Thirty-Seven

"I'M INCORRUPTIBLE"

Guccione has called "Caligula" "a study in the application of power, of how absolute power corrupts absolutely." How does this power broker, shut up in his gilded mansion, propose to avoid this fate if he heads up the world's largest corporation? He flashes a grin, then laughs out loud, "That's easy, I'm incorruptible."[1]

6 FEBRUARY 1990 — SUPREME COURT OF THE STATE OF NEW YORK (38TH LAWSUIT, CONTINUED)

THE SAME DAY, 6 February 1990, at the Supreme Court of the State of New York – County of New York, Penthouse Films International made a motion in opposition to Felix's request for summary judgment.[2] This consisted of two affidavits with numerous exhibits. First was Bob Guccione's affidavit, written, of course, by Guccione's attorneys. Guccione merely attached his signature and probably did not even read the text. This affidavit was quite lengthy, 39 pages in all. In this brilliant document Penthouse and its lawyers outdid themselves. This was the most skillful set of arguments that Penthouse had yet created. It was so well-constructed that a refutation of even a single one of its statements would be extraordinarily difficult. If you have read this far, my italicized commentaries below will not be difficult to follow. Anyone coming to the case afresh would be entirely won over.

---

1. Gwenda Blair, "Style: Bob Guccione Is One Very Rich Man: From Penthouse Pets to Fusion Power and Genetic Engineering," *The Los Angeles Herald-Examiner*, Tuesday, 16 June 1981, pp C1, C4.

2. Robert Charles Guccione, Affidavit of in Opposition to Defendant's Motion for Summary Judgment (6 February 1990). *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. Judge Diane A. Lebedeff presiding. Shea & Gould for plaintiff, John J. Sarno of Robinson Wayne & La Sala for defendants. FRC.

> 2. The story on which defendants' motion is based will be exposed below as having been fabricated after the fact in a bad faith effort to mislead the Court, just as in previous litigations we exposed Rossellini's affidavits as deliberate lies.

As we have seen, most of Felix's legal complaints and statements to the courts were completely factual and not fabricated after the fact. Also, as we have seen, some of Rossellini's previous affidavits contained the most unfortunate misrecollections, and when these were pointed out, Rossellini retracted his erroneous statements. That does not constitute "deliberate lies."

> 3. Defendants' whole motion is based on the utterly fraudulent assertion that the parties' February 2, 1984 agreement (the "Settlement Agreement") relates to the ownership of the copyright in the Film....

Felix's motion said nothing about the February 1984 agreement's relation to the issue of copyright, though it is true that that the motion was based upon the copyright issue settled by that agreement.

> ...In fact, the Settlement Agreement — which was signed to settle litigation over Felix's entitlement to profits from the Film — has nothing to do with the issue of the ownership of the copyright....

As we have seen, legally the February 1984 agreement did indeed vest copyright ownership in Felix, as all parties agreed that the film had been produced under the June 1976 Joint Production Agreement, by which Felix owned 100% of the copyright.

> To the contrary, at the time the Settlement Agreement was executed to resolve — in Penthouse's favor — certain disputes between the parties,....

Financially the February 1984 agreement granted Penthouse a higher percentage in recognition of Penthouse's having purchased the bulk of Felix's debts. Otherwise the agreement was settled in Felix's favor.

> ...the ownership of the copyright to the Film had already long been indisputably vested in Penthouse, which provided all of the money for the Film's production....

Felix provided $3,352,941 towards the production, about $2,000,000 of that raised from outside investors and another $1,000,000 or so loaned by the Italian National Bank of Labor. By Italian law, the Berne Convention, authors' assignments, government licenses, and contract, the copyright was entirely vested in Felix.

> ...Thus, the allegation in the complaint that Penthouse Films [*sic; he meant Felix*] owns the copyright to the Film is not based on the Settlement Agreement. In particular, the motion should be denied because:
>
> a. Penthouse Films' ownership of the copyright to the Film derives from a Joint Venture Agreement signed by Rossellini and Felix in 1975, and an unequivocal assignment to Penthouse Films of all of Felix's rights in the Film, that Felix and Rossellini signed in 1977 in order to confirm the clear provisions of the Joint Venture Agreement.

The Joint Venture of 1975 had been supplanted by the Joint Production of 1976, and the "assignment," far from being "unequivocal," was an incomplete draft that had never been countersigned, notarized, or filed with any government agency. Subsequent contracts and correspondence made it clear that this draft had no bearing whatsoever. Even had the draft been completed, countersigned and registered, it was based on the 1976 Joint Production Contract, not the 1975 Joint Venture Agreement. Penthouse was, once again, trying to have it both ways.

> b. In an effort to avoid the inescapable fact that the Joint Venture Agreement at all times governed the parties' relations, the defendants have fabricated the story that the Film had nothing to do with the Joint Venture Agreement; instead, the defendants offer the fantastic tale that the Film was made under another document, signed June 15, 1976, called the "Joint Production Contract," under a different screenplay, by different authors. Defendants offer no support for their conclusory and patently false assertion that the Film was not produced under the Joint Venture Agreement for the simple reason that no such support exists. To the contrary, the evidence is clear that production began well before the Joint Production Contract under which defendants contend the Film was made even was signed. The speciousness of the defendants' argument is further betrayed by the fact that, in years of litigation between the parties preceding this motion, the defendants never suggested that the Film that was produced was pursuant to a different screenplay.

This is a bold argument. Penthouse had signed the 1976 Joint Production Contract, which makes it somewhat more than a "fantastic tale." As we have seen to the point of tiresomeness, there is massive support for the legitimacy of the 1976 contract, and none for the 1975 agreement. That pre-production had begun before the drafting of the 1976

contract is irrelevant, as work already underway does not prevent the parties from signing novations, from parties withdrawing from old contracts or entering into new ones. All parties had agreed that the film was produced from a different screenplay. As to Felix never having before suggested that the film was produced from a different screenplay, Penthouse was ignoring Felix's 20 February 1987 Memorandum to the US District Court – Southern District of New York:[3] *" 'Gore Vidal's Caligula ' was never produced. Instead, a another screenplay entitled 'Caligula' was co-authored by Gore Vidal and Masolino D'Amico, and on June 15, 1976, an agreement covering the new work was entered into between Penthouse Films International, Ltd., a New York corporation, and Felix Cinematografica."*

> c. That Felix has never disputed Penthouse Films' ownership of the copyright to the Film (and, therefore, that the Settlement Agreement related only to profits to be derived from the Film) is established in the reported 1983 opinion of no less renowned a jurist than United States District Judge Edward Weinfeld, before whom the very parties to this action litigated regarding the Film for more than two years.

Copyright of the film was not an issue in the case tried by Weinfeld. The case concerned percentages as well as which contract governed, the 1975 Agreement or the 1976 Contract. Of course, the governing contract would determine copyright, but the proceedings never progressed far enough to make that determination. The Settlement Agreement of February 1984 was a separate issue, and it did settle the matter of copyright in Felix's favor by agreeing that the film was an Italian production governed by the 1976 Joint Production Contract (not a US production governed by the 1975 Joint Venture Agreement, which went entirely unmentioned).

> d. The motion is based on utterly inadmissible and unreliable affidavits. Most of the purported facts on which the motion is based are presented in the affidavit, sworn to December 15, 1989[,] of John Sarno, a New Jersey lawyer who was not retained to represent the defendants until November 1989. Sarno is the fourth lawyer to represent the defendants in the New York litigation with Penthouse, all of his predecessors having withdrawn. Of course, Sarno does not even purport to have personal knowledge of the facts contained in his affidavit. A few other conclusory

3. 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 for a Stay (20 February 1987). *Felix Cinematografica* v *Penthouse International, et al.*, 83 Civ. 6183 (WCC) (20 October 1987). FRC.

> allegations are presented in the affidavit of Rossellini, who we have exposed in prior actions to be a deliberate liar.

Without stating directly, Penthouse here implied that Felix's previous counsel had withdrawn because Felix had no reasonable case. What Penthouse did not state is that Felix's previous counsel had withdrawn because Penthouse had retained Felix's share of the Caligula *profits for itself and had tied up Felix's resources in court actions that halted Felix's production schedule and drained all Felix's funds, leaving Felix unable to pay its overdue bills.*

> e. Defendants base their argument on patently fraudulent translations of the foreign language documents on which they rely.
> f. Defendants' position on this motion that Felix owns the copyright to the Film contradicts the positions that Felix and Rossellini have taken in prior litigations with Penthouse.

Note the use of the plural "documents." Penthouse was presumably including among those documents the new translation of the Settlement Agreement, which by Italian law was not fraudulent. We shall get to the remaining "fraudulent" documents further on. As for the contradiction, there wasn't one, for Felix had always maintained its ownership.

> g. Defendants' position on this motion contradicts the position that Felix and Rossellini are taking at this very moment in other countries.

Wrong.

> h. The Italian courts simply have no business adjudicating issues relating to a United States copyright of a film that is not being distributed in Italy.

That would be correct had the film not been an Italian production with an Italian copyright.

