

## *Thirty-Nine*

### “SUCH A CONFUSED SITUATION”



“I always wanted a castle, ever since I was a little kid.” — *Bob Guccione*<sup>1</sup>



#### SPRING 1990 — RIVAL RELEASES

NEXT IN THE FILE is a contract between CVF and Scanbox of Denmark's A-B-Collection. It is for pan-Scandinavian rights to the English-language *Caligula*, in both the hard and soft versions. Yes, Felix had manufactured its own soft English edition. The license is for television and home-video rights, as well as 35mm cinema rights. The license would run for seven years beginning on 31 May 1990 for a consideration of US\$20,000. On 8 August 1990 the release had still not occurred due to the fear that Penthouse was in fact the controller of the rights. Kurt Wellojus faxed Uniexport a brief request:<sup>2</sup> “Our lawyers are a little worried, as we are told that Penthouse controls the rights for Scandinavia. Is it possible you could provide us with a legal statement, showing you have the rights to sell CALIGULA in the Scandinavian territory? Sorry about all the problems, but our lawyers [have] to be sure before accepting the contract.” Three weeks later Scanbox forwarded its first check, for \$10,000.<sup>3</sup> All we know about this contract is that it bore fruit, as there were eventually Danish and Swedish VHS releases that resulted from it.

On the other hand, though, Barry E. Winston of Penthouse, at the recommendation of Alan Zie Yongder, publisher of the Hong Kong edition of *Penthouse*, approached Indira Suharjano of Fotomax to release *Caligula* in that

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1. Gwenda Blair, “Citizen Guccione,” *Attenzione: The Italian Life/Style Monthly*, 3 no. 6 (June 1981), p. 48.

2. Kurt Wellojus of Scanbox AS: fax to Uniexport, 8 August 1990. FRC.

3. Provinsbanken: check to Rossellini, 28 August 1990. FRC.

territory.<sup>4</sup> Yongder's associate, Mable Leung of the Yongder Hall Group, had seconded the decision since Fotomax was the leading video chain in Hong Kong. Winston was most interested in learning more, and mentioned the availability of the long and short versions of the film, as well as "three excellent one[-]hour videos," *The Girls of Penthouse*, *Love Story*, and *Penthouse on the Wild Side*, but he found something disturbing:

While we were in Cannes earlier this month, we learned through an associate also based in Hong Kong that the theatrical version of "Caligula" was shown just a few months ago in Hong Kong. This surprised me since the license agreement for the theatrical rights for Caligula expired in April 1986. The former licensee was an Indonesian firm named Pt. Sinar Takun. We have been reissuing the license rights for both theatrical and video worldwide. I have considered the Southwest Asian market quite seriously.

Felix, for its part, was in touch again with Kilian Rebentrost of Tobis Filmkunst. We can recall that in 1980 Tobis had licensed German/Austrian rights from Penthouse, with Rossellini personally brokering the deal, but that Guccione then reinterpreted the contract to deprive Tobis of any income. We should also recall that Lupoi had succeeded in alienating Rebentrost with his letter demanding that Tobis unilaterally alter its contract with Penthouse and send Felix all its income and royalty statements directly. Now, though, Rossellini and Rebentrost were speaking again by telephone,<sup>5</sup> and Rebentrost agreed to examine the court papers "translated and sealed by the Haie [*sic*, should be Hague] Convention concerning my property of Caligola." Rossellini was certain that his German colleague would be convinced, and so he concluded his letter with the succinct, "And then we will proceed with the contract."

Then, sometime in June 1990, Rossellini retrieved a crumpled discarded grid sheet, flattened it out, and scribbled some calculations:

Brazil  
\$ 6,000 by 10 July  
\$ 14,000 by 10 September  
  
Latin America  
\$ 9,000 by 20 July  
\$ 21,000 by 20 October

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4. Barry E. Winston: fax to Indira Suharjano, 22 May 1990. FRC.

5. Rossellini: fax to Kilian Rebentrost, 30 May 1990. FRC.

So, he was expecting a gross income of \$50,000 by late autumn. Whether or not he received it is anyone's guess.

Entertainment Film Distributors of the UK then made out a check in the amount of \$44,000 which it would pay to CVF upon acceptance of the materials that were scheduled for delivery.<sup>6</sup>

Lupoi, after scolding Rossellini for his deleterious behavior a month and a half earlier, now did Rossellini a favor. He wrote a proclamation, intended specifically for Neue Constantin of Germany but addressed "To whom it may concern,"<sup>7</sup> explaining that his office had represented Rossellini since 1982 and could attest to *Caligula* being an Italian film produced and owned solely by Felix. Despite Penthouse's entitlement to a share of boxoffice proceeds,

...Neither Penthouse Films International nor anybody else is entitled to any share of any profits deriving from any other type of income.

