

# VERDICTS & SETTLEMENTS

Bench Decision: Defense  
USDC Northern / 3:21-cv-06948-VC  
Topic: Intellectual Property  
Subtopic: Copyright Infringement

Defense – Andrew M. Gass, Elana N. Dawson, Carolyn M. Homer, Gabriel S. Gross (Latham & Watkins LLP)

In 2013, Cub Club Investment LLC registered seven iDiversicons emojis with the U.S. Copyright Office. Later that same year, Cub Club launched an app on the Apple App Store called iDiversicons that allowed users to send racially diverse emoji that depicted body parts with varying skin tones in certain positions, including thumbs up, thumbs down, and a fist. In 2014, Cub Club’s owner and founder, Katrina A. Parrott, met with Apple’s Unicode Technical Committee representatives and showed the emojis and application in hopes of partnering with Apple. However, Apple informed Parrott that they did not want to partner with her company. In 2015, Apple released its first set of “diverse emojis” to iPhone users. Subsequently, Cub Club filed suit against Apple.



**Andrew Gass**

## INTELLECTUAL PROPERTY

### COPYRIGHT INFRINGEMENT

#### Trade Dress Infringement

BENCH DECISION: **Defense**

CASE/NUMBER: Cub Club Investment LLC v. Apple Inc. / 3:21-cv-06948-VC

COURT/DATE: USDC Northern / Feb. 16, 2022

JUDGE: Vince G. Chhabria

#### ATTORNEYS:

**Plaintiff** – Joseph John Stevens, B. Todd Patterson, John A. Yates, Craig Depew, Kyrie K. Cameron, Edgar N. Gonzalez, Joshua H. Park (Patterson & Sheridan LLP)

**Defendant** – Andrew M. Gass, Elana N. Dawson, Carolyn M. Homer, Gabriel S. Gross (Latham & Watkins LLP)

#### FACTS:

In 2013, Cub Club Investment LLC registered seven iDiversicons emojis with the U.S. Copyright Office. Later that same year, Cub Club launched an app on the Apple App Store called iDiversicons that allowed users to send racially diverse emoji that depicted body parts with varying skin tones in certain positions, including thumbs up, thumbs down, and a fist. In 2014, Cub Club’s owner and founder, Katrina A. Parrott, met with Apple’s Unicode Technical Committee representatives and showed the emoji and application in hopes of partnering with Apple. However, Apple informed Parrott that they did not want to partner with her company. In 2015, Apple released its first set of “diverse emojis” to iPhone users. Subsequently, Cub Club filed suit against Apple.

#### PLAINTIFF’S CONTENTIONS:

Plaintiffs asserted copyright infringement, trade dress infringement, and associated trade dress common law claims.

#### DEFENDANT’S CONTENTIONS:

Defendant denied all contentions in the complaint. Defendant alleged that applying five different skin tones to emoji was an unprotectable idea that entitled plaintiff to no rights under the Copyright Act. Defendant also contended that plaintiff’s complaint was an attempt to monopolize the images of human features used in digital communications. Further, defendant alleged that the two sets of emoji were not substantially similar. Finally, most of the elements of the iDiversicons emoji were not entitled to protection or are only entitled to a lesser “thin” protection, including the particular color plaintiff chose and the use of body parts.

#### RESULT:

Apple’s motion to dismiss was granted. The court found that Cub Club did not allege copying of any protectable element of its emojis. Instead, the copyrighted works were expressions of an idea for racially diverse emojis. Further, the trade dress alleged in the complaint was functional and therefore, unprotectable.

FILING DATE: Sep. 18, 2020