> 4. In order to demonstrate to the Court the shamefulness of the present motion, I must review the history of the parties' relations from the beginning.
>
> The Joint Venture Agreement
>
> 5. In or about 1975, Rossellini and I conceived the project of working together to produce a film based on the story of the Roman emperor Caligula. On October 6, 1975, Rossellini and I executed a Joint Venture Agreement between Felix and Penthouse Clubs International Establishment ("Penthouse Clubs") which, like plaintiff Penthouse

> Films, was then a wholly owned subsidiary of Penthouse International, Ltd. ("Penthouse International"), of which I am also the Chairman. (Penthouse Clubs, Penthouse Films and Penthouse International will sometimes be referred to herein as "Penthouse".)

Wrong. It was Gore Vidal who suggested that Guccione join forces with Rossellini. Guccione initially resisted, but Vidal eventually persuaded him. It is interesting to note that Penthouse here effectively equates Clubs, Films, and International, an equation it had refused to make in all previous litigations.

> 6. A copy of the Joint Venture Agreement, which states that it is to be governed by New York law, is Exhibit 1 in the Exhibit Book to this affidavit being submitted concurrently herewith. The Film was made pursuant to the Joint Venture Agreement and the Joint Venture Agreement has from its execution governed the parties' rights in the Film.

That is a perfect summation of some of the reasons why the Joint Venture Agreement was illegal and needed to be supplanted. No Italian production could legally be made according to New York law.

> 7. Prior to the execution of the Joint Venture Agreement, on or about July 28, 1975, Felix had entered into a contract with Gore Vidal ("Vidal") under which Felix hired Vidal to write a screenplay about the life of the emperor Caligula. A copy of this agreement is Exhibit 2 in the Exhibit Book. Since the agreement expressly was on a "work-for-hire" basis, pursuant thereto Felix received the rights to the screenplay to be authored by Vidal, and Vidal did not retain any rights therein.

As Vidal demonstrated in 1979, he did indeed retain some rights. That is how he managed to have his name removed as sole screenwriter, that is how he got his name removed from the title, and that is how he got his name removed from the novelization.

> 8. In paragraph 1, the Joint Venture Agreement provided that the Film to be produced thereunder would be based on Vidal's screenplay, and in paragraph 2, Felix expressly assigned to the Joint Venture all of the rights in the screenplay, which, of course, it previously had received in the July 1975 agreement with Vidal.

What Penthouse declines to mention is that the Joint Venture had a name: The Caligula Company. The Caligula Company is nowhere credited on the film or in any publicity, before, during, or after production. Penthouse also declines to mention that Felix never transferred any rights to The Caligula Company, demonstrating definitively that the Joint Venture did not govern.

> 9. The Joint Venture Agreement, contemplating that each party thereto would raise a portion of the financing for the Film's production, provided that the copyright and all other rights in the Film would be held by the Joint Venture, and that each party's equity in the copyright would be proportionate to the financing contributed by it (par. 7).[1]
>
> [1] The Joint Venture Agreement also contained the provision that if the schedule contemplated thereby were not met, the agreement would terminate and all rights in the Film would immediately be vested in Penthouse (par. 7). Although the parties did not terminate the agreement, that provision is important because it shows that if, as the defendants now contend, the agreement had been terminated, Penthouse would still have all the rights in the Film.

Item 9, uncharacteristically, is correct. The footnote, though, is absurd. The contemplated schedule had been met, and so the agreement was not terminated for failure to adhere to schedule. Penthouse here seems to be taking the issue further by arguing that if the old contract had terminated for any reason whatsoever, even by a new contract that would give Felix all rights in the film, those rights would be owned solely by Penthouse by default because the new contract would have terminated the old contract.

> 10. Thus, under the Joint Venture Agreement, if one party failed to contribute any money for the Film's production, and the other was forced to finance the Film's production on its own, the party that provided all of the money to produce the Film would be the sole owner of the copyright to the Film. The party that failed to contribute any money would, nevertheless, be entitled to 10 per cent of the net profits derived from the Film's exploitation (par. 4).

Item 10 is also accurate, but is included only to mislead, as we can by now predict.

> 11. Felix failed to contribute any money to the Joint Venture and Penthouse was forced to provide all of the money ($11,000,000) for the Film's production. Felix has acknowledged this fact in numerous documents, which are discussed below. Thus, under the Joint Venture Agreement, Penthouse owned the copyright to the Film, although Felix received the right to receive 10 per cent of the net profits derived from the Film's exploitation.

Felix agreed that, for the purpose of the 1984 Settlement Agreement, the cost of the film would be definitively set at $11,000,000, and that Felix would not claim royalties until that $11,000,000 had been recovered. Felix never agreed that it had not contributed its share of the funding, and Felix certainly never agreed that Penthouse contributed the

totality of the funding. Felix did agree to 10% of the net partly because Penthouse had by then purchased the bulk of its debts and partly because of a physical attack and fears of further such.

> 12. As is discussed below, in 1977, consistent with and confirming the provisions of the Joint Venture Agreement that gave Penthouse the copyright to the Film, Felix executed and delivered to Penthouse Films a clear and unequivocal assignment of any rights in the Film that Felix could have.

As we know, this is inconsistent, for the incomplete and unexecuted 1977 draft assignment was based on the 1976 Joint Production contract, not the Joint Venture Agreement. Only one of these documents could govern, not both.

The Production of the Film

> 13. As I noted above, the Film was made pursuant to the Joint Venture Agreement, which from its execution has governed the parties' rights. The defendants' conclusory assertions that the Film was not produced under the Joint Venture Agreement, or under the Vidal screenplay owned first by the Joint Venture and ultimately by Penthouse, simply are false.
>
> 14. That the Film was based on the original Vidal screenplay owned by the Joint Venture is, of course, apparent simply upon viewing the Film that was produced.
>
> 15. Further, much work was done before the so-called "Joint Production Contract" on which the defendants rely was even signed on June 15, 1976. The construction of the very elaborate sets began immediately upon the signing of the Joint Venture Agreement and had been underway for a year when shooting, began in August 1976.[2]
>
> [2] On this point I invite the Court's attention to certain material distributed to publicize the Film in 1979. This publicity material is Exhibit 3 in the Exhibit Book and the statement that shooting began in August 1976 can be found at page 2 of the "About the Production" section of that material. As we demonstrate, and as is obvious, the extensive casting, negotiation of contracts, and extensive set construction did not take place in the just six weeks between the time that the so-called Joint Production Contract was executed and shooting began.

A viewing of the film would demonstrate that it was not based on Vidal's screenplay, but on a radical rewrite of it. Guccione's lawyers knew better than to submit the screenplay as an exhibit. Ironically, Rossellini and his lawyers also knew better than to submit the

screenplay as an exhibit. The final film did not match any draft of the screenplay, and no copy of the screenplay was signed by d'Amico as author or coauthor.

The set construction did not begin immediately upon the signing of the Joint Venture. Construction began six months later, in late April or early May 1976, when Danilo Donati completed his assignments for Fellini's Casanova. *And again, it is irrelevant if work begun under one contract were to be continued under a different contract.*

> 16. The contract with the director, Giovanni Tinto Brass, was executed on December 1, 1975, more than six months before the Joint Production Contract was created. The contract, a copy of which is Exhibit 4 to the Exhibit Book, provides for Brass to commence performing "upon the execution of this Agreement" (par. 1) on December 1, 1975. The contract also defined a "preproduction period" as "the period commencing with the date hereof [December 1, 1975] and ending at the start of principal photography of the Photoplay" (par. 2).
>
> 17. Similarly, contained in the Exhibit Book as Exhibit 5 is a contract with one of the actors, Sir John Gielgud, that also was signed before the Joint Production Contract was ever made. Exhibit 6 to the Exhibit Book further reflects that work was performed well before the so-called Joint Production Contract was created in June 1976. This exhibit, a letter dated March 11, 1976, shows that as of that date, Peter O'Toole already had been cast in the Film and the terms of his contract negotiated.

The contract with Brass was prepared for signing on 1 December 1975 but it is unknown when it was signed. Brass's contract was terminated when he signed a new contract with similar terms with Felix on 10 March 1976. The contract with Gielgud, interestingly, was made with Felix, not Penthouse. The contract with O'Toole was made not with Penthouse Clubs as the Joint Venture Agreement would have required, but with Penthouse International.

> 18. Exhibit 7 to the Exhibit Book are a series of documents created in and before March 1976 reflecting costs that had been incurred by Rossellini prior thereto in connection with Penthouse Clubs' and Felix's joint venture to produce the Film — here again well before the Joint Production Contract was ever made. Further, I note that these documents refer to the Film as "Gore Vidal's Caligula;" these contemporaneous documents further contradict the lawyer Sarno's uninformed story that the Joint Venture Agreement was aborted and that the Film was produced pursuant to a different screenplay.

These documents do not contradict Sarno's story.

> 19. The sole support offered by the defendants for the story that the Film was not made pursuant to the Vidal screenplay owned by the Joint Venture are two purported assignments to Felix, in the Italian language, from Vidal and one Masolino D'Amico ("D'Amico"), of rights in "another" screenplay that Felix now claims Vidal and D'Amico co-authored. Regrettably, these documents, and the translations that the defendants proffer, are patent shams.

Here Penthouse has a point, though it pursues it incorrectly. Vidal and d'Amico did not in fact co-author the screenplay. That had been the intention, but d'Amico chose not to interfere since Vidal was doing such a splendid job on his own. Yet legally he accepted co-authorship credit, and Vidal wanted him to have co-authorship credit.

