Thirty-Three

"A Shameful Attempt to Mislead the Court"[1]

"I like to do films in a friendly way." — *Franco Rossellini*[2]

While France and Belgium were dutifully recognizing the international validity of an Italian temporary restraining order, the US legal system considered it nonexistent.

20–22 October 1986 — US Law Is a Case Apart (35th and 36th Lawsuits, Continued)

Penthouse responded to Felix's two 17 July lawsuits with the requisite motions to dismiss. In response to the $5,000,000 complaint filed with the Supreme Court of the State of New York – County of New York,[3] attorney David J. Myerson simply denied Felix's allegations, and he had a few comments. In

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1. Penthouse's motion to dismiss (FRC), together with David J. Myerson, Affidavit, 22 October 1986 (FRC). *Felix Cinematografica Srl* v *Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Records, Ltd., Penthouse Clubs International Establishment, and Robert Guccione*, 83 Civ. 6183 (WCC) (1987). 671 F. Supp. 313, 315 (SDNY 20 October 1987). Judge William C. Conner presiding. Charles Miller of Hess Segal Guterman Pelz Steiner & Barovick for the Plaintiff, Richard M. Goldstein and Susan B. Ratner for the Defendants. FRC.

2. The full quote is, "They way I like to do films is in a friendly way where everybody works but when you have the star, all of a sudden, she thinks everybody has to work for her." Rossellini, interviewed in Bob Colacello, "Franco Rossellini," *Andy Warhol's Interview*, February 1975.

3. *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

regard to Felix's "First Cause of Action," which spelled out Penthouse's refusal to abide by contract, refusal to supply accurate accountings, and insistence upon under-reporting income, Myerson stated simply, "The complaint fails to state a cause of action." As regards the other causes of action: "This lawsuit is barred by the existence of a pending action"; "Litigation in this Court of certain of the claims in plaintiff's complaint is barred by the principle of forum non conveniens"; and "This lawsuit should be stayed pending the resolution of the prior pending actions relating to the Film."[4]

The case filed with the US District Court – Southern District of New York would be heard first. After that judgment had been rendered, the Superior Court of the State of New York – County of New York would hear the case. That would not happen for another year and a half.

In response to the complaint filed with the US District Court – Southern District of New York,[5] Penthouse attorneys Richard M. Goldstein and Susan B. Ratner (of Shea & Gould) also moved for dismissal.[6] Their response was 31 pages long, disorganized, and filled with references to case law to prove, first, that the court lacked subject-matter jurisdiction; second, that this matter had already been decided in Penthouse's favor; third, that the forum was improper and should be in Italy; and fourth, that the case should be stayed pending judgment in Italy.

To summarize Penthouse's legal objections succinctly, I need to organize Goldstein and Ratner's arguments somewhat more coherently than they themselves did.

As for the first objection, the court's lack of jurisdiction, Penthouse presented the argument to Judge William C. Conner that on 19 September 1983, in the same US District Court — Southern District of New York where Judge Edward

presiding. Charles Miller of Hess Segall Gutterman Pelz Steiner & Barovick (later Loeb Loeb & Hess, later Pryor Cash Sherman & Flynn) for the plaintiff, Shea & Gould for the defendants. FRC.

4. Penthouse's motion to dismiss, together with Myerson, Affidavit, 20 October 1986. *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. FRC.

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

6. Richard M. Goldstein (with Susan B. Ratner), Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's Complaint. FRC. *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). FRC.

Weinfeld had ruled, more than two years after Felix's original filing, that Penthouse Clubs International Establishment was an indispensable party to the action, and that since aliens were on opposing sides of the conflict (Penthouse Clubs was Liechtensteinian and Felix was Italian), a US court could not have jurisdiction.

Penthouse attorneys Goldstein and Ratner chose not to explain the reasoning behind Weinfeld's objection. This is the logical fallacy known as 'cherry picking,' choosing only evidence that supports a claim, while ignoring the contrary evidence, combined with the logical fallacy of 'quoting out of context,' excerpting a statement in a different context to distort its meaning. Weinfeld had argued that in order to determine definitively whether the October 1975 Joint Venture Agreement or the June 1976 Joint Production Agreement was the governing contract, Penthouse Clubs would need to be involved in the legal hearings. Goldstein and Ratner chose also not to explain that with the Settlement Agreement of February 1984, both sides agreed in writing that it was the June 1976 Joint Production Agreement that had governed. So that issue was settled. Nonetheless, Goldstein and Ratner insisted that "this action must be dismissed because it concerns precisely the same dispute that was the subject of the earlier litigation between the parties," a suit that Felix had discontinued "with prejudice." As we know, the previous suit concerned percentages and music rights, not the film's copyright or breach of the Settlement Agreement, which had not been drafted until after Weinfeld's dismissal. Judge Conner would not refute Penthouse in this matter.

The second objection, *res judicata*, namely that this issue had already been decided and that Felix was merely "judge shopping," was similarly fallacious. Goldstein and Ratner spent several pages establishing, through case law, the validity and universality of *res judicata*, and followed by stating that Justice Weinstein had already decided that the alleged copyright infringement was not a copyright claim *per se* but rather a breach of contract, and that a breach of contract "does not arise under the Copyright Act." Here Goldstein and Ratner utilized two logical fallacies: the 'association fallacy,' citing similarities in two events and arguing that they are therefore identical; and also '*ignoratio elenchi*,' making a valid argument that does not address the question. The two attorneys admitted that the previous suit concerned music rights, whereas the current suit concerned film rights, yet they chose not to explain that in the earlier lawsuit, Felix was objecting to Penthouse's *refusal to pay* for the music license it had granted for the issue of a soundtrack LP. The current complaint, on the other hand, concerned Penthouse's *fraudulent claim of copyright* over the film proper.

Judge Conner would not refute Penthouse in this matter. There was legal precedent for his decision. In 1964 Judge Edward Weinfeld, the same judge who had tried a previous Felix/Penthouse conflict, had ruled similarly in the case of *Harms* v. *Eliscu*. Weinfeld's verdict was appealed to circuit judges Friendly, Kaufman, and Anderson, who opened their ruling with:

> A layman would doubtless be surprised to learn that an action wherein the purported sole owner of a copyright alleged that persons claiming partial ownership had recorded their claim in the Copyright Office and had warned his licensees against disregarding their interests was not one "arising under any Act of Congress relating to... copyrights" over which 28 U.S.C. 1338 gives the federal courts exclusive jurisdiction. Yet precedents going back for more than a century teach that lesson and lead us to affirm Judge Weinfeld's dismissal of the complaint.[7]

So there you have it. If you wish to file a copyright claim with the US Copyright Office on somebody else's work, you are not legally violating copyright law and you stand a good chance of winning.

Goldstein and Ratner continued that "the broad language of the 1984 state court complaint and the Settlement Agreement confirm that *all* rights relating to any manner of exploitation of the Film were previously at issue. It is equally clear that *res judicata* bars Felix from now raising any aspect of those exploitation rights (e.g. videocassette sales) that it neglected to raise in the 1984 suit." That is such a misreading of the documents that it hardly merits comment. Nonetheless, I am obliged to comment. "All" rights had not previously been at issue. By stating that "all" rights had been at issue, Goldstein and Ratner were employing the logical fallacy known as the 'straw man,' the misrepresentation of a position. At the time of the previous hearings and during the negotiations leading to the Settlement Agreement, Felix had been completely unaware of the existence of videocassettes of *Caligula*, and would not learn about it until shortly afterwards. Further, Felix was not barred from raising new complaints concerning exploitation if such complaints stemmed from a violation of the Settlement Agreement. Judge Conner would not refute Penthouse in this matter.

The third objection, *forum non conveniens*, should be broken into its two component parts. As Goldstein and Ratner correctly stated, "Section 19 of the Settlement Agreement states clearly that all issues other than accounting questions *must* be raised in Italian courts." That was correct, and that was admittedly an unfortunate decision made in the Settlement Agreement, as US

7. *T.B. Harms Company* v *Edward Eliscu and Ross Jungnickel, Inc.*, 339 F.2d 823, No 93, Docket 28921. See https://bulk.resource.org/courts.gov/c/F2/339/339.F2d.823.93.28921_1.html.

courts are immune from Italian rulings, thus rendering any judgment in Italy legally meaningless in the United States.

The other component of this objection is "that an action be brought in the forum which best accommodates the private interests of the litigants, and the public interest in judicial economy." Goldstein and Ratner argued that the witnesses to the Settlement Agreement (which had been written in Italian and signed in Italy) were mostly in Italy. Again, that was not true. Except for PAC (Produzioni Atlas Consorziate Srl), which was almost incidental to the Settlement Agreement, all the parties and all the witnesses were living in New York City. Judge Conner would not refute Penthouse in this matter.

The fourth objection was pendency, specifically, that this identical legal case was currently being argued in Italy and awaiting a judgment. Goldstein and Ratner chose not to state that Judge Livio Fancelli had, within his temporary restraining order, unexpectedly ruled on the copyright issue in December 1985, and that Penthouse's several challenges to his ruling had failed utterly. Felix was the decisive and definitive winner in that legal suit. Goldstein and Ratner preferred to say that "the telex from defendants' counsel in Italy which is Exhibit M in the Exhibit Book, shows that litigation is far from resolved." I do not have the defense's exhibit book; nonetheless, it is easy to determine that Exhibit M referred to Gianni Massaro's complaint filed with the Supreme Court of Cassation challenging the Rome Civil Court's jurisdiction over foreign parties, and probably also to the upcoming hearings in the Civil Court of Rome.

Almost incredibly, Penthouse neglected to rebut Rossellini's false claim about the date of first publication! Penthouse also neglected to take advantage of Rossellini's misstep of singling out the English-language version as the item under contention, rather than the film in all versions.

Penthouse also submitted attorney David J. Myerson's "oral" deposition, in which he wrote essentially all the arguments Goldstein and Ratner had made above. This is the logical fallacy known as 'argument from repetition,' making it appear that the case has been discussed extensively to the point where future discussion is futile. Judge Conner would not refute Penthouse in this matter.

> As will be shown below, this lawsuit is a misleading, harassing, and patently improper attempt by plaintiff to reopen the same controversy that has not only been the subject of redundant litigation here and in other parts of the world, but was the basis of an action that was dismissed with prejudice almost three years ago pursuant to a Settlement Agreement which clearly defined the parties' rights in the Film, no matter how it is distributed. As discussed in greater detail below, under the Settlement Agreement, Felix's right essentially is to

> receive ten percent of the net profits of the Film's distribution. The allegations in Felix's complaint that it owns the copyright to the Film and that defendants' rights in the Film are limited to the "theatrical" distribution of the Film outside of Italy are utterly contradicted by the Settlement Agreement.
>
> Defendants categorically deny that plaintiff owns the copyright to the Film. Thus, notwithstanding plaintiff's transparent efforts to cast its claim in a way to try to circumvent the Settlement Agreement, the central issue in this lawsuit is: what are the parties' respective rights in the Film pursuant to the Settlement Agreement? That dispute simply may not be litigated in this Court.

Myerson continued, in his "oral" deposition, to explain that, regardless of which of the two contracts was governed, both contracts explicitly dealt with "*all*" rights to the film. He quoted from the Joint Venture Agreement of October 1975:

> [a]ny and all right, title and interest in and to the Photoplay and all elements and materials contained therein or pertaining thereto, including, but not limited to, all subsidiary rights, all rights in and to the literary, dramatical, and musical materials created or produced for the Joint Venture, and all commercial and merchandising rights....

Myerson here put his foot in his mouth. Penthouse's argument was that the October 1975 agreement governed, and that all subsidiary musical materials therefore automatically belonged to the joint venture. This contradicted the Settlement Agreement of 1984, which proved that the subsidiary musical materials had belonged exclusively to Felix, which in turn transferred that ownership to Penthouse. If those rights had belonged to the joint venture automatically, there would never have been an assignment, nor would Penthouse have offered to pay for such an assignment.

Myerson went on to specify that in this Joint Venture Agreement "the copyright to the Film would be held in the name of the Joint Venture." Myerson followed by quoting the correlative passage from the Joint Production Contract, with emphases:

> Felix guarantees to Penthouse [Films] the acquisition of the <u>utilization rights of the screenplay</u> on which the film will be based,... And Felix pledges to sell to Penthouse 50% (fifty per cent) of <u>said rights</u>.

