2006 NY Slip Op 50949(U)

MOSES PRODUCTIONS, INC., Plaintiff,

v.

SWEETLAND FILMS, B.V., MAGNOLIA PRODUCTIONS, INC., BLANVALE INVESTMENTS, INC., JEAN DOUMANIAN and JAQUI SAFRA, Defendants.

602330/01.

Supreme Court, New York County

Decided May 19, 2006.

BERNARD J. FRIED, J.

Plaintiff Moses Productions, Inc. ("Moses") brought this lawsuit in May 2001 to recover revenue participation in various films written and directed by Woody Allen that were produced, financed, or distributed by Defendants Sweetland Films, B.V. ("Sweetland"), its principals, Jean Doumanian and Jacqui Safra, Magnolia Productions, Inc., and Blanvale Investments, Inc. After a trial, the parties entered into a written settlement agreement in January 2003.

This agreement has spawned several disputes, but only one is now before the Court: whether Defendants may make certain modifications of six of the films for broadcast on network television, pursuant to the parties' settlement agreement. In this agreement, the parties agreed to the creation of one modified version of each film, subject to generally accepted network television censorship and/or standards and practices requirements. At issue is whether the modifications proposed by Defendants meet the requirements of the parties' agreement. This dispute is not about whether making a network version of the films is the best way to preserve Woody Allen's artistic vision; rather, it is one of contract interpretation. The six films around which this dispute centers are "Bullets Over Broadway," "Mighty Aphrodite," "Everyone Says I Love You," "Deconstructing Harry," "Celebrity," and "Sweet and Lowdown."[1]

For the reasons that follow, I find that Defendants are entitled under the parties' agreement to a version of each of the six films with the modifications they have requested.

Moses is a personal services corporation that furnishes services and grants rights on behalf of Woody Allen, a film director, writer, and actor. Defendants were involved in the financing, production, and distribution of seven films written and directed by Allen.

The parties' relationship has been governed by a series of agreements related to these films. On August 1, 1993, Moses entered into an agreement with Sweetland concerning

three of the films ("Three-Picture Agreement").[2] In a paragraph entitled "Creative Control," the Three-Picture Agreement provides, among other things, that Allen will have "final and complete creative control over the [films]," including the screenplay, cast, composer, production elements, and creative aspects of marketing campaigns. (Three Pict. Agt. ¶ 10, at 18.) A subheading within the "Creative Control" paragraph, entitled "Final Cut," provides that "Allen shall have the right to designate the version of the [films] to be distributed by [Sweetland]," subject to certain limitations. (Three Pict. Agt. ¶ 10(F), at 19.) These limitations include Allen's agreement that he "shall provide [Sweetland] with a version of the [film] incorporating coverage elements which Allen believes in good faith to be customary and as required by [Sweetland] enabling [Sweetland] to license the [films] on network and syndicated television and on airlines." (Three Pict. Agt. ¶ 10(F)(2)(a), at 20.)

Allen also entered into direction services agreements with Sweetheart Productions, Inc., an affiliate of Sweetland. For instance, Allen's directing agreement for "Deconstructing Harry" provides that "[Allen] shall be entitled to all approvals, rights of final cut and all other rights of approval and restrictions granted to and reserved to [Allen] and Moses under the [Three Picture Agreement]...." (Ltr. from Sweetheart Prods, Inc. at 3 (Aug. 2, 1996).)

Defendants entered into licensing agreements with film distribution companies, which acquired the rights to distribute the films theatrically, on home video, and on television. Four films ("Bullets Over Broadway," "Mighty Aphrodite," "Everyone Says I Love You," and "Celebrity") were licensed to Miramax. "Deconstructing Harry" was licensed to the Fine Line division of New Line Cinema Corp. "Sweet and Lowdown" was licensed to Intermedia Films.

After a nine-day trial, beginning on May 30, 2002, the parties entered into a Stipulation of Settlement and Order ("Settlement Agreement") dated January 2, 2003, which addressed the disposition and distribution of Sweetland's revenues as of September 30, 2001 and established a trust to administer the films and distribute future revenues among the parties. This Court retained jurisdiction to adjudicate any disputes arising under the Settlement Agreement.[3] (Sett. Agt. ¶ 7.)

A. Paragraph 3(l) of the Settlement Agreement

The subject of the parties' dispute is paragraph 3(l) of the Settlement Agreement. Paragraph 3(l) provides that "[t]he Trustee shall at all times adhere to all of Moses' and Allen's Creative Rights and Reserved Rights as set forth in the Three-Picture Agreement, the One Picture License Agreements, [and] the Director's Agreements." (Sett. Agt. ¶ 3(l).)

As a caveat to this statement, however, it continues:

[N]otwithstanding anything set forth in any agreements related to the Pictures, in accordance with the direction and procedure established by the Court on November 13, 2002, Defendants have delivered to Moses a complete list [attached as Exhibit F to the Agreement] of any and all specific modifications which they propose be made to any of the Pictures for the purpose of creating one (1) *modified* version thereof that complies with

generally accepted Network Television *censorship* and/or standards and practices requirements.

(Sett. Agt. ¶ 3(l)(v) (emphasis added).)

The above provision reflects the fact that on November 25, 2002, Defendants delivered to Plaintiff a list of words and scenes in the films that would need to be modified in order to make the films sellable to networks and airlines. (Ltr. from E.B. Haldeman to M. Zweig (Nov. 25, 2002).) This list included the edits proposed by New Line Cinema for "Deconstructing Harry." Because Defendants had not been able to obtain from Miramax and Intermedia the list of edits they would require for the other five films, Defendants' list of edits for those films was based on a prediction as to the edits the distributors would require. This list became Exhibit F of the Settlement Agreement.