> 20. I turn first to the purported assignment from Vidal, dated July 27, 1976, which is Exhibit C to the lawyer Sarno's affidavit. For the Court's convenience, we have included it in the Exhibit Book as Exhibit 8. (Of course, again, Sarno cannot possibly have any knowledge of the document about which he is swearing to the Court.) Sarno asserts that the document constituted an assignment to Felix of a screenplay that Vidal allegedly "co-authored" with Masolino D'Amico. And from the translation offered by the defendants, that document would so appear. But an examination of the document in the Italian exposes defendants' fraud.
>
> 21. In particular, Article 1 of the purported translation (which is presented without even a translator's sworn certification) refers to Vidal (in the last line on the first page) as the "co-author" of the screenplay. Yet an examination of the document in the Italian reveals the word "autore" — meaning author, not co-author.[3] Further, the word "autore" in the Italian has a box around it, and the number "(1)" appears above it; at the end of the document, there appear, the words, in bolder and obviously different typeface, "(1) annullasi 'autore' e dicesi 'coautore,'" which, in English, mean "strike out 'author' and say 'co-author.'" Suffice it to say that the translation does not so much as indicate that the concept that Vidal had a co-author was quite obviously added on at a later time, nor is any explanation offered as to when or why the Italian document was altered.[4] But one thing is crystal clear: <u>the document was altered</u>!
>
> [3] For the Court's convenience, we have highlighted in yellow the words and passages to which we refer.
>
> [4] It simply is not true that D'Amico co-authored the screenplay of the Film. As discussed below, Rossellini represented that the Italian authorities had to be told that an Italian was involved in authoring the screenplay in order for

> the Film to qualify for an Italian subsidy (which I note was never obtained); accordingly, D'Amico's name was used. But he never authored the Film, as the discussion in the body of my affidavit makes clear.
>
> 22. Similarly, all of the other references to D'Amico, or to Vidal having a co-author of the screenplay, in Article 1 of the so-called translation of the purported assignment are not in the text of the Italian document but are at the end in different typeface. Here again, the translation does not so indicate, nor is any explanation for this patently fraudulent tampering with a document given by the lawyer who proffers it to the Court!
>
> 23. Obviously, this altered document is meaningless to show that the Film was not based on the Vidal screenplay owned by the Joint Venture and is significant only insofar as it is but another example of the defendants' deceit.

What Penthouse chose not to mention is that the alterations were all signed and authorized by Vidal and Rossellini, and were made at Vidal's insistence. When parties to a contract sign and authorize their changes, they are not committing fraud and are not putting forth a "sham." Their signed changes are not "meaningless." Penthouse was correct that d'Amico had not coauthored the screenplay, but he nonetheless had coauthor's rights by contract and by government recognition, thus rendering the truth of that particular matter legally irrelevant. As for the Italian "subsidy," it was obtained, but it turned out to be only worth about 12 cents. Penthouse also neglected to mention that Rossellini, admittedly with help from Penthouse, successfully attempted to obtain an Italian low-interest loan, which did indeed require sufficient Italian authorship.

> 24. The foregoing notwithstanding, there is also additional clear documentary evidence demonstrating the speciousness of defendants' position that the Vidal screenplay and the Film were not subject to the Joint Venture Agreement. Exhibit 9 to the Exhibit Book is a copy of an agreement dated April 1979 between Vidal and Penthouse Clubs. The agreement was executed following a disagreement with Vidal as to the manner in which his authorship of the screenplay on which the Film was based would be publicized and credited on the Film. The agreement was signed in 1979, well after the purported assignment on which Felix relies. In recognition of the by then well-established and undisputed facts that Penthouse Films owned the copyright to the Film and that Felix's entitlement was only to profits, the agreement was not with Felix; instead it was between Vidal on the one hand and Penthouse Films and its affiliated companies on the other hand. Further, in the second "WHEREAS" clause, the agreement expressly stated that the Film was produced based on Vidal's screenplay under the Joint Venture

> Agreement! Thus, from even a cursory review, it is clear that Vidal considered himself the "author" and not a "co-author" of the screenplay and realized that the Joint Venture had produced the Film!

Vidal had effectively divorced himself from the production early on and was unaware that the 1975 Agreement had been replaced by a 1976 Contract. To the best of his knowledge his contract was tied only with the 1975 Agreement. The out-of-court settlement to which Penthouse here refers, written in April 1979 but not signed until May 1979, was between Vidal as the party of the first part, and The Caligula Company, International, Films, and Clubs collectively as the party of the second part. Felix was not named. It was Penthouse that misrepresented the technicalities of the film's production to Vidal, and thus this contract was fraudulent. Vidal surely thought that The Caligula Company included Felix. He did not know that The Caligula Company had long been defunct. From a cursory review of the out-of-court settlement contract, it is clear that Vidal did not consider himself an author or even a co-author of the screenplay.

> 25. The only other alleged support the defendants offer for their demonstrably false assertion that the Film was co-authored by Vidal and D'Amico is a purported assignment to Felix of D'Amico's rights. This document states that it was executed in 1986, which as discussed below, is the year in which Felix first fabricated the story that Vidal and D'Amico co-authored the Film, Felix having litigated for years without ever having so suggested. No explanation is offered as to why the purported rights held by D'Amico were not obtained until 1986. Further, and in any event, Felix having previously assigned its rights, first to the Joint Venture and then to Penthouse Films, any rights obtained by Felix at any time had to be at least for Felix's and Penthouse's mutual benefit.[5] Indeed, such would be the case even if, as Felix falsely contends, the Joint Production Contract controlled.

Felix never needed to so suggest, as that argument was implicit in the argument over the governing contract.

> [5] The defendants' argument that Felix owns the Film's rights because the alleged co-author D'Amico transferred his purported rights to Felix alone has already been rejected by the French courts. On September 27, 1989, the Commercial Court of Paris dismissed an action Felix brought in France against Penthouse Films and Penthouse International for a ruling, among other things, that Penthouse Films may not distribute videocassette and television versions of the Film. In doing so the Court held, among other things, that the purported assignments to Felix of Vidal's and D'Amico's alleged rights could not be construed as giving rights to

> Felix. Instead, if not a fraud on Penthouse, the assignments must be considered as a regularization of the previous grantings of rights. A copy of the French decision is in the Exhibit Book as Exhibit 10. The French court's decision is notable for another reason as well. The court held that the proceedings in Italy had no effect on Penthouse's rights in France, just as we urge this Court to hold with respect to Penthouse's rights in th[e] U.S.

France was bound by treaty to enforce Italian rulings. Felix thus had excellent grounds to appeal this decision.

Felix's Representations Regarding the Italian Filings

> 26. Shortly after the Joint Venture Agreement was executed, and work on the Film had begun, Rossellini stated that if he followed certain procedures with the Italian authorities, he would be able to qualify for a government subsidy for the Film. Relying on its experienced Italian partner, Penthouse agreed that it would do that which Rossellini, with his unique knowledge of Italian requirements, represented was advisable to do, provided that Rossellini and Felix confirmed that the Joint Venture Agreement reflected the parties' agreement as between themselves.

Wrong. Rossellini did not say that Caligula *would be able to qualify for a government subsidy. What he said was that by following procedure he could make it eligible for nomination for a government prize, but only after the film was finished, of course.*[4] *As we know, the Italian government did not award* Caligula *a prize; it seized it instead. It was Silverman's cover letter that misrepresented the facts by omitting any mention of the laws and regulations that forbade a joint venture with a US corporation.*

> 27. Among other things Rossellini stated that it was necessary that documents indicate that Italians were involved in writing the screenplay and in financing the Film's production. Thus, based upon Rossellini's repeated demands and what he claimed was his knowledge of Italian procedures relating to subsidies, on or about June 15, 1976, a representative of Penthouse Films signed a document (the "Joint Production Contract") with Felix. The document stated, as Rossellini represented was necessary, that Rossellini had contributed money toward the Film's production, that Masolino D'Amico, an Italian, had

4. Accordo di Transazione, 30 September 1977. Contract among PAC Produzioni Atlas Consorziate, Felix Cinematografica Srl, Penthouse Films International, Penthouse Clubs International Establishment, Penthouse International, Ltd., and all companies affiliated with Penthouse International, Ltd. DDP 360–18, pp. 19–23 and 360–19, pp. 2–6.

> co-authored the screenplay with Vidal, and that the movie would be "produced as an Italian film."

Penthouse agreed to the new contract because the old contract could not be recognized under Italian law. An executed contract governs and supersedes earlier contracts, regardless of any secret agreements to the contrary.

> 28. This document and subsequent amendments thereto were prepared at Rossellini's urging and based upon Rossellini's representation that he needed to file them to get the subsidy that he wanted. Each of the parties to this lawsuit knew at all times that these documents did not reflect the agreement as between the parties themselves. Then, as now, each of the parties knew that the Joint Venture Agreement of October 6, 1975[,] governed their true relationship and that the Film — which, as discussed above, was already in production — was subject to the Joint Venture Agreement.