The exclusive agent appointed by Felix Cinematografica for the sale or licence of the theatrical and video distribution is CVF Filming Ventures Limited of Cyprus. Banca Nazionale del Lavoro has a lien on the income deriving from said sales or licences, subject to the terms of a loan agreement between said bank and Felix Cinematografica.

Contracts for the theatrical, video and television exploitation of the picture have been entered into by Felix Cinematografica through its said agent in respect of the following countries:

France, Great Britain, Spain, Portugal, Japan, Greece, Belgium, Denmark, Sweden, Finland, Hong Kong, Brasil and Chile.

We can also attest that neither Penthouse nor any other party has filed any legal action objecting to the exploitation of the picture by Felix Cinematografica.

Apart from the single typographical error (1982 should have been 1981), everything Lupoi stated was correct, but that final paragraph was tantamount to painting a bull's-eye on Franco Rossellini's forehead.

That letter served as a prologue to the next stage in the contest between Penthouse and Rossellini, at which it reached its most absurd heights, when both arranged to release *Caligula* to the same German distributor at precisely the same time. On 7 June 1990 Penthouse Films International granted Neue Constantin Film a license for all rights — presumably theatrical, TV-broadcast, and home video, though that is not spelled out explicitly. The advance was nowhere stated, though the distributor was entitled to 75% of all gross receipts. Neue Constantin representative Herman Weigel signed the contract, which was under the sole

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6. Nigel Green: fax to Pietro Bolognini, 1 June 1990. FRC.

7. Maurizio Lupoi: To whom it may concern, 5 June 1990. FRC.

jurisdiction of the State of New York, an idea that had demonstrated its value in the past. Some terms of the contract, while seemingly standard, had a strange resonance:

...Licensee shall not cut, edit or modify Penthouse's logo, trademark or emblem and shall include same in all advertising, publicity and promotional materials relating to the Picture.

The next item is even more surprising:

...Penthouse hereby grants to Licensee solely for the purpose of advertising, publicizing and promoting the rights herein granted to Licensee in the Picture, subject to any restrictions or conditions by which Penthouse is bound, the right: ...to use the name and approved likeness of the director, producer and screenwriter....

Of course, Penthouse had guaranteed (with loopholes) not to use Gore Vidal's name or likeness in any way (beyond the single mitigated "Based on an original screenplay by" credit). Penthouse, with Felix, had also reached an out-of-court settlement with Tinto Brass not to consider him the director. Yet Penthouse worded its Neue Constantin contract in such a way as to make it appear that it had permissions to use the names and likenesses of the writer and director, though with certain unstated restrictions. Surely Neue Constantin surely understood such restrictions merely to mean any particular publicity stills that the writer or director had requested not be used. The only way to interpret this maneuver is that Penthouse was leading Neue Constantin to feel confident about using the likenesses and names of Vidal and Brass and thereby set a precedent outside the US and Italy, where the writer and director would have difficulty pursuing legal claims.

Penthouse added another term that should have gone without saying:

Licensee shall distribute the Picture in its entirety as delivered, and Licensee agrees not to itself or authorize or permit any third party to cut, edit, change, alter, modify or add to prints of the Picture. However, Licensee may edit prints of the Picture solely to meet governmental censorship requirements and television time slot requirements; but under no circumstances shall Licensee delete, edit, alter or reposition the main or end titles or any part thereof or the copyright notice or the credits. Any breach of the terms of this Paragraph shall constitute a material default entitling Penthouse at its election and in addition to any other rights or remedies available to Penthouse and without releasing or discharging Licensee from any liability hereunder, to terminate this Agreement in whole or in part, unless Licensee is inadvertent of such breach.

In a later term of the contract, there was more:

...Licensee shall accord such credits with respect to the Picture, as provided above, in all advertising and publicity issued by Licensee or under its control.... Licensee shall not accord to any other person, firm or corporation any other credit, nor modify the credits in Penthouse's statement without Penthouse's prior written consent....

If any person, firm or corporation shall claim that Licensee has accorded him or it improper or insufficient credit, and shall demand that Licensee either accord him or it certain credit or cease or refrain from according him or it credit, Licensee shall immediately notify Penthouse in writing....

This was Penthouse's added insurance against any further prints not bearing Penthouse's copyright notice or deleting Penthouse's production credit. This was apparently a sore point, since that is precisely what Felix had been doing.

Penthouse had also learned its lesson from the various censor challenges in the US. Rather than defend exhibitors as it had promised to do, Penthouse simply left them to fend for themselves. Now, in its new German contract, Penthouse made its revised policy clear:

It is expressly understood and agreed that Penthouse shall have no responsibility whatsoever for, and shall not be liable in any way to Licensee because of, any act of any censorship board or authority in the Territory....

Further to the point:

Penthouse has the sole and exclusive right to convey the rights, licenses and privileges granted herein; and the rights granted herein are free and clear of any liens or encumbrances.