The Settlement Agreement contemplates that the list in Exhibit F would not be Defendants' final list of proposed modifications of the films. Paragraph 3(l) states that Defendants would later:

add [to Exhibit F] the specific manner in which they propose each modification be made. Defendants shall have until January 8, 2003 to add such references and deliver same to Moses. Should the parties be unable to agree, on or before January 13, 2003, to the Defendants' proposed list of modifications, and/or the specific manner in which the Defendants propose the modifications are to be made, either party will have the right to submit the list to the Court for resolution.

(Sett. Agt. ¶ 3(l)(v).)

As anticipated by this provision, Defendants delivered to Plaintiff another list of words and scenes in a letter dated January 7, 2003. (Ltr. from C.M. Roberts to M. Zweig (Jan. 7, 2003).) The new list not only added the specific manner in which Defendants proposed that the identified words and scenes be modified, but it identified new lines of dialogue that would have to be changed in order to comply with generally accepted network television censorship and/or standards and practices; the new lines had not been listed in Exhibit F. The January 7, 2003 list incorporated the recommendations of all the distributors that had purchased network distribution rights to the films.

Moses objected to the addition of new lines to the list, as well as to the manner in which Defendants proposed that each modification be made. The parties were unable to agree on the modifications that would be made to the films to adapt them to satisfy generally accepted network television censorship and/or standards and practices.[4]

The Settlement Agreement provides that "[a]ny dispute between the parties regarding the need for any of the proposed modifications and/or the manner in which Defendants propose that such modification be made contained on said list shall be resolved by the Court in accordance with the provisions of Paragraph 7 hereof." (Sett. Agt. ¶ 3(l)(v).) The Court retains jurisdiction over "[a]ny dispute between the parties regarding the need for any of the proposed modifications and/or the manner in which Defendants propose that such

modification be made." (Sett. Agt. ¶ 3(l)(v).) After adjudication of the dispute by the Court, "a final list of such permitted modifications and the specific manner in which they may be made, if any ("Final List") shall then be appended as Exhibit G to this Stipulation and Order." (Sett. Agt. ¶ 3(l)(v).) Once that Final List is appended as Exhibit G to the Settlement Agreement, "none of the Defendants ... shall have the right to modify the Pictures except as previously set forth in the Final List, and [] only one (1) modified version of a Picture may be made." (Sett. Agt. ¶ 3(l), at 24.)

The Settlement Agreement also provides:

Notwithstanding the foregoing, as long as a Picture remains in the Trust, such modifications may only be made by the Trustee in contemplation of a television and/or airline license that will result (or will be likely to result) in revenue if the Trustee in its reasonable good faith business judgment determines that licensing revenues from such modified version(s) of the Pictures will be (or will be likely to be) sufficient to justify the costs of such modifications.

(Sett. Agt. ¶ 3(l)(v).)

Finally, the Settlement Agreement contains a merger clause, which provides:

This [Settlement Agreement] and the documents executed in connection herewith ..., together with the Parties' June 11, 2002 on-the-record agreement, the Trust Agreement and the Exhibits thereto, shall constitute the entire agreement and understanding of the Parties with respect to the subject matter hereof and supercede all prior agreements and understandings among the Parties with respect to the subject matter hereof, *provided,* however, that the provisions of any and all other agreements between or among the Parties ... relating to the Pictures [] shall remain in full force and effect and all parties shall retain their respective rights, obligations, claims, remedies and positions except as deleted, modified or released herein.

(Sett. Agt. ¶ 22.)

In accordance with the procedure outlined in paragraph 7 of Settlement Agreement, the parties submitted the dispute to this Court for resolution by way of letter briefs setting forth the parties' respective positions.

B. Documentary Submissions and the Evidentiary Hearing

I held an evidentiary hearing, which was open to the public, between March 28 and March 31, 2005, in order to give the parties an opportunity to present evidence in support of their positions, including evidence as to the modifications of these films that would be required to satisfy generally accepted network television censorship and/or standards and practices.

Prior to the hearing, Plaintiff submitted by letter a variety of newspaper articles, which generally state that networks have become increasingly permissive with regard to foul or blasphemous language and depictions of sex and violence, especially since the early- to mid-1990s.[5] (Ltr. of M. Zweig to J. Gammerman ("Jan. 13 Ltr."), at 4-6, Ex. C (Jan. 13, 2003).) One article reports that major networks are giving television producers "more latitude regarding sex and language" and are airing "racy" scenes in evening programming, in an effort to compete with popular cable television shows. (Jan. 13 Ltr., Ex. C (Hollywood Rptr.).) A few articles cite specific episodes of network television programs that have aired nudity, sexually suggestive content, or crude words, such as "pr-ck," "ass," "tits," "bullsh-t," and "sh-t." (Jan. 13 Ltr., Ex. C (Hollywood Rptr., NY Times, Indianapolis Star).)

The articles acknowledge that such content is subject to network scrutiny, and permission to air such content on networks is not always granted. One article states that "[t]here are still taboos," and the content "can't be gratuitous." (Jan. 13 Ltr., Ex. C (Indianapolis Star, at 3).) A network decision to permit certain content may depend on whether the content is considered to be a "dramatic distraction," or "seems like it's real" and "fe[els] organic" to the program. (Jan. 13 Ltr., Ex. C (Indianapolis Star, at 3).) Some articles suggest that networks permit this type of content only occasionally for particular dramatic reasons. For instance, one article reports that a "sizzling sex scene" in a crime drama aired in one episode as a culmination of two-and-a-half years of episodes developing the relationship between two key characters. (Jan. 13 Ltr., Ex. C (Toronto Star).) Some articles report that episodes of network television shows have aired such content as breast nudity, an oral sex scene, or a "particularly revealing sex scene," but they do not make it possible to infer whether the scenes were equally explicit as the scenes in the films at issue. (Jan. 13 Ltr., Ex. C (NY Times, San Diego Union-Tribune, Toronto Star).) A few articles refer in general terms to the foul language aired by a network, *e.g.* a "five-letter anatomical reference," without identifying the precise content that was permitted. (Jan. 13 Ltr., Ex. C (NY Times).)

