

## Thirty-Four

### “SHOULD I ABANDON THE CASE?”<sup>1</sup>



“I’m friends with everybody because I have a good quality — short memory. I can forget and go on to other battles.” — *Franco Rossellini*<sup>2</sup>



#### 22 OCTOBER 1987 — FELIX INDEBTED TO PENTHOUSE

JUDGE CONNERS’S RULING was followed a few days later by another bill from Bartletts de Reya of London.<sup>3</sup> In addition to a reminder about past amounts still owing, a total of £3,619.95 (US\$5,974.42), there was also a matter of the High Court’s determination that Felix be required to pay Penthouse’s attorneys’ fees of £2,338.19 (US\$3,858.99). By this time, of course, Franco Rossellini and Felix Cinematografica were drowning in debt, and earnings from licenses and royalties would not arrive in time to settle any of these outstanding invoices. Penthouse had made only one payment to Felix, more than three years earlier, back on 1 June 1984, and nearly all of that \$170,000 had gone to Maurizio Lupoi for his attorney’s fees. Rossellini and Felix were now left with only two choices: drop the case, lose all rights to *Caligula*, and declare bankruptcy; or pursue the cases and run the risk of being sued for defaulting on debts. Pursuing the cases entailed the further risk that his attorneys would drop him since he could not pay. Rossellini decided not to give up, no matter what the cost.

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1. Jacques-Georges Bitoun: letter to Massimo Ferrara-Santamaria, 3 November 1987. FRC.

2. Rossellini, interviewed in Bob Colacello, “Franco Rossellini,” *Andy Warhol’s Interview*, February 1975.

3. Bartletts de Reya: letter to Felix in care of Maurizio Lupoi, 22 October 1987. FRC. Also R. George Anticoni: letter to Rossellini, 13 January 1988. FRC.

THE THIRTY-SEVENTH CALIGULA LAWSUIT

3 NOVEMBER 1987 — BITOUN'S MISGIVINGS

**F**RUSTRATED AND OUT OF PATIENCE, Jacques-Georges Bitoun wrote a plaintive letter to Rossellini's Italian counsel, Massimo Ferrara-Santamaria:

Dear Friend,

Here is the state of actions and proceedings engaged by FELIX FILMS.

Unfortunately, I'm stalled and I'm going to lose the benefit of all this because I'm waiting for fee payment owed for a long time but mostly a payment that's necessary for the cost of proceedings and other costs.

I am all the more disappointed that I am responsible for the contract with René CHATEAU who had been wholly hemmed in by Mr. ROSSELINI [*sic*].

In your opinion, should I abandon this case?

In friendship.

Jacques-Georges BITOUN<sup>4</sup>

Rossellini had not paid Bitoun for two years. The reason, of course, is that despite all Bitoun's work, the lawyer had not secured any income for Rossellini, who was effectively flat broke.

Nonetheless, the cases continued. Bitoun appointed another attorney, Ortolland, as his deputy in the case heard at the Commercial Court of Paris on 13 January 1988.<sup>5</sup> This was Felix's suit against Penthouse for fraudulently licensing AMLF the rights to sublicense broadcast and home-video rights to Canal Plus. A total of 3,940 videotapes had been sold. The three companies together earned over 2,700,000 francs (US\$491,489.95). Penthouse, as usual, argued against the court's jurisdiction, claiming that Civil Code Sections 14 and 15, together with the New Civil Procedural Rules Section 42, made it clear that only the court of the defendants' domicile had jurisdiction. Further, Penthouse argued, the Settlement Agreement of February 1984 stated unambiguously that the only courts that had jurisdiction were the Supreme Court of New York for accounting disputes and the Court of Rome for all other disputes. Penthouse also

4. Bitoun: letter to Ferrara-Santamaria, 3 November 1987. FRC.

5. Jugement Rendu le Mercredi 13 janvier 1988, *Felix Cinematografica Srl contre Penthouse International, Ltd., et Penthouse Films International, Ltd.*, Tribunal de Commerce de Paris, Audience Speciale de la Troisième Chambre, 43A, 15.09.1987 15, 25340. Jacques-Georges Bitoun for the plaintiff, Maître Sevellec for the defendants. FRC.

pointed out that pending litigations in other territories required the French court to stay proceedings until other the other cases had been settled.

Felix countered that as the counterfeiting had taken place on French territory, it was the French court that had jurisdiction.

The court rejected Penthouse's arguments *in toto* and fully agreed with Felix that this constituted copyright infringement, punishable by French authorities. The court ordered Penthouse to pay costs of 235.95 francs (US\$42.95), and referred the matter to a hearing two weeks hence, on 27 January 1988.

**14 JANUARY 1988 — PENTHOUSE CITED FOR BEING IN CONTEMPT OF COURT (34TH LAWSUIT, CONTINUED)**

**M**AURIZIO LUPOI WAS THRILLED with a further favorable ruling, this time from the United Sessions at the Supreme Court of Cassation,<sup>6</sup> at which Penthouse had appealed Livio Fancelli's jurisdiction over foreign concerns. The United Sessions entirely rejected Penthouse's appeal and cited Penthouse for being in contempt of court, for which the penalty was £3,000,000 (US\$2,491.76).<sup>7</sup> Once the ruling were published, which would happen on 1 March 1988, the civil case could at last proceed at the Civil Court (Tribunale Civile) of Rome for oral arguments concerning Penthouse's objections about having been improperly served.

The publication of the case would have a further effect of strengthening Felix's case abroad. Italian jurisdiction in the matter was now solidified as *res judicata* and would thus have definitive effect in France and Belgium, which had until now enacted only *preliminary* exequatur rulings. Now all doubt would be removed. The same would apply to other countries that had bilateral treaties with Italy. Since all US suits had been "paralyzed by doubt" about the jurisdiction of the Italian courts, the publication of the ruling might help even there.

Two weeks later there was better news yet.<sup>8</sup> The United Sessions of the Supreme Court of Cassation sentenced Penthouse to reimburse Felix's court costs, a total of £200,000,000 (approximately US\$162,422.86), and to pay an additional penalty on top of that "to compensate us for the damage of having

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6. Maurizio Lupoi: letter to Felix, 14 January 1988. FRC.

7. Lupoi, statement, 21 April 1988, *Felix Cinematografica Srl contro Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse International, Ltd., Penthouse Records, Ltd., and Cosmopolitan Cinematografica*, Tribunale Civile di Roma, Sezione I — G.I. Dr. Galbiatti, R.G. N° 2062/86, filed in Clerk's office 29 March 1988. FRC.

8. Maurizio Lupoi: letter to Rossellini, 28 January 1988. FRC.

proposed the appeal in bad faith and gross negligence (Civil Procedural Code Article 96).”

With this ruling in hand, Felix, after an 11-year hiatus, at last felt confident enough to start up film production again. Nobody at Felix knew that Penthouse would never pay a penny of its fines.

#### 12 FEBRUARY 1988 — LINA WERTMÜLLER’S *TROILUS AND CRESSIDA*

THE NATIONAL BANK OF LABOR’S Autonomous Section on Cinematographic Credit had earlier rejected Felix’s loan application to initiate pre-production on Lina Wertmüller’s film adaptation of Shakespeare’s play. The next day Felix received the good news that the Supreme Court of Cassation had ordered Penthouse to reimburse Felix £5,042,400 in actual costs plus further expenses for a grand total of £5,599,400 (US\$4,547.35).<sup>9</sup> That new situation prompted Giacinto Solito, Felix’s sole administrator, to resubmit his application, together with a full explanation of what had just transpired in court.<sup>10</sup>

#### 18 FEBRUARY 1988 — PLANS CRUMBLE (34TH LAWSUIT, CONTINUED)

THE FRENCH RULING OF JULY/AUGUST 1986, cause of rejoicing, was now cause of grief. Jacques-Georges Bitoun wrote to Franco Rossellini that Penthouse was arguing against the French court’s jurisdiction in the matter. To this message Bitoun attached a pair of bills, one for 32,306.10 francs (US\$5,607.95) and the other for 6,697.75 francs (US\$1,162.65). Bitoun would send numerous reminders about these bills over the next few months,<sup>11</sup> and on 28 June informed Rossellini that the Court of Commerce had postponed the scheduled 13 July hearing until 7 September.

#### 9 APRIL 1988 — PENTHOUSE IS UNMOVED

LUPOI FELT THE NEED to remind Myerson and Massaro of the Italian Supreme Court of Cassation’s ruling, “subject to no appeal,” by which Penthouse was required to pay Felix costs of £5,599,400 (US\$4,547.35).<sup>12</sup> Of course, US concerns are not bound by Italian judgments, and no money would ever be forthcoming.