The exercise of the rights granted to Licensee in accordance herein in and to Picture and materials contained therein will not infringe upon the copyrights or the literary, dramatic, musical, or motion picture rights or the trademarks or the trade names of any party whatsoever and, to the best of its knowledge, the exhibition, distribution and other exploitation of the Picture will not violate the private, civil or property rights of any third party whatsoever....

Licensee will, at its sole expense, within the Territory take all such actions, proceedings or steps as may be necessary either in Penthouse's name or in such name as Penthouse shall require to register or otherwise protect the copyright in the Picture and any other marks, trade names or interests or rights of Penthouse. Licensee will, at any time during the term hereof or thereafter, execute such documents and comply with Penthouse's other requests for establishing and

maintaining Penthouse's exclusive rights in the Picture and associated promotional materials, marks and styles.... Further, Licensee agrees to notify Penthouse promptly of any infringement or breach of the copyright or other rights in the Picture as shall come to the attention of Licensee; to take all such actions or steps at Licensee's expense as Penthouse shall require in respect of any such infringement or breach, and to cooperate fully with Penthouse in any action by or against Penthouse or any of its affiliates relating to rights in and/or remedies for infringements thereof in the Territory.

Then there was the Indemnification article, by which Penthouse vowed to protect Neue Constantin from any costs and damages arising from any legal claims to rights — provided that the costs do not exceed the (unspecified) advance!

These were all hedges against anticipated suits from Felix, and Germany was a good territory in which to make such hedges, since Felix had lost its case there. With this contract, Neue Constantin was contractually obligated to defend Penthouse even should Penthouse be proved in the wrong. Interestingly, Penthouse also agreed to supply Neue Constantin with documents demonstrating the chain of title.

It is odd that Herman Weigel signed that contract on 7 June 1990, since *one day earlier* his lawyer, Dr Mathias Schwarz of Schwarz Schniewind Kelwing Khadjavi Rechtsanwälte, had agreed to meet with Franco Rossellini about licensing rights! Neue Constantin had arranged for Rossellini's flight and hotel reservation on 12–13 June 1990 (revised to 15 June) at the Kempinski Hotel Vier Jahreszeiten in Munich for discussions.<sup>8</sup>

Weigel informed Barry Winston, vice president of Penthouse, of Felix's claims, and Winston, as one would predict, responded by air mailing a copy of the October 1975 Joint Venture Agreement, "the basis for the creation and production of Caligula"; the February 1984 Settlement Agreement, "which makes it very clear that Penthouse paid for the production of the movie Caligula and that Felix agreed to accept 10% of the proceeds and also a payment in the amount of \$150,000 US. Additionally, Felix agreed in the same document that they will not market their version of the film outside of Italy"; Felix's letter of 5 December 1989 repeating its policy not to distribute *Io Caligola* outside of Italy (though this letter also affirmed that the producer of the original *Caligula* was Felix rather than Penthouse); and, finally, Penthouse's 2 February 1990 US copyright.<sup>9</sup>

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8. Dr Mathias Schwarz: faxes to Rossellini, 6 June, 8 June, and 12 June 1990. FRC.

9. Winston: fax to Herman Weigel, 15 June 1990 (misdated 14 June). FRC.

Assuring that Penthouse would indemnify Neue Constantin, Winston continued that "Felix filed a 1986 U.S. copyright and then, in a case against Penthouse in the U.S., learned that the U.S. government would not recognize Felix's position based on an Italian decision and threw the case out of court." Each phrase in that statement was true, but the way those phrases were strung together was entirely misleading. "The new U.S. 1990 copyright in the name of Penthouse makes that perfectly clear."

Winston followed up with a further fax three days later, on the assumption that the promised documents had by then arrived.<sup>10</sup> "It would be helpful if you would forward to me by either fax or by courier the assurances which you received from the representative of Felix Cinematografica. This would be helpful in my understanding of the 'chain-of-title-documents.'" On the following day Weigel forwarded this fax to Rossellini, and at the same time Neue Constantin's legal counsel, Schwarz, also faxed to Rossellini, in care of Lupoi, its concession:<sup>11</sup>

Coming back to the conversation we had here in Munich last Friday we would like to confirm to you that subject to the clearance of the rights situation Neue Constantin has accepted to conclude through your distributor a licence agreement encompassing the same rights and conditions as Neue Constantin's agreement with Penthouse.

Schwarz spelled out the terms missing from the written copy of Neue Constantin's contract with Penthouse: Cinema and TV-broadcast rights for East and West Germany, Hungary, Austria, Czechoslovakia, and German-speaking Luxembourg; video rights for Czechoslovakia, Poland, and Hungary; an advance of US\$50,000, with a seven-year term commencing on 30 June 1990. Neue Constantin would pay a 25% royalty on gross video receipts, and 100% royalty of cinema receipts and 75% net of TV-broadcast receipts, with "distribution costs to be accounted for."