Here Myerson again put his foot in his mouth. Neither party ever claimed that the copyright had actually been registered in the name of the Joint Venture, thus making clear that the Joint Venture Agreement had not governed. Utilization rights are not copyrights. Utilization rights are granted by license

from the copyright holder. Utilization rights to the screenplay do not constitute copyright of the film. As for Felix's pledge to sell to Penthouse 50 percent of the utilization rights, because of the complications we have seen above, Felix instead granted 90 percent of theatrical rights outside of Italy. By quoting from a contract that obligated Felix to sell its share of the rights to Penthouse, Myerson was hardly helping his case that the rights had belonged to Penthouse all along.

Myerson built upon that baseless foundation to argue that:

> Thus, the central issue in the litigation related to who owned what rights in the Film. The litigation was all encompassing; the parties sought to define <u>all</u> of their respective rights in the Film, no matter how exploited. This is important because it explains the all[-]encompassing nature of the subsequent Settlement Agreement between the parties.

It is true that in the Settlement Agreement all the parties did define *all* their respective rights, but in so doing they agreed that the Joint Production Contract and its amendments had governed, and by that Contract and its amendments, Felix owned 100 percent of the copyright. Nothing in the Settlement Agreement changed that. Further, the Settlement Agreement nowhere specified that it dealt with *all* forms of exploitation. (We analyzed article 14[d]'s unfortunate ambiguous typographical error in the preceding chapter.) It would not have helped Myerson's case to make that clear, and so he elided over that problem. In the above, Myerson employed the logical fallacies known as the 'straw man fallacy,' 'cherry picking,' and the 'association fallacy.' Judge Conner would not refute Penthouse on these matters.

Myerson, though, did make one good point. Among Felix's exhibits was a certified translation of the Settlement Agreement, but this was not the same as the certified translation made by Robert Paolucci, notarized on 4 January 1985. Felix's exhibit was fresh, by a different translator, Cira Cecere Pinna, notarized on 3 April 1986. It contained an error, a minor one, but one that Penthouse could capitalize upon. In Section 14(a), the original Italian "la quota di utile spettante a Felix in relazione alla distribuzione del film *Caligola*," translated by Paolucci as "the amount of profit pertaining to Felix in regard to distribution of the film *Caligola*", now became "the share of proceeds due Felix with respect to the theatrical distribution of the film *Caligula*." The translation of 'distribuzione' as 'theatrical distribution' occurred several times throughout the document. Myerson had a field day. This new "purported translation" was a "sham translation," a "shameful attempt to mislead the Court," for in the original Italian document, "*the word 'theatrical' appears nowhere*."

Myerson concluded with a duplicate of Goldstein and Ratner's claim that the Italian court had yet to decide upon the copyright issue, but with an additional detail: "Because, as noted in the telex, Mr. Massaro has been absent from Italy, we have not yet been able to obtain from him the relevant court documents confirming the foregoing but will provide them to the Court in a supplemental or reply affidavit as soon as we receive them and have them translated."

6 NOVEMBER 1986 — THE LANDLORD

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2127578467 MGMB TDMT NEW YORK NY 79 11-06 0535P EST
ZIP
MR WILLIAM MOSES
145 WEST 58 ST
NEW YORK NY 10019
ATTENTION MR MOSES

MY MOTHER TODAY AT 4:50 PM AT GUCCI SHOP HAS BEEN THREATENED ON THE PHONE BY SOMEBODY ON YOUR BEHALF SAYING THAT THEY WILL BREAK HER LEGS IF SHE DOESN'T PAY 4,000 DOLLARS BY TOMORROW. THIS IS ANOTHER OF MANY THREATS WE DAILY RECEIVE ON YOUR BEHALF. PLEASE CONTACT ME AT ONCE FOR EXPLANATIONS BEFORE WE HOLD YOU PERSONALLY RESPONSIBLE OF OUR SAFETY.
FRANCO ROSSELLINI

17:37 EST

MGMCOMP

19 JANUARY 1987 — FRANCE FOLLOWS THE RULE OF LAW (34TH LAWSUIT, CONTINUED)

DESPITE THE EXPECTED COMPLICATIONS in the United States, the French court proceeded as normal and appointed a bailiff to visit the French Public Cinematography Registry and examine all records relating to *Caligula*, and to visit the offices of Canal Plus and AMLF to retrieve any contracts related to *Caligula* and bring them to court for examination. Predictably, this did not sit well with Penthouse, and Guccione immediately hired a lawyer, Daniel Diedler, to counteract this ruling. Diedler found what he thought were convenient loopholes. Articles 145 and 493 of the New Civil Procedural Code indicated that injunctive relief for which an opposing party need not be summoned to court applied only to non-adversarial proceedings. Further, Article 138 forbade the forced production of documents during the course of proceedings. On those bases, a month later, 23 February 1987, Diedler, on behalf of Bob Guccione, Penthouse International, and Penthouse Films International, summoned Franco

Rossellini and Felix Cinematografica to court.[8] Penthouse had had until October 1986 to appeal the Superior Court's ruling, but declined to do so. Having missed the deadline, Penthouse chose instead to annul the ruling on jurisdictional grounds.

6 February 1987 — Penthouse's Unmet Liability

Maurizio Lupoi decided that three years was long enough to wait for Penthouse to meet its obligations under the Settlement Agreement of February 1984. He sent a letter to David J. Myerson, referring to the developments in the US and Italy, and pointing out that "you have discontinued the submission of the accounting statements called by Section 14 of the 1984 settlement." He took the occasion to remind Myerson that Penthouse had not met its contractual obligations to pay for the accounting by Solomon Finger & Newman, which forced that audit to remain uncompleted. He also dutifully notified Myerson that Laventhol & Horvath would continue the work that Finger had started.

And so, while Franco Rossellini was now fighting off a suit for nonpayment of $2,724.70 of delinquent telephone bills,[9] his lawyers set about responding to Penthouse's motion to dismiss the copyright-infringement suit.

20 February 1987 — US District Court – Southern District of New York: Felix Responds to Penthouse (35th Lawsuit, Continued)

Since Penthouse's statements to the court were largely fallacious, since the Italian court, in its temporary restraining order, agreed, unappealably, that Penthouse did not own any copyright to this Italian film, since Penthouse had so obviously violated copyright law as well as its new contract with Felix, and since there was more than sufficient government paperwork to prove all of this, Franco Rossellini felt confident in making his statement to the court.

Rossellini's previous attorney, Charles Miller, left the case (for nonpayment?). The new lawyers, Gideon Cashman and Carol Komissaroff, penned some of the arguments, and quite skillfully.[10] After explaining how the

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8. *Penthouse International, Ltd., et Penthouse Films International, Ltd.*, contre *Felix Cinematografica Srl*, Tribunal de Grande Instance de Paris. Daniel Diedler of Diedler-de la Robertie Partners for the plaintiff, Jacques-Georges Bitoun for the defendants. FRC.

9. Seymour Margolin of Margolin & Meltzer: letter to Rossellini, 20 February 1987, referring to a judgment of the Civil Court of the City of New York of 19 March 1987. FRC.

10. Plaintiff's Memorandum of Law in Support of Its Application for a Preliminary Injunction and for a Seizure and Impoundment Order and in Opposition to Defendants' Motion to Dismiss or

current complaints differed entirely from the complaints dismissed in 1983, Cashman and Komissaroff stated:

> This action concerns the fraudulent misappropriation by defendants of plaintiff's U.S. copyright and the infringement of plaintiff's ownership rights to "Caligula" by defendants' production and distribution of unauthorized videocassettes of "Caligula." Since there is no contract assigning either Felix Cinematografica's copyright rights or its videocassette rights in the work "Caligula" to defendants, this action can not be said to resemble the "contract" action involving music rights dismissed by Judge Weinfeld in 1981.

That was correct, except that the dismissal occurred in 1983, not 1981.

Cashman and Komissoroff at last explained, accurately, succinctly, and in simple English the Italian laws concerning copyright and other rights:

> Theatrical distribution rights are vested in the producer of a motion picture by operation of Italian law; other rights are held by the authors of the screenplay unless expressly transferred in writing. Therefore, at the time of the completion of the film, Felix Cinematografica was vested with a "producer's" rights, and had also acquired by assignment "all rights, none excluded, deriving to [Gore Vidal] and/or which could in any way in the future derive to him as co-author" of "Caligula." Rossellini Aff. ¶¶ 16–18; Exhibit C.
>
> In 1980, Felix Cinematografica acquired from Edizioni Musicali Gemelli S.r.l. the music rights to "Caligula." However, it was not until March of 1985 that Felix Cinematografica acquired by proper written assignment "all rights, none excluded, deriving to [Masolino D'Amico] and/or which could in any way in the future derive to him as co-author" of "Caligula." Rossellini Aff. ¶¶ 19–20; Exhibit D. Therefore, in March of 1985 Felix Cinematografica had acquired the producer's rights, authors' rights, and allied music rights to "Caligula."

We should supplement this with a note about the Berne Convention for the Protection of Literary and Artistic Works, by which no formal declaration of copyright is required. A work is automatically copyrighted from the moment of its creation. The United States refused to join the Berne Convention until 1 March 1989, two years after this hearing. In the meantime, works protected under the Berne Convention would have a difficult time being protected in the United States. That was certainly the case with *Caligula*, as we can see.

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for a Stay, 20 February 1987. *Felix Cinematografica Srl* v *Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Records, Ltd., Penthouse Clubs International Establishment, and Robert Guccione*, 83 Civ. 6183 (WCC) (1987). 671 F. Supp. 313, 315 (SDNY 20 October 1987). FRC.

The two Felix attorneys also detailed the meaning of their evidence. They quoted from the Italian Ministry of Tourism and Entertainment and from the Italian Foreign Exchange Office to demonstrate that government entities officially recognized Felix's ownership of the film, and recognized Penthouse's rights as consisting only of showing the film in non-Italian cinemas and of issuing the music album. Said they:

> In contrast, defendants offer no such evidence supporting their claim of right. Despite their voluminous collection of old complaints and briefs which they submitted to Judge Weinfeld in the 1981 Action (Defendants Exhibit Book Exhibits B, C, D, E, F, and H) nowhere do defendants append the simplest document under which they claim to be acting lawfully: the copyright registration in which they falsely ascribe copyright claimant status to themselves. In fact, nowhere in the affidavit of David Myerson (the "Myerson Aff.") submitted in support of the motion to dismiss plaintiff's complaint does he claim that any of the Penthouse defendants owns the rights in "Caligula." He merely "categorically den[ies] that Plaintiff owns the copyright to the Film," Myerson Aff. ¶ 4.
>
> The original copyright registration herein remains in full force and effect, despite defendants' false statements therein. In that copyright registration, defendants concede that "author" status is vested in Felix Cinematografica. By subsequent supplemental registration Felix Cinematografica has corrected the misstatements in the earlier documents and asserted copyright claimant status in its own right. Standing alone, these competing claims of right require the construction of the copyright act for their resolution, and therefore confer jurisdiction over this dispute exclusively in the federal court....
>
> Defendants demonstrate their bad faith by claiming in this action that jurisdiction is only proper in Italy, despite having challenged that jurisdiction when Felix Cinematografica brought suit in the Court of Rome. Defendants' bad faith is further demonstrated by its knee jerk "lack of jurisdiction" motions at every turn, wasting precious judicial time and resources of this Court, the Court of Rome, and requiring Felix Cinematografica to spend considerable unnecessary funds in defense. Defendants' bad faith is further demonstrated by its unsubstantiated false claim of copyright claimant status, the initial basis on which this Court's jurisdiction is invoked. Defendants' bad faith is further demonstrated by its claim of need before the Copyright Office for an expedited copyright registration to wage a non-existent battle against film pirates.
>
> Most telling, perhaps is defendants' demonstrated bad faith arising from their inconsistent postures with respect to claims of ownership. If the Penthouse defendants, in fact, held all of the rights to "Caligula" as

> they purported to do in 1980 when they registered the copyright to "Caligula" with the Copyright Office, they never would have brought this motion on procedural grounds. Production of the purported "assignment" would go a long way toward demonstrating their claim of right, and would be considerably more persuasive than the indignant huffings in the Myerson Aff. that copyright ownership is not vested Felix Cinematografica.