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9. Lupoi: letter to Myerson, 9 April 1988. FRC.

10. Giacinto Solito: letter to the Ministry of Tourism and Entertainment, 12 February 1988. FRC.

11. Bitoun: letters to Rossellini, 28 April 1988, 1 June 1988, 9 June 1988, 9 July 1988, 25 July 1988, 31 January 1989, 23 February 1989. FRC.

12. Lupoi: letter to Myerson, 9 April 1988. FRC.



This was topped off by yet another reminder from Jacques-Georges Bitoun<sup>13</sup> that Rossellini still owed him a total of 169,120 francs (US\$29,782.55).

#### APRIL 1988 — ADD SPAIN TO THE MIX

ON 30 OCTOBER 1983 VCL International BV had licensed from Penthouse Clubs International Establishment the rights to distribute *Caligula* on videodisc and videotape in Spain. When VCL was dissolved, the license was transferred to Virgin Video in Spain. Metromedia Video SA acquired a similar license on 18 February 1987. With Livio Fancelli's Italian ruling now being case law, Felix was hoping to have the Spanish courts recognize it as well. That would be difficult, though, since Spain had not signed the EEC Convention on Jurisdiction and Enforcement of Civil and Commercial Judgments.<sup>14</sup>

#### MAY 1988 — THE SUPREME COURT OF THE STATE OF NEW YORK – COUNTY OF NEW YORK (36TH LAWSUIT, CONTINUED)

NOW THAT JUDGE WILLIAM C. CONNER of the United States District Court – Southern District of New York had issued his ruling, the Penthouse and Felix parties had time to proceed with the separate but related case at the Supreme Court of New York – County of New York.<sup>15</sup> Felix's previous attorney in this case, Charles Miller, attorney with Hess, Segal, Guterman, Pelz, Steiner & Barovnick, had dropped from the federal case as well as the state case, and his rôle in this case as well was taken by Pryor, Cashman, Sherman & Flynn. They would not last long either.

Leslie Jay again offered her affidavit about the copyright notice that had appeared on the film and on all the publicity materials from before the day of the first US release, and Penthouse counsel David J. Myerson submitted an amended response, arguing that he was legally permitted to do so in order to "assert *res judicata* as an affirmative defense." Myerson repeated all the arguments he had

13. Bitoun: letter to Rossellini, 28 April 1988. FRC.

14. José Manuel Soriano: letter to Franco Rossellini, 16 June 1988 (FRC); and Dyntra S.A.: invoice 71/88 to D José M. Armero of Bufete Armero, 25 April 1988 (FRC); José Marcos Picón Martín: invoice 1158/59 to Felix Cinematografica, 29 April 1988 (FRC); Ministerio de Cultura: letter to José Marcos Picón Martín, 10 May 1988 (FRC).

15. *Felix Cinematografica, Srl v Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Records, Ltd., Penthouse Clubs International Establishment, and Robert Guccione*, Supreme Court of the State of New York – County of New York, Index No. 88/10783. Judge Leonard N. Cohen presiding. Pryor, Cashman, Sherman & Flynn, for Plaintiff; Richard M. Goldstein with Susan B. Ratner of Shea & Gould, for Defendants. FRC.

made at the US District Court, but made his case smoother and stronger. He referred to the Joint Production Contract of June 1976 as an “alleged agreement” and a “purported agreement.” In summarizing the Settlement Agreement of February 1984, Myerson noted that, “It was, of course, based on Penthouse’s ownership of the copyright in the Film, which never had been disputed.”<sup>16</sup> Myerson misinterpreted Rossellini’s affidavit of 15 March 1983 to the District Court concerning the copyright assignment from Penthouse Films to Penthouse Clubs, and thus could state, “Suffice it to say that Felix did not claim then, as it suddenly has now, that Penthouse Films’ registration of the copyright was unauthorized.” Myerson made the disingenuous argument that it came as a surprise to Penthouse that Felix suddenly claimed ownership of the copyright:

Despite the clarity of the Settlement Agreement, in approximately May 1985, Felix commenced in Italy yet another action against Penthouse. Incredibly, Felix contended in this Italian action that it owned the rights to the Film outside of Italy (as well as the rights to the Italian Film in Italy, which, of course, Penthouse does not dispute). Felix sought preliminary and permanent injunctions against Penthouse’s distribution of videocassettes of the Film, notwithstanding that Penthouse — which, unlike Felix, abided by the terms of the Settlement Agreement — had never distributed videocassettes in Italy.

Myerson favorably quoted Gianni Massaro’s *non sequitur* claim that it was contradictory for Rossellini to have argued both that the Settlement Agreement had said nothing about video rights, and yet to have invoked the Settlement Agreement’s stipulations on other matters despite that.

Myerson imputed bad faith to Felix for litigating in New York, “belying its purported desire to litigate in Italy.” Of course, as we have seen, Felix had no choice, partly because this was a new matter that was applicable in New York, and partly because successful litigations in Italy were unenforceable in the US.

Myerson objected once again to Franco Rossellini’s misstatement that he had discovered the copyright registration only subsequent to the signing of the Settlement Agreement. This had, as we have seen, been discussed and accounted for at the US District Court, but Myerson made no mention of that, and continued to refer to Rossellini’s faulty memory as “a deliberate and outrageous lie.” Myerson further stated that “There has not been any discovery in the case as of yet. Indeed, plaintiff has not evidenced any willingness to proceed ever since the basis for the claim of copyright ownership was exposed as a lie.”

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16. David J. Myerson, amended affidavit, 17 May 1988, paragraph 22. *Felix Cinematografica, Srl., v Penthouse International, Ltd., et al.*, Index No. 88/10783, 1988. FRC.

Myerson stated in a footnote:

...the claim to copyright of the music was clearly nothing more than an eleventh[-]hour maneuver to find some basis for federal jurisdiction, since plaintiffs had litigated the issue of the court's subject matter jurisdiction for more than a year without ever so much as mentioning that they had a copyright claim against any defendant. It was not until plaintiffs were faced with dismissal of their case and were given the opportunity to amend that they suddenly purported to raise a copyright issue with respect to the music of the Film. Plaintiffs' maneuver to create federal question jurisdiction was based on plaintiffs' purported filing of their alleged copyright just prior to serving their amended complaint.

That makes for interesting reading, but there are problems with that account. Yes, it is true, but not germane, that Felix did not register the copyright of the music in the US until 13 February 1983 (PA: 161-598),<sup>17</sup> after filing its amended complaint. Felix had licensed only utilization rights and never purchased the copyrights. This does indeed make it a "purported" filing of an "alleged" copyright. What Myerson neglected to state was that Penthouse needed to pay Felix for the assignment of the utilization rights, which would prove that Felix and not Penthouse had the rights originally. More important is Myerson's claim that it was not until Felix amended the complaint in 1983 that it raised the issue of music rights. This was a declaration taken directly from Judge Edward Weinfeld's ruling of 19 September 1983. In that ruling Weinfeld had said twice, and emphatically, that the claim of infringement of music rights was included only in Felix's revised complaint of 1983, not in its original complaint of 1981. This calls for examination. Here is Felix's original complaint paralleled with the amended complaint:

USDC–SDNY, <i>Felix/Rossellini v Penthouse et al.</i> , original complaint, June 1981	USDC–SDNY, <i>Felix/Rossellini v Penthouse et al.</i> , amended complaint, 28 January 1983
34. Records has exploited the music of Caligula.	34. The music of Caligula is owned by Felix.
35. The music of Caligula is owned by Felix.	35. Felix has the sole rights to exploit the copyright of the music of Caligula, and is the owner of the copyright;

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



36. None of the defendant's has or had any license, right or other authorization to exploit the said music.

36. None of the defendants has or had any license, right or other authorization to exploit the said music or copyright, and defendants have caused serious injuries to plaintiffs and to each of them by such wrongful exploitation.

Myerson went one step further and introduced an entirely new argument in his explanation that Penthouse was entitled to partial summary judgment: "The absurdity of Felix's claim is highlighted when one considers that if Felix had the rights to the Film and distributed videocassettes in accordance therewith, Felix would be infringing on Penthouse's copyright to the music!"<sup>18</sup> That was another disingenuous stroke, for the music-utilization rights were bundled with the film-exploitation rights, and no further license for the music would be necessary to distribute the film. Further, Penthouse had purchased the utilization rights (the license to use another party's copyrighted materials), not the underlying copyrights. Myerson knew this but preferred to misstate the facts.

