This situation highlights the need for further legal adaptation in this evolving area.

THE SECOND TOPIC: Legal Foundations for the Protection of Digital Emojis

After analyzing the legal nature of digital emojis and confirming their prima facie eligibility for intellectual property protection, it becomes necessary to examine the legal conditions that enable such protection to be effectively established, whether under copyright or trademark law. Legal protection is not granted automatically merely because an element of creativity or distinctiveness is present; rather, it depends on the fulfillment of specific conditions that vary according to the applicable legal system.

In practice, several challenges arise, including those related to the collective or open nature of emoji usage, as well as the overlap between artistic and commercial uses of the same symbol.

Accordingly, this section first addresses the legal conditions that must be met for emojis to benefit from protection **(Subsection 2)**, and then examines the legal limitations and practical issues that hinder the enforcement of such protection in comparative legal systems **(Subsection 2)**.



FIRST REQUIREMENT: Legal Conditions for Granting Protection under Copyright and Trademark Law

Digital emojis are a form of contemporary expression that raises legal questions regarding their eligibility for protection under intellectual property regimes, particularly within the frameworks of copyright and trademark law. Granting such protection requires the fulfillment of a set of legal conditions that vary depending on the nature of the applicable legal system, whether in terms of originality under copyright law or distinctiveness and actual use under trademark law.

With regard to copyright, Order No. 03-05 of 19 July 2003 on copyright and related rights in Algeria provides that protection covers original literary and artistic works. Such protection arises automatically from the creation of the work, without the need for any formalities.⁹

Article 4 of this law specifies a non-exhaustive list of works eligible for protection, including “photographic works, hand-drawn or computer-generated works, and visual expressive works.” From this provision, it can be inferred that any visual form of expression that satisfies the requirement of originality may be protected, thereby opening the possibility for emojis to fall within the scope of protection if they constitute an expression of personal creativity.¹⁰

However, protection is not granted arbitrarily, but depends on the availability of the condition of originality, as confirmed by Article 3 of the same law, which requires that the work bear the “personal imprint” of the author.

In this context, originality means that the work is the result of a specific intellectual effort, and is not merely a repetition or reassembly of symbols available in the public domain or resulting from a standardized technical standard, as is the case with standardized emoticons according to the Unicode system.¹¹

Therefore, symbols that are designed in an individual and creative manner by creators for commercial entities may meet the condition of originality and benefit from protection, unlike widely used standard symbols that lack personal distinction or what is known in copyright terminology as personal expression or personal imprint that the creator gives to his literary or artistic production.



At the international level, the Berne Convention for the Protection of Literary and Artistic Works of 1886, to which Algeria is a party, provides for the automatic protection of original works without any formalities, but requires that the work be an expression of an idea, whereas ideas themselves are not protected by copyright.¹²

Furthermore, judicial decisions in some countries, such as the United States, apply the Merger Doctrine, which requires that expression lose protection if it cannot be separated from the idea, along with the Scènes à faire principle, which excludes from protection elements that are necessary or customary for expressing general ideas, such as common symbols for expressing happiness or sadness. , which excludes from protection elements that are necessary or customary for expressing general ideas, such as common symbols for expressing happiness or sadness, which directly affects the possibility of protecting standard emoticons.

However, emoji sequences can be viewed as collections or compilations, and may be subject to legal protection when their selection, arrangement, and coordination reflect a clear creative effort that gives them an original character.

Design patterns, on the other hand, represent uniform rules applied to a set of emojis, such as the choice of a particular color or visual style. These patterns can form the basis for protection as compilations.¹³

With regard to trademark law, protection is not automatic but requires formal registration with the Algerian National Institute of Industrial Property (INAPI), in accordance with the provisions of Order No. 03-06 of 19 July 2003 relating to trademarks. Article 2 of this order defines a trademark as “any distinctive sign capable of graphic representation used to distinguish the products or services of one undertaking from those of another.”¹⁴

This definition opens the possibility for emojis to be registered as trademarks, provided they meet the requirements of distinctiveness, non-deceptiveness, and compliance with public order and morality, as set out in Article 7 of the same order.¹⁵

The possibility of protecting emojis as trademarks is further reinforced when they are actually used in the commercial market to indicate the origin of goods or services. This is illustrated by certain foreign precedents, such as the registration of the “Smiley” symbol as a trademark in the European Union, where it was regarded as a distinctive sign associated with specific products and services and benefited from protection on the basis of its use and registration in the marketplace.¹⁶



The Smiley Company SPRL, based in Brussels, is a practical example of how emojis can be protected as a distinctive form in the commercial market.