Franco Rossellini, in his affidavit,[11] also spoke of Penthouse's series of claims in every action that the court in question has no jurisdiction:

> 5. Felix Cinematografica sought a preliminary injunction from the Italian courts, and prevailed on its motion. By order dated December 9, 1985, the Italian court issued a preliminary injunction restraining defendants from producing or distributing videocassettes of "Caligula" in derogation of Felix Cinematografica's ownership rights.....
>
> 6. Claiming that the Italian court was somehow lacking in jurisdiction over defendants and was powerless to restrain distributors in the United States, defendants have not complied with the order. Because the preliminary injunction is not appealable, defendants have sought to collaterally challenge the jurisdiction of the court....
>
> 7. ...Subsequent to defendants' challenge to the jurisdiction of the Italian courts to restrain them, Felix Cinematografica therefore brought suit in this Court to protect its rights under U.S. copyright laws, and concurrently to ask this court's aid in enforcing the preliminary injunction issued by the court of Rome.
>
> 8. In response, defendants have moved to dismiss plaintiff's complaint, asserting that this action belongs before the Italian courts. Given this blatant example of a judicial run-around, plaintiff finds it interesting that it is defendants that complain that they are being harassed.
>
> 9. It is obvious that defendants' attempt to oust plaintiff from this court is merely the execution of their wish to deprive plaintiff of all judicial forums. Eventually Felix Cinematografica will run out of money defending procedural motions and will be unable to continue litigating to protect its rights. Defendants will have thereby prevailed, not because they are entitled to, but because they have greater resources. Such a result should not be permitted.

In his affidavit, Rossellini detailed the Italian ruling and its worldwide effect, as well as the French and Belgian exequatur orders. He went on to say:

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11. Rossellini, Affidavit, 20 February 1987. *Felix Cinematografica Srl* v *Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Records, Ltd., Penthouse Clubs International Establishment, and Robert Guccione*, 83 Civ. 6183 (WCC) (1987). 671 F. Supp. 313, 315 (SDNY 20 October 1987). FRC.

> 41. As far as is known, no action has ever been taken by defendants to cease the distribution of videocassettes either in this country or abroad. In fact, during the week of February 7, 1987, I purchased a videocassette in New York carrying a copyright notice bearing the name of Penthouse Clubs International Establishment and including a "commercial" at the end featuring defendant Robert Guccione offering for sale an "X" rated version of "Caligula." The "X" rated version was copyrighted by Penthouse Films International in 1979.
>
> 42. It is respectfully submitted that if defendants are permitted to continue to hold themselves out as copyright claimant and continue to market videocassettes (and other allied exploitation rights) under false claim of right, the destruction and diversion of Felix Cinematografica's valuable property right in the United States may well be complete. If defendants are further permitted to flaunt in this country what they have been restrained from doing in others, Felix Cinematografica will have been rendered impotent to protect its copyright anywhere.[12]

Cashman and Komissaroff, on solid evidence, predicted the future as well:

> Equally important, unless the infringing videocassettes are immediately seized, defendants will undoubtedly secret and/or transfer the goods into the hands any one of its related organizations in countries in which plaintiff has not yet been granted a preliminary injunction against the sale of the infringing videocassettes, misleading a wholly new set of potential distributors, not to mention the public, and therefore attempt to moot Felix Cinematografica's efforts to halt the distribution and sale of the infringing videocassettes, from which a steady source of income is diverted from plaintiff, and which stand in direct competition with the exploitation of Felix Cinematografica's rights in other formats, such as cable....

Cashman and Komissaroff devoted 44 pages altogether to their response, and correctly summed up the problem:

> Felix Cinematografica has demonstrated to this court — and to the courts of Europe — that that it holds the chain of title to "Caligula." Rossellini Aff. ¶¶ 16–25; Exhibits B, C, D and E. Penthouse does not and cannot make the same demonstration. However, because of the copyright notices on the videocassettes listing Penthouse International Ltd. or Penthouse Clubs International Establishment, doubt exists in the

12. To demonstrate how careless some aspects of Felix's response were, we should point out that Franco's paragraph, "It is respectfully submitted... copyright anywhere," is a verbatim copy of a paragraph on page 13 of Felix's preliminary statement submitted that same day. There are numerous other passages in the preliminary statement and the two affidavits that are exact or nearly exact copies of one another.

> marketplace, effectively precluding Felix Cinematografica from exercising its rights of exploitation. Times passes, and markets close, markets that Felix Cinematografica may never be able to salvage. (p 21)

Importantly, they also made clear that US courts allow impoundment of offending merchandise "at any time during the pendency of a copyright infringement action." They also forcefully rebutted Penthouse's claim that the suit must be settled in Italy: "the 1984 settlement agreement does not address the issue of fraudulent representations in copyright registrations in the United States. Nor did the 1984 Settlement Agreement make any reference whatsoever to videocassettes of 'Caligula' or any allied rights subject to 'interpretation' other than certain music rights. Thus, the venue selection provision does not apply to this matter."

Despite all their wonderful work, Cashman and Komissaroff made one serious error, an error that cost them their case:

> Moreover, neither the wrongful acts of defendants nor acquisition of videocassette rights by plaintiff occurred until subsequent to the settlement agreement signed by the parties in 1984. Therefore, neither the wrongful acts of defendants nor the acquisition of rights by plaintiff can properly be said to be "subsumed" in the 1984 Settlement Agreement and its accompanying dismissal with prejudice upon which defendants' claim of res iudicata is founded....

That was only partly right. Cashman and Komissaroff here followed Franco's lead, accepting his documentation which they thought confirmed his memory of events. They were all wrong. It is true that the video editions were not released to the American market until late March 1984, subsequent to the Settlement Agreement, and thus the complaint about videos could not be invalidated by *res iudicata*. But Penthouse's fraudulent copyright registration occurred *prior* to the Settlement Agreement, and Rossellini first learned it about prior to the Settlement Agreement.

It did not help that Franco Rossellini, in his accompanying affidavit, made this same error. Most of what he wrote was correct, of course, but what he wrote was tainted by a serious problem. Let us take a look:

> 26. With respect to rights held under and pursuant to U.S. copyright laws, I turn now to the discovery of the fraudulent registration of "Caligula" in the name of Penthouse Films International.
>
> 27. Penthouse Films International Ltd. registered the copyright to the motion picture "Caligula" with the U.S. copyright office in November of 1980. However, Penthouse Films International, Ltd.[,] never informed me that it had fraudulently registered the copyright in

its own name. On the face of the copyright registration form, Penthouse Films International[,] Ltd., claimed the acquisition of rights sufficient to qualify it as "copyright claimant" by virtue of "assignment" from Felix Cinematografica. A copy of the registration form is attached hereto as Exhibit F.

28. I discovered this fraudulent registration in April or May of 1984 when I visited New York and found a videocassette of the film "Caligula" in a store. Memory fails with respect to whether I was more surprised at the existence of an unauthorized videocassette of "Caligula" or by the copyright notice on the box which read: "Program Copyright 1979 Penthouse Films International Ltd. All Rights Reserved." I purchased the videocassette and made a photocopy of the box. Attached hereto as Exhibit G is a photocopy of the cover of the box.

29. I wrote immediately to the United States copyright officials and received from them copies of the contents of the file on "Caligula". Among the papers sent me were (a) the copyright registration filed by Penthouse International, (b) a letter from defendants to the copyright office requesting expedited handling, and (c) an assignment of the copyright from Penthouse Films International Ltd. to Penthouse Clubs. International Establishment.

30. Although the copyright registration filed by defendants claimed copyright ownership by virtue of assignment, conspicuously absent from the file was an assignment of copyright rights to the work. For that reason, I telephoned the Copyright Office to determine whether there was any paper in the file purporting to be an assignment of the original rights to "Caligula." I was told that there was no such document in the file.

31. On December 20, 1984, plaintiff requested in writing from David J. Myerson, Esq., Executive Vice President and Chief Operating Officer of Penthouse International Ltd., a copy of the purported assignment by which defendants had acquired copyright rights to "Caligula," and further requested copies of the Penthouse Films International file on the F.B.I. investigation which Mr. Myerson had said accounted for Penthouse's request for an "expedited" registration. A copy of the December 20, 1984[,] letter is attached hereto as Exhibit H.

32. Also attached to Exhibit H is a copy of Mr. Myerson's reply dated January 10, 1985 enclosing the copyright assignment from Penthouse International Ltd. to Penthouse Clubs International Establishment, making no reference whatsoever to an assignment from the original authors or Felix Cinematografica to Penthouse Films International Ltd. He further states that he is unable to find the file relating to the F.B.I. registration.

33. Such an assignment has, of course, never existed. Although Felix Cinematografica has repeatedly offered to transfer its rights to

> "Caligula" to defendants, the latest offer occurring as recently as January 6, 1986, no such assignment of Felix Cinematografica's rights has occurred.
>
> 34. Therefore, defendants' assertion in the registration of the copyright in "Caligula" that it is "copyright claimant" is false. Their claim of... right to produce and distribute videocassettes of "Caligula" is similarly false. This conclusion is reinforced by the fact that Felix Cinematografica did not itself hold the all of the rights to produce and distribute videocassettes of "Caligula" until March of 1985. No agreement between the parties is alleged to have occurred thereafter.

We have to wonder why Rossellini and his lawyers would make such a gross misstatement in their collective rejoinder. When we re-examine the evidence, though, we can see the source of the misremembrance. When Rossellini filed his first round of suits against Penthouse in 1981, in the US as well as in Italy, he was unaware of Penthouse's copyright claim.

During the first two years of legal conflicts, beginning in March 1981, Rossellini knew nothing of Penthouse's copyright registration. It was not until March 1983 when he read Jay Julien's draft response to the US District Court that he learned about this, and scribbled in surprise: "**NEVER SEEN THAT!!!!!**" Rossellini could not fathom why Julien declined to press charges over this infringement. The Settlement Agreement of February 1984 then normalized relations. This novative contract accepted the June 1976 contract and its amendments as having governed; thus Rossellini and his lawyers presumed (wrongly) that the issue was thereby settled, for the June 1976 contract and its amendments gave Felix total ownership of the copyright — though only by default according to the Berne Convention and Italian law, and not explicitly.

Just two months after signing that Settlement Agreement, Rossellini was flabbergasted to see a videocassette of *Caligula* for sale at a shop, with the attribution "Program Copyright 1979 Penthouse Films International Ltd." He purchased the videocassette and asked Julien to consult with E. Fulton Brylawski, which Julien did in June 1984. Julien ordered a certified copy from the US Copyright Office, and that is why, in August 1984, Rossellini again saw for himself Penthouse's copyright registration, which he did not remember having seen earlier when it was exhibited in 1983. Once we digest this progression of events, we can understand why Rossellini misremembered and misspoke — but by misremembering and misspeaking, he played directly into Penthouse's hands.

His attorney Carol Komissaroff made matters even worse in her affidavit to the court:

> 4. Neither the fraudulent misappropriation claim nor the claim of infringement due to the unauthorized production and distribution of videocassettes of "Caligula" arose before February 2, 1984, and consequently neither of these matters was addressed in the litigation of 1981 nor the settlement accord reached by the parties in February of 1984.

What these incorrect statements mean is that Felix was now making a new argument. In addition to the issue of the chain of title, and in addition to the issue of the fraudulent copyright registration, the new argument is one concerned with timing. In arguing for dismissal, Penthouse argued that Felix was filing suit over issues that had been settled by the Settlement Agreement. Anything settled by the Settlement Agreement could not be brought up again in court. Rossellini was incorrectly making the case that the discovery of the copyright infringement occurred after the Settlement Agreement. Rossellini was wrong. Komissaroff was even further off-base when she affirmed that the fraudulent copyright registration occurred after 2 February 1984. And for those simple misstatements, repeated several times in the counter to the motion to dismiss and in the affidavits, Felix would not be able to win. Substantive issues such as chain of title and copyright registration would now become legally meaningless. All that mattered was the procedural issue of Felix bringing up an outdated charge after the settlement. By not explicitly agreeing on the copyright issue in the Settlement Agreement, Felix, according to US law, relinquished its copyright claim to *Caligula*.