Schwarz also makes clear to us why Penthouse had offered to forward the chain-of-title documents: "As you had asked us to do we requested from Penthouse the chain of title documents." Apparently, Penthouse, while promising to send these items, had declined to do so, preferring instead to forward the English translation of the 1984 Settlement Agreement. "As the English translation is not explicit as to the scope of the rights still vesting in Penthouse I would greatly appreciate to obtain a copy of the Italian original." The attorney was feeling justifiably frustrated by the vagueness of the contractual terms as well as the handicap of having only carefully selected

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10. Winston: fax to Weigel, 18 June 1990. FRC.

11. Schwarz: fax to Rossellini, 19 June 1990. FRC.

documents. "May we kindly ask you to provide us with a telefax copy of the original document in which Penthouse was granted a 65% share in the foreign receipts? Would you please also clarify to what extent and if for what reason you claim foreign theatrical distribution rights?" He concluded: "After having received these clarifications we would like to address Penthouse to learn from them why despite the ruling of the Tribunale Civile di Roma they still pretend to be able to sell television and video rights."

Lupoi responded on Rossellini's behalf on 22 June, explaining the sentence of the Civil Court of Rome. "Nowhere is it said or implied — neither in the judgement nor in the 1984 settlement — that Penthouse is to act as the distributor of the picture.... Quite to the contrary, the settlement provides that Penthouse may recover the distribution costs 'in so far as they have been borne directly by Penthouse.'" That was arguably a gross over-interpretation of the Settlement Agreement's article 14(a), which stated simply that Penthouse would pay Felix 10% "of the net producing amount, collected or due for collection by the Penthouse Group." Further to the point, "Penthouse has never pleaded the existence of any theatrical distribution agreement between itself and Felix, the producer; not even the 1984 settlement (sect. 8) refers to any agreement to that effect." As for rights vested in Penthouse: "No ownership right is vested in Penthouse. Penthouse is only entitled to a share (90%) of the theatrical income...." Lupoi enclosed the 1984 settlement as well as the first amendment to the Joint Production Contract, which granted 62.5% to Penthouse. Lupoi neglected to send the second amendment which granted Penthouse 65%; it was this document that Schwarz had requested.

The German matter would take a hiatus for a few days while other disasters developed.

#### THE FORTY-FIRST CALIGULA LAWSUIT

##### 20 JUNE 1990 — PENTHOUSE TAKES ACTION

**T**HOUGH THE CASE in the Supreme Court of the State of New York was still ongoing, Guccione and Penthouse decided to file a second suit against Felix and Rossellini in that same court.<sup>12</sup> The case was for damages arising from Felix's "unauthorized and improper sale of plaintiffs' rights" and the failure to pay

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12. Summons, 20 June 1990, *Penthouse International, Ltd., Penthouse Films International, Ltd., Penthouse Records, Ltd., Penthouse Clubs International Establishment, and Robert C. Guccione v Felix Cinematografica Srl and Franco Rossellini*, Supreme Court of the State of New York – County of New

Penthouse its share of those proceeds. Though Penthouse was entitled to 90% of distribution proceeds, "in flagrant violations of plaintiffs' rights in the Film and the aforesaid agreement, defendants have sold purported rights in the Film to third-parties without disclosing such sales to plaintiffs or accounting to plaintiffs for monies received by defendants in connection with such unauthorized sales." Penthouse now claimed that "Under the Settlement Agreement, plaintiffs are entitled to receive ninety percent of the proceeds from the distribution of the Film, in all geographical areas, and by whatever means or medium." That was a broader claim than Penthouse had ever made before. As we have learned, though, Penthouse had done its homework: "In particular, defendants have formed a company called C.V.F. Filming Ventures Ltd.... C.V.F. Filming, which is incorporated in Nicosia, Cyprus, is taking the position with third-parties that it has received from Felix all of the rights to the Film, including the rights for the theatrical distribution of the Film." In particular, Penthouse exhibited the contract between CVF and New Select of Japan and between CVF and René Chateau in France. Moreover, Rossellini had stated to Neue Constantin in Germany that he controlled the video and theatrical rights, and had offered a license agreement as early as November 1989. Penthouse claimed that Rossellini and CVF had entered into yet other contracts "and have received substantial sums of money in connection with the sale by them of purported rights to distribute the Film."

Penthouse granted that there were pending cases in the Supreme Court of the State of New York, in France, and in Italy "to determine whether plaintiffs or defendants own the copyrights to the Film and the rights to exploit the Film in various territories. Irrespective of who owns the copyrights or the rights to exploit the Film, however, plaintiffs are entitled under the Settlement Agreement to 90% of the proceeds of any exploitation."

Penthouse was demanding an accounting from Felix, which was hardly surprising. That was a tactic it had used in the past, and, as we know all too well, it was Penthouse that had for a decade owed Felix a series of accountings that were never forthcoming. Ironically, and without doubt deliberately, Penthouse's complaints, causes of action, and affirmations were copied almost verbatim from Felix's earlier suits against Penthouse, including "Plaintiffs have performed all of the conditions of the Settlement Agreement required on their part to be performed," which was a demonstrably false statement. Penthouse sued Felix for

breach of the Settlement Agreement, just as Felix had sued Penthouse for breach of the Settlement Agreement.

