

Thirty-Two

“EVERY KIND OF HARASSMENT AND ABUSE”¹



“When you have the law on your side, pound on the law.
When you have the facts on your side, pound on the facts.
When you have neither the law nor the facts on your side,
pound on the table.” — *Old lawyers’ maxim*



A SMOOTH START

AS PER THE SETTLEMENT AGREEMENT, Penthouse was required, no later than 30 April 1984, to provide Maurizio Lupoi with a statement of the accounts as of 31 December 1983.

Penthouse was only one day late when it provided Lupoi with the “Caligula accounting statement for period from inception to December 31, 1983.” On 9 May Lupoi responded with a letter to David J. Myerson:

...On May 2 I met with Mr. Marc Bendesky and with yourself. Mr. Bendesky showed me to the fourth floor where an office had been reserved for the purpose of storing the accounting documents relating to Caligula. Five card[board] boxes of documents had in fact been transported into said office.

Mr. Bendesky and I examined very cursorily the contents of the card boxes and came upon no document relating to the foreign distribution. As Mr. Bendesky explained to me, the foreign distribution files were being sorted out.

On May 3 I came back and was given the files relating to twelve foreign countries.

On May 4 I was handed the remaining files.

1. Maurizio Lupoi: letter to the Banca Nazionale del Lavoro, 2 July 1984. FRC.

I wish to thank you and your staff for having made an office available to us where the documents shall be kept during the course of the forthcoming audit. The near-by photocopying machine and coffe[e] station are also very convenient.

I should ask you to note the following three points:

1. I would tend to doubt that the document delivered to me qualifies as an "accounting statement". At our May 2, 1984[,] meeting, however, you agreed to have a breakdown compiled and delivered to me on the following day. Regrettably, this has not yet been received.

2. The files relating to the foreign distribution have been assembled for the purpose of the audit and something has probably been omitted through inadvertence. Please find herewith a list of documents that should be added to the files.

3. The actual audit shall be begun by an auditing firm in about three weeks['] time. I shall of course give you advance notice of the name of the firm and of the date and shall co-operate with the auditors and with your staff.

I thank you for your assistance in this matter and remain.

Yours sincerely,

Annex A

Central and South America

No reports by distributors

The "Producers Reports" referred to in your letter of April 26, 1984 to Mr. Santora are not in the file.

(the whole file is not fit for auditing in its present state)

Canada

No distributor's report after November 1982 (French Canada) or October 1982 (English Canada)

England

No distributor's reports after April 30, 1981.

Holland

No distributor's reports after October 6, 1982

Despite the deficiencies in the records, this was a step in the right direction, and there was hope that the gaps would be filled in. As a further sign of goodwill, Penthouse made good on several terms in the Settlement Agreement. According to Article 14(b), Penthouse promised to pay Felix \$150,000 "within one month from monetary approval," and according to Article 16, Penthouse would pay Felix the \$10,000 owed on the music-album license and a further \$10,000 as a fine. Consequently, on 1 June 1984 Penthouse sent a certified check for \$170,000, made out to Studio Legale Lupoi at its New York City address.

Lupoi, in turn, drew up a statement for Franco Rossellini, detailing the recent income of \$170,000 and balancing it against the expenses his firm had had to incur. After those deductions, all that remained to Rossellini was \$23,977.74, his first income in over seven years.

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BEGINNING IN 1912, the firm of E. Fulton Brylawski, later named Brylawski & Cleary, handled most of the Hollywood copyright registrations for films,² and so it is to Brylawski & Cleary that Rossellini's lawyer, Jay Julien, turned for help with this issue. As a preliminary investigation, E. Fulton Brylawski explored the catalogue entry at the US Library of Congress, then looked through various news articles, and finally discovered the plagiarism suit brought by Claude Baks against Penthouse International.³

On 2 July 1984 Maurizio Lupoi addressed the Italian National Bank of Labor, explaining the current situation with the videocassettes released in the US. Lupoi realized that US law made little note of distinctions that in Europe are paramount — in a US court it "would not be easy to distinguish" the difference between a joint venture and a coparticipation, or the difference between exploitation rights for cinema exhibition and other exploitation rights. Lupoi sought a simpler way of demonstrating the issue:

...it would be considerably more worthwhile, by your concern on behalf of Felix Cinematografica, if the Italian Exchange Office would write a letter in which (employing the simplest language possible in view of translation into another language) it would acknowledge the following

1. The film CALIGULA is produced by Felix Cinematografica and is of Italian nationality;
2. no granting of rights or of shares of proceeds in favor of nonresidents can take place without the currency permit;
3. the sole authorized assignment pertained to a share of proceeds from the exploitation of the film, in the end on the basis of the transaction of 2 February 1984, subject of permit number 403982 of 10 May 1984;
4. By "exploitation of the film" is meant the distribution in cinemas (please see article 14, letter a of the transaction);
5. every other right, such as copyright, pertains to the producer, Felix Cinematografica Srl.

2. Paul C. Spehr: email message to RS, 23 January 2010.

3. E. Fulton Brylawski: letter to Jay Julien, 20 June 1984. FRC.

Lupoi concluded with two illustrations:

6. We take the liberty of indicating to you that our client had to bear every kind of harassment and abuse by the Penthouse group and that it was only following the settlement agreement that it received, six years after the release of the film, a first amount.

The abuse committed by Penthouse group in putting cassettes on the market has serious economic relevance and, where it would be possible to obtain an immediate judicial remedy, notable sums would flow into Italy.

The Italian Exchange Office provided an initial response on 30 October 1984, in which it agreed that, judging by the contracts alone, Penthouse had the right to exploit *Caligula* only in movie houses.⁴ The Italian Exchange Office submitted a fuller response on 17 December 1984: "...Felix Cinematografica Srl has been authorized by the bodies delegated to do this, to attribute to Penthouse Films International a coparticipation, equal to 90%, of the exploitation in movie theatres of the film in question. Said Felix Cinematografica Srl has been authorized (by permit number 119074 of 20 January 81) to transfer to Penthouse International, Ltd., the musical rights. We do not have news or notification of the transfer of other rights in favor of non-resident subjects."⁵

On 26 July 1984 Lupoi also wrote to Rossellini's other lawyer, Massimo Ferrara-Santamaria, asking his opinion of the legal copyright status and of the other respective Felix and Penthouse rights, based upon the Settlement Agreement of 2 February 1984, the foreign-exchange permits, the assignment of music rights, and Lupoi's 2 July letter to the Italian National Bank of Labor. Ferrara-Santamaria maintained that if there were no documents to amend what he had just studied, then the case was clear:

It is my opinion that the film *Caligula* was produced exclusively by the Felix Cinematografica company of Rome, as evidenced by the Italian Motion Picture Register (maintained by the SIAE, the Italian Association of Authors and Publishers) where the film is recorded as Number 6246 among the films produced in 1979, and as a national film. In fact, only such films can be entered into this register upon declaration of the start of the work, as forwarded to the office maintaining this register of films by the Italian Ministry of Tourism and Entertainment.

4. F. Pellettieri and M. Coletta of Ufficio Italiano dei Cambi: letter 46522 to Studio Legale Lupoi, 30 October 1984. DDP 361-4, p. 87.

5. Ufficio Italiano dei Cambi: letter to the Lupoi Legal Office, 17 December 1984. FRC, DDP 94-2, p. 146.

According to the Italian Copyright Law of 22 April 1941, Number 633 (Article 45), "the exercise of rights to economic exploitation of cinematographic works belongs to the one who organized the production of the work itself." This involves a *cessio legis* [legal assignment], which (as per Article 44 of this law) considers as co-authors of the cinematographic work the author of the treatment, the author of the scenario, the author of the music, and the artistic director.

At present it is certain that Felix Cinematografica (and it alone) organized the production of the film *Caligula* and is the rightful owner of the rights to economic utilization of this work by virtue of not only the above *cessio legis* but also the contracts with the above-mentioned authors of the work, required for approval by the Ministry of Tourism and Entertainment and for registration in the General Register of Works Protected by Copyright and in the special Public Register for cinematographic works, covered by Article 103 and subsequent articles of the above mentioned law Number 633 of 1941.

Therefore, Felix Cinematografica has rightful title to what in Anglo-American legislation is described as film-copyright.

From the above-mentioned documents shown to me such right does not appear in any way to have been transferred to the Penthouse Group nor to any company which is a part of this Group. In fact, according to Article 19 of the Italian law on cinematography of 4 November 1965, Number 1213, "full-length films, made in coproduction with foreign companies, can be considered to be national films on the grounds of special international reciprocity agreements." At present, there is no agreement of this kind between Italy and the United States of America. In the fourth paragraph of this article it is stated that "full-length films made in Italy by Italian companies, with financial, artistic and technical participation by foreign companies, can likewise be considered to be national films, provided special conditions of national interest with respect to artistic, industrial, commercial and labor aspects have been complied with." Such was the case with respect to the film "Caligula", made under conditions approved by the Italian Exchange Office, as evidenced by three permits for the coparticipation in the cinematographic exploitation of the film, on the grounds of the financial contribution by the foreign counterpart....

It should be recalled that with respect to Italian legislation no assignment of rights (to shares of proceeds) in favor of a non-resident in Italy can have validity or effect without the above approval by the national authority.

Finally, it seems advisable to recall a basic principle of copyright, namely that whatever is not expressly mentioned and assigned contractually remains reserved for the owner of title to copyright

exercise. That is the principle which is expressed by the term *favor autoris*.

In this case in particular, this principle applies to the means of economic exploitation of copyright, not practiced at the time of the co-participation contract, to be specific to videocassettes.

An assignment or authorization to distribute the film *Caligula* by way of videocassettes would have had to be explicitly agreed to. This does not emerge from the documents which were submitted to me.⁶

Rossellini summarized Ferrara-Santamaria's findings in his own letter to the Ministry of Tourism and Entertainment.⁷ In a private note to himself, he made mention of another recent discovery, one he should have brought up in court but never did: For a foreign firm to be assigned Italian author's rights it would be necessary to get a Notary Contract (*Contratto Notarile*) to authenticate those rights, and then to get the transfer legalized at the US Consulate in Italy.⁸ This, of course, had never been done with *Caligula*.

COÖPERATION

SIDNEY FINGER, a certified public account with the firm of Solomon, Finger & Newman, a division of Laventhol & Horwath, saw fit to advise Lupoi that there were troubles afoot with the Penthouse accounting.⁹ "Please note that we were lacking a significant amount of documentation which was not found or otherwise made available to us by Penthouse. Furthermore, the books of account maintained by Penthouse for the distribution of the film were inadequate. The principal inadequacy was the lack of an audit trail tracing back from the amounts reflected on the statement submitted to you by Penthouse to Penthouse's books of account." Marc Bendesky of Penthouse sent a most cordial letter on 8 November 1984 to Sidney Finger, of the firm Laventhol & Horwath, concerning the ongoing audit. He opened by conveying his sorrow at the passing of Finger's long-time friend Al Crown. He continued by stating his understanding that the Laventhol & Horwath auditor, Ed Sullivan, had completed the field portion of the audit and was satisfied with the completeness of the materials. The 1980 Penthouse purchase journal was missing, but staff accountant Anton Zitz was able to re-create it with invoices and ledgers. Bendesky welcomed any questions

6. Massimo Ferrara-Santamaria: letter to Lupoi, 30 July 1984. FRC, DDP 94-2, pp. 69-71.

7. Rossellini for Felix Cinematografica Srl: letter to Direzione Generale per la Cinematografia, Ministero del Turismo e dello Spettacolo, nd (circa 2 August 1984). DDP 361-4, pp. 81-82, 88-89.

8. Rossellini, *Il contratto di cessione...*, nd (circa October 1984). DDP 361-7, pp. 4, 3, 2, 7.

9. Sidney Finger of Solomon, Finger & Newman, division of Laventhol & Horwath: letter to the Felix Group, c/o Lupoi, 25 October 1984. FRC, DDP 94-2, p. 64 and 361-7, p. 62.

or suggestions, and expressed that he was open to hearing about any adjustments. Finally, he was able to assure Finger that an unexplained \$50,000 from Australia was for a payment for the Penthouse franchise and was entirely unrelated to *Caligula*.