#### 14 JUNE 1988 — PENTHOUSE SMELLS SUCCESS (36TH LAWSUIT, CONTINUED)

**P**ENTHOUSE'S CONSISTENT POLICIES of filing frivolous charges, making disingenuous arguments, using faulty logic, misstating facts, and ignoring the Italian courts' rulings to cease distributing videos and to pay damages had now, at last, begun to have their intended effect. Felix/Rossellini's legal counsel, Pryor, Cashman, Sherman & Flynn, petitioned the Supreme Court of New York – County of New York to be dropped from the case. The fees so far had amounted to \$82,500, of which \$80,470.84 had been billed to the plaintiffs. Of this, Felix and Rossellini had paid only \$28,500, the last payment having been received a year earlier, on 7 July 1987. The law firm could wait no longer for the balance of \$54,000.<sup>19</sup>

18. Myerson, amended affidavit, 17 May 1988, *op. cit.*

19. Philip R. Hoffman, Order to Show Cause, 14 June 1988. *Felix Cinematografica, Srl., v Penthouse International, Ltd., et al.*, Index Supreme Court of the State of New York – County of New York, Number 88/10783, 1988. FRC.



**22 JULY 1988 — PENTHOUSE FILES A COUNTER-ACTION IN ITALY (34TH LAWSUIT, CONTINUED)**

NOW THAT THE MATTER OF JURISDICTION had been settled in Felix's favor, Felix's suit could get underway at the Civil Court (Tribunale Civile) of Rome on 1 March 1988 (see above),<sup>20</sup> and on 25 March 1988 Felix authorized the continuation of the case (a "retrial").<sup>21</sup> This was a good opportunity for Penthouse to step up its activities.

Still attempting to invalidate Livio Fancelli's temporary restraining order, Gianni Massaro filed a counter-action with the Civil Court of Rome, calling for an investigation, claiming that Fancelli's ruling was based entirely upon misinformation.

As we have seen, Fancelli had issued a temporary restraining order prohibiting Penthouse International and Penthouse Films International from allowing videocassettes to be made available directly or through third parties. Despite that order, Penthouse Products of Englewood, New Jersey, continued to market the tapes. Now Massaro renewed his request that Penthouse Products be integrated into the legal suit. As he stated, "The dust cloud that Felix stirred has ceased; in fact, it was settled by the ill-judged use of court means as per article 700 of the Civil Procedural Code; the procedural geometry cannot be ignored, for it cannot consent in its rigor, unless it held that the ineffectiveness of its intended recipient, responsible for the alleged violation, namely Penthouse Products Englewood, is a third party extraneous to the process. It is a matter therefore of a clear hypothesis of necessary joinder."<sup>22</sup> Massaro also requested a formal interrogatory of Felix in the person of Franco Rossellini, testimony relevant to the literal interpretation of the Settlement Agreement of February 1984, and the Ministry of Tourism and Entertainment's file on *Caligola*.

Penthouse's "image" was at stake in the judgment on ruling, Massaro argued, and Felix was "unscrupulously" having European courts enforce

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20. *Felix Cinematografica Srl contro Penthouse Films International, Ltd., and Penthouse Clubs International Establishment*, Tribunale Civile di Roma, Processo N. 2062/1986 Ruolo Generale Affari Civili Contenziosi — Sezione I — Ruolo N. 29178 — 13607. Giudice Relatore (Reporting Judge) Dr Ruggero Galbiati presiding. Maurizio Lupoi for Plaintiff, Gianni Massaro for Defendants. FRC.

21. Source for this statement is *Sentenza, Felix Cinematografica Srl v Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse International, Ltd., and Penthouse Records, Ltd.*, Tribunale Civile di Roma, Sez. 1<sup>a</sup>, 30 September 1988, sentenza n. 13607, cronologico n. 27536, repertorio n. 12459. FRC.

22. Gianni Massaro, *Penthouse Film International Ltd, Penthouse Club International Establishment riconvenzionale contro Felix Cinematografica*, Tribunale Civile di Roma Sez. I, Dott. Galbiati, Comparsa Conclusionale, 22 July 1988, paragraph I(a). FRC.

exequatur rulings, "passing it off as a final ruling." Felix's "funambulisms," such as interposing Cosmopolitan Cinematografica into the prior legal proceedings, resulted in "stratospheric requests," such as the asking price of \$5,000,000 to sell Penthouse the rights. This price, Massaro incomprehensibly insisted, was a "nonexistent damage since the film had been confiscated!" It was only because Penthouse's defense attorney was not present at the Supreme Court of Cassation, "due to his own commitments connected with his own responsibilities in the arena of the European community," that the Court had erred in its judgment. "PENTHOUSE has ensured, however, also that it would be unorthodox for the Court to permit the acceptance of the counterclaimant's documents of integration, for the sole purpose of not paralysing or slowing down the course of the claim, be it in the end, as shown by the documents of this same proceeding, be it from the renunciation made at the hearing of 27 June before the Investigating Judge, to produce documents and rather in the withdrawal of such to prevent further postponement of the trial."

Massaro also insisted that the court had not understood "Penthouse's confusion and disorientation," for "the claim for ruling on jurisdiction was proposed upon the solicitation of the American lawyers of the summoned [i.e., Penthouse], that in the face of the continued legal initiatives proposed in the United States by Felix they believed the verification to be indisputable of the jurisdiction of the magistrate (considering that the controversy was born and had been determined in the framework of the contestation on the part of Felix of the reports in which Penthouse included the videocassettes). Such conviction of theirs was further reinforced when Felix proposed analogous action, or rather identical, to the present action before the Court of New York."

Massaro went into lengthy and misleading detail about the October 1975 Joint Venture Agreement, demonstrating that Felix had ceded all its authors' rights to that Joint Venture, but then entirely defaulted on its portion of the investment, thus making the film a Penthouse production, not a Felix production. By way of explaining the origins of this Joint Venture Agreement, Massaro made the court aware of Bob Guccione's social standing. As a "painter, esthete, cultivator of the Roman world (his house in New York, published in many magazines of the world, is a sort of museum of the classical style and of the Roman world), and photographer of world fame, he would have had responsibility for the scenographic and photographic aspects of the film (that he would have wanted entrusted to the utmost professionals of the sector, whom he trusted)." Rossellini, on the other hand, would merely "have produced materially the film with a reward for his activity." This hierarchy was proved,

Massaro insisted, when Tinto Brass had filed suit against Felix to block the film, for Felix's response was to integrate Penthouse as coproducer into the proceedings. (Actually, this hierarchy was *disproved* by such. Felix integrated Penthouse Clubs International Establishment for the simple reason that Brass's original contract had been with Clubs, a contract that Felix had assumed several months later.) Massaro further reminded the court that the payment to the Italian National Bank of Labor "was effected wholly by Penthouse."

Massaro returned to his claim of Penthouse's confusion and disorientation:

In the course of the relationship Felix repeatedly requested (and obtained) from Mr. Gerard [*sic*] Kreditor, for Penthouse International Films, the underwriting of documents that it asserted were necessary for Italian bureaucratic exigencies and that it declared expressly counterfeit and devoid of relevance between the parties (Exhibit 6), confirming the entire survival, notwithstanding any other document filed with the Italian Ministerial Authorities of the original JOINT VENTURE contract.

The defendant, in the dark about Italian laws, was then rendered informed by third parties that, in effect, the documents undersigned by it had been utilized by the claimant Felix in the attempt to attain, in its own exclusive interest, relevant undue advantages from the Italian State, first of which was the recognition of the Italian nationality of the film (Exhibit 28) and which were evidently put forth not in good faith.