The company registered a figurative trademark with the European Union Intellectual Property Office (EUIPO) under application number 008505299, with protection covering the design of a symbol resembling the Smiley face across multiple categories of goods and services. The application was filed on December 17, 2009, and the registration certificate was delivered on May 12, 2010, making it protected under European law.

The categories of goods and services protected under this registration include products such as jewelry, paper and printed matter, leather goods, household goods, textiles and clothing, toys, and sporting goods.

This example shows how emoticons can benefit from legal protection as distinctive trademarks when they are actually used in the market and officially registered with the competent authorities, thereby strengthening companies' right to prevent infringement or imitation of these symbols.

Therefore, the legal requirements for protecting digital emojis vary depending on the legal framework adopted. In copyright law, it depends on the originality of the design, while in trademark law, it requires actual distinctiveness and clear commercial use.

Standard or common symbols remain largely outside the scope of protection, unless they are developed in a way that departs from the norm and achieves elements of creativity or distinctiveness.

SECOND REQUIREMENT: Limits of Legal Protection for Digital Emojis

Despite the legal mechanisms provided by intellectual property regimes to protect creative forms, digital emojis continue to raise growing legal and practical challenges, given their hybrid nature and communicative function, as well as the rapid evolution of their use within an open and fast-expanding digital environment.

Even in cases where certain emojis meet the requirements for protection under copyright law, the practical scope of such protection often remains limited. Many



courts, particularly in the United States, adopt a broad interpretation of the fair use doctrine, allowing emojis to be used in a variety of contexts, whether modified or even identical to the original, especially when such use relates to everyday communication or non-commercial expression.¹⁷

On this basis, judicial authorities tend to avoid extending the scope of protection in a manner that could restrict freedom of expression or result in excessive interference with modes of human communication.¹⁸

This issue is further complicated by the absence of clear boundaries between free artistic expression, on the one hand, and the commercial or technical use of emojis, on the other, which negatively affects the effectiveness of the legal protection afforded to them in many legal systems.

One of the most significant limitations facing the protection of emojis lies in the standardized nature of most of these symbols.

They are produced in accordance with unified technical specifications adopted by the Unicode Consortium, which makes them available for public use under open licensing frameworks, without the possibility of attributing exclusive ownership to a specific entity.¹⁹

Under this model, most emojis are treated as communication tools or general technical resources, which generally places them outside the scope of copyright protection, particularly when they lack the minimum level of originality or personal distinctiveness required under the Berne Convention, as well as Article 3 of Order No. 03-05 on copyright and related rights.²⁰

On the other hand, the legal system faces difficulties in regulating the multiple uses of the same emoticon, as it may be used in informal personal conversations and then reused later in an advertising or commercial context.

This functional overlap poses real problems when applying trademark protection rules, especially when the symbol is not permanently linked to a specific product or service, or when it lacks the distinctive character required for registration.²¹

Furthermore, some legislation does not recognize dual protection, meaning that the creator cannot enjoy both copyright protection and trademark protection at the same time, unless a clear distinction can be made between the creative and commercial functions of the symbol.



In the Algerian context, there is a lack of clear legal precedents regarding the protection of digital emojis, and the current legislative framework does not include explicit provisions addressing digital works of a mixed or interactive nature.

This legislative vacuum leads to practical problems for the judiciary and the administration, especially given the rapid growth of digital creativity and the spread of emojis on social media platforms.

At the international level, some courts, particularly in the United States and Germany, have dealt with cases involving the use of emojis in advertising or in the interpretation of contracts.²²

However, these rulings have often focused on the connotation and contextual meaning of the symbol, rather than on its legal classification as a protected trademark or a trademark in its own right.