Lupoi was perturbed by this letter, and responded with a hand-delivered message on Monday, 12 November 1984, to David J. Myerson:

No "additional support" (see the 5th paragraph of Mr. Bendeski's letter) will be needed if Mr. Finger has been provided with copy of all contracts, agreements and correspondence materially affecting or modifying any of said contracts and agreements between companies belonging to the Penthouse group or any one of said companies and a third party in respect to the theatrical distribution of "*Caligula*" or, should you have brought about any other form of exploitation (irrespective of whether you had the right to do so, which shall be determined at a later date), in respect of said other form of exploitation.

Perhaps you will be so kind as to confirm that Mr. Finger has been provided with all said documents.

We would also ask you to note that our clients object to the lateness of your August 31, 1984[,] report (which, we are told, will be delivered today). Unnecessary expenses and fees have been generated by said delay and our clients are of the opinion that Penthouse should reimburse them, without prejudice, of course, to other claims they may have.

On the same day, Marc Bendesky sent a hand-delivered message to Lupoi, summarizing, in tabular form, the expenses from 1 January through 30 September 1984, \$189,800. To this he appended a revised earnings-and-expense report from inception through 30 September 1984, showing a loss of \$1,452,139. He explained in the cover memo: "The net loss of \$1,452,139 compares to the previously reported loss of \$1,533,829 for the period from inception to December 31, 1983. The difference of \$81,690 represents the profit for 1984 to date. Since the statement reports a loss, no payment, as required by the settlement agreement, is due at this time."

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WE CAN NOW SEE THE SITUATION that Felix was in. The \$170,000 from Penthouse barely covered legal expenses, and now it was necessary to

operate on multiple fronts to oversee an accounting in the US (cost: \$20,500),¹⁰ a rights claim in Italy, and a copyright claim in the US, at the same time that its Italian film release, delayed by several trials over five years, was losing money.

To handle the US copyright claim, Felix retained the services of Richard M. Aborn, of Aborn & Anesi, who would work coöperatively with Maurizio Lupoi. Aborn began his duties on Thursday, 15 November 1984, by writing to Steven J. Bosses, the attorney Penthouse had hired to register the US copyright. He began his inquiry by informing Bosses that Felix had never been notified about an FBI investigation of video piracy. "In order to obviate the time-consuming process under the Freedom of Information Act we would appreciate your advising us of the scope and result of this investigation as well as the name of the Special Agent in charge of the investigation or any other agent connected with the matter so that I may contact the F.B.I."

The following day, Friday, 16 November 1984, Aborn resumed the process that Lupoi had begun prior to Felix's suit against Penthouse. As detailed in Chapter 31, on 10 February 1981 Lupoi had sent form letter to all known foreign distributors of *Caligula* demanding that advertisements state that the film was a Felix production, and demanding further to see copies of all related financial statements. Aborn's form letter was not so abrasive as Lupoi's, and yet it was every bit as inappropriate. He sent it to Constantin Film of Denmark, Cinelux Theatres of Swaziland, Tobis Filmkunst of Germany, Vestron Video of Connecticut, and Sander H. Gibson, attorney for Films Mutuels in Québec:

Dear Sir:

This office in connection with Maurizio Lupoi, Esq. of 55 Via A. Bertoloni 00197 Rome, Italy has been retained by Felix Cinematografica in regard to its interests from the exploitation of the film, *Caligula*.

Pursuant to its interests on February 2, 1984, Felix Cinematografica entered into an agreement with Penthouse International and other affiliated companies of Penthouse granting Felix among other things, access to the accounting records and documents of any company conducting business with Penthouse in regard to the motion picture *Caligula*. In other words, Penthouse gave to Felix the right Penthouse would have to verify receipts and expenses of a distributor, assignee or licensee of *Caligula*.

Would you kindly furnish us with a copy of the contract and/or licensing arrangements you have with Penthouse as well as a statement

10. Solomon Finger & Newman: invoice 0848 addressed to The Felix Group c/o Lupoi, 10 January 1985. Unexpectedly, Felix had been able to pay \$12,500 of this total. DDP 361-7, p. 63.

of all monies received by Penthouse as a result of any agreement or arrangement you have with Penthouse regarding Caligula.

Please find enclosed a sworn translation, in relevant part, of the agreement between Felix Cinematografica and the Penthouse Group.

Very truly yours,
Richard M. Aborn

The problem, as before, was that the distributors had contracts exclusively with Penthouse, and were not in a legal position to provide accounting statements to anyone else.

In response to a similar telegram sent by Sergio Galiano, the Spanish Ministry of Culture responded forthrightly: "I am pleased to inform you that the Italian film — whose original title is *Caligola* and in Castilian *Calígula* [—] has had, from its première through 30 June 84, a gross boxoffice revenue 215,468,810 pesetas [\$1,343,791]."¹¹ Embrafilme of Brazil also received a similar communication from Rossellini's office, and simply responded by telegram to Lupoi that the film had earned \$4,229,859.17. Embrafilme further stated that Franco Cella of Argentina had so far paid \$25,000 of a \$50,000 guarantee to release the film in that country.¹²

Other responses were not as hospitable. Vestron waited four weeks to respond: "If Penthouse has agreed to furnish these documents to you, I suggest that you contact that organization directly."¹³ Gibson, for Films Mutuels: "Notwithstanding our presumption of your authority in this matter, we cannot advise our client to provide you with a copy of its agreement with Penthouse nor its producer's report unless our client is duly authorized to do so in writing by said client's actual co-contractant. Furthermore, the extract from the agreement between Felix Cinematografica and the Penthouse Group enclosed with your said letter is not, as you have indicated, truly a sworn translation of said extract nor are there any signatures of the parties thereto."¹⁴ The remaining letters were unanswered.

There is a small gap in the record, but we can reconstruct what happened. Penthouse's Italian attorney, Gianni Massaro, agreed to have Felix's auditors examine the video contracts. Bendesky relayed this information to Finger and

11. Carmen G^a de Salazar, Section Head, Ministerio de Cultura, Madrid: telegram to Sergio Galiano, 28 November 1984. FRC.

12. Ney Rodrigues de Faria, Embrafilme: telegram to the Lupoi Legal Office, 15 December 1984. FRC.

13. Raymond M. Bernstein, Vice President, Business Affairs, Vestron Video: letter to Richard M. Aborn of Aborn & Anesi, 10 December 1984. FRC.

14. Gascon, Gibson, Larose: letter to Aborn of Aborn & Anesi, 12 December 1984. Yes, it was a sworn translation, but the excerpt that Aborn provided was not sufficient to demonstrate that. FRC.

Lupoi, but then in a 4 December 1984 telegram he retracted the offer: "I have been advised by Avv. Massaro that his previous telex to me was incorrectly translated and that I should not provide the video cassette contracts and supporting documentation to your auditors at this time since it is his opinion that Penthouse and not Rossellini is entitled to that income."¹⁵

Two days later, Thursday, 6 December 1984, Laventhol & Horwath provided Felix with the results of their audit.¹⁶ Contrary to Bendesky's cordial offers of full coöperation, the only primary sources that Finger was permitted to see were all post-dated 31 December 1983,¹⁷ and even that collection was incomplete. Laventhol & Horwath concisely stated, "Reference is made to the 'Comments' section below with reference to deficiencies in the records provided to us which limited the extent to which we were able to verify revenues and expenses reported by Penthouse." Prefacing the lengthy tabulations were the Comments:

Penthouse's books and records relating to the film were incomplete and lacking in the following respects:

1. No purchase books were found that would enable us to determine most of the individual vouchers substantiating the expenses charged by Penthouse. This precluded us from examining the applicable vouchers.

2. For the years after 1981 there was no audit trail, schedules, or workpapers that would trace the total revenues reflected on the statement rendered by Penthouse to the books of account of the Penthouse Group.

3. Penthouse appears to have deposited revenues from the film in various affiliated companies including some that were foreign corporations. None of these other companies' books of account were made available to us and no summary records relating to the film were submitted to the New York office of Penthouse by such foreign sources.

The following tabulations each came with further commentary:

United States — 1982 and 1983: "Our analysis of Penthouse's cash receipts book, which was the only record made available to us from which we could attempt to summarize the revenues reported, did not agree with the amount reported on your statement." The total known loss was \$23,461.

15. Marc Bendesky: telegram to Sidney Finger of Laventhol & Horwath and to the Lupoi Legal Office, 4 December 1984. FRC, DDP 361-4, pp. 83-84.

16. Laventhol & Horwath: Letter to Lupoi, 6 December 1984. Original in FRC, photocopies at DDP 94-2, pp. 24-38, and 361-7, pp. 30-46.

17. Lupoi, "Stato della controversia con Penthouse," undated, circa May 1985. FRC.

Canada: "Penthouse did not include in revenues reported, license fees received from the Canadian distributors, Roke Distribution Ltd. and La Corporation Des Films Mutual..." Claim for \$847,101.

Greece: "The following revenues were not reported." Claim for \$44,170.

Spain: "Your film was licensed to Izara [sic] Films S.A. for a minimum guarantee of \$225,000 against a percentage of gross receipts. No licensee reports were made available to us. We were advised by Penthouse that none have ever been received. Since only \$200,314 has been included in revenues reported, claim is made for the difference of \$24,686 (\$225,000 less \$200,314). Note also that Penthouse's cash receipts book reflects an entry indicated a receipt re: the Spain license for \$224,962 on May 11, 1982."

Puerto Rico (including Dominican Republic): "unreported revenues in the amount of \$39,650."

Japan: "The following revenues were not reported": \$23,030.

United Kingdom: "Penthouse applied a fixed rate of \$2.00 in converting English sterling to U.S. dollars reported. Actually the rates ranged from \$2.42 in the latter part of 1980 to \$1.50 in 1983..." which led to "a difference of \$116,611."

Switzerland: "Penthouse has reported only SFr.293,421 at a conversion rate of \$.55 or \$161,382. Claim is made for the difference of \$8,828 (SFr.16,051 @ \$.55). Note that an average rate of \$.55 was applied to the Swiss francs earned in arriving at the U.S. \$ equivalent. Since most of the revenue was realized in the period from August to December 1980 when the rate ranged from \$.57 to \$.61 (per quotations listed in the New York Times) a more appropriate rate to use would be \$.58. Claim in this regard is made for \$9,284 (SFr.309,472 @ the rate differential of \$.03)."

Germany: "Penthouse applied a fixed rate of \$.4388 in converting German marks to U.S. dollars reported. The licensee report covering the period ending December 31, 1983[,] indicated Penthouse's cumulative earnings to be DM3,540,676. Actually the rates of exchange ranged from \$.52 in 1980 to \$.48 in early 1981, the active period of the film's release (per New York Times listed foreign exchange rates). We have calculated the U.S. dollar equivalent of the deutschmark earnings at the varying rates of exchange in effect during the collection period. Whereas Penthouse reported a total of \$1,561,082 of revenues, our calculations reflect revenues of \$1,858,758, a difference of \$297,676."

Finland: "Earnings reported by the licensee for the period October 1982 to August 1983 have not been included in revenues reported." Claim for \$17,432.

Denmark: "...reported revenues should have been \$99,835. Only \$55,673 has been reported, a difference of \$44,162.... Materials billed to the licensee of \$1,900 has also not been included in revenues reported."

Belgium: "Claim is made for the difference of \$30,001."

Hong Kong: "Materials billed to the licensee for \$3,782 was omitted from revenues reported."

Lebanon: "Materials billed to the licensee for \$3,755 was omitted from revenues reported."

Brazil: "No reports from the licensee were made available to us. Although a minimum guarantee of \$60,000 was provided for in the license agreement, only \$5000 was received. Claim is made for the amount received."

México: "Materials billed to the licensee for \$2,134 was omitted from revenues reported. No license reports from the licensee were made available to us. A \$50,000 advance pursuant to the license agreement was included in revenues reported."

Colombia: "A minimum guaranty of \$13,600 was due from the licensee. Only \$4,080 has been included in revenues reported by Penthouse. Claim is made for the difference of \$9,520."

Perú, Bolívia, Ecuador, and Chile: "An outright license fee of \$17,600 was due from the licensee. Of this amount, \$7,040 has not been included in revenues reported by Penthouse."