Now it is time to pause and reflect. Back on 25 March 1981 Penthouse *Clubs* demanded to see the certificate of Italian nationality, which it claimed that Felix had never forwarded. In the suit filed by Penthouse *Clubs* on 2 June 1981, Massaro wrote that Rossellini, inducing the plaintiff to enter into financing and production, was "ensuring his own relevant financial and organizational contribution as well as the Italian nationality of the film." A month later, July 1981, Benjamin Baker submitted an affidavit to the US District Court, on behalf of Penthouse, in which he stated that "Plaintiffs... claim that Italian nationality for *Caligula* and a subsidy were, in fact, granted.... [T]he Italian attorney for Clubs International [Massaro] has categorically informed me that Italian Nationality has not been granted."<sup>23</sup> So Massaro told the Civil Court of Rome that Italian nationality had been granted but that Rossellini had never supplied Penthouse with any such documentation. At the same time, he instructed his fellow

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23. Benjamin Baker, Affidavit, July 1981, *Felix Cinematografica Srl and Franco Rossellini v Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse Records, Ltd., and Robert Guccione*, United States District Court – Southern District State of New York, 86 Civ. 6183 (WCC), 86 Civ. 3435 (19 September 1983). FRC, DDP 360–17, pp. 34+.



attorney in England to deny to the US federal court that Italian nationality had been granted. Now, seven years later, Massaro exhibited that very certificate of Italian nationality as Exhibit 28! He now repeated his earlier allegation that Italian nationality was in breach of the contract and was procured in bad faith. He neglected to mention that the mutual Felix/Penthouse contract to make the film eligible for Italian government contributions required an application for Italian nationality. He also neglected to mention that to apply for a loan from the Italian National Bank of Labor also required an application for Italian nationality.

Further to demonstrate Felix's bad faith, Massaro brought up the topic of the revised *I, Caligula*: "Against all expectation with a real and true surprise attack, Felix arbitrarily produced a new version of the film in substitution of the original, confiscated with definitive sentence."<sup>24</sup>

Massaro's summary of events was that, to protect itself against Felix's endless contractual frauds, Penthouse sought to have a single contract that would abide forever, "because Bob Guccione felt betrayed in the friendship and did not intend to have further relationships with Rossellini who despised him." The Settlement Agreement of February 1984, Massaro continued, just as the original Joint Venture Agreement of October 1975, explicitly set forth that it dealt with *all* forms of exploitation, without exception. Massaro continued that the Settlement Agreement specified that the entire cost of the film was \$11,000,000, footed entirely by Penthouse. Of course, as we have seen, this is not what the Settlement Agreement said.<sup>25</sup>

As a side note, we should pay attention to Massaro's claim of Guccione's feelings having been hurt by Rossellini's betrayal. That was true. Guccione invariably suffered hurt feelings when people turned on him, whether they were Penthouse Pets or business colleagues or family members. He could not understand why they would turn on him or sue him. It never occurred to him that by swindling people, forcing them into prostitution, denying them outside career opportunities, and so forth, they could possibly resent him. He was mystified by their rejections. Concluded he, "If there is a God, he must be terribly unjust or work in such mysterious ways as to be totally unfathomable. I cannot accept anything that is so unfathomable."<sup>26</sup>

Massaro summarized the "Subsequent Legal Developments":

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24. Massaro, *op. cit.*, paragraph III(b).

25. Massaro, *op. cit.*, paragraph IV.

26. Janie Lawrence, "The House That Bob Built," *Independent*, Friday, 15 August 1997, <http://www.independent.co.uk/voices/the-house-that-bob-built-1245604.html>.



Speciously, Felix, deluded in its own expectations (and relative confidence) of usurpation in damages of the defendants, and deluded by the outcome in Italy of the new edition of the film *I, Caligula*, proposed, after more than 16 months from the agreement (naturally, after having taken in what was provided for in the transaction in its own favor), before the Magistrate of Rome with the fraudulent interposition of the Cosmpoli[tan] company, a claim as per article 700 of the Civil Procedural Code, contesting the right of the defendants themselves to exploit the film by videocassettes, declaring that said right had remained excluded from the agreement of 2 February 84 but invoking, at the same time, the procedural regulation provided for by the same agreement. The Magistrate of Rome with the ordinance of 9 December 85, founded upon the tendentious perspective (or exposition) of the facts on the part of Felix and on the lacking examination of the documents (suggestively introduced), prevented Penthouse International, Ltd., "from producing or having produced..." of "not distributing and to make cease the distribution..." on the part of third parties (noted and not summoned into the proceeding). Following such ordinance (legally and logically aberrant as already amply put forth both above as well as in the entry of appearance), Felix summarized the judgment before the Court of Rome.

Thus, concluded Massaro, there was a "paradoxical" situation in which Penthouse, which had supplied the entirety of the funding, was being damaged by the fraudulent magisterial ordinance that was reinforcing Felix's unwarranted claim as copyright owner.

Gianni Massaro's Counter-Action was filled with so many howlers that Maurizio Lupoi had an easy time refuting it in a mere 12 pages. His arguments were mostly repeats of what Felix had presented in the courts previously. He opened by reminding the court that the United Sessions' "decision... focused on the bad faith of the claiming companies, maintaining it to be beyond a doubt, and has sentenced them to the repayment of damages as per article 96 of the Civil Procedural Code. The hardness of the expressions employed in the motivation of the sentence of the United Sessions was such as to have gone well beyond the argumentations set forth by the defense of Felix Cinematografica."

Far from being done deceitfully in order to mislead Penthouse, all the contracts were made as required by law, and by law the film was Italian, and by law Felix owned the copyright. The October 1975 Joint Venture Agreement that Massaro expounded upon is nowhere mentioned in the Settlement Agreement of February 1984, which he himself had drafted, and thus it is made irrelevant to future proceedings. The June 1976 contract and its amendments, which Massaro had attempted at such length to debunk as deliberate forgeries, were in fact the

sole bases of the Settlement Agreement. *I, Caligula* was not illegitimate, but was the prerogative of Felix, which owned all the rights, and it was not in conflict with Penthouse's earnings.

Lupoi brought up something else that had never been mentioned before. The Settlement Agreement contained a clause that read: "Felix acknowledges and confirms that the Penthouse Group has absolutely no part in any debt contracted by Felix, in connection with any third party also in respect to production of the film *Caligola*. Another request may therefore be made by Felix to have the Penthouse Group assume, in whole or in part, payment of said debts." For those not well-versed in the law, the terminology is too abstruse to comprehend. Put into plain English, this means that Penthouse is not responsible for any debts related to production, which are the producer's (Felix's) exclusive responsibility.<sup>27</sup> Of course, that was just required legalese, since Penthouse had by now indeed paid most of Felix's debts. Yet this required legalese, as Lupoi pointed out, is "a clause typical of coparticipation contracts, but certainly not of ties of a corporate nature, even temporary, such as coproduction."<sup>28</sup>

Lupoi's arguments were irrefutable, yet Massaro did what he could to refute them.<sup>29</sup> "The Supreme Court," Massaro argued, "was not informed of the conditions and elements now exposed and therefore ruled as it ruled." Despite any subsequent contracts, history could not be rewritten, and the historical record made clear, he stated, that *Caligula* was produced by Penthouse Clubs and Felix as a Joint Venture. Further, the Joint Venture was signed in New York City, by residents of New York, and was hence regulated by New York law; thus, Felix should not count on "an Italian ray of hope" to overturn a New York contract. The film, though shot in Italy, was regulated by New York law, and it was only a deceptive declaration by Felix that caused the production to be "transferred onto the Italian plane." By the Joint Venture Agreement, Vidal's author rights were ceded by Felix to the joint venture. Massaro had to deal, of course, with the transfer of author rights from Masolino d'Amico on 6 March 1985. He claimed that this transfer of rights was a fraud on Felix's part, since it occurred

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

28. Lupoi, Concluding Statement (8 September 1988), *Felix Cinematografica, Srl, v Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse International, Ltd., and Penthouse Records, Ltd.*, Tribunale Civile di Roma, Sezione I — G.I. Dr. Galbiatti, R.G. N° 2062/86 (29 March 1988). FRC.

29. Gianni Massaro, Closing Reply (16 September 1988), *Felix Cinematografica, Srl, v Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse International, Ltd., and Penthouse Records, Ltd.*, 30 September 1988. FRC.

subsequent to the comprehensive Settlement Agreement of February 1984, which demonstrated that no such author right had existed to begin with.

Expanding upon David Myerson's earlier fallacious argument,<sup>30</sup> Massaro maintained that Felix admitted that the music rights and Vidal's author rights had already been transferred to the Joint Venture, which proved that "Felix has no right to institute proceedings with regard to the production and exploitation of the videocassettes which find specific and binding technical and creative reference in these rights." Again, as a reminder, that Felix owned those music-utilization rights and sold them to Penthouse rather than to the Joint Venture demonstrated definitively that the Joint Venture was not and had not been operative. Vidal's author rights were to have been transferred to The Caligula Company as per the Joint Venture contract, but that never happened once the Joint Venture was replaced by the Joint Production, by which Felix retained Vidal's author rights.