At the hearing, Defendants presented testimony by two expert witnesses as to the modifications that would be required in order to make the films sellable to a network. These experts had helped compile Defendants' lists of proposed modifications of the films in the January 7, 2003 letter. Plaintiff called only one witness, a film critic, who was, by his own admission, not an expert in generally accepted network television censorship and/or standards and practices. He testified, however, that Defendants' proposed changes would damage the comprehensibility, entertainment value and artistic integrity of the films.

1. Jeffrey Halsey

Defendants' first expert was Jeffrey Halsey, who has worked at New Line Cinema for 15 years for the last ten years as Vice-President of video and television services. In this position, Halsey has been involved with adapting "well over a hundred" films for television broadcast, applying generally accepted network television standards. (Evidentiary Hrg. Trans. ("Tr.") at 172-75, 179-80.) Halsey acknowledged that these standards are "a little loose" and vary from network to network, and exceptions have been made in extraordinary

cases, such as for "Saving Private Ryan" and "Schindler's List." (Tr. at 216-17.) He stated, however, that "there are certain words, certain things, visuals that you basically generally accept that you just can't show. The F word, bare breasts, that's the stuff that pretty much everyone, everybody agrees on, that cannot be shown, broadcast or cable television. [sic]" (Tr. at 175, 216-17.)

Halsey applied these generally accepted network television standards to identify problematic scenes and propose modifications to "Deconstructing Harry." (Tr. at 176-79.) Halsey "made these recommendations as if a major network had purchased the picture." (Tr. at 178-79.) Halsey testified that a cable network would require "the majority" of the edits, and a major television network such as ABC or CBS would require "probably all of them." (Tr. at 187.) For the most part, Halsey replaced inappropriate words with similar-sounding words. (Tr. at 182.) Halsey testified that networks do not permit bleeping or muting of words; therefore word substitution is required. (Tr. at 184.) Even with these modifications, Halsey expressed doubt that a major network would purchase the film for broadcast, though a cable network "absolutely" would. (Tr. 188-89.) Because ten years had passed since the film was made, Halsey did not consult the actors or director of the film in compiling his word substitutions. (Tr. at 199.) The list in Exhibit F is identical to the list of edits for "Deconstructing Harry" that Halsey proposed in the January 7, 2003 letter.[6] (Tr. at 181.)

2. Shannon McIntosh

Defendant's second expert was Shannon McIntosh, Executive Vice-President of broadcast and video production and post-production at Miramax Films. During her twelve years at Miramax, McIntosh has adapted "hundreds" of films for use on a large variety of networks. (Tr. at 249-50, 259-60.) McIntosh testified as to generally accepted network television standards and practices, rather than (the usually stricter) airline standards. McIntosh explained that networks have typical standards for modifying films for broadcast on network television, but they look at such decisions on a film-by-film basis. (Tr. at 261-62, 321, 330.) It is impossible to predict exactly what a particular network would require for a particular film, without going through the negotiation process. (Tr. at 321-22.) Ordinarily, when a network wants to buy a film from Miramax, it gives Miramax a list of notes specifying the content that must be changed. (Tr. at 256-57.) This list is the starting point for a bargaining process, in which McIntosh "fights" to have as few changes as possible, to preserve the "integrity of the film." (Tr. at 257, 259.) Ordinarily, the film director helps develop word replacements and shoots coverage for the problematic lines and scenes. (Tr. at 257-58.) In the case of the films at issue here, too much time has elapsed for new coverage to be shot.

McIntosh testified that networks "sometimes" permit "three or five" occurrences of the word "ass." (Tr. at 283-84.) The words "tits," "whore," "balls," "hell," "asshole," "hung," and "schmuck" are also "sometimes" permitted. (Tr. at 284-87.) The use of the words "sh____t," "f____k," "c____m," "pu____y," "bl____ job," "d____ck" (not a man's name), and "d-ldo" are "never" allowed. (Tr. at 284-86.) The use of "Jesus" or "Christ" in a blasphemous sense is

not allowed. (Tr. at 284-85.) Frontal nudity, breast nudity, and certain sexual depictions are absolutely not permitted. (Tr. at 330.) Such nudity could be hidden through blurring, however, rather than a cut or deletion. (Tr. at 333-34.) McIntosh acknowledged that ABC, a major network, aired "Saving Private Ryan" without editing the word "f____k," but she testified that this "one exception" for Steven Spielberg had not changed the absolute rule for everybody else. (Tr. at 327-28, 331-32.) McIntosh testified that network television standards and practices also vary according to the time of day that a show is likely to be broadcast. (Tr. at 325.) She also stated, however, that the networks "d[id]n't want to have multiple versions" of a modified film, so that "one version could air at three o'clock in the afternoon for the kids and another version will air at midnight." (Tr. at 324-25.)