Other Territories: "We have requested the status of the film in territories from which no revenues have been reported: South Africa, Taiwan, Thailand, Argentina, Israel, Philippines, Uruguay."

Foreign Withholding Taxes: "In a number of countries remittances were subject to withholding taxes. These taxes are generally available to be claimed as foreign tax credits, reducing the federal income tax liability of the payor. To the extent these credits were available to Penthouse, the taxes should not be allowed as a reduction from revenues reported." The total claimed was \$339,447.

Costs improperly deducted — 1980-1982: Postproduction: "No substantiation for these costs were made available to us."... ***Record Division:*** "No substantiation was offered for these costs nor for any revenues that may have been realized from the distribution of records or soundtrack related to the film. Your agreement contains no provision for the deduction of such losses to the extent they may have been incurred." ***Salaries and Payroll Taxes:*** "These items consist primarily of amounts paid to Mr. Alfred Crown, who we understand was an employee or agent of Penthouse, who assisted in monitoring the distribution activities of the film on behalf of Penthouse. There is no provision in your agreement which allows for the deduction of these costs." ***Auto Rental, Travel and Entertainment, Postage, Miscellaneous:*** "As noted... above, your

agreement does not provide for these deductions. The majority of such items appear to relate to expenses of Mr. Crown." **Consulting Fees:** "Primarily represents amounts paid to Al Crown Enterprises and Sy Preston Associates. As noted above there is no provision in your agreement for these charges." **Miscellaneous Journal Entry:** "Since this item has not been substantiated claim is being made for the entire amount." The total amount claimed was \$1,072,297.

Costs improperly deducted — 1983: These concerned "Record division loss," "reserve for lawsuits," "Rossellini settlement," "payment to Cital Films," "Other expenses." Concluded Laventhol & Horwath: "There does not appear to be any basis for the 1983 expenses charged in the amount of \$517,436."

Home video: "No revenues have been reported from the licensing of home video rights. We noted entries in the cash receipts book which indicated receipts from these sources as follows." Known totals from Germany, the Netherlands and Spain totalled \$720,000. There was also an inconclusive item indicating an Australian release for a claim of \$70,118. "Inquiry should be made of Penthouse as to other home video revenues not reported, notably from such major territories as the United States, Canada, Japan, England, France, Scandinavian countries, etc. To the extent such video rights were not granted to Penthouse, claim should be made for 100% of such revenues."

Penthouse Audit of Canada Licensee: "An audit was conducted of the Canadian licensee, Mutual Films Corporation Ltd. by Martin T. Darhansoff covering the period to February 28, 1982. A summary of claims, appended to the audit report reflects an amount due to Penthouse of Can\$70,055 (net of 10% due Analysis Film Releasing Company or Can\$7,895). Penthouse should make known to you the final resolution of these claims; any additional sums paid to Penthouse should have been reported to you."

In conclusion, Laventhol & Horwath confessed, "Because the above procedures do not constitute an examination made in accordance with generally accepted auditing standards, we do not express an opinion on the statements." Despite that disclaimer, the report the auditors compiled was devastating, and it demonstrated at the very least that *Caligula* had made a clear profit of several million dollars, of which Felix was entitled to ten percent.

A DELINQUENCY

ON TUESDAY, 11 DECEMBER 1984, the Morgan Guaranty Trust Company of New York filed suit against Franco Rossellini for a delinquent repayment of

\$124,528.40 for a loan in regard to *Caligula*. A term in this suit was “pursuant to subdivision (b) of Section 5222 of the Civil Practice Law and Rules, which is set forth in full herein, you are hereby forbidden to make or suffer any sale, assignment or transfer of, or any interference with any such property or pay over or otherwise dispose of any such debt except as therein provided.” It is unfortunate that Morgan Guaranty attempted to deliver this summons to Rossellini in care of the Penthouse address.

There would be more such troubles, and soon.

APPRECIATE A PROMPT REPLY

PENTHOUSE STONEWALLED Richard M. Aborn. On Thursday, 20 December 1984, Aborn wrote to David J. Myerson, noting that “At our meeting of December 12, 1984, we requested and you consented to provide a number of items, none of which has been received.”¹⁸ Specifically, these were a copy of Felix’s assignment of copyright to Penthouse (“We are not aware of the existence of any assignment and hence would greatly appreciate your immediately forwarding a copy of the purported assignment referred to in the copyright registration”), the file relating to the FBI investigation, and such books of Penthouse Clubs as were relevant to *Caligula*.

Myerson was out of the office until 7 January, and that is when Lupoi sent him a letter to follow up on Aborn’s letter:

Dear Mr. Myerson,

The “Ufficio Italiano dei Cambi” has now ruled that Penthouse has acquired no rights in respect of the exploitation of “CALIGULA” other than the theatrical and musical rights.

A copy of the ruling is enclosed herewith.

The “Ufficio Italiano dei Cambi” is the governmental agency empowered to approve or not approve any sort of contract in the field of motion pictures between Italian companies and foreigners. Its ruling is not subject to appeal and is, therefore, final and binding.

Italy’s Supreme Court has already decided that no obligation towards a foreigner may be undertaken legally unless the relevant licence is granted. As you know, all contracts between Felix and Penthouse are governed by Italian law.

It follows that the video rights belong to Felix and that any exploitation of said rights by a third party, such as Penthouse, constitutes a copyright infring[e]ment.

18. Aborn: letter to Myerson, 20 December 1984. FRC, DDP 94–2, pp. 79–80.

Under the Berne Convention as well as under U.S. copyright law, Penthouse shall have to turn all revenues over to Felix; damages and, in some jurisdictions, punitive damages may be awarded against Penthouse.

There is no point in going to court if a matter can be settled amicably. Should you wish to forward by telex a comprehensive settlement proposition (covering our claims under the audit as well), please do so on or before January 16 1985.

Yours sincerely,
STUDIO LEGALE LUPOI
Prof. Avv. Maurizio Lupoi¹⁹

MORE TROUBLES

FRANCO ROSSELLINI AND FELIX continued to be plagued by overdue bills, and now there was one more. Rossellini had received an \$83,000 loan from a Giorgio Chiaron Casoni, Jr., in regard to *Caligula*. A resident of Staten Island, New York, Catherine C. Petta, purchased that debt and was now suing Rossellini and Felix for the delinquent \$54,191 that he had promised to pay by 31 March 1982 from monies received from Penthouse, which she was certain Felix had received by that date. She was now demanding payment in full, in addition to interest and an accounting.²⁰

DISINGENUOUSNESS

AS PROMISED, MYERSON DID INDEED REPLY to Aborn shortly after returning to work. He sent a brief letter dated Thursday, 10 January 1985, but metered and postmarked Tuesday, 15 January:

Dear Mr. Aborn:

I enclose a photocopy of the copywriter's [sic] assignment and license which was attached to the copywrite [sic] application and referred to in it. I trust this satisfies one aspect of your letter of December 20, 1984. I have not been able to locate a "file" relating to the F.B.I. investigation of the pirated *Caligula* prints, which led to the filing of the copywrite [sic] application. The individual primar[i]ly responsible for the handling of that matter is unfortunately deceased. You may elect to discuss with me further this issue at a subsequent date during which I will attempt to locate whatever records we do have on the matter.

19. Lupoi: letter to Myerson, 7 January 1985. FRC, DDP 94-2, pp. 144-145.

20. Catherine C. Petta against Franco Rossellini and Felix Cinematografica Srl, Supreme Court of the State of New York, County of New York, 9 January 1985. FRC, DDP 361-7, pp. 8-29.

Sincerely,
David J. Myerson
Executive Vice President and Chief Operating Officer²¹

At long last, the Felix executives and attorneys could see this mysterious assignment by which it supposedly gave its copyright over to Penthouse, and they discovered that it was merely the assignment that Penthouse Films had given to Penthouse Clubs in March 1981.

The missing file about the FBI investigation was also worrisome. Who was this unnamed deceased individual who had been “primarily responsible for the handling of that matter”? As we learned in Chapter 29, the theft of the print from the Holly in Hollywood was highly unusual, as was its recovery, as was the failure to conduct an investigation. The theft and piracy had served as a convenient pretext for Penthouse to copyright the film in its own name, hurriedly, without notifying Felix. Now it was revealed that the entire file was missing. Why was Penthouse so lackadaisical about the theft of what it claimed was its intellectual property?

Richard Aborn drafted a response on 22 January 1985, which he shared either with Rossellini or with Lupoi, who offered suggestions, but he did not send the letter. The project was put into abeyance — during a time, it now turns out, when Penthouse was working with AMLF to sublicense French broadcast rights to Canal Plus. An interesting term of that sublicense is the designation of the nationality of the film as “American.”²² This was during the time, also, that Franco Rossellini’s overdue bills continued to mount, as is evidenced by Aborn’s telegram to a Christina Retzini of the Larama Corporation of Manhattan, threatening suit should she continue her “malicious harassment.”²³ There was also a letter from a Rodrigue d’Arenberg of Lausanne, who informed Rossellini that he had been repaying instalments on Rossellini’s 51,818.20 francs (\$12,766.25) debt to the Crédit Suisse de Genève, and that the full balance would be due by 15 May. Could Rossellini help?²⁴

More than a month later, Aborn still had not responded to Myerson, as he was exploring his options. On Wednesday, 27 February 1985, Aborn wrote to

21. Myerson: letter to Aborn, Thursday, 10 January 1985, metered Tuesday, 15 January 1985. FRC, DDP 94-2, p. 65.

22. “Contrat d’achat de droits de diffusion télévisuelle ‘Caligula,’” Centre de coût: 122; numéro d’affaire: 100 393, between Canal Plus and AMLF, 12 March 1985. Penthouse had agreed in advance to this sublicense by a letter dated 18 January 1985 to Paul Rassam of AMLF. FRC.

23. Aborn: telegram to Rossellini, 30 January 1985, quoting a telegram to Christina Retzini. FRC.

24. Rodrigue d’Arenberg: letter to Rossellini, 6 February 1985. FRC.

Carol Faye Simkin of Cowan Liebowitz & Latman, enclosing a number of background documents and asking her expert advice on some basic questions:

- 1) Has there been either an implied or actual assignment of the ownership of the film from Felix to any Penthouse entity?
- 2) What effect does the lack of copyright notice on the film have?
 - a) What steps, if any, should Felix take to cure the lack of notice?
 - b) If none, why?
- 3) What is the best way for Felix to assert its right of ownership of the film?
 - a) Is it prudent for Felix to assert its right of ownership?
- 4) What is the best way for Felix to recover the ten percent of revenues from the film owed to it from Penthouse?
 - a) What is involved from an economic and time perspective?
- 5) Has there been an actual or implied transfer from Felix to any Penthouse entity of any of the rights to the video or any other means of exploitation?
 - a) What effect will the ruling regarding Felix's exclusive ownership of the work (save for ninety percent of cinema revenues) from the Italian government have on a federal or state court proceeding in the United States?
- 6) What is the best way for Felix to assert its right of ownership of the video & to prevent Penthouse from exploiting the work by any other means?
 - a) If litigation is involved what are the time and approximate cost factors?
 - b) In order to make an application for a preliminary injunction must Felix be prepared to state that it either intends to or is able to manufacture or distribute its own video?
- 7) What is the best way for Felix to recover revenues already lost from worldwide sales of the video by Penthouse?
 - a) What is involved from a time & economic perspective?
- 8) Is it possible for Felix to have the rights to the film & video in Italy and other EEC countries but not in the United States?

Rossellini also drafted a letter to Gianni Lagorio of the Ministry of Tourism and Entertainment, requesting a meeting on "a matter that is dear to me."²⁵

Now that video rights were being considered, Felix began to explore what would be required to issue the film on video, and that's when the Felix staff finally noticed an oversight from nearly nine years before. As explained in

25. Rossellini: handwritten draft of a letter to His Excellency Gianni Lagorio, nd (circa 1 March 1985). Written on the outside of the envelope that contained paid translations by Barbara Roder. We do not know if this letter was ever signed or sent. DDP 361-7, p. 94.