**18 AUGUST 1988 — SUPREME COURT OF THE STATE OF NEW YORK — PENTHOUSE'S REPLY AFFIDAVIT (36TH LAWSUIT, CONTINUED)**

**R**ETURNING TO THE ONGOING STATE SUIT in New York, David J. Myerson, president, general counsel, and chief operating officer of Penthouse International, submitted yet another repeat of Penthouse's arguments, arguing, once again, that the issues at hand were all *res judicata* by virtue of Felix's discontinuance with prejudice of 1984. He asserted again that Penthouse owned the copyright as per the Settlement Agreement of February 1984. He reiterated that Rossellini had told the court an "outright lie" when he misstated the facts about his discovery of the copyright registration. He proffered again to the court that the Settlement Agreement stated that it applied to all rights without restriction and that it further confirmed that Penthouse had contributed the entirety of the \$11,000,000 budget, even though the document stated no such things. He again called Felix's translation of the Settlement Agreement a "sham." This is the final item in this particular case that survives in the files. From what we can discern from a later document,<sup>31</sup> Cohen declined to rule on the film's ownership, and instead reduced the issue to the single one of Penthouse's failure to provide an accounting.

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30. Myerson, amended affidavit, 17 May 1988, *op. cit.*

31. John J. Sarno, Reply Affidavit, 16 February 1990. *Penthouse Films International, Ltd., v Felix Cinematografica and Franco Rossellini*, Supreme Court of the State of New York – County of New York, index number 011799/89. FRC.



**30 SEPTEMBER 1988 — SENTENCE OF THE MAGISTRATE’S COUNSEL CHAMBER OF THE FIRST SECTION OF THE CIVIL COURT OF ROME (34TH LAWSUIT, CONTINUED)**

A COLLEGIAL PANEL OF THREE JUDGES — President Mario delli Priscoli, Judge Achille Toro, and Reporting Judge Ruggero Galbiati — issued its ruling on 30 September 1988. The Civil Court, or Tribunale Civile, has the power to dissolve injunctions, and thus could have dissolved Fancelli’s temporary injunction. Instead, the three judges supported Franco Rossellini and Felix Cinematografica in full and denied all of Penthouse’s arguments.<sup>32</sup> As for the earlier Joint Venture governing, “The Court, in view of the interpretative criteria indicated in articles 1362 and subsequent of the Criminal Code, considers eminently clear the will expressed by the two parties to create a new settlement agreement while completely extinguishing any earlier relationship, and as a consequence, substitute the original agreement with a new series of agreements.”

The judges went further, and just as explicitly:

Any other right to the economic utilization of the film, other than its projection in public cinemas, and corresponding to the work’s exploitation (in particular, in television and videocassette production: see articles 12-13-45-46 and 61 of the decree of Author’s rights relative to the regulatory sources), do not appear as part of the contractual stipulation between the two parties. Nor does the exchange of correspondence and telexes between the concerned parties, which preceded the completion of the settlement, provide decisive elements relative to the thesis maintained by the Penthouse Group, according to which the negotiation also included the other utilization rights of the film (reproduction for videocassette production and marketing).

Though the above term was only “provisionally effective,” Felix was definitively ruled the sole producer of *Caligula*, legal owner of all rights apart from the music-utilization and cinema-exhibition rights it had already transferred to Penthouse. Felix owned all television and home-video rights.

After many years of conflict, the judges finally addressed the long-standing problem of Jack Silverman’s letter, by which Felix admitted that the June 1976 Joint Production contract was a legal fiction designed to bypass Italian regulations. For good measure, the judges also addressed the follow-up notes bearing Rossellini’s signature:

For the sake of completeness, it must be added that the circumstances do not exist for the transmission of the documentation to the Public

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32. See also “International Sound Track,” *Variety* (weekly) 331 no. 10, Wednesday, 28 December 1988, p. ???.



Prosecutor, as requested by the defendant companies during the hearing in which the conclusive statements were being made (although in the final bearing, worded following the resumption of the controversy, they no longer insisted), in relation to the hypothesis advanced on an effective crime by Felix in its presentation of false documents, used to obtain Italian nationality for the film. Indeed, in all the documents presented, there appear to be no motives seriously to indicate such a hypothesis; the letter forwarded on 21 May 1978 by Franco Rossellini to Bob Guccione is not at all clear in its content, and in any case, does not contain exhaustive references relative to the matter. The legal costs relative to the trial are borne by the losing party, and are to be paid according to the indications.

The court sentenced the Penthouse companies to reimburse Felix its legal costs of £2,237,500 (US\$1,598.56). That should have settled the issue of rights ownership. The problem, foreseeably, was that Penthouse would repeat old charges in the Supreme Court of the State of New York. What's more, Penthouse appealed the Civil Court's ruling. Normally a Tribunale judgment is not enforceable while an appeal is pending. Nonetheless, the Court of Appeals (Corte d'Appello) decided in this case to have the Tribunale's judgment be immediately enforceable.<sup>33</sup>

#### 29 NOVEMBER 1988 — RENÉ CHATEAU CLAIMS THE FRENCH VIDEO LICENSE

**A**S WE LEARNED ABOVE, René Chateau licensed the *Caligula* home-video rights from Penthouse. Once the French court recognized Felix's ownership, Franco Rossellini's new company, CFV, licensed video rights anew to Chateau for France and various francophone territories, including French-speaking Canada. That was in June 1987 and the contract would run for ten years.

We also learned above that Penthouse had licensed *Caligula's* home-video rights for French-speaking Canada to Alain Katz of Vista Video in October 1983. Vista Video's license expired on 1 September 1987, by which time the company was in receivership. As we learned above, Katz had contacted Felix's attorney Bitoun to suggest that a certificate proving Felix's ownership be provided to the laboratory so that the submasters could be made available to Felix's licensees. We also learned above that with the demise of Vista Video, Katz had become

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33. Penthouse's appeal and the related documents are missing from Franco Rossellini's files. We know of the appeal from Certification of Maurizio Lupoi (4 December 1989), *Penthouse Films International, Ltd., v Felix Cinematografica Srl and Franco Rossellini*, Superior Court of the State of New York – County of New York, Index Number 011799/89. FRC.

involved with a new company, Les Films du Scorpion, S.A., and that he was trying to negotiate deals with Rossellini for Scorpion.

Now things got rather strange. Scorpion had licensed a film called *Caligula et Messaline* for cinema release, and the similarity of title and the virtual identity of Daniel Maffia's logo led to some confusion. René Chateau sent Alain Katz a cordial but firm two-sentence telegram on 28 November 1988, "...by June 1987 agreement with the producer Mr Carlo [sic] Rossellini, we are the only company mandated to sell this film until 1997...."<sup>34</sup>

#### 4 DECEMBER 1988 — THE MINISTERO WILL FINANCE FELIX'S NEXT FILM, BUT ONLY IF...

THE MINISTRY OF TOURISM AND ENTERTAINMENT agreed to authorize the Italian National Bank of Labor's Autonomous Section of Cinematographic Credit to grant a loan of £700,000,000 (US\$546,382.84), but only on condition that Felix receive a favorable ruling on the *Caligula* case. The authorities looked favorably upon Felix's situation, though its assets had been frozen, because there were possibilities for recovery.<sup>35</sup> Those possibilities were immediately threatened.

### THE THIRTY-EIGHTH CALIGULA LAWSUIT

#### DECEMBER 1988 — SUPREME COURT OF THE STATE OF NEW YORK — PENTHOUSE SUES FELIX FOR BREACH OF THE JOINT VENTURE AGREEMENT OF OCTOBER 1975 AND FOR COPYRIGHT FRAUD

BY THIS TIME PENTHOUSE HAD BECOME FED UP with Rossellini and his endless lawsuits. The Penthouse attorneys sought to put an end to the annoyance once and for all. Now that Franco Rossellini had no income and no savings, now that his studio's minimal funds were frozen, now that he could no longer collect any profits worth speaking of from his previous films, and now that he was in debt to his attorneys for tens of thousands of dollars, Penthouse Films International judged it an opportune moment to file a frivolous lawsuit, bringing up false charges and disproved arguments that had already been settled by court

34. René Chateau: telegram to Alain Katz of Les Films du Scorpion, 29 November 1988. FRC.

35. Ministero del Turismo e dello Spettacolo: letter to Felix Cinematografica, 4 December 1988. FRC.

hearings and by out-of-court settlements.<sup>36</sup> Penthouse knew that Rossellini could no longer afford to defend himself. Here is the text, with my italicized comments:

Plaintiff Penthouse Films International, Ltd., by its attorneys, Shea & Gould, alleges as follows for its complaint against defendants:

1. This action seeks a declaration of plaintiff's rights in and to the motion picture film entitled "Caligula" (the "Film").