In preparing her list of edits contained in the January 7, 2003 letter for the films "Celebrity," "Mighty Aphrodite," "Bullets Over Broadway," and "Everybody Says I Love You," McIntosh recommended cuts and edits that were necessary and sufficient to satisfy the generally accepted standards and practices of a conservative major television network. (Tr. at 265, 307, 339-40.) She testified that the changes proposed in Exhibit F would also comply with generally accepted network standards and practices "with a few exceptions." (Tr. at 280-81.) McIntosh acknowledged that not everything in Exhibit F with respect to these films would be required by generally accepted network standards and practices. (Tr. at 309-11.) Moreover, the list of proposed modifications in the January 7, 2003 letter incorporated edits to these films that were not identified in Exhibit F.[7] (Tr. at 281-82, 344-46, 355, 358-70.) For instance, one instance of the word "f____k" in the film "Celebrity" was not listed in Exhibit F. (Tr. at 364-65.) McIntosh testified that the word "f____k" "cannot be" used on network television, and that, to the extent that Exhibit F omitted to list an incidence of the word "f____k," Exhibit F was not in compliance with network television standards and practices. (Tr. at 311, 313.) McIntosh also testified that the major networks do not permit foul language to be bleeped or muted; they require word replacement instead. (Tr. at 261, 323-24.) McIntosh averred, however, that when Miramax tried to sell the films to a network, it "would go to the mat for Woody Allen" to preserve as much as possible of the original scenes and dialogue. (Tr. at 369.)

3. Richard Schickel

Plaintiff called only one witness, Richard Schickel, who is a film critic with Time Magazine, an author, and a film producer, who regards Woody Allen as a "major American artist." Schickel has made a film biography of Woody Allen as a director, which he later developed into a book. Schickel conceded that he is not knowledgeable about generally accepted network television standards and practices and would "certainly not" be an expert in determining how to apply generally accepted network television standards and practices to the films. (Tr. at 103, 106.) Schickel did not propose an alternative list of changes to the films that would satisfy generally accepted network television standards and practices. In fact, Schickel admitted that he was "an absolutist" on the point that "[w]ord replacement is utterly unacceptable in any kind of text" because it "cheat[s] the public." (Tr. at 67-68.) He

acknowledged that "networks don't like bleeping" but stated that he "d[id]n't know honestly" whether networks consequently require word replacements of foul language. (Tr. at 67, 69.)

Schickel did testify, however, that the changes proposed by Defendants' experts to the films "Bullets Over Broadway," "Deconstructing Harry," "Celebrity," and "Mighty Aphrodite" would damage their comprehensibility, entertainment value and artistic integrity. (Tr. at 70-71, 77-83, 86-88, 90-92, 117.) Schickel opined that these films should not be modified at all without Allen's consent. (Tr. at 144.) Schickel agreed that the changes requested by Defendants for "Sweet and Lowdown" and "Everyone Says I Love You" were "minor" and would not alter the integrity of those films. (Tr. at 94-97.)

C. The Films

As requested by the parties, I have viewed all six films, together with the list of modifications proposed by Defendants. I will briefly describe some of the most significant proposed modifications to the four films as to which the parties are still in disagreement.

"Deconstructing Harry"

The most extensive cuts were proposed for "Deconstructing Harry," a "deliberately impolite" film about "a solipsistic writer [named Harry] who tends to use everybody around him as subjects for his books." (Tr. at 61-62.) Schickel stated that a central theme of the film is "transgressive behavior amongst the middle class, respectful people doing unrespectful things." (Tr. at 63.) Consequently, the film depicts "respectable bourgeois people falling into behaviors and [using] language that we don't normally associate with such people." (Tr. at 62.) Two of the scenes from Harry's fantasy life, which were inspired by real events in his life, involve explicit sex and nudity, which Defendants propose to cut. For example: Defendants propose deleting 1:18 minutes from the opening sequence, in which two (fictional) characters have oral sex at a party in sight of other guests, and 1:48 minutes from a scene in which Harry imagines a visit to hell, which involves extensive depictions of unclothed women. Schickel opined that Defendants' cuts would "render the movie essentially incomprehensible" and "profoundly damage the intention of Woody Allen." (Tr. at 53.)

"Celebrity"

"Celebrity" is a film that exposes "people infected by the celebrity virus." (Tr. at 74.) The characters include an aspiring writer, a plastic surgeon, a movie star, a supermodel, and a television broadcaster. The most significant cut proposed by Defendants is the deletion of 2:14 minutes from an scene in which a decidedly un-famous female character takes a lesson from a prostitute in how to perform oral sex, as part of her journey to become a celebrity broadcaster. Schickel testified that the elimination of this "frankly ... obscene scene" would eliminate a "comedic masterpiece" and a "significant scene" in the

development of the character that "should not be cut from the movie." (Tr. at 80, 82.) Defendants also propose extensive word replacements to a scene in which a movie star trashes his hotel room and slaps around his girlfriend with impunity, in which the pair use the "f____k" word 32 times in under two minutes. Schickel opined that the word substitutions would be "utterly diminish the power" of the scene and "make it absurd." (Tr. at 77.)

"Mighty Aphrodite"

"Mighty Aphrodite" is the story of a married man who tracks down his adopted son's natural mother, who turns out to be a prostitute. The prostitute exhibits a casual attitude toward sex which is shocking to the father, and many of the proposed edits involve word substitutions to her dialogue and cuts of images in a pornographic video and images of sexual objects in her apartment. Schickel opined that many of the word substitutions would "spoil the joke" and "soil" the sequences between the father and the prostitute, because the heart of the movie concerns the relationship between these two characters and the father's efforts to help the prostitute improve her life. (Tr. at 87-88.)

"Bullets Over Broadway"

In "Bullets Over Broadway," a second-rate playwright obtains backing for his new play from a mob boss, in exchange for casting the boss's girlfriend. The girlfriend comes to rehearsals accompanied by a bodyguard, a mob hit man, who begins to make brilliant suggestions that eventually transform the play. Schickel opined that Defendants' proposed word substitutions to the foul language, much of it spoken by the bodyguard, are "an assault on this film," because the original language is "essential to understanding the basic irony of the movie which is that this ignoramus [and not the educated playwright] is the one who has a genius for writing." (Tr. at 92-93.)

