UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MATT HOSSEINZADEH,

Plaintiff,

-v-

ETHAN KLEIN and HILA KLEIN,

Defendants.

16-cv-3081 (KBF)

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

This action principally concerns whether critical commentary on a creative video posted on YouTube constitutes copyright infringement. Matt Hosseinzadeh ("plaintiff") filed this action in response to a video (the "Klein video") created by Ethan and Hila Klein ("defendants") and in which they comment on and criticize plaintiff's copyrighted video (the "Hoss video"). (ECF No. 1.) The Kleins' criticism and commentary is interwoven with clips from the Hoss video. The operative complaint alleges that defendants infringed plaintiff's copyrights, made misrepresentations in a counter-takedown notice in violation of the Digital Millennium Copyright Act, 17 U.S.C. § 512(g)(3), and defamed plaintiff. (ECF No. 26.)

Before the Court are dueling motions for summary judgment. (ECF Nos. 82, 86.) The key evidence in the record consists of the Klein and Hoss videos themselves. Any review of the Klein video leaves no doubt that it constitutes

critical commentary of the Hoss video; there is also no doubt that the Klein video is decidedly not a market substitute for the Hoss video. For these and the other reasons set forth below, defendants' use of clips from the Hoss video constitutes fair use as a matter of law. Further, it is clear that defendants' comments regarding the lawsuit are either non-actionable opinions or substantially true as a matter of law. For these and the other reasons set forth below, plaintiff's defamation claim fails. Defendants' motion for summary judgment is therefore GRANTED, and plaintiff's motion is DENIED.

I. BACKGROUND

The following facts are taken from the parties' submissions under Rule 56.1 and are undisputed unless otherwise noted.

Plaintiff is a filmmaker who posts original video content on YouTube. (Plaintiff's Rule 56.1 Counterstatement of Undisputed Material Fact ("Pl. 56.1"), ECF No. 101 ¶ 2.) He has written and performed in a collection of short video skits portraying encounters between a fictional character known as "Bold Guy," played by plaintiff, and various women whom Bold Guy meets and pursues. (See id. ¶ 3.) The allegedly infringed work at issue here is a video skit titled "Bold Guy vs. Parkour Girl," (the "Hoss video") in which the Bold Guy flirts with a woman and chases her through various sequences. (ECF No. 84-1 Ex. 1.)

Defendants also disseminate their work through YouTube. (ECF No. 101 ¶ 19.) On February 15, 2016, defendants posted a video titled "The Big, The BOLD, The Beautiful" (the "Klein video") on YouTube. (ECF No. 84-1 Ex. 2.) In this

video, defendants comment on and criticize the Hoss video, playing portions of it in the process. (ECF No. 101 ¶ 31.) The Klein video opens with commentary and discussion between Ethan and Hila Klein, followed by segments of the Hoss video which they play, stop, and continue to comment on and criticize.[1] The Klein video, which is almost fourteen minutes long, intersperses relatively short segments of the Hoss video with long segments of the Kleins' commentary, ultimately using three minutes and fifteen seconds of the five minute, twenty-four second long Hoss video. (Id.) The Klein video is harshly critical of the Hoss video, and includes mockery of plaintiff's performance and what the defendants consider unrealistic dialog and plotlines. (Id.; ECF No. 84-1 Ex. 2.) In addition, defendants' commentary refers to the Hoss video as quasi-pornographic and reminiscent of a "Cringetube" genre of YouTube video known for "cringe"-worthy sexual content. (ECF No. 84-1 Ex. 2.) As critical as it is, the Klein video is roughly equivalent to the kind of commentary and criticism of a creative work that might occur in a film studies class.

On April 23, 2016, plaintiff submitted a DMCA takedown notification to YouTube regarding the Klein video; YouTube took down the Klein video the same day. Defendants submitted a DMCA counter notification challenging the takedown

[1] The Klein video is arguably part of a large genre of YouTube videos commonly known as "reaction videos." Videos within this genre vary widely in terms of purpose, structure, and the extent to which they rely on potentially copyrighted material. Some reaction videos, like the Klein video, intersperse short segments of another's work with criticism and commentary, while others are more akin to a group viewing session without commentary. Accordingly, the Court is not ruling here that all "reaction videos" constitute fair use.

on the basis that the Klein video was, inter alia, fair use and noncommercial. Three days later, this action was filed.

On May 24, 2016, defendants posted a new video on YouTube titled "We're Being Sued," (the "Lawsuit video"), which discussed this action and criticized plaintiff for filing it. (ECF No. 84-1 Ex. 3.) In response, plaintiff amended his complaint to include a defamation claim. Following a period of discovery, both parties have now moved for summary judgment.

II. LEGAL PRINCIPLES

a. Summary judgment

Summary judgment may be granted when a movant shows, based on admissible evidence in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating "the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In reviewing a motion for summary judgment, the Court construes all evidence in the light most favorable to the nonmoving party, and draws all inferences and resolves all ambiguities in its favor. Dickerson v. Napolitano, 604 F.3d 732, 740 (2d Cir. 2010). The Court's role is to determine whether there are any triable issues of material fact, not to weigh the evidence or resolve any factual disputes. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

b. Fair use

Fair use is an affirmative defense to copyright infringement. It "is a judicially created doctrine . . . first explicitly recognized in statute in the Copyright Act of 1976." On Davis v. Gap, Inc., 246 F.3d 152, 173 (2d Cir. 2001). In determining whether "the use of a work in any particular case" is fair use, courts must consider non-exhaustive factors:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. No single factor is categorically determinative in this "open-ended and context-sensitive inquiry." Blanch v. Koons, 467 F.3d 244, 251 (2d Cir. 2006). The task of determining fair use "is not to be simplified with bright-line rules, for the statute . . . calls for case-by-case analysis." Id. (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994)). The Second Circuit has held that when the material facts in the record are undisputed, the fair use factors are properly considered as a matter of law and therefore may be decided on motion for summary judgment. See Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1257-59 (2d Cir. 1986); see also Blanch, 467 F.3d at 250 ("Although fair use is a mixed question of law and fact, this court has on a number of occasions resolved fair use determinations at the summary judgment stage where . . . there are no genuine

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