Chapter 11, Vidal had suggested to Rossellini that Masolino d'Amico take a coauthorship credit, and d'Amico was agreeable. Vidal then signed his rights to Felix on 26 July 1976,²⁶ and d'Amico assigned his rights several months later, during shooting, on 18 October 1976.²⁷ Yet when pulling out the files, it became apparent that d'Amico had simply submitted a letter rather than sign the proper form. Worse, Felix had never paid him for author rights. Now, with the question of video rights looming, there was no more time to lose. It would have been difficult to issue a video without proper forms from both the official authors. Felix approached d'Amico with an assignment to take effect retroactively to July 1976. D'Amico signed it on 15 March 1985 for a compensation of £3,000,000 (US\$1,398.80), and the Italian Society of Authors and Publishers (SIAE) duly authorized the document on 15 April. Felix now verifiably had exclusive licenses from both the actual and the officially recognized author of the screenplay, and that was a claim that Penthouse could not honestly match.

As the d'Amico problem was being resolved, Lupoi saw fit to approach the Italian Ministry of Tourism and Entertainment. He briefly provided the background and explained the Italian Exchange Office's favorable finding, and was hoping for an "analogous" finding from the Ministry, explaining that "The notice of the Italian Exchange Office is, for whoever knows Italian law, resolutory; however, US law has little familiarity with the concept of 'currency-exchange regulations' and we're afraid that we would encounter significant difficulties in terms of time, seeing the Italian producer's rights recognized on the sole basis of the note from the Italian Exchange Office."²⁸ The Ministry came through on 4 May 1985 with a one-page statement by Director General Mario De Paulis, in simple language, agreeing entirely with the Italian Exchange Office.²⁹ The matter was now definitive — in Italy. In the United States, the legal situation was another matter altogether.

On Wednesday, 13 March 1985, when d'Amico was still two days away from placing his signature on the corrected assignment, Aborn was confident enough

26. Scrittura Privata between Eugene Luther Vidal and Felix Cinematografica Srl, 26 July 1976. FRC.

27. Tommaso (Masolino) d'Amico: letter to Ministero del Turismo e dello Spettacolo, 18 October 1976. FRC. See also "Conclusions complémentaires," by Jacques-Georges Bitoun, 5 December 1990, in *Felix Cinematografica Srl v Penthouse International, Ltd., and Penthouse Films International, Ltd.*, Cour d'Appel de Paris, Docket Number 90 65. FRC.

28. Lupoi: letter to Luigi Mazzella, Capo di Gabinetto, Ministero del Turismo e dello Spettacolo, Tuesday, 12 March 1985. FRC (English).

29. Mario De Paulis, il Direttore Generale, Ministero del Turismo e dello Spettacolo: letter to Felix Cinematografica, Friday, 4 May 1985. DDP 94-2, pp. 58-60. See also Aborn: letter to Patrick Mann [*sic; should be Mahn*], 16 May 1985, DDP 94-2, p. 55.

at last to approach Myerson once again. He again requested the document by which Felix assigned copyright to Penthouse. "To date you have not produced this purported assignment. Please promptly forward a copy of the alleged assignment transferring ownership of the film from Felix to Penthouse."

Since Penthouse claimed not to be able to locate the file concerning the FBI investigation, Aborn was preparing to file a Freedom of Information Act request: "I am preparing an affidavit for your signature encapsulating your recollection, as you related it to me on January 22nd, 1985, concerning the F.B.I. investigation of purported pirated copies of the film. This affidavit will accompany our Freedom of Information Act request to the F.B.I. Your affidavit will facilitate our F.O.I.A. request. However, if for any reason, you do not wish to sign it kindly so advise and we will simply refer the F.B.I. to you." (Aborn would eventually send this draft affidavit a month later, on Friday, 12 April 1985.)

He repeated his request to examine the books of Penthouse Clubs insofar as they pertained to *Caligula*, and asked "when we may have access to them."

By terms of the Settlement Agreement of February 1984, Penthouse was required to submit an accounting to Felix every February and August. The February 1985 accounting was a month overdue. "Kindly provide it forthwith."

There was also the issue of percentages not received:

Additionally, as you are aware the accounting firm of Solomon Finger & Newman has discovered deficiencies in the first accounting you provided in the amount of three million five hundred seventy[-]nine thousand eight hundred eighty two dollars (\$3,579,882), as well as revenues from the sale of the video cassettes of seven hundred ninety thousand one hundred eighteen dollars (\$790,118). Under the terms of the General Agreement Felix is entitled to ten percent (10%) of the additional proceeds from the film stemming from theatrical distribution. Penthouse owns no video rights, hence one hundred [percent] (100%) of the proceeds from the video sales belong to Felix. Please forward a check covering the same now.

Aborn continued with one further request:

Finally, since the deficiencies discovered by Solomon Finger & Newman exceed three percent (3%) of the amount reported by Penthouse in its first accounting, Penthouse is liable under the terms of the General Agreement for the cost of the accounting. Please forward to Solomon Finger & Newman at 919 Third Avenue, New York, New York 10022,

attention Mr. Sidney Finger, a check in the amount of twenty thousand five hundred dollars (\$20,500).³⁰

By this time, Doris Duke was losing her patience. Rossellini had seldom been paying his rent for Duke House Number 49,³¹ and Duke herself was paying Rossellini's telephone bills. She now demanded a share of *Caligula*, and she had her lawyer Samuel N. Greenspoon procure it. That is how Felix and Rossellini assigned \$200,000 of *Caligula's* proceeds to Doris Duke.³²

Then comes a document that cannot be understood completely, as it refers to previous documentation which is now missing. It is a letter from the Italian National Bank of Labor to Lupoi, and it refers to an irrevocable disposition dated 28 March 1984 by which Felix would deposit 30 percent of its net producer share to cover an overdraft on the part of Gaumont. Since Felix was not receiving any share, no deposits were being made. The Bank therefore asked to learn about the current state of Felix's New York lawsuit against Penthouse, to know when monies might again start to flow.³³ We are left to wonder why Gaumont would have had an overdraft and why Felix would be held responsible for it. This was surely a further episode in the irreparable break in relations between cousins Renzo and Franco, after which Franco was no longer able to bear the sight of his cousin.³⁴

Lupoi replied quickly, on Monday, 29 April 1985, explaining that the lawsuit had been brought to a close with the Settlement Agreement, that Felix had then contested Penthouse's two financial reports, that an independent audit seemed to confirm Felix's side, that the Italian Exchange Office has sided with Felix, that Penthouse disputes the findings, and that there would be further negotiations probably towards the end of May.³⁵

In the meantime, on Tuesday, 23 April 1985, Felix received a statement from Lisa Valyiova, who had certified Italian-to-French translations of Gore Vidal's assignment to Felix and an agreement between Felix and Penthouse. The \$420

30. Aborn: letter to Myerson, Wednesday, 13 March 1985. FRC, DDP 94-2, pp. 149-150.

31. We know that he paid for June, July, and August 1983, because the checks, 1115 and 1116 drawn on the Morgan Guaranty Trust Company, are on file at DDP 94-2, p. 137.

32. Sam Greenspoon of Grutman Miller Greenspoon Hendler & Levin: letter to Mahn, Duke Business Office, 3 April 1985; Rossellini and Felix Cinematografica: Assignment to Duke, 2 April 1985, DDP 94-2, pp. 56, 72-73.

33. Banca Nazionale del Lavoro: registered letter to Lupoi, 5 April 1985. FRC.

34. Confidential source: personal conversation with RS, Monday, 5 March 2012.

35. Lupoi: letter to Banca Nazionale del Lavoro, Monday, 29 April 1985. FRC.

payment was now two months overdue: "I find this a little trying and would appreciate it if you would look into the matter."³⁶

In preparation for the forthcoming negotiations between Felix and Penthouse, Lupoi drafted a "State of the Controversy with Penthouse," in which he proffered ideas on how to resolve the outstanding issues. Since Sidney Finger's audit had revealed nearly \$400,000 owing to Felix, and since Finger had had to work with woefully incomplete data, Lupoi guessed that the actual amount owing to Felix would probably be about \$800,000. Lupoi realized that any judicial attempt to recover those funds would be prohibitively expensive and would involve years in court. He proposed a simpler solution. Since the Italian Exchange Office, on 17 December 1984, ruled that Penthouse had no copyright and no rights to video sales, and since the Ministry of Tourism and Entertainment agreed by document dated 4 May 1985, Lupoi thought that France and Germany should offer analogous provisions, after which Felix could approach the US courts as well to abide by and enforce the Italian ruling. Such legal findings would be "exequatur" rulings, and they would have the effect of precluding Penthouse from producing or selling further video copies in those countries. This would, he hoped, encourage Penthouse to sit down at the bargaining table and work out a reasonable settlement. Alternatively, he proposed that, with the Italian rulings in hand, Felix should simply market its own videocassettes of *Caligula* in various parts of the world.³⁷

MAY 1985 — FRUITLESS CORRESPONDENCE

LUPOI HAD NEVER RECEIVED A RESPONSE from Myerson, and so five months later he followed up:³⁸

Dear Mr. Myerson,

You chose not to answer my letter of the 7th January 1985 and apparently instructed Mr. Bendesky to reply on your behalf two months later.

Mr. Bendesky, however, did not comment on the ruling by the "Ufficio Italiano dei Cambi" as he stated he was waiting for Mr. Massaro's advice.

Two more months have now elapsed and either Mr. Massaro did not provide you with his advice or you did not think fit to convey it to us.

36. Lisa Valyiova: letter to Rossellini, Tuesday, 23 April 1985. FRC.

37. Lupoi, "Stato della controversia con Penthouse," undated, circa May 1985. FRC.

38. Lupoi: letter to Myerson, Thursday, 9 May 1985, FRC, DDP 94-2, p. 57.

We have now received an official ruling by the Minister in charge of film productions. The Italian text of the ruling, properly certified as to its source under The Hague Convention, as well as a consularized translation thereof are enclosed herewith.

The ruling by the Minister is so clear that further delay on your part would not be warranted. Under Italian law, which governs the relationship between Felix and Penthouse, our client owns the video rights; this point has now been settled and I would fail my duty towards my client if I did not enforce his rights immediately.

Owing to your lack of response to my previous letter, I shall contact also Mr. Baker in London. I believe he has a better grasp on the legal implications of this matter and I would feel quite comfortable in dealing with him. In any event, I would not put my client to the expense of my travelling to New York to no use.

Yours sincerely,

Lupoi copied the above letter to Ben Baker, to whom he wrote:³⁹

Dear Mr. Baker,

Please find herewith a copy of my letter to Mr. Myerson with enclosures.

I trust you will take this matter in your hands. I did not like Mr. Myerson's delaying tactics nor his lack of etiquette. Nor do I think he is serving Penthouse's interests in the best way.

My firm has been instructed to sue Penthouse now that the legal situation has been clarified at least as far as the video rights are concerned.

You did try once to achieve a fair settlement; would you be willing to try again?

Yours sincerely,

In mid-May Penthouse at last provided an "accounting" through the end of March 1985. Predictably, it was not an accounting, but only a two-page summary without any supporting documents. Total earnings, it stated, were \$19,173,040, and total expenses were \$21,818,457, a loss of \$2,645,417. Rossellini noticed right away that Brazil was not included in the tabulations. No income from videocassette sales was reported, and the improper deductions from last time continued to be made.⁴⁰

39. Lupoi: letter to Baker, Thursday, 9 May 1985. FRC.

40. Bendesky: report to Lupoi, 13 May 1985: "Caligula Accounting Statement for Period from Inception to March 31, 1985." FRC.

Finally, Myerson was moved to respond to Lupoi, and his letter was disingenuous, to say the least, as he pretended to misunderstand the issues:⁴¹

Dear Prof. Lupoi:

I have received your letter of May 9, 1985 in which you criticize me for not responding to you with respect to your claims that your client owns all video rights to Caligula under Italian law.

Prof. Lupoi, I am afraid that I simply will not accept that responsibility. You see, I must rely upon Italian lawyers for determinations of Italian law. That which you tell me, or the significance which you give to documents from Italian governmental agencies, I cannot simply accept. I would be professionally irresponsible if I did, since you are counsel to an adversary. Therefore, I asked that you meet or deal with my Italian lawyer Avv. Giovanni Massaro. But, you refused.