The above does not help to explain Rossellini's letter to Jack Silverman of 5 July 1976,[5] which we read in Chapter 10: "[Vidal] claims that under the present circumstances he is no more the 'author' of the original idea, but rather the 'co-author' with Masolino D'Amico. Only under these conditions is he willing to assign to my Company the necessary rights to the film. At this point the premises of 'an original idea by Gore Vidal and screenplay by Vidal and D'Amico' as stated in our 'joint production contract' of June '76 are incorrect." Neither does the above explain why the July 1976 Joint Production Contract amendment increased Penthouse's share from 60% to 62.5%. Nor does the above explain why the 27 October 1977 Joint Production Contract amendment related to extra costs caused by delays in the release, the adjusted contributions, and the further increase of Penthouse's share to 65%. An inoperative contract would never thus be amended.

> 29. Notably, the Joint Production Contract does not state that it supersedes or nullifies the Joint Venture Agreement, an obvious clause that clearly would have been included had that been the parties' intention. Thus, although defendants now seem eager to put on a charade before this Court, they have previously admitted the total ineffectiveness of the documents upon which they now disingenuously rely.

Because the October 1975 contract was void by Italian law — and potentially prosecutable as well! — there was no need to mention it in the June 1976 contract, though it was admittedly a disastrously unfortunate choice not to have mentioned it.

5. Rossellini: letter to Jack H. Silverman, 5 July 1976. FRC.

30. For example, on June 23, 1976, just eight days after the Joint Production Contract was signed, Rossellini acknowledged in writing that the Joint Production Contract was not intended to alter the arrangement set forth in the Joint Venture Agreement. By letter dated June 23, 1976, Jack Silverman, then president of Penthouse Films, mailed to Rossellini a copy of the Joint Production Contract and confirmed that it was executed merely because Rossellini represented he needed it "to present to the Italian Ministero to apply for the Italian aid." A copy of this letter is Exhibit 11 in the Exhibit Book.

31. The letter confirmed that the Joint Production Contract "contains certain clauses and statements which are quite contrapuntal to our initial agreement between Felix and Penthouse." The letter went on to ask Rossellini to

> acknowledge by signing the bottom this letter that this Joint Production Contract does not constitute the essence of the Joint Venture Agreement... signed... on October 6, 1975 and that it's only the Joint Venture Agreement dated October 6, 1975 that will be binding between Felix and Penthouse and not this new Joint Production Contract.

Rossellini's signature appears on the letter under the words "agreed and accepted."

The ellipses above duplicated the ellipses Penthouse had used in its counter-argument in early 1983. When those ellipses are filled in, the meaning nearly reverses, as we learned in Chapter 31. It is true that Rossellini had made the mistake of signing Silverman's letter. He should have reported it to the authorities instead. Nonetheless, despite that letter, all subsequent agreements and understandings during the production and in the several years following were based entirely on the June 1976 contract, never the October 1975 agreement.

32. Thereafter, also at Rossellini's request, Penthouse Films executed, on July 23, 1976 and October 17, 1977, so-called "amendments" to the Joint Production Contract.

33. After the amendments were executed, Penthouse Clubs once again asked Rossellini to confirm that the Joint Production Contract and amendments were executed for the limited purpose of trying to obtain an Italian subsidy, and that the Joint Venture Agreement continued to govern the parties' relations. Thus, on or about May 21, 1978, Rossellini admitted in a letter to me, included as Exhibit 12 in the Exhibit Book, that:

> notwithstanding the documents and invoices given to me by Gerald Kreditor [the chartered accountant under the Joint

> Venture Agreement] from time to time for the purposes of submitting returns to the Italian Government regarding Gore Vidal's Caligula... the original agreement [of October 6, 1975] between us regarding Gore Vidal's Caligula remains unchanged. (Emphasis added.]

We examined this exhaustively in Chapter 31. There is no indication that Rossellini understood this curious note as referring to the October 1975 agreement.

> 34. Further, in 1977, Rossellini signed on behalf of Felix a document that confirmed that Penthouse had provided all of the funds for the Film's production and that therefore, under the Joint Venture Agreement, all of the equity in the Film's copyright belonged to Penthouse. In particular, the document recited that because
>
> > the whole of the production costs to date amounting to approximately [space left blank] million dollars have been procured by Penthouse and no sum at all has been procured by Felix NOW IT IS AGREED AND DECLARED between the parties that in consideration of the fact that Felix has not procured its above mentioned share in connection with the said production... Felix hereby 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... 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.

The above quote, of course, is from the never-completed, never-countersigned, never-notarized, never-submitted draft assignment that future contracts disregarded.

> A copy of this clear and unequivocal assignment to Penthouse Films[6] of all of Felix's rights (the "Assignment") is Exhibit 13.

The draft was hardly unequivocal, but the footnote makes for interesting reading, for Penthouse realized that it flatly contradicted the October 1975 agreement as it mentioned Films rather than Clubs.

> [6] Although the Joint Venture Agreement was between Felix and Penthouse Clubs, Felix executed the Assignment in favor of Penthouse Films because Penthouse Films was the signatory to the Joint Production Contract.

The above explanation is weak indeed.

The Release of the Film

35. The Film was first released in or about late 1979. Consistent with the parties' agreement in the Joint Venture Agreement and the Assignment, and with Felix's and Rossellini's knowledge and consent, from the time that the Film was released it bore a notice that the copyright thereto was held by Penthouse Films. Publicity regarding the Film bore the same notice. Exhibit 14 to the Exhibit Book is a copy of a screening program for the Film which was distributed and which bore the copyright notice of Penthouse Films.

That is incorrect. Yes, the film was first released on 10 November 1979, after a week-long public test screening beginning 14 August 1979, but that edition of the film bore no copyright notice at all. Screenings and bookings arranged by Penthouse did state a 1979 copyright in violation of Italian law and in violation of all contracts with Felix. Had the 1975 Joint Venture been operative, the copyright would have been displayed as The Caligula Company, or, had Felix truly defaulted, the copyright would have read Penthouse Clubs International Establishment, not Penthouse Films, which was not a party to the Joint Venture.

36. Penthouse Films registered its copyright to the film in 1980 when the FBI asked that we do so in connection with an investigation into an alleged film pirate. Exhibit 15 to the exhibit book is a copy of a memorandum dated October 29, 1980 that we received from Analysis Film Releasing Corporation, who was then our distributor of the Film, relating to the FBI inquiry.

37. Apart from the fact that Penthouse's copyright notice was published for the world to see in 1979, Rossellini was actually aware of Penthouse's publication of its claim to the copyright from the very start. Exhibit 16 to the Exhibit Book is a November 16, 1979 memorandum 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, Rossellini attended the screening as the memorandum referred to indicates. The screening program contained in the Exhibit Book as Exhibit 14 — 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.

38. Exhibit 3 to the Exhibit Book is publicity material relating to the Film, which also was distributed on various occasions. Of course, this too contains the Penthouse Films copyright notice.

Penthouse here had its best argument. Rossellini, his staff, his board members, and certainly his attorneys should have fought this flagrant breach of contract, but they never noticed it.

The 1981 Federal Court Litigation

> 39. In or about 1981, Penthouse Clubs commenced an action in Italy against Felix and Rossellini for an accounting of the money, supplied by Penthouse, that Felix and Rossellini had spent in connection with the Film....

The above omits what had preceded that event: Penthouse's approval of Felix's accountings (which unfortunately are now lost) and Penthouse's refusal to pay for the music it had sublicensed from Felix.

> ...Notwithstanding the pendency of that action, or more likely because of it, in or about June, 1981, shortly before the scheduled court date in Italy on Penthouse Clubs' claims, Felix and Rossellini commenced an action in the United States District Court for the Southern District of New York against Penthouse Clubs, Penthouse Films, Penthouse International, Penthouse Records, Ltd., and me. The complaint in that action, entitled Felix Cinematografica v. Penthouse International, Ltd., et al., Index no. 81 Civ. 3435 (E.W.), which was assigned to Judge Edward Weinfeld, is Exhibit 17 to the accompanying Exhibit Book. The complaint sought, in addition to a receiver for the Film, an accounting of the proceeds of the Film, and enforcement of Felix's purported rights in the Film, which the complaint alleged were "35% of the gross proceeds of all exploitation of Caligula" (page 12, paragraph e) (emphasis supplied). These allegations are extremely important for this motion, because they reveal that notwithstanding the all encompassing nature of that earlier litigation, Felix and Rossellini never once suggested that they owned the copyright to the Film. Quite to the contrary, their sole claim, disputed by Penthouse, was that, as the Joint Production Contract recited, they had contributed money to the Film's production, and therefore were entitled to receive 35 per cent of the proceeds from the Film's exploitation[.]

The copyright had not originally been at issue as Felix was at first unaware of the problem. What was at issue was the percentage. Of course, as we have seen, the litigation also concerned which contract was operative, and that conclusion would also determine copyright. When Rossellini first learned of Penthouse's copyright registration in March 1983, he was shocked that Julien did not challenge it in court.

> 40. Significantly, while arguing that the Joint Production Contract governed, defendants never once suggested that the Film was based on any screenplay other than the Vidal screenplay or that the screenplay was co-authored by D'Amico, a story that was not fabricated until Felix and Rossellini got new lawyers in 1986.

The authorship was not at issue in those hearings, though a determination of operative contract would have determined legal authorship.