Discussion

The dispute concerns whether, under the Settlement Agreement, Defendants may make certain modifications of the films in order to create one version of each film that would satisfy generally accepted network television censorship and/or standards and practices.

Moses contends that Defendants may not make the modifications proposed in the January 7, 2003 letter, because: (1) the Settlement Agreement permits Defendants only one opportunity to propose a list of edits to the films, and Exhibit F was that list; (2) Defendants' modifications are inconsistent with generally accepted network television censorship and/or standards and practices; (3) the modifications would impermissibly compromise the comprehensibility, entertainment value and artistic integrity of the films; (4) Defendants have not shown that any network has ever requested the proposed changes; and (5) Defendants have not shown that the Trust would receive an economic benefit from the modified films.

This Court has retained jurisdiction to "enforce the terms" of the Settlement Agreement and to resolve any "disputes concerning, arising out of or relating to" it. (Sett. Agt. ¶ 7.) The Settlement Agreement shall be "governed by and construed in accordance with the laws of the State of New York." (Sett. Agt. ¶ 29, at 38.) The parties evidently agree that New York law governs the resolution of this dispute, because they both cite New York decisions in their March 2006 letter briefs.

New York courts construe settlement agreements "in accordance with contract principles and the parties' intent." *Sharp v. Stavisky,* 221 AD2d 216, 216 (1st Dept. 1995) (quoting *Serna v. Pergament Distributors, Inc.,* 182 AD2d 985, 986 (3d Dept. 1992)). In construing contracts, courts must be guided by a "fair and reasonable interpretation," consistent with "the purpose of the parties in making the contract." *Cromwell Towers Redev. Co. v. City of Yonkers,* 41 NY2d 1, 6 (1976). The goal is "a practical interpretation of the expressions of the parties to the end that there be a realization of their reasonable expectations." *Sutton v. East River Sav. Bank,* 55 NY2d 550, 555 (1982) ("In searching for the probable intent of the parties, lest form swallow substance, our goal must be to accord the words of the contract their fair and reasonable meaning.'") (citations omitted). Consequently, "not merely literal language, but whatever may be reasonably implied therefrom must be taken into account." *Id.* (citations omitted).

A. Whether Defendants May Introduce Edits in the January 7, 2003 Letter Not Listed in Exhibit F

Plaintiff contends that the only list of Defendants' proposed edits properly before me is the list of edits turned over by Defendants to Plaintiff in November 2002, which became Exhibit F. Defendants argue that I may also consider the list of modifications proposed in the January 7, 2003 letter. I agree with Defendants for several reasons.

First, the parties have consented to give this Court the authority to determine the modifications that are necessary to create a version of the films that complies with generally accepted network television censorship and/or standards and practices. In the words of Plaintiff:

[A]s we have previously advised the Court, Moses has nevertheless consented that, in order to make one alternative version of the Pictures, both Moses and Mr. Allen will abide by the Court's rulings with respect to any changes to the Pictures that [the Court] *deems necessary to meet Network Television censorship and/or standards and practices requirements.* [Emphasis added] We ask only that, in the exercise of its discretion and judgement, the Court apply a common-sense approach and use realistic and *current* standards geared to the intended adult audience for the Pictures.

(Ltr. of M. Zweig to J. Gammerman, at 2 (Jan. 13, 2003).)

Second, Plaintiff has agreed that Defendants are entitled to create "one [ ] modified version" of each of the films "that complies with generally accepted Network Television censorship

and/or standards and practices requirements." (*See* Sett. Agt. ¶ 3(l), at 23.) Plaintiff's agreement to provide Defendants with a version of the films that satisfies generally accepted network television censorship and/or standards and practices requirements has long been a basis of the parties' business relationship.[8]

Furthermore, the Settlement Agreement contemplated that Exhibit F would not be the final statement of Defendants' proposed modifications to the films. The Settlement Agreement provided that the list turned over in November 2002 would specify only the visual images and lines of dialogue that would somehow need to be modified in order to satisfy generally accepted network television censorship and/or standards and practices; it was not supposed to propose modifications, such as word substitutions and deletions. The Settlement Agreement provided that, by January 8, 2003, Defendants "are to" deliver to Moses "the specific manner in which they propose each modification be made." (Sett. Agt. ¶ 3(l) at 23.) That is, Exhibit F should be considered an interim list of edits, to be replaced by a more complete proposal, which was due on January 8, 2003. This proposal was actually delivered to Plaintiff in the January 7, 2003 letter. The Settlement Agreement states that if Moses does not accept the proposed edits in Exhibit F or in the second, more complete proposal (*i.e.* in the January 7, 2003 letter), the parties would "have the right to submit the list to the Court for resolution." (Sett. Agt. ¶ 3(l)(v).)

Paragraph 3(l) provides that after the Court resolves

[a]ny dispute between the parties regarding the need for any of the proposed modifications [in Exhibit F] and/or the manner in which Defendants propose that such modification be made," [*i.e.,* the proposal contained in the January 7, 2003 letter,] a *final list* of such permitted modifications and the specific manner in which they may be made, if any [] shall then be appended as Exhibit G to this Stipulation and Order.

(Sett. Agt. ¶ 3(l)(v) (emphasis added).) The Settlement Agreement thus provides that both Exhibit F and the proposal contained in the January 7, 2003 letter would be superceded by a "final list" of modifications, to be appended as Exhibit G to the Settlement Agreement.

The parties evidently contemplated Exhibit F as a preliminary way-station on the road to Defendants' complete list of proposed modifications in the January 7, 2003 letter, which was in turn to be superceded by the "final list" in Exhibit G. I conclude that it would be a misreading of the Settlement Agreement to limit Defendants to only the edits listed in Exhibit F. Furthermore, a contrary decision would defeat the primary purpose of paragraph 3(l) of the Settlement Agreement, in which Moses agreed to provide Defendants with a modified version of the films that complied with generally accepted network television censorship and/or standards and practices requirements. Consequently, in resolving the instant dispute, I will consider the complete list of edits in the January 7, 2003 letter.