Because of that refusal, I am in the strange position of seeking to communicate both your arguments and interpretations of Italian law, as well as my own requests for information, interpretations, and guidance to Avv. Massaro, who does not speak the same language that I do.

I, for one, do not see the situation at all as clear [*sic*] as you do. The first letter from this Italian Minister, you said, showed that the only transaction approved was the assignment of the film by the settlement. Yet, there is now also the assignment of the music rights, as it should be. I am not aware of the legal effect of "rulings by ministers" in Italy — whether they are subject to change, interpretation, or supplementation. I must rely upon my counsel in Italy to tell me that and by copy of this letter, I am sending Avv. Massaro a copy of your letter and its attachments.

While I have no objections to your dealing with Mr. Baker, I am afraid that you are naive if you believe that he, as an English solicitor, would take it upon himself to express determinations of Italian law. He and I have often discussed the matter in the past in this context as well as in others. It seems you simply must face the reality of dealing with my Italian counsel if you expect us to abide by any of the advice which we receive. I urge you, therefore, again, to contact Avv. Massaro on the matter as promptly as possible.

Sincerely,

We should parse the above letter. We have no evidence anywhere that even suggests that Myerson requested Lupoi to address his issues to Massaro instead. The issues Lupoi raised concerned "statements presented by the Penthouse Group, verifications or payment of the profit amount due and owing Felix," and

41. Myerson: letter to Lupoi, Tuesday, 21 May 1985. FRC.

these were Myerson's purview, not Massaro's. By contract they would be settled not in Rome, but in the Supreme Court of New York, based on Italian law. It was Myerson's obligation to find an Italian attorney who could talk him through the legal ramifications.

Further to the point, Myerson argued that the letter from the Italian Ministry of Tourism and Entertainment incorrectly stated that the *only* right transferred was the assignment of the film from Felix to Penthouse. There was no such assignment. The assignment was for cinema-exploitation rights in non-Italian territories. As for whether the Ministry dealt with one assignment or two, we can read when we read the Ministry's letter to see that the Ministry limited itself to the issue of film-exploitation rights, leaving other rights, such as a separate release of a soundtrack LP, unmentioned, as these were not at issue.

Finally, Myerson argued that it would be "naive" to assume that Ben Baker could "express determinations of Italian law," though that is not at all what Lupoi was asking.

THE THIRTY-FOURTH CALIGULA LAWSUIT

COSMOPOLITAN CINEMATOGRAFICA

WITH THAT LAST STONEWALLING, Lupoi was left with no choice but to file suit. He began not, as one would expect, in the Appellate Division of the Supreme Court of New York, but in Rome, because of the unexpected development concerning videocassettes.

As mentioned above, a video-distribution firm by the name of Cosmopolitan Cinematografica Srl, headquartered in Rome, had just licensed from Penthouse Products of Englewood, New Jersey, the rights to import videocassettes of *Caligula* into Italy and other European countries.

Lupoi filed the above complaint on Monday, 27 May 1985 (registered on Friday, 31 May 1985).⁴² Some years later Lupoi summarized⁴³ that this suit sought:

injunctive and declaratory relief relating to the ownership rights of the motion picture *Caligula*, including damages sustained by Felix due to Penthouse's illegal distribution of videocassettes.... The civil court of

42. *Felix Cinematografica Srl e Franco Rossellini contro Cosmopolitan Cinematografica Srl, Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, and Penthouse Records, Ltd.*, Pretura Civile di Roma. FRC.

43. Quoted from Certification of Maurizio Lupoi (4 December 1989), *Penthouse Films International, Ltd., v Felix Cinematografica Srl and Franco Rossellini*, Superior Court of the State of New York – County of New York, Index Number 011799/89. FRC.

general jurisdiction in Italy is the Tribunale. However, petitions for injuncti[ve] relief submitted before the filing of a suit with the Tribunale are heard by a different court, the Pretore [sic]. Therefore, Felix petitioned the Pretore for an order temporarily restraining Penthouse from distributing the videocassette *Caligula* pending the outcome of Felix's underlying lawsuit.

The following day Lupoi tersely responded to Marc Bendesky's two-page accounting statement: "We have examined your Accounting Statement to March 31, 1985. We reject it in its entirety."⁴⁴ At the same time he telegraphed Myerson: "Please be advised that Felix Cinematografica shall sue the Penthouse group companies under the February 2, 1984[,] settlement without any further delay."⁴⁵

At a hearing on 25 June 1985, attorney Gianni Massaro, representing Penthouse, made a motion for dismissal, arguing that the Court (*Pretura*, or Court of First Instance, or Chancery if we prefer archaic English) of Rome had no jurisdiction over a foreign corporation, and, further, that Felix had no standing to summon only Penthouse Films and Penthouse Clubs while not summoning Penthouse Products of Englewood.

In a further argument, Massaro maintained that Felix's exploitation of *Io Caligola* in Italian cinemas could not possibly be prejudiced by the sale of videocassettes outside of Italy. Massaro also attempted to make a case that historically, prior to the Settlement Agreement of February 1984, *Caligula* had been produced as a true co-production by Clubs and Felix, not as a coparticipation between Films and Felix. Further, by means of the Settlement Agreement, Penthouse had acquired the right to produce and distribute videocassettes of *Caligula*.

In a subsequent pleading, Penthouse requested that the case be moved from the Civil Prosecutor to the Public Prosecutor, for the reason that Cosmopolitan's act of introducing videocassettes of *Caligula* into Italy was a criminal offense, since the Supreme Court of Cassation had definitively banned the film in February 1984.⁴⁶ By this argument, Penthouse was explicitly arguing that it was party to criminal act.

44. Lupoi: letter to Bendesky, Tuesday, 28 May 1985. FRC.

45. Lupoi: telegram to Myerson, Tuesday, 28 May 1985. FRC.

46. The 25 June 1985 hearing is summarized in "Il Pretore, sciogliendo la riserva che precede," heard on 9 December 1985 and filed with the Clerk on 13 December 1985, as a sequel to *Felix Cinematografica Srl contro Cosmopolitan Cinematografica Srl, Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, and Penthouse Records, Ltd.*, Pretura Civile di Roma, Sezione I — Dott. Fancelli, Wednesday, 30 October 1985. FRC has the original Italian as well as two different English translations, one by Giorgio Serafini and one by P. Bonnefous.

FALTERING FINANCES

DURING ALL THIS TIME, by late June 1985, Franco Rossellini was \$4,560 behind on his rent for one of his three apartments, 145 West 58th Street, Apartment 10J, where he lived in Manhattan when he was not staying on the Duke farm.⁴⁷ By mid-September Rossellini's delayed payments had tried his landlord's patience beyond endurance. The landlord, William A. Moses, won a suit for immediate payment of \$4,516.02 on pain of eviction and seizure of property.⁴⁸ Since Rossellini was able to continue residing there, we conclude that he somehow must have met the payment, most likely through a loan procured by Doris Duke.

Rossellini's company, Felix Cinematografica, was not doing well either. For years Felix's business had been conducted largely from Rossellini's apartment on Via di San Valentino, though meetings had long been held at a second apartment on Via Teodoro Monticelli. The 30 June 1986 meeting was held at San Valentino, with an announcement that Felix's office would from now on be held at his cousin Fiorella Mariani's house. At this meeting, the shareholders were presented with the balance sheet as of 30 December 1985. Up to that date, residual costs for *I, Caligula* were still at £2,248,411,436 (approximately \$1,337,154.95), and the overall loss for the fiscal year was £3,260,715 (approximately \$1,939.19). There was also mention of the "unpleasant stalemate" with Renzo Rossellini's Gaumont-Italia.⁴⁹

LIVIO FANCELLI COMES TO THE RESCUE

AT THE END OF OCTOBER 1985, Judge (*Pretore/Chancellor*) Livio Fancelli of the Court of First Instance (*Pretura/Chancery*) of Rome rejected Massaro's motion for dismissal.⁵⁰ Fancelli was meticulous, and he could see no merit whatsoever to Penthouse's arguments. Felix owned the chain of title from Vidal

47. Rossellini: letter to William A. Moses, Friday, 21 June 1985. At various times, he seems to have rented apartments 10H, 10L, and 10M in addition to his regular 10J. His mother, Lina Pugni, lived in apartment 14BB. FRC.

48. *William A. Moses v Franco Rossellini*: Civil Court of the City of New York, County of New York, Index Number 45150/85, Monday, 16 September 1985. FRC.

49. Felix Cinematografica, Verbale di Assemblea Ordinaria, file 1158/69, 30 June 1986; Davide Costa, Bilancio Sociale al 30 Dicembre 1985; Costa, Relazione dell'Amministratore Unico sul Bilancio Sociale Chiuso al 31 Dicembre 1985, submitted 1 April 1986 (all three included in Biagiotti, 7 July 1986). FRC.

50. *Felix Cinematografica Srl contro Cosmopolitan Cinematografica Srl, Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse Records, Ltd.*, Pretura Unificata di Roma. Pretore Dott. Livio Fancelli. Maurizio Lupoi represented the "Felix

and d'Amico. As producer, Felix had "all the rights that by law are due an author," which included "all radio-television means, already invented or of future invention." The only rights that Felix had granted Penthouse were cinematic exploitation rights outside of Italy to which Penthouse was entitled 90% of net, as well as separate music rights for issuing a soundtrack album. No other rights had been transferred, by contract or by law. Since Penthouse had repeatedly claimed that the Settlement Agreement had granted it copyright, Fancelli felt the need to spell the legal case explicitly: "the settlement between the parties in no point and in no form provides for any transfer of author rights effected by Felix, apart from the musical rights of which we have spoken." As for Penthouse's repeated claim that historically the film had been produced under the October 1975 contract, Fancelli again felt obliged to refer to the Settlement Agreement: "The agreements as per articles 12 and 13 are those stipulated in 1976/77...." The Settlement Agreement was not a transfer of ownership rights, but only a "profit share" deriving from the exploitation of the film. Unequivocal confirmation of this conclusion had been supplied by the Ministry of Tourism and Entertainment as well as the Italian Exchange Office.

Fancelli issued an injunction ordering Cosmopolitan and the Penthouse group of companies to cease any production of videocassettes. This was to protect Felix's intellectual-property rights. It was entirely irrelevant to the legal process that parties other than those who had signed the Settlement Agreement were involved in the production of videocassettes ("no integration of the counterclaims is necessary"). The parties who signed were responsible and must ensure that all production cease. As to Massaro's objection that video sales abroad would not injure ticket sales to *Io Caligola* in Italy was similarly irrelevant: "the provision requested, therefore, has the purpose of preventing damage wherever this arises, whether in Italy or abroad."

Fancelli recognized that, when dealing with Penthouse, the above findings would not be considered clear, and so he added even more explicit language: "The Settlement Agreement has made available to the Penthouse group a range of cinematographic materials, property of Felix, and on which only Felix claims author rights: Of such materials the defendants have made illegitimate use, contemptible in its brutality, which the judge must impede from being carried out any further."

Group," Antonio Diego Quattrone represented Cosmopolitan, and Gianni Massaro represented the "Penthouse Group." FRC.

Fancelli's ruling was a "preliminary ruling," or, as it would be called in the US, a "temporary restraining order," obligating production and distribution of videos to cease pending the outcome of the civil case.

The hearing on injunctive relief would thus go ahead as scheduled.

PENTHOUSE APPEALS TO THE SUPREME COURT OF CASSATION (34TH LAWSUIT, CONTINUED)

PENTHOUSE WAS HORRIFIED BY THIS DEVELOPMENT, and so Massaro filed a case with the Supreme Court of Cassation to have the Civil Court of Rome declare that the Pretura did not have jurisdiction.⁵¹ Sometime later, Lupoi briefly provided the context for Penthouse's maneuver:⁵²

Italian civil procedure allows a litigant to stay trial proceedings and seek a jurisdictional ruling by Italy's highest court, the Corte Suprema di Cassazione. A jurisdictional ruling by the Corte Suprema di Cassazione seldom takes less than two years. Therefore, unscrupulous defendants can raise a jurisdictional issue and petition the Corte Suprema di Cassazione merely for the purpose of staying a trial and gaining time.... During the aforementioned litigation, Penthouse objected to Italian jurisdiction. It filed its petition to the Corte Suprema di Cassazione before the temporary injunction had been issued by the Pretore.

