

RKR
No. 20-8308

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

WILHELMINA "MINA" MONTGOMERY, PLAINTIFF/PETITIONER

U.S. Court, U.S.
FILED

OCT 29 2021

OFFICE OF THE CLERK

v.

NBC TELEVISION *et al*, APPELLEES/RESPONDENTS

AGNIESZKA HOLLAND *et al*, DEFENDANTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

U.S. Court of Appeals, Second Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

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October 25, 2021

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Wilhelmina “Mina” Montgomery, an American citizen and writer living abroad, respectfully petitions for rehearing of the Court’s decision issued on October 4, 2021 in case no. 20-8308. Ms. Montgomery, the *pro se* Appellant/Petitioner, moves this Court to grant this Petition for Rehearing and consider her case with merits briefing and oral argument.

Further, in light of new discoveries in this case, Ms. Montgomery requests that the Court rule in this case for *de novo*.

Pursuant to Supreme Court Rule 44.2, this petition for rehearing is filed within 25 days of this Court’s decision in this case.

STATEMENT OF FACTS

This is a copyright infringement case. This Petition for Rehearing is the result of the Court's denial of the Petitioner's Petition for a *writ of certiorari* in Case No. 20-8303. The most recent decision from a lower court in this case is that of the U.S. Court of Appeals, Second Circuit.¹

That my two Short Stories, "The Groaning Road The True Story"² and "The Groaning Road The Fictionalized Story"³ – hereafter referred to as "THE TRUE STORY" and "THE FICTIONALIZED STORY" respectively— were in the possession of the Respondents/Appellees and the Defendants has been determined by e-mails⁴ that were exchanged between the *pro se* Appellant/Petitioner and defendant Agnieszka Holland, director of "Rosemary's Baby the Miniseries", hereafter referred to as "the FILM". And that "THE TRUE STORY" and "The FICTIONALIZED STORY" were in the possession of

¹ See Appendix A to Petition for writ of certiorari, Case No. 20-8303: Summary Order, Court of Appeals, 2nd Cir., Montgomery v. Holland, NBC Television *et al*, Case No. 19-3665, 11/12/2020

² See Certificate of the Copyright Office of the United States in Appendix to this Petition for Rehearing.

³ *Ibid.*

⁴ See E-mails between Plaintiff/Petitioner Montgomery and Defendant Holland in Appendix G to Petition to U.S. Supreme Court for a *writ of certiorari*, Montgomery v. NBC Television *et al*, aka Montgomery v. Holland *et al*, Case No. 20-8308

the Respondents/Appellees has also been confirmed by the Respondents/Appellees' counsel in filings with the district court, SDNY.⁵

The district court filed its Summary Order⁶ on September 30, 2019; and the U.S. Court of Appeals 2nd Circuit filed its Summary Order⁷ on November 12, 2020.

None of the Appellees or Defendants in this case responded to the Petitioner's Petition for a *writ of certiorari* that was submitted to this Court on April 12, 2021.

REASONS FOR GRANTING THE PETITION

I. Pursuant to Supreme Court Rule 44.2, this Petition for Rehearing is based on the discovery of intervening circumstances of substantial and controlling effect. Firstly, the Appellees/Respondents in this copyright infringement case altered the contents of a document, *after* the *pro se* Petitioner filed her initial Complaint, and passed it off to the lower courts as being the entirety of the original content.

⁵ See Doc # 39 , U.S. District Court, SDNY, Montgomery v. Holland, *et al*, Case No. 17-CV-3489 (VSB)

⁶ See Summary Order, U.S. District Court, Montgomery v. Holland et al, No. 17-CV-3489 (VSB), 9/30/2019.

⁷ See Summary Order, U.S. Court of Appeals, 2nd Cir., Montgomery v. Holland et al No. 19-3665, 11/12/2020

This altered version of the original DVD (plus digital HD) of “The FILM” that the Appellees filed with the lower courts after I filed my Complaint, as well as Internet streaming altered versions that were evidently altered after I filed my Complaint, Amount to Tampering, Concealment and Material Fact.