There was still a way to rescue the situation. Felix and its lawyers could have explained to the court that the Settlement Agreement, which was signed in Italy under Italian jurisdiction, gave Felix and no one else the copyright. Thus, the issue had indeed been brought up in the settlement, and all parties had agreed that Felix was the owner. Felix did not make such an argument before the court.

2 MARCH 1987 — ENFORCING THE ITALIAN RULING

DON GETZ BEGAN TO GATHER some of the information about the contracts that Penthouse had signed with various distributors throughout the world, and reported his findings to Rossellini. Nippon Herald had a contract for Japan, Ízaro had a contract for Spain, and Tobis Filmkunst had a contract for Germany. There was news of a video contract for Germany held by Constantin Video GmBH. With this information in hand, Felix, yet again, went about its by-now familiar routine of sending out its rounds of letters of warning, starting with Vestron in the Americas, Constantin in Germany, Nippon Herald in Japan, and possibly

other distributors as well. The results, as one can easily predict, would be the same as ever.

March 2, 1987

Gentlemen:

We represent Felix Cinematografica, the producer of the motion picture "Caligula".

We have been instructed by our said client to advice [*sic*] you that an injunction has been issued on December 9, 1985[,] by the court in Rome, Italy ordering Penthouse International Ltd and Penthouse Film International Limited to abstain from producing or causing third parties to produce any further video cassettes of the motion picture "Caligula" and to cease from distributing or causing third parties to distribute the video cassette produced before the judgment was entered.

As a matter of law, the court found that Felix Cinematografica is the sole owner of the video rights.

The injunction is enforceable worldwide.

The French, and Belgium courts have issued identical injunctions by recognizing the one issued by the Rome court.

Our client has advised us that you have been and currently are distributing video cassettes from the motion picture "Caligula".

Neither Penthouse International Ltd nor any other Penthouse company have ever acquired the video cassette right from our client. Our client has never assigned said rights, nor has it ever granted any video cassette licence to any company or person anywhere in the world.

Based on the above, we are of the opinion that:

1. You are accountable to our client for all the sales of the video cassettes since you would be unable to show a chain of title flowing from our client to you.

2. By continuing the distribution of the video cassettes, thereby allowing Penthouse to defy the order of the Rome court, you are liable to us just as Penthouse is.

Accordingly, demand is hereby made that you immediately cease any further distribution of the video cassettes.

A translation of the Rome and Paris court's injunction is enclosed herewith.

Very truly yours,
Studio Legale Lupoi[13]

13. Lupoi: letter to Ízaro Films (Madrid), Constantin Video GmbH (Munich), Nippon Herald Films, Inc. (Tokyo), Tobis Filmkunst GmbH (Berlin), 2 March 1987. FRC.

5 MARCH 1987 — LUPOI RESPONDS TO PENTHOUSE'S ITALIAN APPEAL (34TH LAWSUIT, CONTINUED)

ALMOST A YEAR AND A HALF after Gianni Massaro filed at the Supreme Court of Cassation his challenge to the Rome Civil Court's jurisdiction, Maurizio Lupoi responded. We can see that his patience had begun to wear thin, as he began to adopt the Penthouse-style hostility in his remarks, which opened with these telling paragraphs:

> It is difficult to catch sight of any glimmer of foundation in the proposed claim for a ruling of jurisdiction, while the bad faith or the serious guilt is evident in the petitioner consisting in the crass and inexcusable ignorance, which is recognized together with the bad faith.
>
> The petitioner, as is customary, would have had to take under examination the criteria of jurisdictional connection enunciated in article 4 of the Civil Procedural Code and demonstrate how these are inapplicable to the litigation. He, instead, enunciates criteria of jurisdictional connection findable not in article 4 of the Civil Procedural Code but only in his private legal fantasy, and then demonstrates that Italian jurisdiction cannot be rooted on these.[14]

Lupoi noted that in the first oral defenses as well as in the first written defenses (10 July 1985), Penthouse raised ten objections, not one of which was related to jurisdiction. The objection to jurisdiction was not raised until things had begun to go badly for Penthouse. After making lengthy mention of the widespread recognition of the abuse of preventive rulings on jurisdiction, Lupoi pointed out that:

> This Honorable Court should like to keep in mind that in the US two rulings are pending among the same parties, set forth after the decision of the magistrate and on the basis of such decision, in the course of which the American companies objected, among other things, that the jurisdiction of the magistrate is still *sub iudice* [under judgment] and they therefore were able to thus delay even the proceedings in the United States.

14. Maurizio Lupoi, Response, 5 March 1987. *Felix Cinematografica S.r.l.* contro *Penthouse International, Ltd., e Penthouse Clubs International e nei confronti di Cosmopolitan Cinematografica S.r.l.*, Corte Suprema di Cassazione a Sezioni Unite in sede di regolamento di giurisdizione (1 March 1988). FRC.

18 AND 19 MARCH 1987 — INCREASING CONFIDENCE: THE BRITISH COURT ISSUES AN EXEQUATUR RULING (34TH LAWSUIT, CONTINUED)

THE BRITISH HIGH COURT followed France and Belgium in acknowledging the international force of Judge Livio Fancelli's ruling against Penthouse, and issued an exequatur ordering Penthouse to cease all manufacture and sale of videocassettes of *Caligula*, with an appeal period to expire one month hence.[15] This was "the first declaratory Judgment to have been registered in the High Court of Justice in England under the new laws."[16]

19 MARCH 1987 — TROUBLES IN GERMANY (34TH LAWSUIT, CONTINUED)

JUST ONE DAY LATER, the German Civil Court in Munich issued the opposite ruling, declaring itself incompetent to issue a seizure order.[17] On this latter point Jacques-Georges Bitoun filed an appeal through his German legal contact, Dr D. Schenk of Nörr, Stiefenhoffer & Lutz, the firm that had argued the case in that country. Their total charges were 6,000 DM (approximately US$3,339.09).[18] The Magistrate of the Court of Munich suggested that Bitoun provide documented proof of videocassette sales in Germany, and to provide an idea of the financial damages that Felix suffered from those sales.[19]

19 MARCH 1987 — DECREASING CONFIDENCE: TOO LATE TO GO BACK

REGARDLESS OF COURT VICTORIES, despite the chain of title, notwithstanding government recognition, and in spite of court orders, there was precious little to be done to regain control of a commodity that had for so many years been under the illicit charge of an adversary. Massimo Ferrara-Santamaria realized this all too painfully. Nonetheless, he did what he could. He telephoned Canal Plus, and when the secretary asked his name, she told him what he was expecting to hear: Madame Ginestra is out of Paris. That may have been true, but she was aware of the *Caligula* troubles and did not want to hear from anyone

15. *Felix Cinematografica* v *Penthouse Film International, Ltd., and Penthouse International, Ltd.*, High Court of Justice, Queen's Bench Division, N° 5/1987, ruling issued 18 March 1987. FRC. See also Keith A. Price of Bartletts de Reya, Solicitors: letter to Massimo Ferrara-Santamaria, 27 March 1987. FRC.

16. Keith A. Price for Bartletts de Reya: letter to Felix Cinematografica, 17 July 1977. FRC.

17. *Felix Cinematografica Srl* v *Penthouse International, Ltd., and Penthouse Films International, Ltd.*, Landgericht München I, 21. Zivilkammer, Geschäfts-Nr.: 21 0 23 796/86 Go, 19 March 1987. Felix's lawyers for this case were Bernd Eichinger, Herman Weigel, and Karl Einz Bollinghaus. FRC.

18. Jacques-Georges Bitoun: letters to Rossellini, 27 March 1987 and 28 April 1987; Dr D. Schenk of Nörr Stiefenhoffer & Lutz: letter to Bitoun, 24 April 1987. FRC.

19. Bitoun: letter to Rossellini, 31 March 1987. FRC.

about the topic. He then called Paul Rassam of AMLF. They had been quite cordial and remained so. After exchanging pleasantries, Rassam acknowledged that Rossellini had been swindled, but explained that because the film had been in circulation in France for seven years already, it was a bit late now for Rossellini to submit a chain of title to the courts, especially since Penthouse had such a fine reputation as a financially booming group of companies. When Ferrara pointed out to Rassam that the AMLF contract specified incorrectly that *Caligula* was an American film rather than Italian, Rassam had a peculiar response. He hypothesized that since the film had been banned in Italy, it was likely that the European Community may have wished to give the impression of obeying the law by pretending it was a US film rather than a banned Italian film.[20]

UNDETERMINED TIME — UNDERSTANDING FRANCO

THE PUBLISHED STORY is that Franco Rossellini was continually wooing Doris Duke with extravagant gifts and bouquets of flowers, without telling her that he was paying for everything out of her own funds.[21] That story on the face of it is absurd. Duke knew full well that Rossellini did not have a penny to his name, and she would never have allowed him to expend his own money on gifts while he was still indebted to her for over a hundred thousand dollars. The truth was surely that Duke had authorized Rossellini over the years to make purchases for her while on his travels, and he did so, topping them off with flowers. She also allowed him to call her collect. Over the years the bills mounted to about $215,000. When a servant, Patrick Mahn, included those expenses in an account of Rossellini's debts (in 1987?), Duke feigned shock and indignation and schemed a way to get even. She phoned her New York attorney, Samuel N. Greenspoon, to insist, "You are going to take the Penthouse matter over. I want you to go and make some sense of this mess he has gotten himself into." Duke knew that Greenspoon was one of Penthouse's battalion of attorneys, and she knew that Greenspoon's partner, Norman Roy Grutman, was Penthouse's principal outside attorney. Grutman, to complete the geometry, was also one of Duke's attorneys. She was asking the firm to represent both sides of a conflict. When Duke issued her ultimatum to Rossellini, he erupted. "I swear to you, if those fucking lawyers had stayed out of this deal, there would never have been a problem. I am

20. Massimo Ferrar-Santamaria: letter to Rossellini, 19 March 1987. Ferrara mistakenly wrote "English" rather than "American," but even so, his meaning is clear. FRC.

21. Tom Valentine and Patrick Mahn, *Daddy's Duchess: An Unauthorized Biography of Doris Duke, the World's Wealthiest Woman* (Secaucus: Lyle Stuart, 1987), p. 171.

convinced that Grutman and Greenspoon told Guccione that he didn't have to pay me a dime."[22] When his reaction was conveyed to Greenspoon, the attorney responded laconically that he "never could understand Franco when he talked."[23]

4 APRIL 1987 — ARGENTINA

THIS IS A CONFIRMATION COPY OF THE FOLLOWING MESSAGE:

2127578467 TDMT UG NEW YORK NY 168/165 04-04 1057A EST
WUW 39022901 ABSA AR
ADOLFO BULLRICH Y CIA. LTDA
BUENOSAIRES ARGENTINA
ON MARCH 27 A CERTIFIED LETTER WAS SENT TO JEAN PIERRE MARCIE RIVIERE AT ALVEAR 1760 THE LETTER READ IN ITS ESSENTIAL PARAGRAPH AS FOLLOWS: JEAN PIERRE FOLLOWING YOUR TELEPHONE CALL THIS MORNING AT 9AM AT MY HOTEL PLAZA FRANCIA, I TAKE NOTICE OF YOUR THREAT: THAT IF I EVER TRY TO COME BACK TO ARGENTINA YOU WILL ARRANGE TO BREAK MY NECK HERE IN BUENOS AIRES OR EVEN NEW YORK, SIGNED FRANCO ROSSELLINI. SUCH A LETTER HAS BEEN REJECTED BY THE ADDRESSEE AND SENT BACK TO ROSSELLINI AT HIS NEW YORK ADDRESS ON APRIL 3 BY ADOLFO BULLRICH Y CIA LTDA AND GEORGINA FERRARI DE SALINAS, BE AWARE NEVERTHELESS THAT THE DEATH THREAT HAS BEEN REPORTED TO THE POLICE IN BUENOS AIRES AND NEW YORK AND AN ORDER OF PROTECTION IS GOING TO BE ISSUED. THE ORGINIAL OF THE SAID REJECTED LETTER IS DEPOSITED CARE OF THE LAW FIRM PRYOR CASHMAN SHERMAN 410 PARK AVENUE NEW YORK.
VINCENZO NATALE