This was a repeat of Penthouse's earlier attempted strategy from the summer of 1977 in response to Pretore Giacobbe's unappealable ruling in favor of Tinto Brass. As we learned above, in the summer of 1977 Penthouse contemplated overturning the ruling by arguing that it was not factually based.

Penthouse now persuaded Giancarlo Lui to lend his name to the appeal, which was filed on 27 November 1985 by Gianni Massaro on behalf of Penthouse Films and Penthouse Clubs. Massaro argued that Penthouse International, Penthouse Clubs, and Penthouse Records had been "irregularly" and "not validly" notified, making Felix's complaint "fundamentally null and void." Penthouse Products of Englewood, "the alleged perpetrator of the crime," had not been called into the case. He argued that the Italian courts had no jurisdiction

51. *Penthouse Films International, Ltd., e Penthouse Clubs International Establishment contro Felix Cinematografica Srl*, Corte Suprema di Cassazione, Sezioni Unite. Gianni Massaro for "Penthouse Group" and Maurizio Lupoi and Dr Patricia Moschese for the "Felix Group." FRC.

52. Quoted from Certification of Maurizio Lupoi (4 December 1989), *Penthouse Films International, Ltd., v Felix Cinematografica Srl and Franco Rossellini*, Superior Court of the State of New York – County of New York, Index Number 011799/89. FRC.

in this matter, for several reasons. *Cosmopolitan*, he insisted, had never licensed *Caligula* and Felix fraudulently named it in the suit only as a pretext to get an Italian hearing. Massaro made the case that Judge Livio Fancelli's ruling explicitly applied only to Italy, whereas the advertisement for *Caligula* videos, which Felix had exhibited in the suit, pertained exclusively to US customers, and that the advertisement clearly stated that the videos were not available outside the US. Judge Fancelli, Massaro said, was negligent in his duties for ruling against non-Italian companies, which were outside his jurisdiction, with a "possible" restraining order against companies that "operate exclusively abroad" and have no branches in Italy. Massaro also maintained (wrongly) that Felix had "acknowledged" in writing that Penthouse, in addition to having provided nearly all the funding for the production, had brought in an "additional \$12,000,000." As a remedy, Massaro requested that Penthouse Products be integrated into the debate, and that the "Supreme Court of Cassation in Joint Session accept the present request for preventive ruling on jurisdiction," and thus "declare the lack of jurisdiction on the part of the Magistrate of Rome."⁵³

A week later, on Thursday, 5 December 1985, Massaro requested suspension of Pretore Fancelli's temporary restraining order pending the Supreme Court of Cassation's ruling on the issue of jurisdiction.

JUDGE LIVIO FANCELLI DOES NOT BACK DOWN (34TH LAWSUIT, CONTINUED)

JUDGE FANCELLI WAS ENTIRELY UNMOVED by Massaro's arguments for a suspension. On 9 December 1985 he ruled that a suspension was inappropriate for a summary (preliminary) proceeding, such as the present one, and it would result in "an unjustified denial of urgent cautionary protection which is contrary to the nature and purposes of Article 700 Code of Civil Procedure."⁵⁴ (Let us put that into down-to-earth terms. Fancelli had issued a temporary restraining order pending the outcome of a trial. Massaro attempted to have that temporary restraining order suspended pending the outcome of an appeal! That would defeat the whole purpose of a temporary restraining order.) Fancelli also commented on the jurisdiction over foreign defendants who have residence or

53. *Penthouse Films International and Penthouse Clubs International Establishment v Felix Cinematografica Srl*, Corte Suprema di Cassazione — Sezioni Unite ricorso per regolamento preventivo di giurisdizione. Complaint filed by Massaro, Wednesday, 27 November 1985. FRC.

54. *Felix Cinematografica Srl contro Cosmopolitan Cinematografica Srl, Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse Records, Ltd.*, Pretura Unificata di Roma, 9 December 1985, filed 18 December 1985, cronologico no 174. FRC includes the original Italian as well as English translations by Serafini and Bonnefous.

domicile in Italy, and Penthouse did indeed elect domicile at Massaro's office. Concerning Massaro's argument that an Italian judge's ruling would affect only foreign companies in their work abroad, Fancelli maintained this was of "no relevance." The Settlement Agreement had been signed in Rome, all parties had domicile in Rome, and by the Settlement Agreement all parties agreed that the Court of Rome had jurisdiction.

Massaro's argument that Penthouse Products of Englewood, as "alleged perpetrator of the crime," should also be summoned, was similarly "juridically groundless." Penthouse Products was a third party that was not a signatory to the Settlement Agreement. The other Penthouse signatories, though, were bound by that Agreement, but had not abided by its terms when they sublicensed *Caligula* to Penthouse Products.

Fancelli's lengthy and almost impenetrable injunctive ruling in the case repeated much of what he had written in his October rejection of Penthouse's motion to dismiss. His December ruling, though, was stated even more forcefully. According to contract as well as to Article 701 of the Code of Civil Procedure, Roman jurisdiction was "beyond doubt." A suspension was "not allowable in a cautionary action" (cautionary action = temporary restraining order) as this would create an "unwarranted nullification."⁵⁵

As to Massaro's pleading that historically *Caligula* had been a coproduction rather than a coparticipation, Fancelli cited Article 46 of the Law on Copyright, and concluded that "no relevance can be attached to the defendant's argument" that this "entailed a pro-rata purchase by Penthouse of the exploitation rights of the Picture."

Fancelli rejected Massaro's argument that the Settlement Agreement had granted Penthouse the rights to produce and sell videocassettes. Fancelli recognized that the Settlement Agreement was quite explicit in granting Penthouse only the traditional exploitation right in cinemas, and that any other rights would need to be granted in writing by Felix. According to Article 110 of the Law on Copyright, "the transfer of the exploitation rights must be proven in writing.... Any interpretations not strictly adhering to the letter of the Law [have] to be rejected," he stated. This latter point went beyond the expected temporary restraining order; it was a pronouncement on a matter of law. Fancelli ruled, as a point of law, that Penthouse did not and had never owned any video or television rights to *Caligula*.

55. *Felix Cinematografica Srl contro Cosmopolitan Cinematografica Srl, Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, and Penthouse Records, Ltd.*, Pretura Civile di Roma, Sezione I — Dott. Fancelli, Wednesday, 30 October 1985. FRC.

Massaro's petition filed with the Supreme Court of Cassation eventually was scheduled for a hearing two years later, on 17 December 1987.⁵⁶ Unless the Supreme Court of Cassation would eventually rule against jurisdiction, Fancelli's ruling would hold true.

Variety reported on the case, and quoted Rossellini as stating, "Any assignment of foreign property must be approved here (Italy)." Rossellini also felt vindicated when Mario De Paolis, director general of the Italian Ministry of Tourism and Entertainment, recognized the Italian nationality of *Caligula*. "It was the first time the Italian government took a serious position to protect Italian film rights." Since *Caligula's* worldwide film gross had by now been estimated at \$40,000,000, Rossellini concluded that "The film has enormous value in the current thriving videocassette market."⁵⁷

There was no possibility of appealing Fancelli's temporary restraining order.⁵⁸ The year nineteen hundred and eighty-five thus ended with what seemed to be a clear and decisive victory for Franco Rossellini. The situation, though, was not to be so simple.

JANUARY 1986 — ENFORCING THE INJUNCTION

FANCELLI'S TEMPORARY RESTRAINING ORDER would become void unless Felix were immediately to file its papers with the Civil Court (Tribunale Civile) of Rome for a final judgment, certainly no later than the 16 January 1986 deadline. Final judgment could not be expected for another two or three years, pending the Supreme Court of Cassation's ruling on jurisdiction, but in the meantime Fancelli's injunction would remain in force. Lupoi also planned to sue Penthouse in the US, no later than 14 January 1986, for copyright infringement. Indeed, some video copies claimed a copyright by Penthouse International, while others claimed a copyright by Penthouse Films International, and both were in violation of all contracts between Felix and Penthouse.⁵⁹

By Thursday, 9 January 1986, Massaro had been served with the Court of Rome's injunction. Lupoi found this a good opportunity to write once again to David J. Myerson:⁶⁰

56. See Carol Komissaroff: letter to Judge William C. Conner, United States District Court – Southern District of New York, 18 June 1987. FRC.

57. Hank Werba, "'Calig' Vid Draws Italian Court Action; U.S. Suits Expected," *Variety* (weekly), 322 no 7, Wednesday, 12 March 1986, p 35.

58. Lupoi: telegram to Aborn, Thursday, 9 January 1986. FRC.

59. *Ibid.*

60. Lupoi: letter to Myerson, Thursday, 9 January 1986. FRC.

We have now been instructed by our client to enforce the order worldwide either by way of recognition of by using it as a basis for a legal action under the applicable law of each country. I am taking the trouble to write to you only because you pointed out to me in your last letter that your attorney does not speak your language and you do not speak his. Should you wish to comply with the order without putting Felix to the inconvenience of suing Penthouse for copyright infringement, you would also save to your company the inconvenience of being sued, of losing the case and of having to pay damages in addition to returning every dollar made out of the exploitation of rights which belonged, and still belong, to Felix.

With the Pretore's temporary restraining order in place, Felix was now able, on 17 January 1986, to summon the various Penthouse entities regarding copyright, economic rights, industrial rights, property rights, and intellectual rights to *Caligula*.⁶¹

In a surprise turn-around, though, Franco Rossellini announced his private intentions. He would be happy to sell his share of the film to Penthouse and wash his hands of the whole affair:

We have only been instructed to offer to sell to Penthouse all Felix's rights in the picture, without any restrictions nor territorial limitations, at the price of US\$5,000,000, payable half at the execution of the sale and half after three months. This offer will expire on February 14, 1986, your acceptance thereof shall be effective only if it reaches our Rome office on or before said date together with the payment of the first half of the price.

The offer was surprisingly generous. It would have solved everyone's problems in an instant and would have spelled an end to all the legal battles. It would have at long last allowed Rossellini to re-start his production schedule after a years-long hiatus, and it would have enabled him to catch up on all his delinquent bills, which were becoming more pressing with each passing day. For instance, just a few weeks after making this offer, Rossellini received another overdue statement in the mail, this one from Sporthotel Lorünser of Zürs am Alberg, Austria, which claimed an outstanding balance of \$23,867.⁶²

Rossellini held out an olive branch. Penthouse responded with a legal attack.

61. We know the date only from the summary included in the judgment issued on 30 September 1988: *Felix Cinematografica Srl contro Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse Records, Ltd.* Tribunale Civile di Roma, decided 30 September 1988, deposited with the Court Clerk 15 November 1988, registered in Rome 29 November 1988, docket 13607, roll number 29178. FRC.

62. Herbert Jochum, Sporthotel Lorünser: letter to Rossellini, Tuesday, 28 January 1986. FRC.

21 FEBRUARY 1986 — SIMPLIFY AND REPEAT (34TH LAWSUIT, CONTINUED)

ON FRIDAY, 21 FEBRUARY 1986,⁶³ Penthouse Films and Penthouse Clubs, represented by Massaro, responded to Felix's suit at the Civil Court of Rome (Tribunale Civile di Roma) with Investigating Judge Galbiati serving as the head of a collegiate panel of three judges (the other two being President Mario delli Priscoli and Judge Achille Toro), claiming the legal invalidity of Fancelli's rulings.⁶⁴ According to Massaro's pleading, Fancelli had claimed jurisdiction despite a pending suit to establish jurisdiction, and thus Fancelli's injunction must be suspended. Further, Fancelli had misstated the facts. Massaro again insisted that the producer had been Penthouse Clubs alone, as Felix had entirely defaulted on its financial contributions. Massaro again argued that the governing contract had been the one dated October 1975, which was to be interpreted according to the laws of New York State; that all subsequent contracts used the October 1975 agreement as a basis; and that the October 1975 agreement vested in Penthouse all exploitation rights in any manner whatsoever. Massaro repeated his argument that the defaulting party would be entitled to only ten percent of net proceeds, which he maintained was precisely what had happened. Penthouse, he said, had signed the subsequent contracts only because Felix insisted and because Penthouse was unaware of Italian laws. The Settlement Agreement, he stated, mentioned the subsequent contracts merely to acknowledge that they remained in effect, and further, it clearly stated that Penthouse had covered the full \$11,000,000 cost of the production, and that thus Penthouse is full and exclusive owner of the property. Massaro's interpretation of the various contracts was contrary to the reality, but repetition often reaps rewards. Massaro went one further by claiming that Felix's unwarranted reference to an imagined "Guccione Group" was sheerest fantasy, as there was no such legal entity. He also claimed that Penthouse International was currently trying to have the Ministry of Tourism and Entertainment revoke the film's Italian nationality. Fancelli's erroneous and illegal ruling, he said, had the effect

63. *Felix Cinematografica Srl contro Penthouse Films International, Ltd., and Penthouse Clubs International Establishment*. Tribunale Civile di Roma, Registro Generale (General Docket) 2062/1986 — Sezione 1^a. Giudice Relatore (Reporting Judge) Dr Ruggero Galbiati. Maurizio Lupoi for Felix and Gianni Massaro for the "Penthouse Group." FRC.