B. Whether Defendants' Proposed Modifications Are Consistent With Generally Accepted Network Television Censorship and/or Standards and Practices

From the hearing testimony, it is evident that the list of proposed edits in Exhibit F is incomplete for the purpose of creating one version of the films that complies with generally accepted network television censorship and/or standards and practices at least with respect to the films distributed by Miramax. I must now address whether the modifications proposed by Defendants in the January 7, 2003 letter are sufficient to create one version of the films that complies with generally accepted network television censorship and/or standards and practices. Because the parties have reached general agreement as to the proposed edits for "Sweet and Lowdown" and "Everybody Says I Love You,"[9] this discussion will focus on the four remaining films: "Bullets Over Broadway," "Deconstructing Harry," "Celebrity," and "Mighty Aphrodite."

At the March 2005 evidentiary hearing, the parties had an opportunity to present live testimony by expert witnesses as to the modifications necessary to satisfy generally accepted network television censorship and/or standards and practices. Defendants presented two witnesses, who are experts as to generally accepted network television censorship and/or standards and practices and were subject to extensive cross-examination. Halsey and McIntosh testified that virtually all of the dialogue and visual images that Defendants propose to edit would absolutely not be permitted to air on network television.[10] The remaining words, according to McIntosh, were in a gray category and would "sometimes" be permitted by networks. McIntosh testified, however, that it was impossible to be certain that any network would permit the words in this gray category; permission would depend on the outcome of line-by-line negotiations.

Plaintiff, on the other hand, has proposed no alternative list of proposed modifications to the films that would satisfy generally accepted network television censorship and/or standards and practices, and virtually no evidentiary basis from which I might evaluate the modifications proposed by Defendants. Although Plaintiff has not controverted the testimony of Defendants' experts that Plaintiff's unmodified films would not be suitable for network television, it has nonetheless taken the unreasonable position that few or no modifications are permissible for these four films. With respect to "Celebrity" and "Deconstructing Harry," Plaintiff contends that no television version at all may be made. (Tr. at 15; Pl.'s Prop. Findings of Fact at 16-17.) Although Plaintiff does not go so far as to argue that no television version of the films "Mighty Aphrodite" and "Bullets Over Broadway" may be made, it maintains that Defendants' proposed modifications are impermissible because they would destroy crucial scenes, damage character development, and undermine these films' messages. (Pl.'s Prop. Findings of Fact at 17-19.) Plaintiff bases its objections on the premise that the modifications proposed by Defendant are "more restrictive and extreme than what Network Practices would require." (Pl.'s Prop. Findings of Fact at 7.)

Plaintiff has provided virtually no evidentiary support, however, for this premise. At the evidentiary hearing, it presented testimony by only one witness, Schickel, who conceded that he was not an expert on generally accepted network television censorship and/or standards and practices and opposed all modifications to Woody Allen's films on principle. Schickel's testimony as to the effect of the modifications on the artistic integrity, entertainment value, and comprehensibility of the films is irrelevant to the question of whether the modified films would satisfy generally accepted network television censorship and/or standards and practices.

Plaintiff also relies on a series of newspaper articles, which report generally that network standards are more permissive than they were in the past, especially since the early- to mid-1990s. Newspaper accounts are generally disfavored by courts. *See Georgian Motel Corp. v. NY State Liquor Auth.,* 184 AD2d 853, 855 (3d Dept. 1992) (ALJ impermissibly relied on "various newspaper and magazine articles ... devoid of information suggesting any indicia of reliability"). "The live testimony of [] witnesses" is "far preferable to newspaper accounts" of the same subject matter. *May v. Cooperman,* 780 F.2d 240, 263 (3d Cir. 1985) (newspaper articles were inadmissible hearsay under Fed. R. Evid. 803(24), where plaintiffs did not make reasonable efforts to obtain more probative evidence and made no showing that declarant's perception, memory, narration, and sincerity were reliable).

In any event, Plaintiff's newspaper articles are not persuasive evidence of the network television censorship and/or standards and practices that would be applied to the films at issue, for several reasons. First, unlike Defendants' expert witnesses at the hearing, the articles offer no opinion as to how the allegedly changed network standards would apply to the films at issue, *i.e.,* the likelihood that *each* of the images and lines of dialogue at issue here would survive network scrutiny. The articles do no more than affirm that certain language or sexual content is sometimes permitted by some networks in particular cases. Some articles report generally that network standards have loosened, without specifying the content that has been permitted or providing enough context for me to deduce the circumstances under which a network might decide to air certain content. To the contrary, the articles acknowledge that network permission is not always granted and may be denied depending on such fuzzy concepts as whether the content "seems like it's real" or "fe[els] organic" to a particular network executive. (Jan. 13 Ltr., Ex. C (Indianapolis Star, at 3).) Furthermore, it is uncertain whether the standards discussed in the articles apply to these films. The articles discuss almost exclusively the content of evening television series, rather than the content of films adapted for television, which may air at any time of the day and do not generally air on an episodic basis. It is unclear whether the same standards would apply to films as to evening television series.

For these reasons, the newspaper articles upon which Moses relies, together with Schickel's testimony, are insufficient to rebut the case-specific testimony of Defendants' expert witnesses, subject to cross-examination by opposing counsel and questioning by the Court, that the specific modifications proposed by Defendants satisfy generally accepted network television censorship and/or standards and practices.