II. The NBC Television version, which was the first airing of “The FILM”, the original DVD (Plus Digital HD) Version, the Digital HD version, the Internet-streamed version and the Blu-ray (Plus Digital HD) version – the latter being the altered document that the Appellees/Respondents filed with the lower courts – Should *All* Be Compared by a jury of reasonable lay observers who would perceive the shortened running times of these altered versions of “The FILM” and consider the fact that now certain scenes are missing from these altered versions.

However, those similarities that are now missing on streamed versions of “the Film” were nonetheless aired on NBC Television on May 11, 2014 and on May 18, 2014; and they can still be seen on the original DVD (plus digital HD). At what exact date and time the alterations were made after my, the pro se the Petitioner’s, Complaint was filed is the question. But the more than twenty-five

times that I downloaded and viewed the *original Internet version* of “the FILM” have been recorded for comparison to altered *Internet versions* of it. The original DVD of “The FILM” should be compared in Discovery to the Blu-ray version of “The FILM that the Appellees submitted to the lower courts.

An objective jury of reasonable lay observers would ask themselves why these scenes were deleted from the original NBC Television version, from the original DVD (Plus Digital HD) version and from the original Internet-streamed version after I filed my Complaint.

Further, a jury of lay observers should be allowed to perceive the extent of dissemination of “The FILM” on television and through other publishing devices such as digital HD, Blu-ray with digital HD, DVD with digital HD, and through Internet streaming all over the world, every day, from now on.

Section 102(b) of the Digital Millennium Copyright Act⁸ amends Section 104 of the Copyright Act, adds new definition to Section 101 of the Copyright Act, and forces criminal penalties for certain instances of circumvention and interference with copyright management information including felony penalties starting at 7 copies for audio-visual works. The DMCA increases the penalties for copyright infringement on the internet.

III. An objective jury made up of objective and reasonable lay observers should be allowed to read both of the Petitioner’s works, “THE TRUE STORY” and “THE FICTIONALIZED STORY”, and then view “the FILM” to decide

⁸ Pub. L. No. 105-304, 112 Stat. 2860

whether the “Pattern Test” should be applied to the *more than one hundred Similarities* that exist between these three works. No *objective* jury of reasonable lay observers would conclude that such a substantial number of similarities in “The FILM” to nearly every paragraph of “THE TRUE STORY” and “THE FICTIONALIZED STORY” amount to mere coincidences.

For, on July 11, 2012, after having agreed to read the Petitioner’s two Short Stories “THE TRUE STORY” and “THE FICTIONALIZED STORY”, defendant director Agnieszka Holland, wrote to me, the Petitioner, in an e-mail of my characters being “vivid, sensual”:

Dear Aminah! I am really sorry didn’t write you sooner; was way to busy with my shooting, then travels around the world, editing etc to focus properly on your stories. I read them now with the real pleasure and interest. It is well written, with the personal voice and vivid, sensual characterization. The story about G and Hitler’s portrait is strong and subtle “short story” in the best American literature way, the second one seams to me to be one chapter of the longer novel, it is intriguing, but doesn’t work like the independent short story, rather as a fragment of the bigger one. I don’t know what were your intentions and neither what plans do you have with this writing. Anyway, I feel the vibrant tone and your – so original – point of view and will be curious to read and know more of your work. All my best – Agnieszka⁸

Eighteen months later, on January 7, 2014, defendant Agnieszka

⁸ See E-mail correspondence in the Appendix of this Petition for Rehearing exchanged between the Petitioner and defendant director Agnieszka Holland.