64. Massaro, *Penthouse Films International, Ltd., e Penthouse Club International Establishment contro Felix Cinematografica Srl*, 21 February 1986, Tribunale Civile di Roma, Sezione I, G.I. Dott. Galbiati, *Comparsa di Costituzione* — *Risposta e Domanda Riconvenzionale*. Also: Gianni Massaro, *Penthouse Films International, Ltd., e Penthouse Club International Establishment contro Felix Cinematografica Srl*, nd, Tribunale Civile di Roma, Sezione I, G.I. Dott. Galbiati, *Note Autorizzate*. FRC.

of doing “irreparable damage” to the “business image” and “commercial credibility” of Penthouse.

Lupoi responded on Thursday, 6 March 1986:

The question raised by the claimant company is the following: Is it sufficient that a party address a fee-stamped piece of paper with the name “preventive ruling on jurisdiction,” serve it and file it with the Court of Cassation to produce the aforementioned effect?

Isn’t it perhaps necessary that, in addition to the form, there also be present some substance?⁶⁵

He pointed out that “we do not see how a precautionary ruling [temporary restraining order] could consist of the suspension of the same judgment in the scope of which this is being requested.” Lupoi deftly pointed out that Penthouse had not argued jurisdiction until after all its other arguments had failed, and further that Penthouse had explicitly accepted Italian jurisdiction.

In a subsequent, undated response, Massaro repeated his earlier arguments and continued that the law was explicit in giving the producer full ownership of all exploitation, no exclusion, and that Felix’s default left Penthouse as sole producer. Felix was “delusional” in thinking that it could claim that video rights were excluded from the Settlement Agreement, while invoking that same Settlement Agreement for its right to bring suit, a full 16 months after receiving profits. The logic of Massaro’s argument defies all explanation. Fancelli’s temporary restraining order, he again argued, must be suspended pending the Cassation’s ruling on jurisdiction.

That is where Franco Rossellini’s files end on this particular matter. Despite that gap, it is certain that Massaro’s arguments failed and that the civil case was suspended pending the Cassation’s ruling on jurisdiction.

MAY 1986 — FELIX ATTEMPTS TO RELEASE *IO CALIGOLA* ON HOME VIDEO

FELIX BEGAN THE PROCESS of releasing *Caligula* onto the home-video market, in an attempt to pre-empt Penthouse’s efforts. It began its program in the uncontested Italian territory. The first such contract was for *Io Caligola*, which Felix licensed to Videa LLC. Unfortunately, Videa never paid the license fee and

65. Tribunale Civile di Roma, Sezione I — G.I. Dr. Galbiati, R.G. No. 2062/86, per *Felix Cinematografica Srl (Attrice)* contro *Penthouse Film International, Ltd., Penthouse Club Establishment (Convenute)*, *Penthouse International, Ltd., Penthouse Records, Ltd. (Convenute contumaci)*, 6 March 1986. FRC.

thus the contract was annulled.⁶⁶ Felix tried again, this time with Compagnia Cinematografica Prima Srl of Rome, to which it granted a seven-year license for a release strictly to Italy and to Italians living abroad, for a consideration of £ 30,000,000 (\$19,199.21). This contract was executed on 23 May 1986, and would take effect for seven years beginning 31 July 1986.⁶⁷ As we shall see, this contract never bore fruit.

16 JUNE 1986 — CORRECTED COPYRIGHT FILING

WITH LIVIO FANCELLI'S RULING IN HAND, Felix's new attorney, John F. Hornick (of Finnegan Henderson Farabow Garrett & Dunner), filed a Certificate of Supplementary Copyright Registration with the US Copyright Office. This corrected erroneous assertions on the registration that Penthouse had filed and authorized on 7 November 1980. "S.r.l." was added to Felix Cinematografica's name, and it was now claimant of copyright, in care of the legal firm of Hess Segal *et al.* of Manhattan.⁶⁸

Unfortunately, in addition to correcting those two errors, Felix added a new error, claiming that the first publication was not 10 November 1979 in Italy, but 2 February 1979 (or 5 February 1979 — the paperwork was contradictory) in Great Britain:

The enclosed Form CA does not contain a statement that the Italian dubbed version of "Caligula" was published first, and that the English language soundtrack for "Caligula" was first published in the version which is the subject of Penthouse's Copyright Registration No. PA 83-587 and the enclosed Form CA. Subsequent to our previous correspondence, we learned that although the film is of Italian origin, the English language version of "Caligula" was first published on February 5, 1979[,] in Great Britain.

That was completely untrue. It seems to have been a tactic to prevent Penthouse from claiming copyright to the English version and leaving Felix with rights only to the Italian version. Nonetheless, even Franco Rossellini soon afterwards remembered that it was not the 2nd of February but the 5th, and that the event of that day was not a public screening but was rather, to put it nicely,

66. Nicola Ceci Ginestrelli: letter to Felix Cinematografica, 16 June 1986; Felix Cinematografica: letter to Ginestrelli, 23 June 1986 (both included in Biagiotti, 7 July 1986). FRC.

67. Felix Cinematografica: invoice number 1/86 to Compagnia Cinematografica, 28 May 1986 (included in Biagiotti, 7 July 1986). FRC.

68. John F. Hornick: letter to Nancy E. McAleer, US Copyright Office, 16 June 1986, and the accompanying Supplementary Copyright Application Form CA dated 13 May 1986. FRC.

the date of the delivery of the elements to Penthouse in preparation for the Cannes trade festival of May 1979.⁶⁹ More bluntly, it was the day that Penthouse removed the bulk of the *Caligula* materials from Technicolor for shipment to more malleable editors in France. There was no honest way to get around the inescapable truth: The first public screening of *Caligula* was with a dubbed Italian-dialogue track. The first public screening of the English version was on 1 February 1980, and that booking was arranged entirely by Penthouse. The Felix lawyers failed to understand that the issue of language was irrelevant. By Italian law, by Fancelli's pronouncement of law, by the Berne Convention, and by contract, Felix owned the film's copyright in its entirety, in Italian and in English.

Hornick's letter contained another statement that was completely unfounded, and this statement too would come to haunt Felix in future years: "Although Felix granted an exclusive license to Penthouse for theatrical distribution of the motion picture entitled 'Caligula,' Felix has retained all other copyright rights in that motion picture." Felix had, in fact, never granted Penthouse an *exclusive* license for theatrical distribution; Felix granted Penthouse a set percentage of all non-Italian boxoffice receipts. The end result was Penthouse's handling of all non-Italian releases, but the contracts themselves, taken literally, were not so strict.

THE THIRTY-FIFTH AND THIRTY-SIXTH CALIGULA LAWSUITS

17 JULY 1986 — COPYRIGHT INFRINGEMENT AND BREACH OF CONTRACT

LIVIO FANCELLI'S TEMPORARY RESTRAINING ORDER, containing as it did a ruling as a matter of law concerning copyright, enabled Felix to draft a pair of suits against Penthouse for copyright infringement. Charles Miller, attorney with Hess Segal Guterman Pelz Steiner & Barovnick, filed a \$90,000,000 federal suit with the US District Court – Southern District of New York on 17 July 1986, requesting a trial by jury, and pointed out that Italy was a signatory to the Universal Copyright Convention. He thought it unnecessary to point that the United States was also a signatory. That was a mistake from which Felix would suffer.⁷⁰ (The state suit was for \$5,000,000.)⁷¹

69. Rossellini: annotations in draft of a suit filed by Felix against Penthouse in the US District Court, 17 July 1986. Dates of the draft and annotations are unknown, but are probably circa June 1986. FRC.

70. *Felix Cinematografica Srl v Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Records, Ltd., Penthouse Clubs International Establishment, and Robert Guccione*, 86 Civ. 6183 671 F. Supp. 313, 315 (SDNY 1987). United States District Court – Southern District of New York.

Despite the lessons learned earlier, this suit named Penthouse Clubs International Establishment among the defendants, for the reason that Penthouse Clubs was claiming copyright for *Caligula*, and that "Penthouse International, Penthouse Films, Penthouse Records, Penthouse Clubs and Guccione are the 'alter egos' of each other...." Further, it mentioned the October 1975 contract between Felix and Clubs and included it among the exhibits. The complaint went further by claiming that the October 1975 contract was "abrogated" by the successor June 1976 contract. That was not strictly true, though the effect was hardly different from an abrogation. To abrogate an earlier contract, a successor contract must specifically name and dissolve that earlier contract, which was not the case at all with the June 1976 Joint Production contract, which simply left the earlier contract unmentioned.

Felix erred again in item 13, repeating the erroneous statements in Hornick's letter. Felix again claimed it had granted Penthouse Films "an exclusive license" for distribution to cinemas outside of Italy. Felix went on to its erroneous item 18: "The English version of the film *Caligula* was first published by Felix on or about February 5, 1979, when Felix caused the negatives of the film to be delivered to Penthouse Films for distribution." Transport of film elements does not constitute a "publication" in any sense of the word. The attorneys should have recognized this.

Felix correctly argued that Penthouse fraudulently claimed copyright of *Caligula*. Felix then incorrectly argued that Penthouse had committed fraud by claiming the first publication as 10 November 1979 in Italy rather than 5 February 1979 in Great Britain.

Throughout the complaint, Felix singled out "the English version" as the matter of contention. Again, this was an error. Felix should have argued ownership of the film *in toto*, not merely the English version.

In its other arguments, though, Felix was correct: Penthouse had breached its contracts, had misrepresented the copyright, had illegally produced and distributed videocassettes, and had illegally transferred copyright to the offshore Penthouse Clubs. Felix demanded \$90,000,000 in damages, a prohibitively high figure designed to be negotiated down.

Judge William C. Conner presiding. Jay Julien for the plaintiff, Richard M. Goldstein and Susan B. Ratner for the defendants. FRC.

71. *Felix Cinematografica Srl v Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Records, Ltd., Penthouse Clubs International Establishment, and Robert Guccione*, Supreme Court of the State of New York, County of New York, Index No. 88/10783. Judge Leonard N. Cohen presiding. Charles Miller of Hess Segall Gutterman Pelz Steiner & Barovick (later Loeb Loeb & Hess, later still Pryor Cash Sherman & Flynn) for the plaintiff, Shea & Gould for the defendants. FRC.

On that same day, Hess Segal Guterman Pelz Steiner & Barovnick filed a companion suit with the Supreme Court of the State of New York – County of New York, this one dealing with disputes regarding auditing. It duplicated many of the errors made in the complaint filed with the US District Court, and it made some more.

It did, though, have the virtue of stating beautifully an important issue, though it should have deleted the word “exclusive”: “As Felix’s exclusive licensee for theatrical distribution of *Caligula* outside of Italy, Penthouse Group owed Felix a fiduciary duty.” This complaint stated, correctly, that Penthouse had “concealed from Felix the full amount that it has received from the theatrical distribution of *Caligula*.”