While Defendants' experts testified that networks "sometimes" permit certain words proposed to be modified by Defendants, I cannot say that any particular modification proposed by Defendants is not required by generally accepted network television censorship and/or standards and practices. The evidence permits me to conclude only that, if the proposed modifications were made, the films *would* satisfy generally accepted network television censorship and/or standards and practices. Moreover, in light of Plaintiff's total opposition to Defendants' proposed edits to these four films, it seems futile to go through the proposed edits line by line, only to conclude that an insignificant number of words in this gray category might survive network scrutiny.

Moses has also argued that the proposed modifications are too conservative, in light of the likelihood that any broadcast of the films would be at night, when one would expect a largely adult viewing audience. (Jan. 13 Ltr., at 4.) This allegation, however, is not supported by the hearing testimony. McIntosh indicated that networks will purchase only one version of each film, and this is the version that they will air both at night and during the daytime. (Tr. at 324-25.) In any case, the Settlement Agreement permits Defendants to create only *one* modified version of each film. Therefore, Defendants' single modified version of each film might well have to satisfy the more conservative standards for daytime programming.

Consequently, I conclude that the evidence shows that the modifications proposed in the January 7, 2003 letter comply with generally accepted network television censorship and/or standards and practices, in satisfaction of paragraph 3(l) of the Settlement Agreement.

C. Whether the Proposed Edits Impermissibly Compromise the Comprehensibility, Entertainment Value and Artistic Integrity of the Films

Moses nevertheless contends that its obligation to provide a version of the films that satisfies generally accepted network television censorship and/or standards and practices requirements is limited by Allen's creative control. While Defendants have the right to *request* certain modifications to the films, Moses argues that none of the agreements give Defendants the right to *obtain* any of their requested modifications, because the Settlement Agreement does not eliminate Plaintiff's creative control rights under the various agreements between the parties. In ostensible support of this argument, Schickel opined that the changes proposed by Defendants to four of the films ("Deconstructing Harry," "Celebrity," "Mighty Aphrodite," and "Bullets Over Broadway") would damage their comprehensibility, entertainment value and artistic integrity.

It is undeniable that Defendants have proposed not insignificant modifications to these four films.[11] The films, all given an "R" rating, contain extensive profanity, and the first three contain explicit sexual content or nudity. Defendants have proposed extensive word replacements for the profanity and cuts of the explicit sexual content and nudity.

In the Settlement Agreement, Moses consented, "notwithstanding anything set forth in any agreements related to the Pictures," to the development of "one (1) *modified* version [of each of the films] that complies with generally accepted Network Television *censorship* and/or standards and practices requirements. (Sett. Agt. ¶ 3(l)(v) (emphasis added).) The merger clause provides that the Settlement Agreement "supercede[s] all prior agreements and understandings among the Parties" with respect to the films at issue, to the extent that it deletes, modifies, or releases the parties' rights and obligations. (Sett. Agt. ¶ 22.) Therefore, the parties' consent to the creation of a network version of the films in the Settlement Agreement supercedes any contrary provisions in previous agreements, such as the Three Picture Agreement, and including provisions regarding Allen's creative rights.[12] I conclude that, in the Settlement Agreement, Moses bound itself to consent to the creation of one version of each of the films that complies with generally accepted network television censorship and/or standards and practices requirements.[13]

It may well be that some of the edits proposed by Defendants affect the coherence, artistic merit, and entertainment value of some of the films. Plaintiff has consented, however, to the creation of a version of each of the films that complies with generally accepted network television censorship and/or standards and practices requirements; it negotiated and executed a Settlement Agreement that set forth a procedure by which the Court could modify the films in order to make them comply with generally accepted network television censorship and/or standards and practices. Therefore, suitable modifications are required.

A "modification" is "a change to something; an alteration." Black's Law Dict. 1020 (7th ed., West 1999). To "censor" means "to officially inspect, (esp. a book or film) and delete material considered offensive." *Id.* at 216. When Moses entered into this Settlement Agreement, it had to have known that most or all of the content identified by Defendants would have to be altered or deleted. After agreeing to permit its films to be "modified" and subjected to network television "censorship," it is unreasonable for Moses now to take the position that the films may not be so modified.

Plaintiff has urged, however, that any modifications to the films be accomplished by bleeping or muting, rather than by word replacement. In support of this position, Schickel testified that bleeping or muting would do less damage to the artistic integrity of the films than word replacement. Based on the undisputed hearing testimony that networks rarely or ever air films with bleeping or muting, however, and the parties' apparent agreement that shooting alternate coverage for the films is no longer feasible, it appears that word replacement is the only way to modify the content in order to comply with the parties' agreement to create one version of each of the films that complies with generally accepted network television censorship and/or standards and practices requirements. This conclusion applies also to the films "Sweet and Lowdown" and "Everybody Says I Love You."

D. Whether Any Network Has Requested the Proposed Changes

Moses also complains that Defendants have not presented evidence that any network would broadcast the films even if the proposed edits were made, or that the network would require all of Defendants' proposed edits.

The Settlement Agreement contemplates the creation of "one (1) modified version [of each of the films] that complies with generally accepted Network Television censorship and/or standards and practices requirements." (Sett. Agt. ¶ 3(l)(v).) Both of Defendants' expert witnesses, Halsey and McIntosh, had broad experience in modifying films to satisfy generally accepted network television censorship and/or standards and practices and were well qualified to testify as to the modifications that would be required to satisfy generally accepted network television censorship and/or standards and practices. They testified as to the standards employed by a conservative network in modifying films for television, and not as to airline standards. In light of the fact that the Settlement Agreement limits Defendants to the creation of just one modified version of each of the films, Defendants' plan to create a version of each film that complies with the most conservative major network's standards is unobjectionable.

Consequently, Defendants were not required to present evidence of the specific modifications that a particular network would require.