Felix presented its arguments on 1 August 1990. The transcript is missing from the file, as are the other documents, if there were any. From a later letter by John J. Sarno, though, we learn what happened.<sup>13</sup> The judge, who was initially disposed to reject Felix's motion to dismiss, changed her mind upon hearing the results of the Italian and French cases, which contradicted one another, especially since the French court declared that it had jurisdiction. The judge was "reluctant to give up jurisdiction in favor of the Italian tribunals."

#### 21 JUNE 1990 — RIVALRY IN BRAZIL

**A**T THE SAME TIME, Penthouse was making inroads into Brazil, which prompted Rossellini to write to Rede Nacional de Filmes Nacionais Ltda, with whom it had signed a contract on 23 March: "...we authorize you to proceed against whoever is in possession of materials of our film (prints, master, videocassettes, negatives, etc.) as no one except our two above[-]mentioned Companies may provide to release the exploitation rights of the film for Brazil." He enclosed the Certificate of Origin supplied by the Ministry of Tourism and Entertainment, the SIAE certificate regarding author's rights, and the sentences of the Court of Rome and the Supreme Court of Cassation.

#### 26 JUNE 1990 — MORE CONFUSION

**T**HE 26TH OF JUNE was a memorable day in Franco Rossellini's life, for it was on that day that he realized he was again lost at sea.

Simultaneously with the troubles in Germany, France, New York, and Brazil, was a bizarre situation in which Felix licensed video rights to Domovideo.<sup>14</sup> Just after signing the contract, Lucia Lo Russo of Domovideo found it absurd that her company would have to pay £100,000 (US\$80.47) per tape for sale to shops for rental-only licenses, whereas a rival company, Skorpion, was selling tapes for £29,000 (US\$23.34) a piece at newsstands for sale-only nonrental videos. Of course, the Skorpion release was unauthorized, but Franco was helpless to put a stop to the situation. Failing a license to the uncut *Caligola*, Lo Russo saw no alternative but to request the return of her company's advance deposit. Lo Russo also mentioned previous canceled contracts between Rossellini and Scino Glam

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13. John J. Sarno: letter to Maurizio Lupoi, 2 August 1990. FRC.

14. Lucia Lo Russo of Domovideo: letter to Rossellini, 26 June 1990. FRC.

(Glam Fascination) and Fabiani, which indicates to us that Felix had been quite aggressive in trying to land home-video contracts.

#### 26 JUNE 1990 — FELIX LOSES IN FRANCE (37TH LAWSUIT, CONTINUED)

**A**FTER WINNING THE FINAL ROUNDS in the French courts, Felix was rendered helpless by lack of funds. If we recall, on 13 July 1988 the Paris Court of Appeals upheld the jurisdiction of the French Court of Commerce. Penthouse now attempted to annul that ruling in the French Court of Cassation.<sup>15</sup> Franco Rossellini and his lawyers did not even attend the hearings, and the court came crashing down mercilessly. The Court of Cassation ruled in an unpublished decision that the Settlement Agreement was clear that only the Italian courts had jurisdiction in this matter, and so remanded the case to the Versailles Court of Appeals and fined Felix 191 francs 11 centimes (US\$38.39).<sup>16</sup> (This demonstrates another gap in the record, as there are no surviving records in the Rossellini collection indicating that this case had ever been heard in the Versailles Court of Appeals.)

#### 26 JUNE 1990 — SCHWARZ PROVES HIS ABILITIES

**I**N RESPONSE TO LUPOI'S LETTER of 22 June, Schwarz called Lupoi's bluff about Penthouse not having been given an exclusive license:

You are right in stating that until now we have not seen an express grant of distribution rights to Penthouse in any of the agreements that have been provided to us. However, we realize that in Paragraph 14 (a) of the Transaction Agreement of February 2nd, 1984, it is stated that Felix shall receive 10% of 100% of the net producing amount, collected or due for collection by the Penthouse Group. It is quite apparent from this language that at least in 1984 it was felt between the parties that the Penthouse Group was to collect the distribution receipts which would only make sense if the Penthouse Group was the distributor outside of Italy.

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15. *Penthouse International, Ltd., and Penthouse Films International, Ltd., v Felix Cinematografica Srl*, Index Number 88-19000, La Cour de Cassation, Première Chambre Civile, Camille Bernard, Senior Judge/President; Thierry, Recording Judge; Savatier, Conseiller Référéndaire (Adviser). Maître Charbonnier for plaintiff, defendants not represented. FRC.

16. Jurisprudence, Cour de cassation, Inédits, formerly posted at: <http://droit-finances.commentcamarche.net/jurisprudence/cour-de-cassation-1/inédits-2/1538442-cour-de-cassation-chambre-civile-1-du-26-juin-1990-88-19-000-inédit>.