> 41. Penthouse moved to dismiss the complaint on the ground that the United States district court lacked subject matter jurisdiction over the action, since both plaintiffs were aliens and defendant Penthouse Clubs is a Liechtenstein corporation. As Penthouse urged, the result was that Penthouse Clubs' presence on the opposite side of the action destroyed complete diversity of citizenship. Confronted with the likelihood that the district court was going to grant Penthouse's motion, and in an attempt to escape that inevitable result, in January 1983 Felix and Rossellini filed an amended complaint. A copy of the amended complaint is contained in the Exhibit Book as Exhibit 18.
>
> 42. The amended complaint was identical to the original complaint in all except two respects. First, it deleted references to defendant Penthouse Clubs. Second, Felix and Rossellini added a claim that they owned the copyright to the music of the Film.[7] Notably, in contrast, Felix and Rossellini never claimed that Felix owned the copyright to the Film.
>
> [7] That claim was based on the allegation that a November 8, 1980 assignment to Penthouse International — which Felix had indisputably executed — of any rights Felix might have had in the music was not valid because Penthouse International did not pay the amount it was required to pay thereunder. In the subsequent Settlement Agreement, the defendants confirmed Penthouse International's ownership of the copyright to the music.

That was another excellent argument. Rossellini and Felix should have challenged the copyright registration, but Julien blundered and Rossellini did not have sufficient skill to repair the damage. We should also check Penthouse's claim that it was in the amended complaint of 28 January 1983 that Felix and Rossellini first "added a claim that they owned the copyright to the music of the Film." This was a repeat of Myerson's claim from May 1988, which Felix had never been refuted, though it should have and could easily have refuted it. As we learned above, Felix's charge about the illegitimate use of the music was part of the original complaint as well as the amended one.

> 43. By opinion and order dated September 19, 1983, Judge Weinfeld dismissed plaintiffs' complaint for failure to join Penthouse Clubs as an indispensable party who, if present, would defeat diversity jurisdiction. A copy of the opinion, which is reported at 99 F.R.D. 167, is contained in the Exhibit Book as Exhibit 19.

Judge Weinfeld's Opinion

44. Judge Weinfeld's opinion is significant for this motion. In order to reach the legal conclusion that he lacked subject matter jurisdiction to resolve Felix's claims, Judge Weinfeld made findings of fact about the contracts before him, findings that were adverse to Felix.

45. With respect to the Joint Venture Agreement, the court found:

> It provides that if a contractee fails to contribute its required share of capital to the Film's production, its share of the Film's net profit, if any is limited to ten percent.

Exhibit Book, Exhibit 19; 99 F.R.D. at 170.

That is a summary of an article in the Joint Venture Agreement, not a ruling that the Joint Venture Agreement governed.

46. Based on the clear record before him, Judge Weinfeld also found that the litigation related to all of the rights to the Film and the proceeds from all exploitation of the Film. The court's opinion stated:

> Essentially, what is at issue is whether the Joint Venture Agreement of October 1975 or the Joint Venture Production Contract of June 1976 governs the production and exploitation of the film and the rights of the participants to the distribution of its earnings. Under the former, the defendants contend plaintiffs are limited to ten percent of the net profits, whereas under the latter, plaintiffs claim to be entitled to thirty-five percent.

Weinfeld nowhere stated that the issue concerned whether all rights were being disputed. He was concerned simply with the percentages of net proceeds.

> Exhibit Book, Exhibit 19; 99 F.R.D. at 171. Thus, under the court's findings, even if, as Felix and Rossellini contended, the Joint Production Contract governed, Felix's entitlement would have been to receive 35 per cent of the Film's net profits, not the ownership of the copyright to the Film.

By the terms of the Joint Production Contract, Felix had total ownership of the copyright.

47. Ultimately, as discussed below, the issue of whether the Joint Production Contract or the Joint Venture Agreement governed was resolved by the parties' Settlement Agreement, which defined Felix's interest as 10 per cent of the Film's net profits — consistent with what Judge Weinfeld found it would be if Felix did not contribute money for the Film's production and the Joint Venture Agreement governed — and made the Joint Production Contract an issue of the past. The Joint

> Venture Agreement continued unabated. That Felix eventually was forced to concede that its entitlement was limited to that which had originally been provided in the Joint Venture Agreement was consistent with Judge Weinfeld's observation that Felix's contention that the Joint Production Contract governed was "a position not readily apparent from the express language contained [in the documents signed by Rossellini]." Exhibit Book, Exhibit 19; 99 F.R.D. at 170.

That is a complete misreading of the February 1984 Settlement Agreement, which specified unambiguously that the 1976 Joint Production Contract and its amendments had governed all along, and made no mention of the earlier Joint Venture Agreement. The reduction to 10% from 35% related to Penthouse's oft-mentioned purchase of the bulk of Felix's debts, not to the validity of the Joint Venture.

> 48. As noted, Judge Weinfeld granted Penthouse's motion to dismiss for failure to join Penthouse Clubs as an indispensable party who, if present, would defeat diversity jurisdiction. The court's dismissal of the case on the ground of Penthouse Clubs' indispensability was conditioned on Felix's and Rossellini's ability to proceed in this Court. In this connection, Penthouse agreed that, if Felix and Rossellini brought the same action in this Court, Penthouse would not interpose statute of limitations defenses except insofar as such defenses would have been available were diversity jurisdiction retained. 99 F.R.D. 172, fn. 13. In short, Penthouse permitted Felix and Rossellini to continue their action in this Court.
>
> 49. Thus, notwithstanding the pendency of the litigation between the parties in Italy, Felix and Rossellini then commenced another action against Penthouse in this Court. A copy of that complaint, which was nearly identical to the federal court complaint, appears in the Exhibit Book as Exhibit 20. Like the federal court complaint that preceded it, the state court complaint alleged that Felix's and Rossellini's rights in the Film derived from the Joint Production Contract. And like the two federal court complaints before it, the state court complaint was all encompassing; like the federal court complaints, it alleged that Felix and Rossellini were entitled to "35% of the gross proceeds of all exploitation of Caligula" (Exhibit Book, Exhibit 20; p. 15, ¶(e)). Nowhere in the state court complaint, just as nowhere in the federal court complaint, did Felix and Rossellini allege that they owned the copyright to the Film.

By throwing events slightly out of sequence, Penthouse gave a wrong impression of Felix's motives in filing with the state court. Felix dropped its charges with prejudice upon signing of the February 1984 Settlement Agreement. Again, copyright was not the issue, which is why it went unmentioned.

The Settlement Agreement

> 50. Less than five months after Judge Weinfeld made the findings that were so devastating to Felix and Rossellini, they agreed to settle with Penthouse all litigation that was then pending. On February 2, 1984, a Settlement Agreement was executed in the Italian language. A copy of the agreement, together with a certified translation thereof, is in the Exhibit Book as Exhibit 21.

It was Penthouse that had agreed to settle with Felix, not the other way around.

> 51. Based on what had never been disputed was Penthouse Films' ownership of the copyright to the Film, the Settlement Agreement essentially resolved in Penthouse's favor all of the parties' disputes concerning the percentage of the Film's profits to which Felix was entitled; Penthouse, in turn, agreed to and did make a lump sum payment to Felix of $170,000.

And it resolved in Felix's favor everything else.

> 52. In particular, the Settlement Agreement confirmed, as Penthouse had contended but Felix had disputed, that Penthouse had contributed all of the money for the Film's production ($11,000,000) (paragraph 14(c))....

Wrong. The paragraph in question had all the parties agree that the total production cost had been $11,000,000, and it specified that Penthouse had (ultimately) contributed the bulk of that sum. It did not anywhere state or even imply that Felix had defaulted, nor did it state when Penthouse contributed its amounts, or under what circumstances.

> ...Consistent with this fact, the Settlement Agreement confirmed the substantive provision of the Joint Venture Agreement, that Felix and Rossellini were entitled to receive 10 per cent of the net profits derived from the Film's exploitation outside of Italy (paragraph 14(a)).

"Consistent" is wrong. "Coincidental" would have been a more appropriate word.

> 53. The Settlement Agreement also confirmed that Penthouse International owns the copyright to the music of the Film (paragraph 7) — a recitation that would be utterly inconsistent with ownership of the Film by Felix. Penthouse agreed not to distribute the Film in Italy. Felix was given the exclusive right to distribute in Italy and receive the profits from an Italian language version of the Film edited for the Italian law and market, the unedited version having been banned in Italy.

Wrong. The copyright was owned by Edizioni Musicali Gemelli Srl, which Felix licensed. Felix later assigned its Gemelli license to Penthouse. The Settlement Agreement was completely consistent with Felix's ownership of the film proper.

> 54. Notwithstanding the foregoing, the defendants argue that because the Settlement Agreement mentions the Joint Production Contract and not the Joint Venture Agreement, the Joint Venture Agreement does not and never did govern the parties' relations. The answer to this argument is obvious: the Joint Production Contract had to be mentioned because its provisions were modified in the Settlement Agreement. The Settlement Agreement merely confirmed the provisions of the Joint Venture Agreement and Assignment, which at all times remained in effect.

"Obvious" is the wrong word. "Impenetrable" would be more appropriate. The above argument is sophistry of the worst sort.