Holland wrote me, the Petitioner, another email:

Happy New Year, Mina! I wonder how are you? Did you succeeded with your writing projects? I am in Paris now for a bit longer, starting the mini series for NBC based on Rosemary's baby and wondering if you're interested 1) to try to play the small part in that? 2) to give some lessons to the children of my US producers? Let me know! Hugs. Agnieszka Holland¹⁰

I will state here that in my opinion defendant director Agnieszka Holland successfully shopped my two Short Stories, "THE TRUE STORY" and "THE FICTIONALIZED STORY" to her producers; and by inviting me to "The FILM's" set, she, an acquaintance of mine for twenty-five years at the time, would have wanted me to know that my Short Stories were being produced on film without my having been paid for them. For, certainly, she had never known me to be an actress, but only a university professor of English.

Before I cite below, in detail, of *Roth Greeting Cards v. United Card Company*, 429 F. 2d 1106, U.S. Court of Appeals, (9th Cir.), I will point to the fact that in "the FILM" the many dozens of similarities to "THE TRUE STORY" and to "THE FICTIONALIZED STORY" are astounding. The below-cited *Roth v. United* is a standard example of the "pattern test", or a case where

¹⁰ See E-mails exchanged between the Petitioner and defendant Holland in Appendix to Petitioner's Petition for *writ of certiorari*

copyright infringement was found based on proof of access to the original work and substantial similarity in the total concept and feel of the works. The Court of Appeals, Ninth Circuit in *Roth* made it clear that verbatim expressions and dialogue in a case cannot be held simply to be common expressions that could be spoken by anyone if a combination of substantial similarities can be established by the observer(s).

This “pattern test”, or combinations of substantial similarities should be used by an objective jury of reasonable lay observers who could then decide whether they believe “The FILM” infringes my two Short Stories “THE TRUE STORY” and “THE FICTIONALIZED STORY”. To mention only a few of the more than one hundred that I documented in my Amended Complaint and Second Amended Complaint (the latter stricken from the record by the district court):

- On Episode 1 of “The FILM, between Minute 57 and Minute 58 we see “Rosemary Woodhouse” holding a page with a caption that reads “THE TRUTH AND MYTHS”.
- “The FILM’s subtitle is “Fear Is Born”, which was taken directly from page 9 of “THE TRUE STORY” where I find my friend in

an upscale apartment he is sharing with an older couple in Paris with a photo of Hitler on the wall.

Struck with fear...I didn't want to leave right away without learning his side of the story, and maybe I didn't want to hurt his feelings even if he'd put me as well as himself in such a predicament – and maybe like he probably did, I wanted to know more about these Nazis living in the middle of Paris in 1988,¹¹.

- There are at five (5) instances of verbatim dialogue in “The FILM” to my dialogue in “THE FICTIONALIZED STORY”, as I documented in my Amended Complaint¹² and in my Second Amended Complaint¹³ (My Second Amended Complaint was stricken from the record by the district court due to my having listed an additional defendant even though I had not been instructed that I could not list additional defendants).
- In “The Film”, some of the verbatim dialogue is spoken by similar characters, with similar actions, in the same setting, and in similar scenes *within* the settings of “THE TRUE STORY” and “THE FICTIONALIZED STORY”;
- In “The FILM” the pertinent dates are the exact dates to the ones in “THE TRUE STORY” and in “THE FICTIONALIZED STORY”.
- In “The FILM”, “Guy Woodhouse” is no longer a struggling actor on Broadway in New York, but now a writer and

¹¹ See the Short Story entitled « THE TRUE STORY » in the Appendix to this Petition for Rehearing.