Felix detailed Penthouse’s only three bi-annual accounting statements, each concluding with a deficit, and the last of which brought matters up to the end of March 1985, after which Penthouse ceased supplying statements. Felix detailed the discrepancies in and shortcomings of the records that Penthouse had supplied, finding under-reportings of at least \$3,440,000 in the available records, with further discrepancies indicating at least a further \$50,000,000. Felix argued that this concealment had not merely had the effect of withholding moneys due, but was also a breach of contract, and requested damages of a further \$10,000,000 plus costs.

18 JULY 1986 — EXEQUATUR ORDER IN FRANCE (34TH LAWSUIT, CONTINUED)

THE NEXT DAY Felix’s French attorney, Jacques-Georges Bitoun, sent Maurizio Lupoi a telegram with the good news that the Superior Court of Paris had just carried out the exequatur ruling, making Livio Fancelli’s temporary restraining order of December 1985 enforceable throughout France.⁷² The order would be published in the Cinematographic and Audiovisual Public Registry (Registre Public de la Cinématographie et de l’Audiovisuel) on 12 August 1986,⁷³ after which the Brussels Convention mandated a maximum of two months to file an appeal.⁷⁴ Jacques-Georges Bitoun wrote letters to René Chateau, G.I.E. Hollywood Boulevard, and Canal Plus informing them of this development, and instructing them: “I therefore thank you no longer to carry out the settlement of

72. Bitoun: cable to Lupoi, 18 July 1986. FRC. See also *Felix Cinematografica Srl contre Penthouse International, Ltd., and Penthouse Films International, Ltd.*, Tribunal de Grande Instance de Paris, Ordonnance, Immatriculation en France sous le titre CALIGULA n° 52647, 18 July 1986. FRC.

73. Bitoun: letter to Rossellini, 25 August 1986. FRC.

74. Chantal Bodin-Casalas, Concluding Arguments, 5 April 1990, Cour d’Appel de Paris, *Felix Cinematografica contre Penthouse International, Ltd., and Penthouse Films International, Ltd.* FRC.

amounts owed to the PENTHOUSE INTERNATIONAL, LTD., and PENTHOUSE FILMS INTERNATIONAL, LTD., companies, and to save that money."⁷⁵

Bitoun wrote again to René Chateau⁷⁶ and Canal Plus⁷⁷ in October, this time asking about the chain of title they had examined prior to issuing *Caligula* in France. Pascaline Gineste, counsellor for Canal Plus, responded simply that her company licensed the rights through AMLF, which in turn had licensed the rights from Penthouse, all of which had been legally and regularly recorded at the Public Cinematographic Registry on 18 March 1985.⁷⁸ This prompted Bitoun to send a letter to AMLF as well.⁷⁹

OTHER NEWS OF THAT MONTH — POVERTY

ON 7 JULY 1986 FELIX'S ACCOUNTANT, Dr Giuseppe Biagiotti, sent Franco Rossellini a large package filled with photocopies of various documents, preceded by a noble but distressed cover letter. (To understand this letter, we need to remember that Viva was the Italian film company set up to coproduce Fellini's *City of Women*. Whether this had been set up by Guccione, by Renzo Rossellini, by Franco Rossellini, or by another party, is never made clear. From Biagiotti's letter, we can infer that Viva later attempted to claim rights to and/or proceeds from *Caligula*.)

1) My credit position.

From the telephone conversation between us that took place yesterday afternoon, Sunday, I could glean the conviction that you are not well up to date on the extent of the expenses incurred by me for more than two years that have, moreover, consented to eliminate the Viva company and to uphold Felix Cinematografica; and this also because, from 18 April 1984, you no longer examined and initialled the balance sheets that I have scrupulously kept.

Even if this incurs a cost of £88,000 [US\$59.10] for DHL, I consider it necessary and urgent to send you photocopy of the balance sheets, from the last page — number 26 — initialled by you, up to the latest, number 32.

75. Bitoun: letter to René Chateau, 8 August 1986 (FRC); Bitoun: letter to G.I.E. Hollywood Boulevard, 8 August 1986 (FRC); Bitoun: letter to Canal Plus, 8 August 1986; Bitoun: letter to Rossellini, 8 August 1986 (FRC).

76. Bitoun: letter to Chateau, 7 October 1986. FRC.

77. Bitoun: letter to Canal Plus, 7 October 1986. FRC.

78. Pascaline Gineste: letter to Bitoun, 14 October 1986. FRC.

79. Bitoun: letter to AMLF, 20 October 1986. FRC.

Upon the examination of the contents of said balance sheets, all rigorously verifiable, you can see:

a) that no professional compensation was debited by me, and it was due to me from May 1984 on;

b) that the interests on my financial exposure for many periods have not been debited, and, however, they have been contained to the maximum;

c) that though the two last checks of the Compagnia Cinematografica Prima, amounting to £18,000,000 [US\$12,089.06], are recorded as taken in, there results to my credit the sum of £9,429,675 [US\$6,333.11]. Towards this end it is necessary to point out that approximately £8,000,000 [US\$5,372.91] lire were spent from May 1986 on, and this exactly in function of obtaining the cessation of the videocassettes, unexpectedly enacted, for approximately 10,000,000 [US\$6,716.15] more with respect to the £25,000,000 [US\$16,790.36] of the preceding cessation proposal.

d) it is evident that, because of my above-stated credit position, no further sacrifices can be expected from me, being now very limited by modest financial resources, because of the financial collapse suffered by one of my sons-in-law;

e) among those related expenses incurred are £2,000,000 [US\$1,343.23] in covering the check, of equal amount, that you released to Marconi, Esq., without which he would not have been able to draft and present the appeal of the Biagi case. Then I had to pay the related withholding tax and, furthermore, the new annual tax, the government license tax, of £1,000,000 [US\$671.62]. I also had to provide for the notarial expenses and the renewal of the powers of attorney that can be deposited between 7/8 days); lastly, for the storage and the transportation of the copies of the film, without which everything could have gone dispersed. I am sending you photocopies of the documents in question of the rights of the videocassettes, drafted along the lines of the preceding one.

Yet there was some hope on the horizon. If we understand this correctly, two companies had expressed interest in distributing *I, Caligula* to Italian cinemas, while Rossellini was pinning his hopes on yet a third company, which was not so responsive.

2) Distribution of the film.

To date only two modest routes have opened up:

— that of Glam, who would give, in effect, a maximum of £70 million [US\$47,013.00] for the copies plus VAT, with an expiration of October 1987 on, in the amount of £10 million [US\$6,716.15] a month.

It would give, then, 13% net of the amount taken, according to indications from the Italian Society of Authors and Publishers, once costs have been covered. Since it has its own building, however, it would like the negative to be transferred to Technicolor;

— the solution by Centanni, who would maintain being able to cede the materials to the interested regional agents.

According to this, if we are able to get at least 40/45 copies in good condition from Cinechimica, we could get between 80 to 100 million lire [between US\$53,729.15 and \$67,161.43] from the agents, still as a matter of fact.

In order for this solution to help us in the recovery of all the copies and of all the previews and in order for it to try to bring an end to said responsibility, I had to sign the commitment for a compensation of £2,500,000 [US\$1,679.04] to be issued when things are done, by this coming 31 October.

This solution would be perhaps preferable to the first, but it would be best that you deal with it and examine each thing as it comes up.

Naturally the importance of Titanus is such that, if you were to succeed in convincing Lombardo, his solution would be preferable to all the others.

As I have already told you, in order to discover eventual abuse of plans I have maintained it necessary to take a subscription to the monthly updates from the Society of Italian Authors and Publishers.

3) People's Bank of Milan Checking Account.

As in the attached photocopy, the transfer of \$USA10,000 cost £15,922,549 [US\$10,693.81], for which, to my knowledge, the situation of the account should now be the following:

Balance on 23 May 1986	£	592,107	[US\$	397.66]	+
deposit on 23 May 86	"	17,400,000	[US\$	11,686.09]	
	"	17,992,107	[US\$	12,036.75]	-
— bank wire \$10,000	"	15,992,549	[US\$	10,693.81]	
Balance	£	1,999,558	[US\$	1,342.93]	

Best Regards,
Biagiotti

The month ended, predictably, with yet one more eviction notice served by Franco Rossellini's landlord, William A. Moses, citing \$864.15 in unpaid back rent.⁸⁰ That was followed on 15 August 1986 by the Marshal's Notice for seizure of Rossellini's property for unpaid rent of \$4,516.02.⁸¹

80. Civil Court of the City of New York, County of New York Housing Part, Notice of Petition, William Moses against Franco Rossellini, 28 July 1986. FRC.

81. Danny M. Weinheim, Civil Court of the City of New York, Marshal's Notice, *William A. Moses v Franco Rossellini*, 15 August 1986. FRC.

5 AUGUST 1986 — LUPOI CATCHES SOME MISTAKES

IT WAS NOT UNTIL NEARLY A MONTH after the two suits were filed in New York that Maurizio Lupoi had the opportunity to review them, and he immediately noticed the inaccurate statement about the abrogation of the October 1975 contract. He also caught a significant typographical error, and pointed out that it would have been useful to mention worldwide applicability of the Pretura's ruling as well as the French *exequatur*.⁸² It was too late, though; the damage had been done.

A SEPTEMBER TO REMEMBER

IT WAS SOMETIME EITHER IN SEPTEMBER 1985 or in September 1986 that an event occurred. The best guess is that it was in 1986.

Early on a Saturday morning in September the telephone in [Pat] Mahn's home on the Duke estate jangled. It was a very nervous and upset Paco [Rossellini's friend] calling from New York with the news from Rome. Deciphering the call was no easy task. The nervous youngster was gibbering in what is best described as "Spanglish," so Mahn finally resorted to Paco's native language to learn what had happened. Enzo [Natale, Rossellini's bodyguard] had been severely beaten and taken to a hospital. Franco was in hiding.... Doris [Duke] learned that Enzo had been kicked around severely, suffering a broken face, some broken ribs and a serious concussion. He eventually recovered.⁸³

11 SEPTEMBER 1986 — FIGHTING LIKE THE ENEMY

BY THIS TIME ROSSELLINI AND HIS LAWYERS had come to understand the virtues of Penthouse's legalistic maneuvers and performed a few such for themselves. As Penthouse had insulated itself by establishing overseas shell corporations in Liechtenstein and Switzerland with bank accounts in Vaduz, Felix would now insulate itself by establishing an overseas shell corporation in Cyprus, and that is how New Ventures Limited Filming came into being. Almost immediately after its founding, its name was changed to Cyprus Ventures Filming, with the acronym CVF. This new firm was based at the office of the accounting firm Coopers & Lybrand, which had a 10% interest and would choose

82. Lupoi: telegram to Lee N. Steiner, 5 August 1986. FRC.

83. Tom Valentine and Patrick Mahn, *Daddy's Duchess: The Unauthorized Biography of Doris Duke* (Secaucus NJ: Lyle Stuart, 1987), pp 188, 191.

the administrator as well as handle all the accounting needs. A local trust representing Franco Rossellini had a 90% interest. Rossellini paid a \$60,000 retainer fee ("investment") to cover legal fees. Where he got the \$60,000 is not revealed in the surviving paperwork. Felix would license television and videocassette rights to CVF, and the bank account was established at yet another country: Switzerland, at the Credit Suisse in Geneva. Don Getz, now working for Rossellini, would be in charge of sales.⁸⁴

As the resulting releases would reveal, Rossellini had made some alterations. The opening credits were changed once again. They were taken from a poor-quality duplicate of the image of the gold medallion, and over that image were new credits, in a different font, without any mention of Guccione or Penthouse. The movie was now "A FRANCO ROSSELLINI PRODUCTION." The closing credit scroll ended with a 1979 copyright notice by Felix Cinematografica Srl.

22 OCTOBER 1986 — EXEQUATUR ORDER IN BELGIUM (34TH LAWSUIT, CONTINUED)

FELIX'S CASE WAS NOW EVEN STRONGER with the Belgian recognition of the validity of Livio Fancelli's temporary restraining order from December. With the courts of three countries now agreeing that Felix alone held the copyright and video rights to *Caligula*, it looked as though Franco Rossellini would at last have justice on his side. Perhaps he could have, were it not for foolish mistakes and sabotage.

84. Lupoi: letter to Rossellini, 11 September 1986. FRC.