> 55. Despite the overwhelming amount of evidence confirming Penthouse's long[-]established ownership of the copyright to the Film, in a fraudulent attempt to make it appear as if Felix owns the Film's copyright, Felix proffers a false translation of the Settlement Agreement. According to Felix's translation, the Settlement Agreement relates only to the distribution of the Film in movie theaters; Felix argues that all other rights to the Film belong to Felix although, as discussed above, there is no document that so provides.

The 1976 Joint Production Contract specified that Felix was owner and producer, and therefore, by default under Italian law and the Berne Convention, the copyright holder as well. Felix held the chains of title from all the film's credited creators. The translation, or mistranslation, of the Settlement Agreement was covered in Chapter 33. The matter at hand is not documentation prohibiting non-cinema distribution rights, but rather Italian government approvals, which govern the issuance of such rights. The Italian government authorities never granted any such licenses to a noncitizen.

> 56. The purported translation on which the defendants rely was allegedly obtained in Italy just prior to the commencement of Felix's 1986 action against Penthouse discussed below. It is a shameful attempt to mislead the Court. It refers to the "theatrical distribution" of the Film in no less than nine separate places. However, as an examination of the original Settlement Agreement in Italian makes crystal clear, the word "theatrical" appears nowhere; rather, in each place in which the defendants have inserted the word "theatrical," the Settlement Agreement refers to Penthouse's distribution of the Film without the qualifier "theatrical." (See Clauses 2, 3, 5, 8, 14(a), 14(d), 14(g), and 17.)

This was covered in Chapter 33.

The Res Judicata Effect of the
Discontinuance of the 1984 Action

57. Annexed to the Exhibit Book as Exhibit 22 is Rossellini's own affidavit, sworn to March 15, 1983, submitted by Felix and Rossellini in opposition to the Penthouse defendants' motion in the 1981 federal action to dismiss plaintiffs' amended complaint for failure to join Penthouse Clubs as an indispensable party. In that affidavit, Rossellini argued that because Penthouse Films claimed to own the Film's copyright, and, indeed, had registered the copyright in its own name, Penthouse Clubs was not an indispensable party to that lawsuit. In particular, in Section 13(a) of his affidavit, Rossellini stated:

> On November 7, 1980, [Penthouse] Films registered Caligula in the United States Copyright Office naming [Penthouse] Films as the assignee and owner of the copyright. (Exhibit 2.) Defendants certainly would not have registered the copyright of Caligula as being owned. by [Penthouse] Films if this were not the fact as [Penthouse] Films understood it. It is also particularly noteworthy that an assignment of the copyright of Caligula was recorded in the United States Copyright Office on March 31, 1981, purporting to assign it from [Penthouse] Films to Clubs.

Suffice it to say that Rossellini and Felix never once suggested that Penthouse Films' registration of the copyright in its own name was in any way improper.

58. Felix's and Rossellini's acceptance of Penthouse's registration of the copyright is consistent with the fact that from the time of its release in 1979, the Film was distributed bearing the Penthouse copyright notice. Of course, Felix and Rossellini were aware of this at all times.

As mentioned in Chapter 31, Jay Julien's blunder in his poor choice of wording ("as Films understood it" should have been "as Films wished it to be understood") would result in the utter ruin of Felix. What Penthouse here declined to point out was that Penthouse Films' rather than Penthouse Clubs' original claim of copyright disproved the validity of the 1975 Joint Venture Agreement, and this disproof was further enhanced by the purported transfer of copyright from Films to Clubs. Had the Joint Venture governed, even had Felix defaulted, The Caligula Company would have been copyright owner, or, at the most extreme, Clubs would have been the copyright owner. There would have been no reason for Films to claim copyright and then transfer that copyright to Clubs.

59. Further, in settling in 1984 for 10 per cent of the proceeds of all exploitation of the Film outside of Italy, (and 100 per cent of the

> proceeds of all exploitation in Italy of the Film as edited for the Italian law and market), Felix was fully aware of the videocassette market. Indeed, Felix so admitted in its court papers in later litigation with Penthouse on the very same issue. (That litigation is discussed in paragraphs 65 through 67 below.) A memorandum which Felix submitted to the United States district court for the Southern District of New York in 1987 stated:
>
> > Moreover, it cannot be said that the parties were unaware of the value of videocassette rights in 1984.
>
> (Felix Cinematografica v. Penthouse International, Ltd., et al, 86 Civ. 6183 (WCC), 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 For a Stay, p. 38, Exhibit Book hereto, Exhibit 23.)

The February 1984 settlement did not address the issue of video rights, which were not yet available and which the Italian Exchange Office and the Ministry of Tourism and Entertainment had not authorized.

> 60. Based on all the above facts, the Settlement Agreement also provided for the dismissal of all the pending litigation relating to the parties' rights in the Film. In accordance therewith, the litigation between Felix and the Penthouse defendants, including plaintiff herein, Penthouse Films, then pending in this Court was discontinued with prejudice. A copy of the stipulation providing for the discontinuance of the case with prejudice, which was signed by all parties, as well as by their counsel, and filed with this Court, is contained in the Exhibit Book as Exhibit 24.

The February 1984 Settlement Agreement dismissed pending litigation. It did not dismiss future litigations based upon breach of contract or violation of law.

> 61. Thus, under the terms of the Settlement Agreement and the principles of *res judicata* attendant to discontinuances with prejudice, the parties voluntarily precluded themselves from relitigating the issues that were or could have been raised in the prior litigations — which, of course, included the issue of the ownership of the copyright to the Film.

As we learned, the February 1984 settlement, by granting the validity solely to the 1976 Joint Production Contract and its amendments, vested copyright in Felix, consistent with Italian government permits and law.

Felix's 1985 Italian Action

> 62. In an obvious effort to avoid the preclusive effect of Judge Weinfeld's findings and the discontinuance with prejudice of the 1984 state court action pending at the time that the Settlement Agreement was entered into, 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 Penthouse does not dispute). Felix sought preliminary and permanent injunctions against Penthouse's distribution of videocassettes of the Film worldwide.

Felix was not attempting to avoid the preclusive effect of Weinfeld's rulings or the discontinuances with prejudice. It was trying to protect its copyright and its intellectual property.

> 63. Penthouse objected to the jurisdiction of the Italian court to hear Felix's claim because the Penthouse defendants are not located in and do not transact any business in Italy....

Penthouse had elected domicile in Rome for purposes of legal disputes.

> ...In an effort to suggest that Penthouse's ownership of the copyright to the Film had not already been long established when the Settlement Agreement was executed, Felix argued that the Settlement Agreement's paragraph 19, which provided for the Italian courts to hear disputes regarding that agreement's "formation, validity, and interpretation" conferred jurisdiction on the Italian courts.
>
> 64. Notwithstanding that the issue of Penthouse's ownership of the copyright to the Film had been long established, and that the Settlement Agreement had nothing to do with it, the Italian court accepted jurisdiction of Felix's fraudulent complaint and ultimately rendered the decision in Felix's favor that is in defendants' Exhibit Book on this motion as Exhibit J. The decision however has nothing to do with the ownership of the United States copyright to the Film, about which the instant lawsuit centers.

As the film was Italian, the Italian courts' rulings had worldwide applicability.

Felix's 1986 Actions And Waiver Of
The Claim that Italy Is The Exclusive Forum

> 65. Notwithstanding the pendency of the Italian action, and belying its reliance on paragraph 19 of the Settlement Agreement and a purported desire to litigate in Italy, in approximately August of 1986, Felix commenced two new actions against Penthouse — one in this Court and one in the United States District Court for the Southern

> District of New York. Both actions were commenced two years before the Italian court rendered the decision referred to in paragraph 64 above and therefore were not based on that decision. The complaint in the action in this Court seeks, among other things, an accounting of the proceeds from the theatrical distribution of the Film to which Felix claims to be entitled; the complaint contains the false threshold allegation that Felix owns the copyright to the Film.

Fancelli's temporary restraining order had worldwide applicability, and Felix had not only the right but the legal obligation to challenge its violation in the US. Penthouse had never provided more than a few incomplete accounting statements, which, even in their fragmentary form, proved beyond any shadow of a doubt that it was withholding Felix's share of the profits. Again, Felix had every right and legal obligation to challenge this breach of contract in a New York court.

> 66. A copy of the complaint in the federal court action is Exhibit 25 in the Exhibit Book. As can be seen, the complaint sought to adjudicate the issue of the proper ownership of the U.S. copyright to the Film. By judgment dated October 23, 1987, the district court (William Conner, J.) dismissed the action for lack of subject matter jurisdiction on the ground that the presence of aliens on both sides of the caption destroyed complete diversity of citizenship and the issue of ownership of copyright was more appropriately resolved in state court because it does not present a federal question.
>
> 67. Felix's commencement of the two actions in New York was in recognition of the fact that Italy has nothing to do with the claims of copyright ownership to a Film which Penthouse has agreed not to distribute, and is not distributing, in Italy. Of course, Felix's invocation of the jurisdiction of the New York courts on the issue of the ownership of the copyright to the Film nullifies defendants' argument that the Italian courts are the appropriate forum, and would constitute a waiver of any reliance on the forum selection clause in the Settlement Agreement even if that agreement applied.