10:54 EST

MGMCOMP

6 APRIL 1987 — INCREASING CONFIDENCE: SEIZURE ORDER (34TH LAWSUIT, CONTINUED)

IT IS IMPOSSIBLE, NOW, TO IMAGINE THE EMOTIONS of those involved in the various proceedings, for just after the realization that they had made major blunders over the past decade, suddenly the French court issued an order even more favorable to Felix. The judge at the Tribunal of Commerce in Paris ordered that all videocassettes of Caligula at AMLF, Vista Video, Éditions des Savannes, and Éditions Filipacchi be confiscated as counterfeits. It was determined from the paperwork gathered from the licensees that Penthouse had earned over 2,700,000 francs (US$444,893.94) from the videocassette deals in France. The court provisionally awarded Felix 3,000,000 francs (US$494,326.60) in damages. When Jacques-Georges Bitoun notified Franco Rossellini of the good news, he was

22. Valentine and Mahn, *op. cit.*, pp 171–173. Valentine and Mahn's chronology is clearly at fault.
23. *Ibid*.

perplexed that his client did not bother to reply.[24] He was simply unaware of the nightmare that Rossellini was undergoing in New York and Rome.[25]

7 April 1987 — Penthouse Reacts (34th Lawsuit, Continued)

The very next day Keith A. Price of Bartletts de Reya wrote to inform Rossellini that there were more troubles ahead. Ronald Fletcher Baker & Co had contacted him, challenging the British Court's order on procedural grounds for irregularities. The hearing would likely be at the end of June, and so until then everything would be on hold. Further, the Penthouse solicitors notified Price that should their procedural objection fail, they would then ask for a stay in order to challenge the ruling on the basis of the registration.[26]

8 April 1987 — Predictable Responses

Lupoi's 2nd March letters to video distributors elicited the necessary reaction. The first response was from Nishimura & Sanada, the attorneys for Nippon Herald in Japan, and it demonstrates that rulings with international effect had, in practice, no international effect. "Our client was extremely surprised to learn that Felix Cinematografica claims sole ownership of the video rights for the motion picture *Caligula*. Penthouse Clubs International Establishment ('Penthouse') has warranted to our client that it controls all such video rights. Therefore, please contact Penthouse to discuss this matter."[27] Absent a court ruling in Japan, there was no other possible response from Nippon Herald's attorneys.

1987 — Unlicensed VHS Releases of *I, Caligula*

There is nothing in the Franco Rossellini files concerning the first VHS issues of *Io Caligola*, probably because Franco Rossellini never knew about them. Sometime in 1987 Mida Film, a subsidiary of The Universal Video Srl, issued a strange edition (release # 359), consisting of *Io Caligola* but with sequences from the banned 1979 edition of *Caligola* edited back in.

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24. Bitoun: letter to Rossellini, 28 April 1987. FRC.

25. Requête afin de saisie conservatoire (Request for the Seizure of Counterfeit), 6 April 1987, and the accompanying Ordonnance, 7 April 1987, *Felix Cinematografica S.r.l.* contre *Penthouse Films International and Penthouse International, Ltd.*, 1987, Tribunal de Commerce de Paris, 153128 (FRC). See also Bitoun: letters to Rossellini, 8 April 1987, 21 April 1987, and 28 April 1987, all FRC.

26. Price of Bartletts de Reya: letter to Rossellini, 7 April 1987. FRC.

27. Ryosuko Ito of Nishimura & Sanada: letter to Lupoi, 8 April 1987. FRC.

Simultaneously, Edizioni Eden, which seems to have been the "adult" wing of Mida, issued exactly the same video, but with a hotter cover consisting exclusively of nude scenes of Penthouse Pets in the film. How widely these videos were distributed, we do not know, though we shall hear about The Universal Video Srl again, below.

The Mida and Eden VHS editions open with a prominent Gaumont logo, and there is no evidence that Gaumont took issue with these releases. Was it Gaumont that issued these video licenses? Perhaps in collaboration with OMNI?

23 APRIL 1987 — HANDING YOUR ADVERSARY YOUR AMMUNITION (35TH LAWSUIT, CONTINUED)

NOW WE ARE BACK TO THE US DISTRICT COURT. Sometime in winter or spring 1987, Felix had submitted an application for a "preliminary injunction and seizure and impoundment order." This document does not survive in the Franco Rossellini files. Penthouse suggested to the court "that discovery would be appropriate herein prior to any hearing on an application for a preliminary injunction," indicating that discovery would provide incriminating documents in Felix's files, or at least documents that could be interpreted as incriminating. Then, at a conference held at the US District Court on 3 April 1987, the "Court stated that it will first rule on the threshold issues raised in defendants' motion" concerning the court's jurisdiction, "and, in doing so, will disregard that portion of plaintiff's papers which attempts to support plaintiff's application for an injunction."[28] The transcript of that conference is similarly missing from the Franco Rossellini files. We know of these documents and events only because they were mentioned in the following hearing, which occurred on or just after 24 April 1987.

As we have seen, Felix's responses to the US District Court – Southern District State of New York of 20 February 1987, objecting to Penthouse's motions to dismiss, were plagued by two errors. Susan B. Ratner represented Penthouse solo this time around, and, as to be expected, she latched onto those two errors to file a pleading before the court:[29]

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28 Susan B. Ratner (with Richard M. Goldstein), Reply Memorandum in Further Support of Defendants' Motion to Dismiss, 23 April 1987, *Felix Cinematografica* v *Penthouse International et al.*, 83 Civ. 6183 (WCC) (1987). FRC. See also written deposition by Susan B. Ratner filed in conjunction with the Further Support of Defendants' Motion to Dismiss, 24 April 1987. FRC.

29. Ratner, Reply Memorandum, *Felix Cinematografica* v *Penthouse International et al.*, 83 Civ. 6183 (WCC) (1987), *op. cit.* FRC.

> To refer here to just one of the blatant lies contained in Franco Rossellini's affidavit, plaintiff's position relies on Rossellini's purported discovery in 1984 of Penthouse's claim that it owns the film's copyright. As is discussed in the reply affidavit of David Myerson, that assertion is directly contradicted by the sworn statements of Rossellini in an affidavit that he submitted to this Court in March 1983 in connection with the previous case before Judge Weinfeld. In that affidavit, Rossellini not only complained that Penthouse Films had registered the copyright in its own name in 1980, but relied on such registration to buttress a claim that Judge Weinfeld ultimately rejected anyway. Rossellini even annexed a copy of that registration as an exhibit to his 1983 affidavit.[30]

Ratner did not feel that argument was sufficient on its own, and so she picked it up again in the second section of her motion:

> Even had plaintiff's shameful lie not been revealed, plaintiff's argument would have been unavailing. As Leslie Jay's affidavit showed, Rossellini was aware of Penthouse Films' claim to the copyright of the film as soon as it was published. In any event, the publication by Films of the copyright notice was constructive notice of that fact to Rossellini as a matter of law.... And of course it strains credulity that Felix would have settled all of the litigations pending in 1984 without having been aware of the status of the copyright.[31]

Those were two excellent arguments, though the second was misleading. As we saw in Chapter 29, Franco Rossellini, his colleagues at Felix, and Lupoi and Julien and the rest of the Felix lawyers, *had all failed to notice the copyright notice that closed the film and that was imprinted on all the publicity materials*. This staggers the imagination, and yet it is true. Ratner was also correct about Rossellini having settled all pending litigations in February 1984 in full awareness of the copyright status. The Settlement Agreement recognized that the June 1976 contract and its amendments had governed, and by those documents Felix owned full copyright. It is unfortunate that this was not spelled out explicitly in the Settlement Agreement, even though there is no other legitimate way to interpret its meaning, especially under Italian law, and the Settlement Agreement was an Italian document, signed in Italy under Italian jurisdiction. Ratner's wording is misleading, leaving the reader with the impression that the Settlement Agreement did not deal with the copyright issue.

30. *Ibid*., p. 3, fn. 1.
31. *Ibid*., p. 14, fn. 4.

Instead of taking into account Felix's demonstrations that this lawsuit dealt with copyright infringement rather than mere breach of contract, and despite Felix's having demonstrated that the present case was substantially different from the earlier case tried by Judge Weinfeld, the Penthouse attorney pressed forward with her client's insistence that this was strictly breach of contract, that the current case was identical in every way with the case that Weinfeld had already decided, and that Felix had settled with prejudice, and was thus barred by *res judicata*. Let us parse through the arguments, one by one.

- *Res judicata* "arguments are based on well-established law and are unassailable." That is true, but Felix was not attempting to assail *res judicata*. Judge Conner would not refute Penthouse on this matter.
- Felix served a "purported application" for a temporary restraining order and seizure and impoundment order, "without having first received permission from this Court." The application was not "purported," and it is true but irrelevant that it was done separately from the present hearings. Judge Conner would not refute Penthouse on this matter.
- The "purported application" was based "on lies and altered documents," thus exposing "the baselessness of plaintiff's position and plaintiff's inability... to establish the irreparable injury needed to justify the sweeping injunction for which plaintiff contends." No altered documents were introduced into the court by either party. Felix had made some howling errors in some of its documents. Penthouse had outright invented a fraudulent document *post hoc* that had never been part of any agreement, and had misrepresented several documents to make them appear to say what they were never intended to say. Nonetheless, no document had been *altered*.
- Since in this case, "once the issue of ownership was resolved, there were no issues which required construction of the terms of the Copyright Act,"[32] Felix's assertion that the dispute over copyright ownership "does not involve the construction of a particular contract" was, Ratner insisted, "strained," and "as wrong as it is irrelevant," for "plaintiff's present complaint, like its previous complaint, is based entirely on the construction of the contracts between the parties." Her reasoning is that this case concerned a contractual dispute about copyright ownership

32. *Ibid*., p. 6.

rather than infringement.[33] Judge Conner would not refute Penthouse on this matter.

- Expanding on the above point, Ratner bluntly stated that the present case "is based entirely on contract." Her support for that was that "The complaint alleges that plaintiff's rights to the film *vis-à-vis* Penthouse derive from the Joint Production Contract of June 1976 (a document whose effectiveness defendants have always disputed) and the Settlement Agreement of February 1984...." That argument conflated two separate issues. Had the June 1976 contract or the February 1984 contract between Felix and Penthouse concerned an *assignment* of copyright from one party to another, then Ratner's argument would have held some weight, but the contract did not concern an *assignment* of copyright. The contracts established as a given that the copyright was entirely Felix's. Ratner attempted to parallel the current grievance with the previous grievance about Felix's *assignment* of the music-album rights to Penthouse, which Penthouse refused to pay. Further, Penthouse had not "always" disputed the June 1976 contract. Penthouse did not dispute it until 1981, and then, in the Settlement Agreement of 1984, Penthouse agreed to cease disputing it, and accepted it as having been the governing contract all along. Ratner attempted — poorly — to adjust her argument a few pages later on, when she wrote that:

> Plaintiff's argument that this case is different from the previous case because in the previous case the only copyright plaintiff claimed to own was to the music is, of course, ridiculous. The parties are identical, plaintiff's claims are identical, the legal principles are identical and, as we have shown, even the fact that Penthouse claimed ownership of the copyright to the film was at issue.

  Judge Conner would not refute Penthouse on this matter.
- To strengthen her case, Ratner went so far as to argue that Felix had indeed assigned the copyright to Penthouse. She was referring, of course, to the assignment from 1977, drafted by Gerald Kreditor, that had never been countersigned, that had never been dated, that had never been notarized, and that had never been registered. Here Ratner employed the logical fallacy of 'false attribution,' an appeal to an irrelevant source in support of her argument. Judge Conner would not refute Penthouse on this matter.

33. *Ibid.*, pp. 7–9.