2. Plaintiff Penthouse Films International, Ltd. ("Penthouse")[,] is a corporation organized under the laws of the state of New York.

3. On information and belief, defendant Felix Cinematografica, s.r.l. ("Felix")[,] is a corporation organized under the laws of Italy.

4. On information and belief, defendant Franco Rossellini ("Rossellini") is a citizen of the nation of Monaco and is the President and owner of Felix.

5. By agreement dated October 6, 1975 (the "Joint Venture Agreement"), Penthouse Clubs International Establishment ("Penthouse Clubs"), an entity affiliated with Penthouse Films, and Felix entered into an agreement under which they agreed to produce the Film.

*Items 5–8 were true but irrelevant, as the referenced contract had been superseded by subsequent contracts.*

6. Under the Joint Venture Agreement, Penthouse Clubs and Felix each were required to contribute fifty per cent of the financing for the Film's production costs.

7. The Joint Venture Agreement further provided that if either party thereto contributed no financing for the Film's production costs, that party's entitlement to the net proceeds from the distribution or exploitation of the Film would be limited to ten per cent thereof.

8. The Joint Venture Agreement related to all rights in the Film, and allocated all proceeds from any means of exploitation or distribution of the Film. For example, paragraph 7 of the Joint Venture Agreement stated that the agreement governed:

[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, dramatic, and musical materials created or produced for the Joint Venture, and all commercial and merchandising rights....

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36. *Penthouse Films International, Ltd., v Felix Cinematografica, Srl, and Franco Rossellini*, Supreme Court of the State of New York – County of New York, Index Number 011799/89. Judge Diane A. Lebedeff presiding. Shea & Gould for Plaintiff, John J. Sarno of Robinson, Wayne & La Sala for Defendants. FRC.

9. At no time either before the Joint Venture Agreement was executed, during the production of the Film, or after the Film was released, did Felix or Rossellini ever claim that the Joint Venture Agreement or any of the parties' dealings related to anything other than all rights in the Film and all proceeds from all means of exploitation or distribution of the Film.

*Item 9 was irrelevant, since Franco Rossellini had to await government approvals and author transfers before any discussions could take place.*

10. As the Joint Venture Agreement provided, the Film was produced by Rossellini and by Robert C. Guccione, who was then the President of Penthouse.

11. Felix failed to contribute any money towards the Film's production and Penthouse was forced to contribute the entire \$11,000,000 of the Film's production costs. Accordingly, under the Joint Venture Agreement, Felix's entitlement to the proceeds derived from the exploitation or distribution of the Film was limited to ten per cent.

*Item 11 was untrue.*

12. Felix and Rossellini confirmed and acknowledged that Penthouse contributed all of the funds for the Film's production in an assignment from Felix to Penthouse, which was signed by Rossellini in 1977.

13. The assignment explicitly confirmed Penthouse's ownership of the copyright to the Film. The assignment stated that thereby, Felix:

assigns all and every right of whatever nature and howsoever arisen it has or may have in the film in all its aspects to Penthouse whether or not such rights are referred to in the joint production contract above mentioned or whether arising to Felix in any other way whatsoever to the effect that the ownership of the film in all its aspects and all rights of whatever nature in relation to the film are hereby forthwith unequivocally and without reservation vested in Penthouse. (Emphasis supplied)

*Items 12–13 referred not to an assignment but to a never-completed, unexecuted draft transaction that had not been countersigned.*

14. The Film was released to the public in or about 1980 in New York. From the time of its first release, and with the knowledge and agreement of Felix and Rossellini, the Film has continually born a notice stating that the copyright to the Film belongs to Penthouse.

*Item 14 was untrue, as the copyright notice was not by agreement with Rossellini.*



15. In or about November 1980, Penthouse registered its copyright in the Film in the United States copyright office, also with the knowledge and agreement of Felix and Rossellini.

*Item 15 was untrue, as Rossellini was unaware of this copyright registration until over a year later.*

16. In or about 1981, Penthouse Clubs commenced an action in Italy against Felix and Rossellini, among other things, to require them to account for the money, contributed by Penthouse, that they spent in connection with the Film. In or about June 1981, shortly before the scheduled court date in Italy on Penthouse Clubs' claims, and in an effort to avoid an adjudication thereof, Felix and Rossellini commenced an action against Penthouse, Penthouse Clubs, and certain others, in the United States District Court for the Southern District of New York (the "Federal Action"). Among other things, Felix's and Rossellini's complaint alleged that Felix and Rossellini were entitled to share in "35% of the gross proceeds of all exploitation of Caligula," (complaint, page 12, paragraph e) instead of the ten per cent to which they were entitled under the Joint Venture Agreement.

*Item 16 was true but misleading. Felix filed suit when Rossellini finally understood that Penthouse was withholding his share of the proceeds and also filing fallacious charges. Penthouse Clubs dropped its Italian charges. In context, it was clear that "all" meant "all to date."*

17. At no time during the pendency of the Federal Action did Felix or Rossellini ever claim that the parties' prior agreements and disputes related to anything other than all proceeds from all means of exploitation and distribution of the Film, nor did they ever dispute Penthouse's well-established ownership of the copyright to the Film.

*Item 17 was similarly true but misleading, since government approvals and author transfers had not all taken place; in this context "all" meant "all currently available."*

18. Indeed, during the pendency of the Federal Action Felix and Rossellini relied on Penthouse's ownership of the copyright to the Film to support an argument that Penthouse Clubs was not indispensable party to the case, and, in connection therewith, submitted to the court a copy of Penthouse's 1980 registration of its copyright in the Film in the United States copyright office.

*Item 18 was untrue. Felix did not rely upon Penthouse's copyright but upon Penthouse's fraudulent claim of copyright to demonstrate that Films had been coparticipant and that Clubs had not been coproducer.*

19. By opinion and order dated September 19, 1983, the court dismissed Felix's and Rossellini's Federal Action for lack of subject matter jurisdiction, on the condition that the defendants consent to

personal jurisdiction in the Supreme Court of the State of New York, County of New York[,] so that Felix and Rossellini could continue their action in that court. The court's opinion reiterated that the action related to the Joint Venture Agreement and all proceeds from all means of exploitation or distribution of the Film.

*Item 19 was true but tendentious and misleading.*

20. In or about January, 1984, Felix and Rossellini commenced a second action (the "State Action") against Penthouse, Penthouse Clubs, and certain others, in the Supreme Court of the State of New York, County of New York. The complaint was nearly identical to the complaint in the Federal Action. Among other things, like the complaint in the Federal Action that preceded it, the complaint in the State Action alleged that Felix and Rossellini were entitled to receive "35% of the gross proceeds of all exploitation of Caligula" (complaint, page 15, paragraph e) (emphasis supplied). Like the complaint in the Federal Action, the complaint in the State Action did not challenge Penthouse's ownership of the copyright to the Film.

*Item 20 was technically true, but the context makes clear that "all" referred to "all available" by Rossellini, which consisted only of income from cinema releases.*

21. On or about April 24, 1984, Felix and Rossellini discontinued the State Action with prejudice.

*Item 21 was true but tendentious, for it deliberately withheld the reason, which was that Penthouse had agreed to an out-of-court Settlement Agreement satisfying Felix's grievances.*

22. Penthouse's ownership of the copyright to the Film is established by the principle of res judicata.

*Item 22 was false.*

23. Contrary to and in derogation of Penthouse's clear ownership of the copyright to the Film, Felix and Rossellini have sent false and malicious communications to numerous entities with which Penthouse does business, and have falsely asserted in lawsuits filed by them in foreign nations, that they own the copyright to the Film.

*Item 23 was untrue, for the Settlement Agreement implicitly established Felix's copyright ownership, and the Italian courts recognized Felix's ownership of rights.*

24. Penthouse is entitled to a judgment declaring that Penthouse owns the copyright to the Film.

*Item 24 was false.*

WHEREFORE, plaintiff demands judgment:

1. Declaring that plaintiff is the owner of the copyright to the Film,  
and
  2. Granting plaintiff such further relief as the Court may deem just  
and proper.
- Dated: New York, New York  
December , 1988

This trial would not get underway for more than a year.