Penthouse had denied that Italian courts were the appropriate forum when challenged in Italy, and maintained that Italian courts were the only appropriate forum when challenged in the US. Penthouse violated the rulings of the Italian courts, which forced Felix to defend its rights in courts in the US. Here Penthouse is accusing Felix of its own illicit maneuvers and even implies that the February 1984 Settlement Agreement was invalid.

Rossellini's Deliberate Lies

> 68. In the federal litigation before Judge Conner, the allegation that Felix owns the copyright to the Film was exposed as having been based

on a deliberate and outrageous lie. In its papers in that action, the Penthouse defendants demonstrated, as they do here, that the assertion by Felix of a claim of copyright ownership is barred by the principle of *res judicata*. Felix's devious attempt to avoid the inevitability of a dismissal on that ground betrayed the lie on which Felix's 1986 federal and state court actions and its defenses in the instant action was based: In Felix's papers, served in February 1987, in opposition to Penthouse's motion to dismiss the federal action on the ground of *res judicata*, Rossellini *falsely averred* that he did not "discover" that Penthouse claimed to own the copyright until April 1984, immediately after the discontinuance with prejudice of the litigation between the parties. In particular, Rossellini had the audacity to aver in an affidavit, sworn to February 20, 1987:

> 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 the 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 19789 [*sic*] Penthouse Films International Ltd. All Rights Reserved." I purchased the videocassette and made a photocopy 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...

There is no denying that Rossellini had made a howling blunder in the above-mentioned document, and that his lawyers negligently allowed this error and even compounded it grotesquely. Rossellini was correct, though, to state that it was not until after the February 1984 Settlement Agreement that he discovered that Penthouse had issued the video and that Penthouse had continued to claim copyright despite the Settlement Agreement.

The pertinent pages from Rossellini's affidavit are Exhibit 26 to the Exhibit Book.

69. Suffice it to say that, as noted in paragraph 57 above, Rossellini's statement under oath in February 1987 is flatly and definitely contradicted by Rossellini's own affidavit, sworn to March 15, 1983, which Rossellini and Felix submitted to the federal court in the litigation before Judge Weinfeld in opposition to Penthouse's motion to dismiss Felix's and Rossellini's amended complaint for failure to join Penthouse Clubs as an indispensable party.

70. A copy of Rossellini's March 15, 1983[,] affidavit is contained in the Exhibit Book as Exhibit 22. Again, in that affidavit, Rossellini argued that because Penthouse Films was claiming to own the copyright of the Film, and, indeed, had registered it in its own name, Penthouse Clubs was not an indispensable party to the lawsuit. In particular, Rossellini's paragraph 18(a) bears repeating here. Speaking on March 15, 1983, Rossellini stated:

> On November 7, 1980, Films registered Caligula in the United States Copyright Office naming Films as the assignee and owner of the copyright. (Exhibit 2.) Defendants certainly would not have registered the copyright of Caligula as being owned by Films if this were not the fact as Films understood it. It is also particularly noteworthy that an assignment of the copyright of Caligula was recorded in the United States Copyright Office on March 31, 1981, purporting to assign it from Films to Clubs. (The purported dates of execution of the assignment are February 23, 1981, and March 5, 1981. I wish to emphasize that it was recorded on March 31, 1981.) Thus, after learning of the imminent action by Felix, they recorded the purported assignment.

(Emphasis supplied.)

This is a repeat of arguments made in paragraph 57.

71. 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 submitted in opposition to Penthouse's motion to dismiss the 1986 federal action — and about which he there had the audacity to say he learned only after happening on evidence of the publication of the copyright in a videocassette store in 1984!

72. Rossellini's blatant lies exposed the speciousness of Felix's allegations in the 1986 federal action, the 1986 accounting action and the instant lawsuit that Felix owns the copyright to the Film. And, needless

> to say, these lies speak volumes not only about the lengths defendants will go to deceive, the Court but about the veracity of every other statement in Rossellini's affidavit.

Guccione neglects to mention that as soon as the error was pointed out, Rossellini backed down, re-examined the documents, and apologized, which is hardly the behavior of one who speaks "blatant lies."

The Inadmissibility And Unreliability
Of The Defendants' Affidavits

> 73. As noted above, the defendants' motion for summary judgment is based primarily on purported facts contained in the affidavit of John Sarno, the New Jersey lawyer the defendants retained in November 1989. Sarno, having entered the case some fifteen years after the events about which he purports to attest took place, does not and cannot claim to have personal knowledge thereof. Thus, his affidavit is utterly worthless and should be disregarded.
>
> 74. In this regard I note that the defendants have followed a clear pattern of changing stories and positions as new lawyers have come in to represent them. Felix and Rossellini were represented in connection with the 1981 litigation before Judge Weinfeld, the Settlement Agreement, and the 1984 discontinuance with prejudice of the action then pending in this Court by Jay Julien, Esq. When, in 1986, in an effort to avoid the preclusive effect of the findings and adjudications in the earlier litigations, Felix and Rossellini commenced new litigation in New York, claiming for the first time that Felix owned the copyright to the Film and that Penthouse Films was merely its theatrical licensee, it was with new lawyers, the firm of Hess, Segall, Guterman, Pelz, Steiner & Barovick. Immediately after the Penthouse defendants served a motion to dismiss Felix's federal complaint that pointed out the deceit inherent in Felix's position, the Hess, Segall firm withdrew from the representation of Felix in the 1986 federal action and the 1986 action for an accounting commenced in this Court.

We have no documentation explaining the withdrawal of Hess Segall Guterman Pelz Steiner & Barovick, though it most likely was due to Felix's inability to pay.

> 75. Thereafter, Pryor Cashman Sherman & Flynn was substituted in as counsel. Felix and Rossellini used the substitution to obtain numerous adjournments. Eventually, the Pryor Cashman firm moved for and was granted leave to withdraw as counsel. Copies of the court's orders relieving the firm as counsel are in the Exhibit Book as Exhibit 27. In November 1989 the defendants appeared with yet another set of lawyers and, predictably, a brand new story.

Pryor Cashman Sherman & Flynn took the case, bungled it, and withdrew when Felix could not pay. Felix's story was not new in any way.

> 76. The discussion throughout my affidavit also exposes the utter falsity of Rossellini's prior and present affidavits. Thus, Rossellini's affidavit should be disregarded since it is as worthless as Mr. Sarno's.
>
> 77. Finally, the discussion in the affidavit of Barry Winston being submitted concurrently herewith demonstrates not only the inconsistency of Felix's and Rossellini's various positions but also the unreliability of statements made by Maurizio Lupoi, the third affiant on whom defendants rely on this motion. Accordingly, Lupoi's affidavit should be disregarded as well.
>
> Conclusion
>
> 78. As the foregoing demonstrates, there is no basis for summary judgment in favor of the defendants. Substantial triable issues of fact exist as to all of the defendants' assertions, including the assertion that the Settlement Agreement applies to this case. As the evidence shows, it does not.
>
> WHEREFORE, it is respectfully requested that the instant motion be denied in all respects.
>
> Robert C. Guccione

There followed a second affidavit,[6] this one by the vice president of Penthouse International, Barry E. Winston, who pointed out what he asserted were inconsistencies between what Felix was doing outside of court and what it was claiming in court. In essence, Winston argued that since Penthouse retained exclusive rights to the music, it followed that Felix could not claim complete rights to the film. That is a specious argument we have covered above. He also related his discoveries about CVF of Nicosia, its agreement with New Select of Tokyo, Uniexport's approach to Neue Constantin, and Lupoi's claim that Penthouse did not have an exclusive distributorship. Such "secret" contracts, Winston maintained, were inconsistent with Felix's position before the court. He also pointed out, correctly, that Felix's claim that Penthouse had no exclusive distributorship was contradicted by John Hornick's letter of 16 June 1986 addressed to the US Copyright Office.

6. Barry E. Winston, Affidavit (6 February 1990). *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.

6 FEBRUARY 1990 — MAKING A FUSS ABOUT THE VIDEOS

SIMULTANEOUSLY WITH THE ABOVE, John J. Sarno sent notice to Vestron Video's Legal Affairs Department that by distributing videocassettes of *Caligula*, Vestron was infringing upon Felix's copyright.[7] Exactly a month later, Vestron would reply, reasonably, that unless there is a US ruling or proof of Felix's ownership, the contract with Penthouse would remain in force.[8]

A month later Rossellini took Vestron up on its offer (misspellings retained):

> Miss Knoller
>
> Mr. John Sarno has forwarded me the letter you have sent in reference of my film "Caligula" that Vestron is illegally distributing.
>
> While you expect the ruling of the Supreme Court of New York I would like you to send to Mr. Sarno the following documentation:
>
> 1) The chain of titles of the film.
>
> 2) The assignements of the Authors Masolino D'Amico and Gore Vidal.
>
> 3) The assignement by Penthouse Film International to Vestron.
>
> Infact as you can see from the attached document, Penthouse Film International from 1981 has transferred rights to Penthouse Club International of Vaduz.
>
> As you must have seen by the previous documents I have personally sent you, by registered mail, both Penthouse Clubs and Penthouse Films are parties to the Italian litigation and are bound by the Italian executory judgement.
>
> Regards
>
> Franco Rossellini
> Felix Cinematografica s.r.l.
>
> Attached: copyright assignement and license as recorded at the Copyright Office of Washington[9]

Franco faxed a copy of this letter to John Sarno, and appended to it a note informing him that the Vestron catalogue of 14 September 1989 listed the *Caligula* directors as Bob Guccione and Giancarlo Lui, and the production company as Penthouse Films.