¹² Amended Complaint, *Montgomery v. Holland et al*, U.S. District Court, SDNY (VSB)

¹³ Second Amended Complaint, *Montgomery v. Holland et al*, U.S. District Court, SDNY (VSB)

university professor of English in Paris, as is my character “Jerri Miles” in “THE FICTIONALIZED STORY”;

- In “The FILM”, “Rosemary” and “Guy” are now an interracial couple, as are “Tracey” and “Damien” in “THE FICTIONALIZED STORY”;
- In “The FILM” Guy and Rosemary Woodhouse no longer have stuffy, old, lower middle-class neighbors, but glamorous, artsy, partying ones, who attend Parisian restaurants and Jazz clubs, as do my characters found in “THE TRUE STORY”;
- in “The FILM”; “Rosemary” now has a blond best friend, “Julie”, in whom she confides her suspicions about mysterious disappearances in Paris, as does “Jerri”, in “THE FICTIONALIZED STORY” have a blond best friend “Andréa” in whom she confides her suspicions about a mysterious disappearance in Paris;
- In “The FILM”, unlike in the original film *Rosemary’s Baby*, we see “Rosemary” investigating these “mysterious disappearances” and blond best friend “Julie” cautioning her that she’s becoming obsessed; as blond best friend “Andréa” in “THE FICTIONALIZED STORY”, cautions “Jerri” about becoming obsessed with her investigation of the “mysterious disappearance” of their friend (In the original film *Rosemary’s Baby*, “Rosemary” does not have a blond best friend or any other best friend; nor is she investigating “mysterious disappearances”);

- In Episode 2 of “The FILM” we see a lengthy “Bridges Scene” in Paris, and a scene with characters listed as “Producer 1” and “Producer 2” in which they discuss making Guy’s book into a film and of admiring Guy’s writing concerning the passage of past, present and future time. Both of these scenes were taken from paragraphs in this Petitioner’s “THE TRUE STORY”.
- In “The FILM” there is now an elderly Paris Police Commissioner who has spent most of his career working on unsolved murders and “mysterious disappearances”; just as in “THE FICTIONALIZED STORY” my character the elderly” Professor Stern” has spent his entire career working on unsolved crimes committed by Nazis who have disappeared and live in plain view in many societies.
- In “The FILM”, *ALL* of the dialogue between “the Paris Police Commissioner” and “Roman Castevet” is developed from my, the Petitioner’s, written expression describing my character “Professor Stern” and his train of thought.
- In “THE FICTIONALIZED STORY”, African American “Tracey” has come to Paris to look for her long-missing father; African American “Jerri” and her blond friend “Andréa are looking for their friend, “Tracey’s” father, who mysteriously disappeared from an apartment in an upscale neighborhood with a photo of Hitler on the wall. At the end of “The FILM” we see the photos of three murdered women; two of them have brown skin and one of them is blond. The newspaper caption over their photos in the police precinct reads “3 Barbarous Crimes”. The

length of this Petition for Rehearing does not permit the other dozens of similarities in "The FILM" to my two short stories. They are, however, listed in my Amended Complaint and my Second Amended Complaint

In *Roth Greeting Cards v. United Card Company*, 429 F. 2d 1106, the U.S. Court of Appeals, Ninth Circuit, reversed the district court's decision and remanded the "cause...for further proceedings consistent with this decision". In arriving at its decision, the Court of Appeals stated that:

It appears to us that in total concept and feel, the cards of United are the same as the copyrighted cards of Roth. With the possible exception of one United card, (exhibit 6), the characters depicted in the art work, the mood they portrayed, the combination of art work conveying a particular mood with a particular message, and the arrangement of words on the greeting card are substantially the same as in Roth's cards? In several instances the lettering is also very similar.

It is true, as the trial court found, that each of United's cards employed art work somewhat different from that used in the corresponding Roth cards. However, "[T]he test of infringement is whether the work is recognizable by an ordinary observer as having been taken from the copyrighted source." *White-Smith Music Pub. Co. v. Apollo Company*, 209 U.S. 1, 17, 28 S. Ct. 319, (1907), *Bradbury v. Columbia Broadcasting System, Inc.*, 287 F.2d 478 (9th Cir. 1961).