It is therefore not astonishing that the Tribunale Civile di Roma has excluded from all economic utilization rights of the film "Caligola" the exploitation of the film in the theatres.

Schwarz continued reasonably:

If I understand Mr. Rossellini correctly he is willing to let Penthouse have 90% of the theatrical income of the film. We will therefore suggest to Penthouse a split between the two parties so that we would pay to Penthouse 90% of the theatrical income and to Felix 10% of the theatrical and 100% of all other income.<sup>17</sup>

#### 27 JUNE 1990 — LUPOI MASTERS THE ART OF DOUBLE-TALK

**L**UPOI'S RESPONSE TO SCHWARZ was brilliant in using Penthouse's latest suit in the Supreme Court of New York to Felix's advantage!<sup>18</sup> He opened by conceding that in February 1984, when the Settlement Agreement was signed, Penthouse was indeed "the distributor-in-fact of the picture," but added that even in the latest suit that Penthouse filed against Felix, Penthouse was demanding its 90% share and was not contesting Felix's right to grant licenses. "You will find herewith a copy of said complaint from which it appears that Penthouse does not dispute Felix's rights to distribute the picture theatrically; it only claims 90% of the proceeds." Of course, again, that was an over-interpretation of the complaint, in which Penthouse did state that a suit over such rights was currently pending.

Lupoi was adamant about not allowing Neue Constantin to take it upon itself to determine the 90/10 split:

The payment of Penthouse's share is of course a matter between the parties and under no circumstances will Neue Constantin be allowed to pay 90% of the theatrical income to Penthouse and 10% to Felix. The 90/10 shares concern the net proceeds (see the 1984 Settlement) and are therefore a matter to be accounted for between the parties.

It is amazing that, by this time, Neue Constantin had not canceled its contracts and decided to look elsewhere for product to exhibit. The company did not need to have the headache of quarreling attorneys, each giving opposite advice. Abandoning all common sense, Neue Constantin battled on through at least January 1991 trying to work things out between Felix and Penthouse, miring itself further and further into this tar baby. Lupoi optimistically

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17. Schwarz: fax to Lupoi, 26 June 1990. FRC.

18. Lupoi: fax to Mathias Schwarz, 27 June 1990. FRC.

concluded his letter with, "I trust that this will clear all outstanding issues and expedite the conclusion of the contract."

The next day Mathias Schwarz received a distressed fax message from Barry Winston of Penthouse International, who again insisted that the Joint Venture of 1975 was the governing agreement and that the Settlement Agreement of 1984 defined Felix's rights as nothing other than 10% of the net outside of Italy. He reminded Schwarz that Felix had promised repeatedly never to release the film outside of Italy, neglecting to mention that Felix had promised not to release *Io Caligola* outside of Italy, while it was free to issue the original edition anywhere. He also pressed upon Schwarz that Felix had lost its legal battles everywhere except in Italy, and that Penthouse was currently challenging the Italian ruling. As for the chain of title, "The material we sent to Neue Constantin are the basic elements of our chain of title." Winston repeated Penthouse's offer to indemnify Neue Constantin, explained that Felix was "trying to intimidate your client," even though Penthouse had confirmed its 1980 US copyright in 1990 and even though "no agreement exists" to grant Felix the right to issue the film in Germany. He also appealed to Neue Constantin's previous trust in Penthouse when it had licensed video rights "for many years."

#### JULY 1990 — THE NEED TO EXPEDITE

ONE CAN UNDERSTAND Lupoi's (pretended?) optimism, for Felix was in desperate need of instant income. It was of momentary relief when Neue Constantin, at the conclusion of a meeting on the morning of Friday, 6 July 1990, agreed to a contract with CVF as exclusive licensee of Felix, with the proviso that the courts of Munich have exclusive jurisdiction.<sup>19</sup> Another term was that all correspondence with Penthouse would be shared with Rossellini. Of course, by signing this agreement, Neue Constantin had again breached its contract with Penthouse, but that hardly mattered because Neue Constantin was preparing to file charges of fraud against Penthouse.<sup>20</sup> After German taxes, the \$57,000 advance to CVF was reduced to \$35,750,<sup>21</sup> which was surely welcome.

19. Schwarz: fax to Rossellini, 4 July 1990 (FRC); Enzo Natale: fax to Schwarz, 5 July 1990 (FRC); Schwarz: fax to Rossellini, 6 July 1990 (FRC); Herman Weigel: fax to Rossellini, 11 July 1990 (FRC); Rossellini of CVF: fax to Schwartz, 17 July 1990 (FRC); Rossellini of Felix: fax to Pietro Bolognini, 17 July 1990 (FRC).

