

“BoingBoing” that contained the inflammatory headline: “Rightscorp’s terrifying extortion script is breathtaking in its sleaze.”² In emailing the article to himself, Mr. Singer did not edit or add any content; his email contained *only* the copied article. Indeed, Grande also included the article itself on its exhibit list as Defendant’s Exhibit 57.³ Further, when Grande questioned Mr. Glass about Defendant’s Exhibit 44 at his deposition, it asked only whether Mr. Glass had ever seen the email Mr. Singer sent to himself.⁴

This “evidence” consists of nothing more than crude and prejudicial statements made by a biased third-party that has no involvement in this case about issues that have no relevance to this case, as they are not probative of the efficacy of Rightscorp’s technology to detect infringement. Plaintiffs, therefore, move the Court to preclude Grande from introducing Defendant’s Exhibits 44 and 57 and related testimony, including the deposition testimony of Mr. Glass (collectively, “the BoingBoing evidence”).

ARGUMENT

I. The BoingBoing Evidence is Highly Prejudicial.

First, the probative value of the BoingBoing evidence, if any, is substantially outweighed by the very real and significant danger of unfair prejudice under Federal Rule of Evidence 403. Grande’s sole purpose for introducing this evidence is to inflame the jury. Indeed, courts routinely preclude evidence containing such “pejorative terms” and “crude and inflammatory” language. *See, e.g., Luv n’ care v. Laurain*, No. CV 3:16-00777, 2021 WL 7907283, at *2 (W.D. La. Mar. 29, 2021) (“The use of pejorative terms such as ‘knock-off shop,’ ‘counterfeiter,’ and ‘copy shop’

² Defendant’s Exhibit 44 is attached to this motion as Exhibit A. The article is available at <https://boingboing.net/2015/09/28/righstcorps-terrifying-extor.html>.

³ Defendant’s Exhibit 57 is attached to this motion as Exhibit B.

⁴ Grande designated the following video excerpts of Mr. Glass’s deposition transcript to play for the jury: 76:22-77:05, 77:06-17, 77:20-22, 78:17-22. These excerpts are attached to this motion as Exhibit C.

are ‘unduly prejudicial under FRE 403.’”); *King v. Univ. Healthcare Sys., L.C.*, No. CIV A 08-1060, 2009 WL 2222700, at *3 (E.D. La. July 24, 2009) (excluding emails because “the crude and inflammatory language used and emotions expressed in them will have the primary effect of placing [witnesses] in an unflattering light.”). The BoingBoing evidence is no different. The article itself (*i.e.*, Defendant’s Exhibit 57) even features a picture of Drew Barrymore from the horror movie *Scream* crying in terror over a telephone. *See* Ex. B.

In addition, the BoingBoing evidence is irrelevant to the issues in this case. Rightscorp’s technology is at issue in this trial, but not its business methods, and certainly not how a hostile third-party might mischaracterize those methods. Accordingly, the Court should preclude Grande from introducing the BoingBoing evidence to the jury.

II. The BoingBoing Evidence is Hearsay.

Second, the BoingBoing evidence should be excluded because it is nothing more than out of court declarations from a third-party pro-piracy website. Cases are legion holding that “newspaper articles [are] classic, inadmissible hearsay.” *Roberts v. City of Shreveport*, 397 F.3d 287, 295 (5th Cir. 2005); *Hicks v. Charles Pfizer & Co. Inc.*, 466 F. Supp. 2d 799, 804 (E.D. Tex. 2005) (stating that articles are not sworn or certified, and the authors are not subject to cross-examination, rendering such articles incompetent summary judgment evidence). The BoingBoing article, from boingboing.net, is even less reliable since it is not an article from an established and reputable newspaper.

Importantly, none of the evidence Grande seeks to introduce extends beyond the content of the article itself in a manner that suggests Warner or any other Plaintiff took any action based on any awareness of the article. As noted above, Mr. Singer merely emailed the article *to himself*

and did not include any other content.⁵ And Mr. Glass's deposition confirmed that Mr. Glass had never seen Mr. Singer's email before his deposition.⁶ Therefore, none of the evidence Grande seeks to present concerning the BoingBoing article could fall into any conceivable hearsay exception.

Finally, the BoingBoing article lacks trustworthiness. Not only is the article's author, boingboing.net, a third-party website that is known for its pro-piracy stance, but the author's statements in the article were not sworn or certified, nor is the author subject to cross-examination. *See Hicks v. Charles Pfizer & Co. Inc.*, 466 F. Supp. 2d 799, 804 (E.D. Tex. 2005); *see also Alanis v. Tracer Indus. Mgmt. Co.*, No. 1:13-CV-386, 2016 WL 4426377, at *5 (E.D. Tex. Aug. 18, 2016) (excluding compilation of newspaper articles from trial as inadmissible hearsay).

Accordingly, the BoingBoing evidence, appearing in all of its forms, is inadmissible hearsay.

CONCLUSION

For the foregoing reasons set forth above, the Court should preclude Defendant's Exhibits 44 and 57, and any related testimony, including the excerpts from Mr. Glass's videotaped deposition.

Dated: October 24, 2022

Respectfully submitted,

By: /s/ Andrew H. Bart
Andrew H. Bart (admitted *pro hac vice*)
Jacob L. Tracer (admitted *pro hac vice*)
Jenner & Block LLP
1155 Avenue of the Americas
New York, NY 10036

⁵ For that reason, Mr. Singer's email should also be excluded because a "copy-and-paste document is not the best evidence, and thus is inadmissible." *See United States v. Jackson*, 488 F.Supp.2d 866, 871 (D. Neb. 2007) (holding that a "cut-and-paste document" was not an accurate original or duplicate because it did not reflect the entire conversation and thus was inadmissible because it was not the best evidence (citing Fed. R. Evid. 1001-04)).

⁶ *See* Ex. C at 78:3-5 (Q. "Did you review this e-mail in preparation for your deposition today?" A. "I did not.") & 78:17-22 (Q. "Having just reviewed this e-mail, is this the first you're learning about Rightscorp's terrifying extortion script?" A. "Yes, this is the first time.").

Telephone: (212) 891-1600
Facsimile: (212) 891-1699
abart@jenner.com
jtracer@jenner.com

Robert B. Gilmore (admitted *pro hac vice*)
Philip J. O'Beirne (admitted *pro hac vice*)
Michael A. Petrino (admitted *pro hac vice*)
Kevin J. Attridge (admitted *pro hac vice*)
Stein Mitchell Beato & Missner LLP
901 15th Street, N.W., Suite 700
Washington, DC 20005
Telephone: (202) 737-7777
Facsimile: (202) 296-8312
rgilmore@steinmitchell.com
pobeirne@steinmitchell.com
mpetrino@steinmitchell.com
kattridge@steinmitchell.com

Daniel C. Bitting (State Bar No. 02362480)
Paige A. Amstutz (State Bar No. 00796136)
Scott Douglass & McConnico LLP
303 Colorado Street, Suite 2400
Austin, TX 78701
Telephone: (512) 495-6300
Facsimile: (512) 495-6399
dbitting@scottdoug.com
pamstutz@scottdoug.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that on October 24, 2022 all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system pursuant to Local Rule CV-5(b)(1).

/s/ Paige A. Amstutz _____

Paige A. Amstutz