- To bolster her case that Penthouse had "always" disputed the June 1976 contract, she noted that the Settlement Agreement entitled Felix to 10% of the net, just as the October 1975 contract had done, and *not* as the June 1976 contract had done. She declined to give the history of why the percentage had been scaled back to 10%, which was, as we have learned, simply that Penthouse had purchased most of Felix's debts. Penthouse then refused to pay that 10%. Judge Conner would not refute Penthouse on this matter.
- Since the 10% entitlement proved, according to Ratner, that it had been the October 1975 contract that had governed all along, then it followed that *all* rights to the film had been agreed upon, for that is what the October 1975 contract established. This is the fallacy of 'kettle logic,' in which two or more inconsistent arguments are used to defend a position. If the October 1975 contract gave Penthouse all rights to the film, then there would be no need for the alleged 1977 assignment. If the alleged 1977 assignment granted Penthouse all rights to the film, then it follows that the October 1975 contract had not granted Penthouse all rights. Ratner argued that *both* the October 1975 contract *and* the alleged 1977 assignment granted Penthouse all rights to the film. This is made even worse by her previous argument that the Settlement Agreement of 1984 also granted Penthouse all rights to the film. The Settlement Agreement contradicted both the October 1975 contract as well as the alleged 1977 assignment. Only one could be true, not two and certainly not all three. Ratner also employed the 'straw man' fallacy, misrepresenting what the October 1975 had said. Had it been operative, then it would have been The Caligula Company that had *all* rights to the film, not Penthouse or Felix individually. Further, it goes without saying that even if the contract had decided upon *all* rights, that would refer to rights only once they had been cleared by the individual authors (screenwriters, composers, etc.) and once the Italian government agencies had authorized those rights. The Italian government was quite clear that nontheatrical rights had not been assigned to Penthouse or to The Caligula Company or to anyone else. Judge Conner would not refute Penthouse on this matter.
- Ratner claimed it was "outrageous" that Rossellini would state to the court that Penthouse's license was only for "theatrical distribution." Citing David J. Myerson, she agreed that the translation Rossellini provided of the Settlement Agreement was a "sham" translation, "in which the word 'distribution' was translated as 'theatrical distribution' in

no less than nine places." As we learned, the Italian Exchange Commission and the Italian Ministry of Tourism and Entertainment controlled assignments of nontheatrical rights to films, and they had no records anywhere of such rights having been assigned domestically or internationally, and were thus those rights were definitively held exclusively by Felix. The Rome Tribunal too agreed that Felix alone held nontheatrical rights. Ratner chose not to discuss this portion of the matter. This again, was 'cherry picking' the evidence. In literal terms, Ratner was correct about the translation, but by this time Rossellini had provided the Italian original as well, and anyone could check it against the translation. Further, as far as the Rome Tribunal was concerned, 'theatrical distribution' was indeed the correct legal translation. Judge Conner would not refute Penthouse on this matter.

- Ratner also brought up the issue of jurisdiction: "the authorities are quite clear that dismissal of a suit for lack of subject matter jurisdiction bars relitigation of the issue of subject matter jurisdiction on the same claim as well as with respect to theories of recovery which could have been, but were not, previously raised." Repetitiously, it must be emphasized yet once again, that this matter was not being relitigated. Felix had not "previously raised" the matter because the Settlement Agreement established definitively (if not too explicitly) that Felix owned full copyright to the film. The issue had thus been settled in Felix's favor. Judge Conner would not refute Penthouse on this matter.
- "With prejudice" is another term that Ratner brought up several times, reminding the judge over and over that Felix had dropped its previous charges "with prejudice." By the Settlement Agreement, she repeated emphatically, the parties intended "to readjust reciprocal relations without any reservation or restriction." By her inexplicable interpretation that meant that the copyright to the film belonged solely to Penthouse. Judge Conner fully agreed with Penthouse on this matter.
- Even though the home-video rights could theoretically have been litigated and settled earlier, Felix had not chosen to bring up the issue prior to 1984, despite its admitted realization of the value of videocassette rights. Since *res judicata* applied not only to matters that had been litigated, but to matters that *might* have been litigated but had not been, this issue, too, said Ratner, was barred by *res judicata*. Of course, at the time of the 1984 Settlement Agreement, Felix itself had not yet acquired video rights, and

so there was no known reason to raise the issue. Judge Conner would not refute Penthouse on this matter.

- There was also the matter of the statute of limitations. Said Ratner, "the statute of limitations with respect to copyright actions is three years." Since Rossellini's affidavit of 15 March 1983 mentioned Penthouse's fraudulent copyright registration and even included it among Felix's exhibits, and since he did not file the present suit for infringement until August 1986, it followed that Felix's opportunity had lapsed, and therefore the copyright now belonged to Penthouse. Again, Ratner was 'cherry picking' the evidence. First, less than one year after Rossellini's affidavit of 15 March 1983, all matters were settled by the Settlement Agreement by which all parties agreed that Felix owned the copyright to the film. This occurred less than three years after the copyright infringement and hence was well within the allotted time. Second, the Settlement Agreement specified that future litigations concerning issues raised within it be heard in the Italian courts, and thus Felix filed suit in Rome in May 1985 over this issue (among other issues), again within the three-year limit of the date of discovery. She also neglected to mention that the Italian government agencies proclaimed that copyright was vested entirely in Felix. Judge Conner would not refute Penthouse on this matter.
- As we have seen in earlier parts of this book, when Felix sued Penthouse in the US, Penthouse argued that the case belonged in Italy. When Felix sued Penthouse in Italy, Penthouse argued that an Italian court has no jurisdiction over US corporations. This happened repeatedly, routinely, predictably. Felix back in February declared to the court that Penthouse was trying to deprive it of a legal forum. Ratner found this "irrelevant" and further declared this to be "untrue" for the demonstrable reason that plaintiff was currently arguing the identical suit in the Supreme Court of the State of New York – County of New York. Ratner here employed the logical fallacy of 'inconsistent comparison,' by which different methods of comparison are used to make an unwarranted equation. Judge Conner would not refute Penthouse on this matter.

Following the Further Support of Defendants' Motion to Dismiss were a number of written depositions. David J. Myerson's deposition deserves some study.[34] Myerson wrote:

> The first contention of plaintiff to be exposed a lie is that the instant case is not one involving a dispute over the ownership of a copyright because, allegedly, defendants did not assert that they own the copyright to the film and did not annex to their moving papers any writings evidencing such ownership. This argument is an introduction to plaintiff's abuse of this Court's process. As the record shows, Penthouse Films International, Ltd. ("Penthouse Films")[,] acquired the copyright to the film by assignment from Felix in 1977.
>
> In paragraph 33 of his affidavit in opposition to the instant motion, Rossellini stated: "Such an assignment has, of course, never existed." Plaintiff's assertion that there is no writing evidencing plaintiff's assignment of its rights in the film to Penthouse Films is pitiful in light of the fact that such an assignment not only was part of the record on defendants' motion to dismiss plaintiffs' complaint in the lawsuit before Judge Weinfeld, but also was discussed in the memorandum which was Exhibit C to the exhibit book to my moving affidavit on the present motion.

We have dealt with this alleged assignment numerous times now, and there is no point in repeating the facts yet again, but we should remember that on 20 December 1984 when Felix Attorney Richard M. Aborn requested from Myerson a copy of the assignment from Felix to Penthouse, Myerson replied with a copy not of the unexecuted 1977 assignment, but of the assignment from Penthouse Films to Penthouse Clubs, stating in his cover letter, "I trust this satisfies one aspect of your letter of December 20, 1984."[35]

Myerson's language was even more emotional than Ratner's:

> 6. No less reprehensible than Rossellini's denial of the very existence of a document in the record before this Court is Rossellini's false assertion that he did not know until April or May 1984 that Penthouse Films claimed that it owned the copyright to the film....
>
> 7. Exhibit 2 to Rossellini's March 15, 1983[,] affidavit is a copy of Penthouse Film's 1980 registration of its copyright to the film with the U.S. Copyright Office. This, of course, is the very same document that is annexed as Exhibit F to Rossellini's February 20, 1987[,] affidavit

34. David J. Myerson, Written Deposition, Reply Memorandum in Further Support of Defendants' Motion to Dismiss, 23 April 1987, *Felix Cinematografica* v *Penthouse International et al.*, 83 Civ. 6183 (WCC) (SDNY 1987). FRC.

35. David J. Myerson: letter to Richard M. Aborn, 10 January 1985. FRC.

> submitted in opposition to the instant motion — and about which he now has the audacity to say he learned only after happening on evidence of the publication of the copyright in a videocassette store in 1984!
>
> 8. Needless to say, these bold faced [*sic*] lies speak volumes not only about the lengths plaintiff will go to deceive this Court but about the veracity of every other statement in Rossellini's affidavit.

Myerson continued, 'cherry picking' data to build a peculiar case that Felix would have difficulty refuting. He referenced Felix's 1983 complaint that Films had transferred copyright to Clubs:

> 11. Thus when Rossellini executed the Settlement Agreement in February 1984, it was with complete knowledge that Penthouse Clubs owned all rights to the film "of whatever nature and howsoever arisen." The Settlement Agreement was based on Penthouse's ownership of all rights in the film, for which Penthouse provided financing. Felix's entitlement is to "10% of 100% of the net producing amount, collected or due for collection by the Penthouse Group" under the Joint Venture Agreement as confirmed by the Settlement Agreement (§14a). Rossellini's outrageous argument that Penthouse is its licensee only with respect to the theatrical distribution of the film is grounded on a further obviously deliberate lie. As discussed in my moving affidavit, Rossellini provides a sham translation of the Settlement Agreement in which the word "distribution" was translated as "theatrical distribution" in no less than 9 separate places.

Penthouse also submitted Leslie Jay's affidavit. Jay was a longtime Penthouse employee and quite dedicated.[36] Despite having been involved with the movie as Jack Silverman's assistant from 1976, she was not involved in the contractual or legal issues and was perplexed that anyone other than Bob Guccione and Penthouse could possibly claim ownership.

> ...I can state unequivocally that from the time that the film was released in 1980 it bore a notice that the copyright to the film was held by Penthouse Films International, Ltd. ("Penthouse Films"). Publicity regarding the film bore that same notice. Exhibit C to the supplementary exhibit book being submitted concurrently herewith is a copy of a screening program for the film which was distributed and which bore the copyright notice of Penthouse Films....
>
> ...I am advised that Franco Rossellini claims that he did not know until "April or May 1984" that Penthouse has been claiming the

36. Leslie Jay-Gould, "Mr. Penthouse & Me," *Open Salon*, 27 October 2010, http://open.salon.com/blog/leslie55/2010/10/27/mr_penthouse_me.

> copyright ownership of the film. Apart from the fact that Penthouse's copyright notice was published for the world to see in 1979, Franco Rossellini was actually aware of Penthouse's publication of its claim to the copyright from the very start. Exhibit E to the supplemental exhibit book is a memorandum which I wrote on November 16, 1979[,] relating to preparation for a screening for the film which was to and did take place the next day. To the best of my recollection, Mr. Rossellini attended the screening as the memorandum referred to indicates. The screening program contained in the supplemental exhibit book as exhibit C — which, of course, bore Penthouse's copyright notice — was distributed at the screening. Naturally, the film, which also contained the copyright notice, was displayed as well.
>
> ...Exhibit F to the supplemental exhibit book are the production notes relating to the film, which also were distributed on various occasions. Of course, these too contain the Penthouse Films copyright notice.

Despite the jolting set-back, Felix would continue in its quest for recognition of its rights as producer.

26 May 1987 — Rossellini Attempts to Repair the Damage

The careless errors in Franco Rossellini's earlier response, the result of poor memory, and the resulting harsh responses from Penthouse, served as a wake-up call. For his "sur-reply" Rossellini spoke by himself, though surely with help from his lawyers. His lawyers wisely did not provide affidavits. Rossellini's reply was eloquent, literary in quality, meticulously and accurately documented, but far from perfect.[37]

He began by stating the obvious: The 1977 "assignment" was nothing more than an incomplete, unsigned draft. He explained that Ben Baker had exhibited that document in the earlier trial primarily to demonstrate that no contract postdating October 1975 agreement was to have effect and partly to demonstrate that Felix had entirely defaulted on its investment in the production. Baker had *not* exhibited the document to show that an assignment had taken place. Rossellini made his point even more clearly:

> 4. Myerson clearly states in his Reply Affidavit "that Penthouse Films... claimed the copyright to the film on the basis of an assignment of that copyright signed by Rossellini in 1977...." Myerson Reply Aff. ¶ 9 (emphasis added).

37. Rossellini, Sur-Reply Affidavit in Opposition to Motion to Dismiss or for a Stay, 26 May 1987. *Felix Cinematografica* v *Penthouse International et al.*, 83 Civ. 6183 (WCC) (SDNY 1987). FRC.

> 5. This Court might be curious to know why defendants did not submit this potentially pivotal document with their moving papers and instead asserted a claim of copyright rights in the film "Caligula" variously based upon an October 6, 1975 Joint Venture Agreement and/or a 1984 Settlement Agreement. Most parties with such a purportedly unequivocal "assignment" of rights would set such document boldly before the Court, rather than gingerly.