E. Whether the Modified Films Would Be Profitable

Moses also contends that the Settlement Agreement requires Defendants to demonstrate that the licensing revenues derived from their proposed modifications would justify the costs. Since Defendants did not submit such evidence, Moses contends that Defendants are not entitled to the modifications they propose.

The Settlement Agreement states that the Trustee may not permit modifications of the films unless, in the Trustee's "reasonable good faith business judgment," the licensing revenues from the modified films would be profitable. (Sett. Agt. ¶ 3(l)(v).) Defendants argue that enforcement of this provision of the Settlement Agreement would be premature, because the determination of the profitability of the modified films is to be made separately by the Trustee, and only after the instant dispute over Defendants' proposed modifications to the films has been resolved.

I agree with Defendants. According to the Settlement Agreement, the above provision contemplates a separate and later determination by the Trustee as to the profitability of the films as modified. This issue is not yet ripe for resolution. If the parties enter into a dispute with respect to this issue in the future, they may then seek resolution by this Court.

For the foregoing reasons, I find that Defendants are entitled to create one modified version of each of the six films at issue (*i.e.* "Bullets Over Broadway," "Mighty Aphrodite," "Everyone Says I Love You," Deconstructing Harry," "Celebrity," and "Sweet and Lowdown"), in accordance with the list of modifications proposed in the January 7, 2003 letter, which I find

comply with generally accepted network television censorship and/or standards and practices, in satisfaction of the Settlement Agreement between the parties.

This list shall be the "final list" of modifications to the films and shall be appended as Exhibit G to the Settlement Agreement.

[1] The parties reached an agreement with respect to the creation of a network version of the film "Small Time Crooks" prior to the March 2005 evidentiary hearing in this dispute. Consequently, it is no longer a subject of this dispute.

[2] Allen ultimately delivered seven films, rather than three.

[3] Section 7 of the Settlement Agreement provides in relevant part: This Court (Hon. Ira Gammerman) shall retain jurisdiction to enforce the terms and conditions of this Stipulation and Order and any documents executed in connection therewith, including, without limitation, the Exhibits hereto. Any disputes concerning, arising out of or relating to this Stipulation and Order shall be submitted to Justice Gammerman for resolution. If, for any reason, Justice Gammerman is not then a sitting Justice of the Supreme Court of the State of New York, County of New York, then any dispute shall be submitted to another sitting Justice of the New York County Commercial Division of this Court. (Sett. Agt. ¶ 7.) This matter was transferred to me in 2004, after Justice Gammerman retired as a sitting Justice of the Supreme Court.

[4] Moses subsequently consented to Defendants' proposed changes as to the films "Sweet and Lowdown" and "Everyone Says I Love You," provided that the dialogue is modified by bleeping, rather than word replacement. (Ltr. from C. Carbone to J. Fried, at 4 (Mar. 22, 2006).)

[5] The articles submitted by Plaintiff come from such sources as the Hollywood Reporter, New York Times, Chicago Tribune, San Diego Union-Tribune Indianapolis Star, Rocky Mountain News, (Minneapolis) Star Tribune, Toronto Star, and (Montreal) Gazette.

[6] Whether Exhibit F's list of proposed changes is identical to the list proposed in the letter dated January 7, 2003 with respect to the film "Sweet and Lowdown" is irrelevant, since Plaintiff has consented to Defendants' proposed modifications to that film.

[7] For the most part, the difference between Exhibit F and McIntosh's list in the January 7, 2003 letter is that Exhibit F was under-inclusive. The epithets in McIntosh's report that were not listed in Exhibit F included at least nine lines of dialogue from "Bullets Over Broadway," four from "Mighty Aphrodite," one from "Everyone Says I Love You," and eleven from "Celebrity." (Tr. at 280-83, 358-70.)

[8] Plaintiff's consent in the 2003 Settlement Agreement to the creation of a version of the films that complies with generally accepted network television censorship and/or standards and practices requirements is consistent with the 1993 Three Picture Agreement, which states: "Allen shall provide [Sweetland] with a version of the Picture incorporating coverage elements which Allen believes in good faith to be customary and as required by [Sweetland] enabling [Sweetland] to license the Picture(s) on network and syndicated television and on airlines." (Three Pict. Agt. ¶ 10(F)(2)(a), at 20.) Allen's "final cut" right in paragraph 10(F) of the Three Picture Agreement was expressly "subject [] to" Allen's obligation to provide Sweetland with a version of the films that could be licensed for use on network and syndicated television and on airlines. While the parties evidently anticipated that Allen would shoot alternative video footage, or "cover footage," at the time the films were first delivered to Sweetland, between 1993 and 1999, the quoted provision reflects the parties' understanding that Allen was obligated to provide Defendants with a version of the films that could be licensed for use on network and syndicated television and on airlines.

[9] The parties apparently only disagree as to whether the dialogue should be modified by bleeping or by word replacement.

[10] Defendants' witnesses testified as to the five films: "Bullets Over Broadway," "Everyone Says I Love You," "Deconstructing Harry," "Celebrity," and "Mighty Aphrodite."

[11] These four films are the only films as to which Plaintiff contends that Defendants' proposed edits alter the meaning of the films.

[12] In any case, the Three Picture Agreement, which gave Allen "final and complete creative control" over the films, made Allen's creative rights in that agreement and related agreements subject to his obligation to provide Sweetland with a version of each film that would "enabl[e] [Sweetland] to license the [films] on network and syndicated television and on airlines." (Three Pict. Agt. ¶ 10(F).)

[13] As previously stated, at an earlier point in this litigation, Moses conceded its obligation under the Settlement Agreement to provide Defendants with a version of each of the films that satisfied "Network Television censorship and/or standards and practices requirements." (Jan. 13 Ltr. at 2.)