20. Rossellini: fax to Livio Bruni (Rio de Janeiro), 17 July 1990. FRC.

21. Ursula Borchardt of Neue Constantin: fax to Rossellini, 16 July 1990 (FRC); Rossellini of CVF: fax to Borchardt of Neue Constantin, 17 July 1990 (FRC); Borchardt of Neue Constantin: letter to Rossellini, 18 July 1990 (FRC); Borchardt of Neue Constantin: fax to Rossellini, 20 July 1990 (FRC); Maurizio Lupoi: fax to Mathias Schwarz, 20 July 1990 (FRC).

On 19 July 1990 Schwarz belatedly responded to Winston's fax of 28 June.<sup>22</sup> He explained that Felix maintained that the 1984 Settlement Agreement and the ruling of the Court of Rome vested it with all video and television rights. Further, Felix explained that "Penthouse International Ltd. never had any rights to the Film as any eventual rights vesting in the Penthouse Group previously were assigned to another company of the Penthouse Group."

Diplomatically, Schwarz explained the current status:

You will certainly understand that our client in such a confused situation is not in a position to sign the Agreement provided to it by you. We have agreed, however, with Mr. Rossellini that a certain amount of the advance requested by Felix is to be paid into an interest[-]bearing escrow account and that such sums will only be paid over to Felix or its distributor if Penthouse hereto gives its consent or if a definite judgement of the Court of Appeal in proceedings between the Penthouse Group and Felix Cinematografica establishes that Felix is entitled to such sums paid into the escrow account.

With that, the submasters were expedited to Berlin<sup>23</sup> — or were they? Ursula Borchardt sent an urgent fax to Rossellini three days later stating that the internegatives of the feature and the preview had not yet arrived,<sup>24</sup> and she wrote again, even more urgently, six days after that.<sup>25</sup> Fortunately, the materials arrived in the nick of time,<sup>26</sup> though the black-and-white stills and color slides were mysteriously lost in the post and the television version had still not been sent.<sup>27</sup> In the meantime, Barry Winston of Penthouse International shot a fax to Mathias Schwarz:<sup>28</sup>

I have read your July 19th fax many times which I received on Friday, July 20, 1990. I have discussed it with Mr. David Myerson, who is President of Penthouse International and is also an outstanding attorney. We are both quite perplexed with the dilemma that Felix Cinematografica has created for all of us.

Neue Constantin is our former licensee, business friend and we have always had a smooth and very successful business relationship.

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22. Schwarz: fax to Barry E. Winston of Penthouse International, 19 July 1990 (FRC), and fax to Rossellini, 19 July 1990 (FRC).

23. Rossellini: fax to Maurizio de Tolis of Transor, 21 July 1990. FRC.

24. Borchardt of Neue Constantin: fax to Rossellini, 24 July 1990. FRC.

25. Borchardt of Neue Constantin: fax to Rossellini, 30 July 1990. FRC.

26. Borchardt of Neue Constantin: fax to Rossellini, 6 August 1990. FRC.

27. Borchardt of Neue Constantin: fax to Rossellini, 8 August 1990. FRC.

28. Winston, Vice President of Penthouse International: fax to Mathias Schwarz, 25 July 1990. Schwarz's secretary Rudolph forwarded this by fax to Rossellini. FRC.

Now suddenly Felix has come between us, claiming that they control the exact licensing arrangement that Penthouse had with Neue Constantin for a number of years. The 1984 agreement very clearly states (I sent you a translation copy of it) that there was a 90/10% distribution agreed upon yet now Felix is stating that this is not so.

Winston and Myerson were far from perplexed, as they were intimately involved in the behind-the-scenes arrangements and court cases. Felix, of course, did not deny the 90/10 distribution arrangement, but stated, correctly, that it applied only to cinema releases. Winston chose not to explain that Penthouse had never paid a decade's worth of royalties owing to Felix. After asking for confirmation of certain of Schwarz's statements, Winston continued:

We are an adversary of Felix but we do not want to get into any business or legal dispute with Neue Constantin. Instead, we want to have an agreement with them in which we have stated we will indemnify Neue Constantin in any problems they may have with Felix or anyone else.

However, if Neue Constantin does enter into an agreement with Felix, it will force Penthouse to take legal action against Felix in Germany. This will involve Neue Constantin in an awkward situation which Mr. Wiegel [*sic*] wanted to avoid in the first place. As I stated in my June 28th fax to you and our former contract with Neue Constantin clearly states, Penthouse Films International was the licensor and would be again in this particular situation if we could resolve it.

When Rossellini saw this letter the next day, his response was straightforward:<sup>29</sup>

I also received the copy of Penthouse's letter. I'm astonished!!

For five years I believed I was fighting against a well-organized criminal entity.....and now I find, suddenly, with bitterness, that they were spending my energy just so I could fight idiots.

Fortunately I have a sense of irony.

Adding to the irony, Rossellini neglected to submit the double-taxation-exemption form, which forced Neue Constantin to pay money owed to Rossellini to the tax authorities instead.<sup>30</sup>

Franco Rossellini's belated assessment that he was fighting idiots rather than organized crime was correct. Penthouse's inconsistent claims in court, the differences in the assertions among its lawyers, and the further differences

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29. Rossellini: fax to Schwarz, 26 July 1990. FRC.