Rossellini also pointed out to the court that Penthouse was claiming copyright by the October 1975 agreement, and then claiming it again by the draft assignment of 1977, even though each document would invalidate the other.[38] Further, *after* the draft assignment, the 17 October 1977 amendment to the Joint Production Contract "altered the respective rights of the parties," which would have been unnecessary had the draft assignment been valid. More tellingly, Italian government officials would first have to approve any transfer of rights before an assignment could be considered valid, and this they never did.

The draft assignment had specified that Felix had raised no moneys at all toward the production, but that was contradicted by the 17 October 1977 contract amendment in which Penthouse confirmed that Felix had raised $3,500,000 toward the production.

Rossellini showed that *all* rights could not have been at issue, since at the time of the Settlement Agreement, Felix itself still had not acquired *all* the rights, and certainly not the video rights.

He also made clear that the Settlement Agreement, far from confirming the validity of the October 1975 Joint Venture Agreement, did not even make a passing mention of it, but instead confirmed the June 1976 Joint Production Contract.

Synthesizing the above facts, Rossellini noted that: "Therein the Penthouse defendants 'acknowledge the full validity and effect' of the 1976 Joint Production Contract, as amended (Exhibit E, ¶ 12), and nowhere mention an 'assignment' of rights. It is inconceivable that defendants would have confirmed their future expectation of receiving 50% of the rights yet to be acquired by Felix Cinematografica in the work "Caligula" (Exhibit D, ¶ 3) if they believed they already held 100% of all rights in the work."

As for Penthouse's claim that it owned video rights, Rossellini told the court that "the 1984 Settlement Agreement, which did not mention videocassette

38. The draft assignment of circa July 1977 used as its authority the June 1976 Joint Production Contract, which had put the October 1975 Joint Venture Agreement into abeyance.

rights, predates the acquisition of the bundle of rights necessary to exploit such a medium, and therefore, is ineffective to convey videocassette rights."

Rossellini got past the problem of the two different translations of the Settlement Agreement quite simply: "Irrespective of the instances in which translators selected different words, the critical dates are the same in both translations. All other agreements between the parties are in English."

He also got past the most important problem, namely, his faulty memory resulting in the false testimony in his previous response:

> 19. I acknowledge that I read and executed the affidavit attached to defendants' papers, and must on that basis acknowledge having seen the false copyright registration submitted by defendants to the Copyright Office. I apologize to the Court for that failure of recollection. At that time, I believed that the "assignment" to which defendants referred in the copyright registration was the June 15, 1976 Joint Production Contract, pursuant to which defendants acquired the exclusive right to distribute "Caligula" theatrically in all parts of the world except Italy. I was unaware that defendants claimed any further rights in the work, and certainly was unaware that they claimed ownership rights in the work which Felix Cinematografica had not yet acquired.
>
> 20. Upon becoming aware in 1984 that defendants claimed more ownership rights in "Caligula" than those transferred under the June 15, 1976 agreement, I took very specific steps in order to ascertain the extent of the problem, and do something about it. I wrote to the Copyright office, I consulted with counsel around the world, and I amended the copyright registration to reflect the true facts. See Rossellini Aff. ¶¶ 26 through 36.

Franco Rossellini acknowledged his past blunders, and spoke simply about them:

> 21. I am not an attorney. I am a citizen of Italy, my native language is Italian, and I am unfamiliar with the intricacies of U.S. copyright laws. Nevertheless, I am informed that this Court might conclude that I should have noticed the improper copyright notices published by defendants earlier than I did, and that I should have been sufficiently sophisticated and knowledgeable about the intricacies of U.S. copyright law to have known that if the copyright notice contained defendants' name, it was possible that the copyright application might have falsely ascribed ownership of the copyright itself to defendants.
>
> 22. Even if this Court so concludes, I respectfully submit that because the fraudulent holding out of copyright claimant status is a continuing wrong, affecting the marketplace on a continuing basis, only

> that portion of Felix Cinematografica's claim falling outside the limitations period should be precluded. I submit that this Court may properly conclude that damages for that period of time within the limitations period remain available to Felix Cinematografica for the harm which plaintiff suffers daily in the marketplace. The false information contained in defendants' copyright application has not magically evaporated with the passage of time; it is still contained in the copyright office material, to the continuing damage of Felix Cinematografica.

Rossellini played right into his adversaries' hands, simply because he did not understand that he had indeed reacted in time to the fraudulent copyright registration both in the US and in Italy. Had he understood that, and explained it to the court, he would have bolstered his case considerably and made Penthouse's future rebuttals a bit more difficult to formulate.

Finally, regardless of the contracts between Felix and Penthouse, the defendants' behavior "constitutes an act of statutory copyright infringement," particularly since the rights to *Caligula* are governed by Italian law.

This sur-reply was the best and most solid statement of the case that Franco Rossellini or Felix had ever made or would ever make. The facts were irrefutable. Nonetheless, he would lose.

2 JUNE 1987 — DAVID J. MYERSON RESPONDS

MYERSON QUICKLY ATTEMPTED TO DESTROY Rossellini's credibility even further, by the simple expedient of misinterpreting everything in his sur-reply and by misinterpreting all the documents in question as well as Judge Weinfeld's ruling. Nearly everything Myerson said was a relentless repeat of his earlier positions, which had been thoroughly debunked. It is worth quoting the bulk of his text:

> As is discussed below, Rossellini's affidavit further confirms what we showed in our previous papers: (1) This litigation does not "arise under" the Copyright Act. Instead, it is at best a meritless claim to the ownership of the copyright to the film, and thus this Court does not have federal question jurisdiction over it. (2) As we also showed, the case is barred by the statute of limitations and by the principle of res judicata in any event.
>
> 2. Rossellini acknowledges, as of course he must, that he knew at least as early as March 1983 (the date of his prior affidavit) that Penthouse Films had registered the copyright in its own name based on an assignment signed by Rossellini.[1] This alone confirms that this case is

> barred by the three[-]year statute of limitations governing actions for copyright infringement as well as by the principle of res judicata. And as we noted in our previous papers, Rossellini's blatant lies speak volumes about the credibility of his other statements.

Let us look at Myerson's footnote 1:

> [1] The copyright registration explicitly stated that Penthouse Films claimed the copyright "by virtue of assignment."

Now let us return to his text:

> 3. Rossellini's attempts at pages 2 through 11 of his affidavit to attack the validity of the assignment which in his last affidavit he pretended did not exist merely demonstrate that this case is no more than a dispute over the ownership of the copyright to the film based on documents signed by the parties — and thus that this Court lacks jurisdiction to consider it.

In the above paragraph, Myerson committed 'association fallacy.' Rossellini denied that an assignment existed. To refute Rossellini, Penthouse exhibited a document that was not an assignment and pretended that it was. Rossellini explained that the document was not an assignment. Penthouse responded by claiming this proved Rossellini was a liar, for he was now explaining away a document he once claimed did not exist. Judge Conner would not refute Penthouse in this matter.

> 4. Since the meritlessness of Rossellini's attack on the assignment is not relevant to the legal principles on which the instant motion is based, I do not discuss herein in detail the numerous flaws in Rossellini's position. Suffice it to say that Rossellini's convoluted attempt to cover his own falsehood is baseless because the assignment is entirely consistent with the Settlement Agreement and the Joint Venture Agreement.[2] The assignment relates to Penthouse's right to register the copyright of the film in its name. The assignment does not purport to determine the rights of the parties to the proceeds of the film which could be and are governed by other documents.

The purported "assignment" was in fact entirely *inconsistent* with the Settlement Agreement and the Joint Venture Agreement. Judge Conner would not refute Penthouse in this matter. We see that Myerson has another footnote, which is worth examining:

> [2] As is shown by the record in the litigation before Judge Weinfeld, Penthouse disputes the effectiveness of the Joint Production Contract and amendments thereto.

Myerson was wrong. Penthouse had earlier *disputed* the effectiveness of the Joint Production Contract and amendments thereto, but later accepted their effectiveness when it signed the Settlement Agreement. Judge Conner would not refute Penthouse in this matter.

Let us return now to the main body of Myerson's text:

> 5. As for Rossellini's argument that all of the rights to the film were not implicated in the parties' previous dealings because one Masolino D'Amico purportedly held rights to the film, my moving affidavit shows that the litigation before Judge Weinfeld indisputably related to all rights in the film. And as the record in that case shows (and to which the Court's attention is respectfully invited) Rossellini never in that case; even suggested that all of the rights to the film were not involved. The speciousness of Rossellini's latest position is confirmed by the fact that the film was released in 1980 publishing Penthouse's copyright notice, and has been continuously distributed since that time, and Masolino D'Amico has never claimed any rights thereto.

Wrong. The case before Judge Weinfeld concerned "plaintiff's rights," not *all* rights. D'Amico's disinterest in whether or not he had signed over his rights was not relevant to this proceeding. This is the logical fallacy known as 'argument from silence,' where a conclusion is based on an opponent's failure to object. By Italian law d'Amico should have surrendered his rights prior to cinema exploitation, but he absolutely needed to surrender his rights prior to the creation of a derivative work such as a videocassette. If he chose not to complain about having been bypassed, that does not alter the copyright or the law. Judge Conner would not refute Penthouse in this matter.

> 6. Rossellini's "excuses" for having lied to this Court about his purported recent discovery of Penthouse's status as copyright claimant are no less baseless. Rossellini asserts that he is not an attorney, and for that and other reasons, his egregious behavior is excusable. (Rossellini sur-reply Aff. ¶ 21). This, of course, is ludicrous in light of his experience in the film industry and the fact that has been represented by both Italian and American counsel in connection with the film since at least 1981, when he first attempted to invoke the jurisdiction of this Court and claimed rights to the film which he did not possess.

As we can see, Myerson entirely misrepresented what Rossellini had written in his sur-reply. This again is the 'straw man' fallacy. Judge Conner would not refute Penthouse in this matter.

> WHEREFORE, for the reasons stated above and in my previous affidavits, it is respectfully requested that this lawsuit be dismissed and

that defendants recover the costs and attorneys' fees they incurred in defending against it.

18 June 1987 — Judge Conner Asks for Help

Judge William C. Conner was by now sufficiently perplexed that he asked Michael Sloyer to telephone Felix's attorney, Carol Komissaroff, to request an explanation of the status of the litigation in Italy. Komissaroff was happy to oblige, and in a mere ten pages summarized accurately, succinctly, completely, and perfectly the Italian situation. She made it a point to emphasize that Fancelli's injunction (temporary restraining order) "is not subject to appeal, and is currently in full force and effect."[39] She also admitted that the Supreme Court of Cassation in Rome was scheduled to hear the Penthouse Clubs/Massaro/Lui suit on jurisdiction on 17 December 1987.

18 June 1987 — Felix Moves Ahead

With the courts of Italy, Belgium, and the United Kingdom behind him, Franco Rossellini began his long-planned strategy of licensing European video rights himself. His first license was to René Chateau Publishers of Paris through his Cypriot firm CVF. Chateau had previously issued *Caligula* on VHS through a license from Penthouse. That would now change. For a consideration of 350,000 French francs ($57,589.34) Chateau now had the license to sell videos to France, its territories, and off-shore Francophone ex-colonies, as well as to French-speaking Belgium, Switzerland, and Canada. How much of that money Rossellini was able to keep for himself is unknown, but any money at all was welcome, and he surely settled some long-overdue expenses with his earnings.

Immediately following this friendly transaction, there were problems, as Technicolor would not allow René Chateau access to the lab.[40] At the end of the following month Rossellini officially notified the lab that Chateau had licensed the rights and was permitted access.[41] By this time Rossellini was indebted to Bitoun for 160,000 francs (US$25,298). Bitoun suggested that in the future Chateau pay him directly, to simplify the matter of money being shot around among France, Italy, Cyprus, and the US. It would also allow Bitoun to collect his fees more readily.[42]

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39. Carol Komissaroff: letter to Judge Conner, SDNY: 18 June 1987. FRC.
40. Bitoun: letter to Rossellini, 11 August 1987. FRC.
41. Rossellini: letters to Technicolor S.p.A., 28 July 1987 and 31 July 1987. FRC.
42. Bitoun: letter to Rossellini, 11 August 1987. FRC.