#### JANUARY 1989 — EUROPEAN SALES TRIP

**B**EFORE ROSSELLINI HAD A CHANCE TO REACT to Penthouse's latest lawsuit, he had already arranged a European sales tour for licensing television and home-video rights. *Daily Variety* reported that Penthouse International planned to appeal the unappealable Italian ruling and that licenses it had already granted would remain in force despite the judgment. David Myerson told *Daily Variety*, "We intend to appeal from the decision in Rome concerning *Caligula* and to fight it in every court and every country. The decision seems to me to have no practical impact since we believe *Caligula* has already been sold everywhere we have any interest. However, as a matter of principal we will contest it." Gianni Massaro also chimed in, saying that the court hearing was too speedy, and that this was contrary to normal juridical practice. Actually, the hearings lasted over a course of nine months, and that was after several years of hearings in different courts. Said Massaro, "There was no prior investigation. The court did not call for witnesses or documented evidence. It is not logical that Penthouse financed the entire production for film rights alone."

Franco Rossellini said, much more simply, "Their case is lost. There is nothing to appeal. The order is good all over the world."<sup>37</sup> Over the course of the next few years, Franco Rossellini would discover to his dismay that an Italian ruling has no effect outside Italy, and that there are no unappealable rulings in Italy.

There was more good news yet. On 23 January 1989 Massimo Ferrara-Santamaria sent Franco Rossellini some documentation concerning the recent successful appeal against the sequestration order for *Last Tango in Paris*.<sup>38</sup> This was now case law and could easily be used as a blueprint to have the full-length *Caligula* appealed as well. Judging from a letter from Pietro Bolognini nearly two

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37. "Rossellini Plans Europe Sales Trip for 'Caligula,'" *Daily Variety*, \_\_\_ no \_\_, Tuesday, 10 January 1989, p. 28.

38. Massimo Ferrara-Santamaria: letter to Rossellini, with excerpts from defense lawyer Luigi D Maio's memo on *Last Tango in Paris*, 23 January 1989. FRC.



years later, *Caligola* was indeed now no longer sequestered,<sup>39</sup> though there is no other information in the files about this, and though the uncut *Caligola* would never be reissued in Italy.

#### 6 FEBRUARY 1989 — FELIX STARTS AFRESH

**M**ASSIMO FERRARA-SANTAMARIA drafted Franco Rossellini's letter to the National Bank of Labor's Autonomous Section for Cinematographic Credit.<sup>40</sup> In response to the Ministry of Tourism and Entertainment's promised favorable opinion should Felix prevail, Felix approached the Autonomous Section for Cinematographic Credit accepting the offer of £700,000,000 (US\$546,382.84) financing to re-open the studio, and offered as a guarantee the "entirety of the net proceeds, matured and maturing, relative to the cinematographic exploitation of the film CALIGULA in the whole world, excluding Italy, owed to FELIX, in any capacity from the US coparticipation of PENTHOUSE of New York." This was a reasonable guarantee for Felix to make in any case, but was clever as well. If Penthouse decided again to default on paying Felix's share of the proceeds, it would be answerable not only to Felix, but to the Italian government. At least, that was the hope. It would not be the reality.

Felix took this one step further, offering in addition "half of the net proceeds due to it, matured and maturing, relative to the exploitation of the film CALIGULA in all the countries of the world, excluding Italy, through the means of home video, television, and every other non-cinematographic means." Thus, if Penthouse decided to keep distributing home videos and licensing television rights, it would be answerable to the Italian government.

All cessions would henceforth be effected through an agent of the Autonomous Section for Cinematographic Credit's choice, which again would cause Penthouse to think twice about ceding further rights.

Felix further offered half the net proceeds of the original *Caligola* should the sequestration order be lifted and the film re-released in Italy. The pre-print materials for *Caligola*, on deposit at Technicolor Rome, would be under the control of the Autonomous Section for Cinematographic Credit.

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39. Pietro Bolognini of Uniexport: fax to Franco Rossellini, 5 December 1990. FRC. It appears that pre-print materials for the 1979 *Caligola* have all been destroyed, though this is not certain.

40. Rossellini for Felix: letter to the Banca Nazionale del Lavoro, SACC (Sezione autonoma per il Credito Cinematografico), 6 February 1989. FRC.

Nine days later, on 15 February 1989, Franco Rossellini sent a further letter on behalf of Felix to the Autonomous Section for Cinematographic Credit,<sup>41</sup> making an offer even more generous:

In partial modification of our preceding letter of 6 February 1989 for the purpose of restricting the guarantees to the most efficient ones in terms of profitability and realised the fastest, we are prepared to cede to you 100% (one hundred per cent) instead of the 50% of the television rights of our film CALIGULA throughout the world, excluding Italy.

At the same time Rossellini wrote a letter to the National Bank of Labor<sup>42</sup> with a copy to the Autonomous Section for Cinematographic Credit a further modification:

...we irrevocably place at your disposal the entire sum of £500,000,000 (said in another way five hundred million) to apply towards the financing for our consolidation in the course of the issuance/allocation on the part of the Autonomous Section on Cinematographic Credit (Intervention fund — art 2 law 14.8.71 no 819).

Now, at that time £500,000,000 was the equivalent of US\$369,254.98. Just a few months earlier Felix had effectively no funds at all. Felix still had no funds, but was certain that the Ministry of Tourism and Entertainment would come through with its £700,000,000 loan. The contract between the Autonomous Section for Cinematographic Credit and Felix Cinematografica was signed in Rome on 8 March 1989,<sup>43</sup> and the £700,000,000 loan arrived on 23 March 1989.<sup>44</sup> Just three weeks earlier, on 1 March 1989, the US had at long last signed on to the Berne Convention for the Protection of Literary and Artistic Works, which should theoretically have offered Felix some protection in the United States. Unfortunately, even after signing the treaty, the US was still a case apart, and the Berne Convention had no bearing on Felix's forthcoming American proceedings, though it encouraged Penthouse to become even more aggressive in reversing the Italian ruling.

All this good news was simultaneous with the predictable overdue reminder from Jacques-Georges Bitoun. This time, in addition to fees owing of 173,300 francs (US\$27,845.50), there was the new matter concerning

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41. Rossellini for Felix: letter to the Banca Nazionale del Lavoro, SACC, 15 February 1989. FRC.

42. *Ibid.*

43. Contract among SACC, represented by L'Avv. Gian Mario Feletti, Felix Cinematografica, S.r.l., represented by its sole administrator Giacinto Solito, and Romano Franco Rossellini; G/10892 at the Ufficio del Registro Atti Privati Roma, represented by its director Dr Aldo Pappacena, 8 March 1989. FRC.

44. SACC: letter to Felix Cinematografica, 23 March 1989. FRC.

19,300.80 francs (US\$3,044.28) due for services rendered in December and January.<sup>45</sup>

Now that Felix had a contract with the Autonomous Section for Cinematographic Credit, it was free to have CVF license *Caligula* to Uniexport, and it granted that license for all territories save the US and France.<sup>46</sup> This was a two-year renewable consignment from which Uniexport would earn 15% of all net up to a gross realization of £500,000,000, after which Uniexport would retain 20% of net receipts. Ominously, this was for all formats in all venues, cinemas as well as television and home video. This was a risky move, and it deserves explanation.

On 30 September 1988 the Civil Court of Rome upheld Felix's claim as the sole owner of intellectual-property rights, utilization rights, and exploitation rights, apart from those it had transferred to Penthouse. The court did not specify copyright, though copyright would be included in the intellectual-property rights. The court further upheld the validity of the Settlement Agreement of February 1984. A careful reading of that Settlement Agreement demonstrates that it nowhere states explicitly that Penthouse had exclusive rights to sublicense the film. It states only that Penthouse would earn 90% of profits from screenings in non-Italian cinemas, though it did admittedly word this, in article 14(a), as amounts "collected or due for collection by the Penthouse Group," which implied that Penthouse had an exclusive distributorship. A clever interpretation of the Settlement Agreement could allow Felix to license the film wherever it pleased, for cinemas, television, or home video, so long as Penthouse got its share. Penthouse seemed not to have realized this, and Penthouse certainly was not expecting Felix to make use of this loophole.

There was a reason also for excluding the US and France. The courts in the US did not look favorably upon Italian rulings, Italian copyrights, Italian government authorizations, or Italian contracts. Furthermore, it was now established historical practice that a US investor who fraudulently registered copyright of another entity's work was not guilty of infringement. There was also a suit still pending in the Supreme Court of New York for which Felix could not afford representation. That made assignments in the US untenable. As for France, Felix had won the case in the Tribunal de Commerce de Paris in April 1987, but Penthouse had challenged that decision and the case was still pending. Licensing rights in France would thus have been premature. It was best for the present that

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45. Bitoun: letter to Rossellini, 23 February 1989. FRC.