Added to this is the issue of open or collective licenses, whereby some platforms allow the use of certain emojis under free licenses, such as Creative Commons licenses, which makes it difficult to claim any exclusive protection and requires a distinction to be made between original emojis designed within the framework of private commercial projects and those that have become part of the digital public domain.²³

Therefore, the legal protection of digital emojis faces several limitations, some of which are technical and related to design standards, while others are legal and result from the ambiguity of texts or the difficulty of classifying emojis within traditional categories of protection.

Furthermore, practical application remains limited, both in Algeria and in many comparable systems, which calls for clearer and more flexible legislative intervention that keeps pace with the specific characteristics of this new form of digital creativity and regulates its protection more precisely.

Conclusion:

The study has shown that, despite their formal simplicity, digital emojis now constitute a widely used form of symbolic expression in the digital environment, which gives them increasing significance in the contexts of artistic creativity, commercial distinction, and even in contractual interactions and everyday transactions.



However, the status of these symbols within legal intellectual property protection systems remains controversial, whether in terms of the legal nature under which they can be classified, the conditions that must be met to grant them effective protection, or the limits of that protection in the absence of explicit provisions and the evolution of digital practices.

The study showed that the applicability of copyright to digital emojis is linked to the condition of artistic originality, meaning that they are the result of personal creativity that expresses the intellectual imprint of the author.

This applies only to emojis that are individually designed and original or distinctive, and does not include standardized and common emojis produced according to Unicode technical standards.

As for trademarks, it has been shown that emojis may be eligible for protection if they are actually used to distinguish specific products or services and meet the criteria of distinctiveness, legitimacy, availability, and non-deceptiveness, in accordance with Algerian law and the provisions of several comparative legal systems.

The study also showed that despite Algeria's accession to leading international conventions such as the Berne Convention, the Paris Convention, and the Madrid Agreement, the Algerian legal system still lacks precise legislative treatment of the issue of emojis, whether through legal texts or judicial guidelines.

This poses difficulties for law enforcement officials in adapting these symbols, especially given the overlap between their technical, commercial, and communicative functions and the absence of precise technical criteria for assessing originality and distinctiveness in this context.

Based on the foregoing, the following recommendations can be proposed:

- 1) The need to include legal provisions specific to interactive digital works, including emojis, in Algerian copyright legislation, allowing for flexible and innovative adaptation to these new forms of creativity.
- 2) Efforts should be made to guide judicial and administrative bodies to develop clear national jurisprudence in this area, based on international standards and comparative jurisprudence, while taking into account the specificities of the Algerian digital environment.



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- 3) Develop joint technical and legal guidelines between the National Copyright and Related Rights Office and the Algerian National Institute of Industrial Property to define the criteria that can be used to assess symbols in terms of originality or distinctiveness.
- 4) Encourage researchers and universities to address this issue in academic research in order to enrich the legal debate and propose practical and feasible solutions.
- 5) Strengthen regional and international cooperation in the field of intellectual property in the digital age, through active participation in relevant WIPO programs and drawing inspiration from comparative experiences in protecting emojis in the virtual environment.

Thus, it becomes evident that the protection of digital emojis represents a paradigmatic example of the contemporary challenges facing intellectual property in the era of digital transformation, highlighting the need for a flexible legal adaptation that balances the protection of creativity with the free circulation of knowledge and symbols in the digital public sphere.

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¹⁷ - Fair use principle: This is a legal exception that allows the use of copyrighted works without the permission of the copyright holder in certain circumstances, such as education, scientific research, criticism, or news reporting. The primary goal is to strike a balance between copyright rights and the public interest in access to knowledge. This principle is applied in the United States of America and is known in the Latin system as exceptions and limitations to copyright.

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¹⁹ - Open licenses: Open licenses are legal agreements that allow users to access, modify, and freely distribute source code or original content (with specific restrictions), promoting transparency, collaboration, and innovation. They are available in software (such as Linux and Firefox), educational resources, and creative materials. The most well-known examples are open source licenses and Creative Commons licenses, which provide broad usage rights with conditions such as attribution (BY) or share-alike (SA). Reference: Aja Al-Jilali, Intellectual Property -Concept, Nature, and Sections, Encyclopedia of Intellectual Property Rights, Part I, Zain Legal Publications, Beirut, Lebanon, 2015, pp. 305 and 306.

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