At about the same time, June 1987, Franco Rossellini was being fêted in Colómbia for the 17th Cartagena Film Festival, the Festicine, as it was called. Appointed a juror at that festival, he was flown in together with assistant juror Margherita Pacheco and Nicholas Rosso, and was greeted immediately upon arrival by festival organizer Victor Nieto.[43] *El Universal* carried a photo of him contentedly speaking with famous Méxican actor Ignácio López Tarso.[44]. Looking at the two published photographs of him, we can see that he was at last back in his element, entirely at ease to be back with his type of people, on familiar territory.

Life began to begin to seem normal again when, on 22 June 1987, Horse Import-Export of Neuilly, France, sent CVF 29.940,02 francs (US$4,888.32) for use of a 35mm French TV version of *Caligula*.[45]

Incidentally, it was at this time that Rossellini ran across an unusual reference in *Newsweek*: Guccione's attorney, Norman Roy Grutman, who had defended Penthouse in its cases against censors in Boston and Atlanta, was now also the attorney for Guccione/Penthouse's adversary, Jerry Falwell, co-founder of the Moral Majority, who had long been in legal conflict with Guccione and Penthouse over censorship issues.[46]

17 JULY 1987 — BAD NEWS FROM THE UK

FELIX ATTORNEY KEITH A. PRICE of Bartletts de Reya in London informed Maurizio Lupoi about the developments in the United Kingdom.[47] There was a new law in the UK relating to foreign judgments, and the *Felix-v-Penthouse* conflict was the first case to be tried under the new rules. The Penthouse attorneys were testing the new law by challenging the way in which their clients were served with the summonses. Penthouse argued that the Notices of Registration should have been, but had not been, stamped with the Court's seal; that the Notices of Registration should have been accompanied by an official form called Acknowledgement of Service; and that the time for appealing the Notices should be two months when served outside the jurisdiction. On these three bases, the Penthouse attorneys were arguing that the summonses had not

43. Unidentified news clipping found among Rossellini's personal papers. FRC.

44. *El Universal* (Cartagena), 24 June 1987, p 1. Photo by Maruja Parra. FRC.

45. Horse Import-Export: letter to CVF, 22 June 1987. Horse amusingly requested a "4.462 m" version, six minutes longer than even the longest version! FRC.

46. "PTL: A Battle of Words in the Holy War," *Newsweek*, 6 July 1987. Clipping found among Rossellini's personal papers. FRC.

47. Price: letters to Lupoi and to Gideon Cashman, 17 July 1987. FRC.

been served validly, and hence the case should be dismissed. At a hearing lasting an hour and a half the High Court decided that there was insufficient evidence to demonstrate that the Notices had been incorrectly served, but did grant that Notices served outside the jurisdiction of England and Wales needed a Court seal. The Court further granted that the Acknowledgement of Service form "must be adapted and served with the Notices," and that the defendants were correct in arguing that the time for appeal would thus be two months. Price immediately instructed Felix's New York attorneys to serve the Notices to the Penthouse entities once again, and this time in conformity with the Court's decisions. Price closed his letter by noting that there was still an amount owing to him for £350.95 (US$569.02).

It did not help when, at the end of August, Bartletts de Reya sent Rossellini a fuller bill, detailing all moneys still owing, a total of £3,619.95 (US$5,870.51), with a plea: "I regret having to write to you, but the above account appears to be unpaid. If you have a reason for withholding payment, please let me know, otherwise I would appreciate your cheque in the next few days."[48] Maurizio Lupoi forwarded this letter to Rossellini, telling Bennett simply, "we shall pass your letter on to our client. Please understand that there is not much else we can do for you."[49] By this time Lupoi realized that, absent a meaningful court victory, no moneys would be forthcoming from Rossellini, for the simple reason that Rossellini had no money left, and was not in a position to earn any. As for the financial help offered by Doris Duke, she paid out only pittances, never enough to help Franco Rossellini over his hurdles.

14 September 1987 — Vista Video Declares Bankruptcy

Alain Katz, who had licensed video rights from Penthouse in October 1982,[50] now informed Bitoun that there had been a change. The Penthouse license expired on 1 September 1987, by which time Katz's company, now named Vista Video, was in receivership, and the trustee, an attorney named Carrasset-Marillier, was in the process of selling off the company's assets, including its lapsed license to *Caligula*. This was worrisome, and Katz encouraged Bitoun to supply a certificate of Felix's ownership of the property. "In addition, it would also be desirable that you obtain a certificate from this company confirming to you that you have indeed recuperated the rights of the film for Mr

48. D.F.C. Bennet of Bartletts de Reya: letter to Rossellini, 27 August 1987. FRC.

49. Maurizio Lupoi: letter to D.F.C. Bennett of Bartletts de Reya, 3 September 1987. FRC.

50. Myerson of Penthouse Publications: letter to International Video Publisher, 4 October 1982. DDP 94–2, p. 101.

ROSSELINI [*sic*], to enable you to obtain the restitution of the masters of the film from the French laboratories, where they currently are, because this is still in 'pirated' exploitation."[51]

Katz, in the meanwhile, had become involved in a new interest, Les Films du Scorpion, S.A., for which he was trying to negotiate deals with Rossellini and Felix concerning *Caligula* as well as a different film entitled *The Collector*, presumably the 1965 John Fowles film from Columbia Pictures. The nature of these proposed negotiations remains a mystery.[52]

21 SEPTEMBER 1987 — MAKING USE OF THE NEW SITUATION

AS HE HAD EARLIER LICENSED French-territory *Caligula* video rights to René Chateau, Rossellini now licensed Italian-territory home-video rights, to G.B. Television Srl, for an eventual total of £50,000,000 (US$38,258.68).[53]

Predictably, that income, which would be parcelled out over a series of anticipated payments, was quickly counterbalanced by a bill from Massimo Ferrara-Santamaria that itemized outstanding debts: judicial preparation of the exequatur with attorneys in the UK, Germany, and the US, as well as discussions with Canal Plus, AMLF, Don Getz, and Neue Constantin. There was also another matter concerning Rossellini's earlier film on *Medea*. In addition, there was the situation with the long-delayed Wertmüller film of *Troilus and Cressida*, which necessitated dealing with the National Bank of Labor and various attorneys.

Even worse was this second attempt at a home-video release of *I, Caligula.* Despite Rossellini's having licensed *exclusive* home-video rights to G.B. Television, the contract was suddenly usurped when The Universal Video Company issued yet another unauthorized VHS release. Again, we need to wonder how the Universal Video Company came to issue the video. One possibility is that Gaumont Italia may have licensed the rights, but if Gaumont did so, it did so without authorization from Felix. Another possibility is that The Universal Video Company simply pirated the film, issuing it without licenses or with forged licenses. We shall probably never know the truth. What we do know is that G.B. considered Universal's release a breach of contract that terminated its agreement with Felix. Ferrara-Santamaria wrote to Rossellini about a meeting with Universal:[54] "I spoke with Mr. Fabiani, who thought he could negotiate on

51. Alain Katz: letter to Bitoun, 14 September 1987. FRC.

52. Katz: letter to Rossellini, 17 July 1987 (FRC); telegram to Rossellini, 17 August 1987 (FRC).

53. Scrittura privata tra la Felix Cinematografica s.r.l. e G.B. Television s.r.l., 21 September 1987. FRC.

54. Massimo Ferrara-Santamaria, Estimated Fee Note, 30 September 1987. FRC.

the basis of an offer of 5/6 million lire [US$3,825.87 to US$4,591.04], and I pointed out that the situation was illegal and only with an offer of at least ten times that might negotiations with Franco Rossellini begin, as happened." "As happened" would indicate that The Universal Video Srl reached an agreement with Rossellini, but to all appearances it immediately thereafter ceased distribution of the videocassettes. The total of Ferrara-Santamaria's bill was £15,300,000 (US$11,707.15).

There was more. Rossellini was still in arrears with his French attorney Jacques-Georges Bitoun, who submitted a new invoice for 95,223.00 francs (US$15,688.49), on top of the previous amount owing of 35,000 francs (US$5,766.43). "Given the importance of the notes, my treasurer can no longer wait, and moreover, at the end of October, I created a Professional Civil Partnership with two collaborators, which obliges me to be settled before this date."[55]

23 October 1987 — Break-Down in Germany (34th Lawsuit, Continued)

Felix had appealed the German decision,[56] but the Munich First District Court – 21st Division dismissed the case and ordered Felix to pay Penthouse damages not to exceed 25,000 DM (US$13,842.74), and that Felix's total hardship not exceed 40,000 DM (US$22,148.39).[57] The argument by the three-judge panel was that Felix's counsel had declined to provide any certified documents to demonstrate the effectiveness of Fancelli's temporary restraining order. Uncertified photocopies in the Italian language would not suffice. Despite repeated extensions, Felix's attorney declined to provide sufficient documentation. The German Supreme Court, and hence the District Court, could not enforce a ruling that could not be proved. The courts doubted that Felix even had an enforcement order in Italy, much less elsewhere. Having been presented only uncertified photocopies, the judges concluded that the Italian decision was simply "an isolated case ruling without fundamental meaning."

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55. Bitoun: letter to Rossellini, 13 October 1987. FRC.

56. *Felix Cinematografica Srl* v. *Penthouse International*, Munich First District Court, 21st Civil Division, F.272. Dr. Noerr for Plaintiff, Gianni Massaro for Defendant. FRC.

57. *Felix Cinematografica* v *Penthouse International and Penthouse Films International*, Munich First District Court – 21st Division, 29 W 1403/87, 21 D 23796/86, 23 October 1987. FRC.

19 OCTOBER 1987 — JUDGE CONNER'S RULING (35TH LAWSUIT, CONTINUED)

AFTER A FOUR-MONTH WAIT, Judge William C. Conner of the United States District Court – Southern District of New York issued his ruling.[58] He agreed (implicitly) almost entirely with Penthouse's arguments, offering no refutations. For instance, he quoted the following passage from the Settlement Agreement:

> The parties hereby intend to settle — as they do in effect — any pending dispute, to prevent future litigations relevant to events that have hitherto occurred and, generally, to readjust reciprocal relations without any reservation or restriction, with reciprocal and irrevocable waiver of any and all rights, actions, just claims and privileges, whether directly or indirectly connected or relative, in any country of the world, to titles in any way regarding any relation up to now between the parties.

Judge Conner agreed with Penthouse that the above passage indicated that all non-Italian distribution rights, of whatsoever manner, were now vested in Penthouse, especially since the above quote did not specify "theatrical" distribution as opposed to other forms of "distribution." Of course, the above quote did not mention *any* form of distribution. By so violently misrepresenting the above passage, Conner could rule that the dispute was one of contract interpretation, and not one of copyright infringement:

> Although plaintiff's complaint is framed entirely in terms of infringement, the Court finds that it is really an action on a contract, wherein plaintiff in essence seeks a declaration that the Settlement Agreement entered into among the parties did not transfer the rights of videocassette distribution to the defendants. There is nothing in this case which requires construction of the Copyright Act.

That, of course, was arguing for proof of a negative, and entirely disregarded the text of the contract, which nowhere dealt with any transfer of film rights. Concluded Conner: "In sum, since plaintiff's suit involves only contract issues, it must be dismissed for lack of subject matter jurisdiction." To this he added a footnote: "The fact that alien parties are present on both sides of this lawsuit destroys complete diversity under 28 U.S.C. § 1332. Accordingly, plaintiff cannot invoke the Court's jurisdiction on that basis." That was the problem, once again, of Italian Felix filing charges against Liechtensteinian Penthouse Clubs in a US court. This made the case unwinnable, despite Clubs being a shell corporation

58. Ruling by Judge William C. Conner, 19 October 1987, *Felix Cinematografica* v *Penthouse International et al*, 83 Civ. 6183 (WCC) (SDNY 1987). FRC.

operated entirely out of Manhattan. Felix should never have named Penthouse Clubs in its US complaints. Conner's ruling further makes clear that US law has no concern with foreign copyrights or foreign judgments. Conner did, though, hold out one fragile twig of hope: "Defendants' motion for attorney's fees and costs is denied. Although the Court must dismiss the claim for lack of jurisdiction, the Court does not believe that the action was brought in bad faith. Plaintiff may have a legitimate claim, albeit one which must be brought in another forum."