46. Contract between Uniexport Film and C.V.F. Filming Ventures, Ltd., 20 March 1989. FRC.



Felix leave those two territories alone and instead establish legal precedent by demonstrating its definitive ownership over the film in all the rest of the world.

Felix made the move even riskier by employing a failed strategy from the past. Franco Rossellini sent a letter to Vestron Video which had licensed pan-American home-video rights to *Caligula*.

Dear Mr. Bargman

as you recall, on May 1-1987 Mr Rinaldo Bianchi from Studio Legale Lupoi notified Vestron Video about the decision of the Judge Fancelli to stop distribution of *Caligula*'s video cassettes until the Tribunal of Rome would have taken a decision on the merits.

The Tribunal of Rome has now declared that all Video and Television rights of the film *Caligula* belong to the Producer of the film Felix Cinematografica — as by assignement by the authors Gore Vidal and Masolino D'Amico.

By consequence who ever has or is distributing *Caligula* in video is infringing the Copyright of Felix Cinematografica. The Court has declared executive the charge no.2 of the Sentence.

I would be grateful if you could contact — at once — Professor Lupoi in Rome : Via Bertoloni 55 ROMA.

Regards

Franco Rossellini<sup>47</sup>

He attached the court decision as well as the chain of title as supplied by the Ministry of Tourism and Entertainment. Vestron wisely declined to respond. As a licensee it was not infringing copyright. The licensor (Penthouse) should have been warned, not the licensee.

Rossellini was also working to settle the situation in the United Kingdom. His solicitor Bartletts de Reya had now become Mischon de Reya.<sup>48</sup> Of the \$8,115 still owing, Rossellini was at last able to make a small partial payment of \$1,000 with the promise for the balance forthcoming. The Italian court ruled that Felix owned the non-cinema rights, but said nothing about the ownership of the physical materials. Nonetheless, Felix was now attempting to seize the submasters thought to be held for Penthouse Clubs by Film Media Services Limited, which would be a delicate operation, for if Film Media Services were to suspect that a seizure was planned, it would surely alert Penthouse.

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47. Rossellini for Felix: letter to David W. Bargman, Director, Legal Affairs, Vestron Video, 23 March 1989. Spelling and grammar largely uncorrected. FRC.

48. R. George Anticoni of Mischon de Reya: letter to Rossellini, 31 March 1989. FRC.

What is especially interesting about this letter from R. G. Anticoni of Mischon de Reya is that it is clear that Gideon Cashman was still Felix's New York attorney. It should be recalled that almost a year earlier, on 14 June 1988, Cashman's firm had petitioned the Supreme Court to be dropped from the case for lack of payment. The Supreme Court of the State of New York had not yet granted Pryor, Cashman, Sherman & Flynn's request to be dropped,<sup>49</sup> and so in the interim Cashman was still under Rossellini's employ.

Less than two months later Franco Rossellini went one step further and ordered from Technicolor Rome a 35mm print of *Caligula*, but this was something new; it was a "television copy,"<sup>50</sup> about which we shall learn more below.

Felix, through CVF, expanded upon its license to Uniexport Films, and licensed both the hard and soft versions of the English-language *Caligula* to New Select of Japan for nontheatrical as well as theatrical release!<sup>51</sup> The contract would run six years for a total of US\$120,000, plus 70 percent of television royalties.

Rossellini was bursting with confidence. He wrote to his long-suffering attorney Massimo Ferrara-Santamaria:<sup>52</sup>

Just a few words to confirm with affection my debt to you for your continued work of professional assistance for the protection of my interests for so many years.

I undertake to pay you £50,000,000 (fifty million lire) [US\$34,827.33] upon the first receipts from the film "CALIGULA," giving copies of this present letter to our mutual friend Pietro Bolognini, to whom the exploitation of the film is entrusted, so that he sees to getting you, as soon as possible, that fifty million, in instalments, as the receipts accrue.

I pledge to pay you another fifty million upon the recovery of the proceeds due me for the illegal exploitation of the film by Penthouse International, Bob Guccione, and their associates.

The present applies to all legal effect.

One day later Rossellini, through CVF, granted a five-year theatrical license to Shailesh Shah, Inc., of India for a total of US\$20,000.<sup>53</sup> Five days after that,

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49. Notice of Entry, 25 July 1989. *Penthouse International, Ltd., v Felix Cinematografica Srl and Franco Rossellini*, Supreme Court of the State of New York, County of New York, IAS Part 8, Index Number 89/11799. FRC.

50. Technicolor SpA Bolla di Accompagnamento, n. progressivo attribuito 001958, 15 May 1989, with accompanying handwritten notes by Franco Rossellini. FRC.

51. Contract between C.V.F. Filming Ventures and New Select Co., Ltd., 17 May 1989. The existence of a Felix-prepared soft English version can be demonstrated by a letter from SACC to Technicolor SpA with a carbon copy to Felix Cinematografica Srl, 5 September 1990. FRC.

52. Rossellini: letter to Ferrara-Santamaria, 19 May 1989. FRC.

Felix, through the Autonomous Section for Cinematographic Credit, ordered two 35mm prints for the upcoming Cannes Festival.<sup>54</sup> It was surely for Cannes that 1,000 four-color promotional brochures, 21cm × 27.9cm, were ordered for £900,000 (US\$616.33) + VAT.<sup>55</sup>

Even more boldly, Uniexport offered Neue Constantin *Caligula* for German release in cinemas, on television, and on home video:<sup>56</sup>

...your Company has bought once the cinema rights of the above film for the territory of Germany. Rights, however, which we believe have expired.

As we have been authorized to deal the re-issue rights, as well as videogram and TV rights, before dealing with other interested buyers, we believe dutiful to first ask you if you may be interested to the film and to its new edition.

Edition, which has been purposely prepared for television in soft version. This new edition, of 2 hours, available in 2 parts, of 1 hour each may be re-issued for cinema and released for video and tv....

Neue Constantin was indeed interested, especially in the soft television version, and asked for a videocassette screener.<sup>57</sup>

Next in the surviving files is a \$20,000 check from Luis A. Martinez Lopez of Camad, Inc., made out to CVF, for Mexican cinema and video rights to the English version of *Caligula*.<sup>58</sup> Then comes the six-year contract with Inter Films of Chile for the English version of *Caligula*, for a consideration of \$6,000.<sup>59</sup> After that in the file is a thermal photocopy of an advertisement in a Brazilian home-video trade journal announcing *Caligula's* availability from America Video.<sup>60</sup>

There was also a six-year contract between CVF and Civite SA of Spain for cinema, television, and home-video rights to *Caligula* for a consideration of

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53. License between C.V.F. and Shailesh Shah, Inc., 20 May 1989. FRC.

54. SACC: letter to Technicolor SpA, 25 May 1989. FRC.

55. Poligraf: invoice addressed to Pietro Bolognini of Uniexport Film, 22 May 1989 (FRC); Uniexport Film: letter to Poligraf, 30 May 1989 (FRC).

56. Uniexport Film: letter to Neue Constantin Film GmbH, 30 May 1989. FRC.

57. Herman Weigel of Neue Constantin Film: telex to Uniexport Film, 15 June 1989; Alexandra V. Buccholz of Neue Constantin Film: telex to Pietro Bolognini of Uniexport Film, 3 July 1989; Pietro Bolognini of Uniexport Film: letter to Herman Weigel of Neue Constantin Film, 14 July 1989; Alexandra V. Buccholz of Neue Constantin Film: telex to Pietro Bolognini of Uniexport Film, 26 July 1989. All FRC.

58. License between C.V.F. and Camad, Inc., 1 June 1989. FRC.

59. License between C.V.F. and Inter Films, Ltd., 8 June 1989. FRC.

60. America Video (São Paulo, Brazil), advertisement in *Jornal do Video*, 20 June 1989. See also Bolognini (this time representing Bolmar Distribuzione Srl!): fax to Livio Bruni, 8 November 1989; Rossellini: faxes to Livio Bruni, 17 July and 19 July 1990. All FRC.



US\$60,000 plus 25% of home-video earnings and 55% of television earnings.<sup>61</sup> A week later came a five-year contract, for home-video release only, with Filmitalus Ltda. of Portugal.<sup>62</sup> This was for the full 156-minute edition, in either English or Italian, for a consideration of \$15,000. These business dealings were no more substantive than mirages.

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61. Contract between C.V.F. and Civite S.A., 20 June 1989. FRC.

62. Contract between C.V.F. and Filmitalus Ltda., 27 June 1989. FRC.