It is predictable that Vestron declined to respond.

---

7. John J. Sarno: letter to Vestron, Inc., 6 February 1990. FRC.
8. Aimée J. Knoller, Manager, Legal Affairs, Vestron: letter to John J Sarno, 6 March 1990. FRC.
9. Rossellini: letter to Aimée J. Knoller of Vestron: 13 March 1990. FRC.

The next day, 7 February 1990, Rossellini caught a few anomalies that he pointed out to Sarno.

> 1) Among the documents exhibited by Penthouse is a letter and assignment from Penthouse Films to Penthouse Clubs — Exhibit 26.
> 2) Exhibit 27, while a "NOTICE OF ENTRY" apparently given by Cashman, says that the plaintiff is Penthouse Clubs!!! What a great defense!!!
> 3) There is no mention of the "assignment" from Penthouse International to Penthouse Films International dated 5 December 1975!!!!
> 4) The judge's order to release Cashman, prepare... is registered as Penthouse International against Felix Cinematografica!!!!

16 February 1990 — John J. Sarno Simplifies Matters (38th Lawsuit, Continued)

In response to Penthouse's overwhelming claims in the Guccione and Winston affidavits, Sarno thought it best to clear the air by going back to the basics:

> It is respectfully submitted that the sole issue before this Court is whether the clear and unambiguous language contained in the Settlement Agreement, language deliberately agreed upon and reaffirmed by the parties, bars the present lawsuit.

Sarno reminded the court that the Settlement Agreement mandated that ownership issues were to be litigated in Italy, were subject to the jurisdiction of the Italian courts, and that "all parties have specifically agreed to be bound by Italian law." Penthouse's attempted refutation consisted of personal attacks on Rossellini and "a fantastic story of international intrigue, the stuff of dime-store magazines but of no moment to this motion." He followed this by the risky claim that "not one court of law has been persuaded by Penthouse's position." Weinfeld, Sarno explained, dismissed the case for failure to join an indispensable party, not for lack of merit, and recommended that litigation of ownership issues be confined to Italy. Sarno also reminded the court that when Felix had filed an accounting claim in the Supreme Court of the State of New York, Myerson in his affidavit responded that the Settlement Agreement established that Penthouse was owner of "all rights in the Film." He also called to attention Penthouse's argument before Judge William C. Conner in the US District Court that all of its ownership rights were derived exclusively from the Settlement Agreement.

Those statements were in stark contrast with Guccione's more recent affidavit that the Settlement Agreement "has nothing to do with the issue of the ownership of the copyright," but that Penthouse's ownership derives from the 1975 Joint Venture Agreement together with the unexecuted draft assignment of 1977. Judge Cohen had declined to declare Penthouse the owner of the rights, and in fact had declined to decide the ownership controversy, retaining only the accounting action. Sarno almost miraculously even managed to salvage something from William C. Conner's dismissal, for Conner reduced all issues to the one concerning "what rights [Penthouse] received pursuant to the Settlement Agreement." Conner ruled that since the dispute centered entirely on the interpretation of the Settlement Agreement, the claim must be brought before a different forum, even though Felix "may have a legitimate claim."

Sarno interpreted the "different forum" as necessarily meaning the Italian courts. Since the Italian courts had declared Felix the exclusive owner of intellectual-property rights as well as video and television rights, that ruling "should be recognized by this Court by the doctrine of comity between nations.... Alternatively, this Court should declare the Italian tribunal as the exclusive forum within which to litigate the ownership of the film." State, federal, and foreign courts have all agreed that ownership rights cannot be litigated in New York. Further, at commencement, Penthouse expressed a preference for Italian courts when it filed its first suit in Italy in 1981. Sarno also refuted Winsten's characterization of Felix's claim to own all rights to the film, whereas in fact Felix had long conceded that Penthouse owns 90% of theatrical rights.

Sarno further pointed out that the Commercial Court of Paris issued its decision prior to the Italian judgment's executory status, and that it is not final.

19 FEBRUARY 1990 — TECHNICOLOR AWAITS PAYMENT

IT WAS INEVITABLE that Rossellini would not be able to meet his payments for the current distribution deals. A Miss Absy, who signed herself as Secretary to Mr. Rossellini, explained to Technicolor that "Several delays in payments to us from foreign Corporations have created this embarrassing situation."[10]

12 FEBRUARY 1990 — THE NEW CORRECTED COPYRIGHT REGISTRATION

BACK ON THE 2ND OF FEBRUARY 1990 Rossellini had sent, by Federal Express, a request for a copy of the copyright registration from the US Library of

10. Miss Absy: letter to Dott. E. Coscarella of Technicolor SpA Rome, 19 February 1990. FRC.

Congress's Copyright Office.[11] It was too late, for he soon made a horrific discovery. The supplementary copyright registration that Felix had submitted to the US Copyright Office in May 1985 had been overturned, replaced by a different supplementary copyright registration filled out by Stevan J. Bosses of Fitzpatrick Cella Harper & Scinto on behalf of Penthouse. Bosses clearly took his obligations to Barry Winston seriously and ensured that the US copyright be "valid"[12] for recognition in countries signatory to the Universal Copyright Convention, as they had discussed in November. The new supplementary registration corrected only "Line 1" of Penthouse's original copyright claim, altering the name of the author, Felix Cinematografica, by adding "S.r.l." to the end. Otherwise it reaffirmed Penthouse Films International as copyright claimant. It made no mention of the earlier purported transfer from Films to Clubs, nor did it make any reference to Felix's earlier corrected copyright registration. This corrected copyright form was filled out on 2 February 1990, was signed by Bosses on 9 February 1990, and was received by the Copyright Office on 12 February 1990.[13] This was now the officially recognized paperwork.

5 March 1990 — Franco Rossellini's Affidavit in Further Support of Defendants' Motion for Summary Judgment (38th Lawsuit, Continued)

Rossellini's response to Penthouse's suit in the Supreme Court of the State of New York – County of New York was brief, a mere six pages, clearly influenced by Sarno's earlier response. His arguments were so simple as to be incomprehensible to a newcomer to the issues, opening with the salvo that "Through the deliberate and cynical use of distortion and deception, plaintiff seeks to obfuscate uncontroverted facts and has intentionally withheld facts from this Court in order to continue its efforts to drive me and co-defendant corporation Felix Cinematografica into bankruptcy."

His argument was that Penthouse lacked standing to bring the case and that Penthouse's seeking of a declaration of ownership of the film was unrelated to copyright issues. By the Settlement Agreement, apart from accounting issues, all controversies must be litigated in Rome. Further, since the film is Italian it is

11. Rossellini: letter to Library of Congress Certification and Document Section, 2 February 1990. FRC.

12. Stevan J. Bosses of Fitzpatrick Cella Harper & Scinto: letter to Barry E. Winston of Penthouse International, Ltd., 1 November 1989. FRC.

13. Certificate of Supplementary Copyright Registration, Form CA, United States Copyright Office, Caligula, Registration Number of Basic Registration PA 83-587, effective date 2 February 1990. FRC.

subject to Italian law, which has exclusive jurisdiction over the interpretation of the Settlement Agreement. Italy's courts ruled that Penthouse owned 90% of cinema exploitation and that Felix owned video and television rights.

Rossellini attempted to derive some advantages from previous adverse rulings. Now he mimicked the previous court decisions, arguing that since Penthouse claimed copyright ownership via various contracts, then the present case was a garden-variety contract claim unrelated to copyright issues. Since federal courts have exclusive US jurisdiction over copyright issues, and further, since the parties agreed that copyright issues would be litigated in Italy, the Supreme Court of New York "lacks jurisdiction over the matter and should recognize the principal of comity between nations."

He also turned Penthouse's tactics around and used them against the plaintiff. Since Penthouse Films in its complaint alleged that it jointly capitalized the film's production with Liechtensteinian Penthouse Clubs together with Felix pursuant to the 1975 Joint Venture Agreement, by which Clubs and Felix were originally joint owners, and since Penthouse further argued that Felix assigned all its rights to Penthouse Films in 1977, it would follow that Films and Clubs jointly owned the film. Penthouse indeed presented this argument in its complaint. Despite that, in March 1981 Films, claiming sole copyright, transferred its rights to Clubs, which Penthouse chose not to mention in its recent complaint. Penthouse therefore originally claimed that all rights belonged to Clubs and not to Films. So, if Penthouse was arguing that Clubs owned *Caligula*, then it followed that Films had no standing to bring the present suit. What's more, both Clubs and Films were signatories to the Settlement Agreement and had thus bound themselves to Italian jurisdiction, making them bound to the recent Italian rulings. "It is clear that plaintiff's intentional withholding of critical facts from this Court reveals that its lawsuit is merely a sham, designed to harass and intimidate me and to disrupt a valid commercial enterprise."

He left his argument there, deciding against rebutting Penthouse's accusations point by point. Instead he concentrated on work, booking *Caligula* around the world. Penthouse filed an opposition, which is missing from the files, but Felix's response survives, and we shall examine it shortly.