The remarkable similarity between the Roth and United cards in issue (with the possible exception of exhibits 5 and 6) is apparent to even a casual observer. For example, one Roth card (exhibit 9) has, on its front, a colored drawing of a cute moppet suppressing a smile and, on the inside, the words "I wuv you." With the exception of minor variations in color and style, defendant's card (exhibit 10) is identical. Likewise, Roth's card entitled "I miss you already," depicts a forlorn boy

sitting on a curb weeping, with an inside message reading"*** and you haven't even left ***" (exhibit 7, is closely by United's card with the same caption, showing a forlorn and weeping man, and with the identical inside message (exhibit 8).

The question remains whether United did in fact copy the Roth cards. Since direct evidence of copying is rarely available, copying may be established by proof of access and substantial similarity. NIMMER § 141.2 at 613. Although in some circumstances the mere proof of access and substantial similarity will not demand that the trier automatically find copying, the absence of any countervailing evidence of creation independent of the copyrighted source may well render clearly erroneous a finding that there was not copying.

In the present case there was clear and uncontradicted testimony establishing United's access to the Roth cards. United brought Roth cards to its offices. ... In addition, there was testimony almost compelling the inference that it was United's practice to look at the cards produced by other companies and make similar cards for sale under the United label. These circumstances, together with the marked similarity between the cards on which this suit was brought, with the possible exception of one card, convince us that each of United's cards in question, considered as combined compositions of art and text, were in fact copied from the Roth cards. It follows that there was infringement. See *Detective Comics, Inc. v. Bruns Publications, Inc.* 111 F.2d 432 (2d Cir. 1940).

The judgment is therefore reversed and the cause is remanded for further proceedings consistent with this opinion.¹¹

IV. Hoping for more fairness than the questionable subjective Opinions rendered by the lower courts in this case, the *pro se* Petitioner also requests of the Court *de novo* judicial review with a discovery phase and a jury trial guaranteed by the Seventh Amendment.

¹¹ *Roth Greeting Cards v. United* Card 429 F.2d 1106, U.S. Court of Appeals, 9th Cir. (1970).

Petitioner. Some of the Characters that we see in “The FILM” do not exist in the Ira Levin novel or in the original film *Rosemary’s Baby*. Furthermore, in Sheldon v. Metro-Goldwyn Pictures Corp. 81 Féd 49 (2nd Cir., 1936),

“the trial court dismissed Sheldon’s complaint, finding that Metro-Goldwyn’s film appropriated only those elements from the play for which there could be no assertable copyright, such as its general themes, motives or ideas” [At issue was the question as to whether] “Metro-Goldwyn’s appropriation of the original elements of Sheldon in his play amount to copyright beyond fair use... ” The answer is yes, [as] “the court reversed, and held that Sheldon’s original authorship of certain elements, as deviating from the historical facts, were entitled to copyright protection. Further, the court ruled that because Metro-Goldwyn’s film substantially copied those protected elements, Metro-Goldwyn was liable for infringement, and the injunction was granted.”¹⁷

“Rule: No plagiarist can excuse the wrong by showing how much of his work he did not pirate”.¹⁸

Finally in American *Broadway Cos., Inc v. Aereo* 573 U.S. 431 (2014) it was ruled that time-shifted streams on the internet of a work aired over television amounts to infringement.

As I, the *pro se* Petitioner, want to believe that a more just judicial system is possible in our country, I beg the Court to not resolve the substantial and important factual issues in this case without full briefing and argument.

October 25, 2021



Wilhelmina “Mina” Montgomery, *pro se*

¹⁷ LexisNexis Law Case Study

¹⁸ *Ibid.*

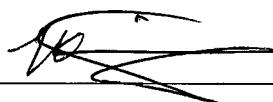
CERTIFICATE OF PRO SE COUNSEL

This Petition is presented in good faith and not for delay.

Wilhelmina "Mina" Montgomery

Date October 25, 2021

Signature



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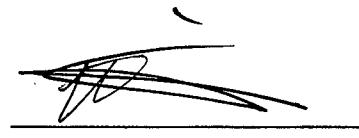
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DECLARATION

In accordance with 28 U.S. Code § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 25, 2021



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