30. Schwarz: fax to Rossellini, 24 August 1990. FRC.

between the assertions its lawyers made and the assertions that its staff made, can make sense only if we conclude that Bob Guccione really did believe that he had contributed the bulk of the funds for the film, and that he really did believe that he was the film's producer, copyright holder, and owner — and that his executives, attorneys, and accountants felt obliged to humor him. Regarding some claims, it appears that his executives, attorneys, and accountants actually believed his fantasies.

Guccione occupied himself obsessively with photography, painting, cooking for family and friends, collecting famous pieces of art, decorating his townhouse, and dreaming extensively of ever-more grandiose endeavors. He had no head for management, he had no patience for the tedious details of contracts, and he had no time for the bother of workaday business. He entrusted all those concerns to his lawyers, to his accountants, and to his upper-echelon staff. His lawyers, his accountants, and his upper-echelon staff handed him paperwork for his signature, and, like Franco Rossellini, he signed on the dotted lines without understanding the significance of the language contained therein. Guccione trusted his advisers completely.

Penthouse's records had always been a disaster, with little recorded in its ledger books, and with those line items recorded wrongly. Its documentation was dumped wrecklessly into unmarked containers scattered hither, thither, and yon. Guccione proudly boasted that he was unable to read a balance sheet.<sup>31</sup>

Guccione's lawyers did not understand how the film had been made and financed, took it on faith that their client had produced the film, and simply obeyed their client's orders that things be set right against a delusional and maniacal Franco Rossellini who had somehow got it into his head that he and not Guccione had made *Caligula*. They did not study the documentation in depth, and simply hammered the written evidence into conformity with their client's ideas. The same holds true for staff and accountants.

Somewhere in this epic mess, at some time early on, someone had cheated, deliberately, with malice aforethought, and walked off with millions. It was a brilliantly calculated maneuver. This someone correctly understood that neither Franco Rossellini nor Bob Guccione was keeping track of the money, and took full advantage of that propitious situation, setting the two entrepreneurs on a collision course. This someone had sought to protect himself, or herself, or themselves by the simple expedient of hiring of murderous thugs, or contriving to have (an unaware?) Guccione do so. Who that person was, or who those

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31. John Colapinto, "The Twilight of Bob Guccione," *Rolling Stone*, 1 April 2004, p. 52.

persons were, will likely never be revealed. I have my strong suspicions, but dare not put them in print.

Nobody in the Penthouse empire had a full understanding of how the film had been made or financed. Nobody at Penthouse understood the Settlement Agreement of February 1984. Nobody at Penthouse understood that Franco Rossellini was in the right. Nobody at Penthouse understood that Felix Cinematografica had produced the film, largely with its own money and the money it had raised.

#### JULY 1990 — THE NEED TO EXPEDITE

NIGEL GREEN of Entertainment Film Distributors, Ltd., in the UK now picked up the correspondence that had been latent since March,<sup>32</sup> informing Pietro Bolognini of Uniexport that not all the materials had arrived. At least, though, some money was arriving from Brazil,<sup>33</sup> and a few thousand in royalties also arrived from Chile.<sup>34</sup> At the end of July Neue Constantin forwarded \$16,666 for CVF in care of Lupoi.<sup>35</sup> With the new income, Felix was at last able to forward £73,920,000 (US\$62,544.20) to Technicolor.<sup>36</sup>

Of course, nothing could be that simple, and Felix had been sabotaged, though we do not know by whom. Mathias sent Rossellini a fax upon arrival of the elements:<sup>37</sup>

I am happy to meet you here in our office on Friday, 11:00. Please be informed, however, that a checking of the Film-negative that you had sent to Neue Constantin showed that it is of a miserable quality not allowing for striking any theatrical prints and that the television too is of a poor quality. Could you please inform us where our client may get better quality material.

This was not an aberration. Entertainment Film Distributors in the UK also sent a fax to Rossellini, having found countless faults in the audio and video of the videotape submaster.<sup>38</sup>

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32. Green of Entertainment Film Distributors: fax to Bolognini of Uniexport, 19 July 1990. FRC.

33. Rossellini: faxes to Bruni, 17 July (FRC) and 19 July 1990 (FRC).

34. Cristian Echeverria A of Inter Films Ltda in Santiago: letter and fax to Rossellini, 23 July 1990. FRC.

35. Bankhaus H Aufhäuser: cashier's check to CVF Filming Ventures c/o Studio Legale Lupoi, 30 July 1990. FRC.

36. Technicolor SpA: fax to Rossellini, 30 July 1990 (FRC); Rossellini for Felix: letter to BAI Bank branch in Rome, 30 July 1990 (FRC).

37. Schwarz: fax to Rossellini, 30 August 1990. FRC.

The Hong Kong license granted in early November to Filmax had been held in abeyance until now, when Indra Suharjano faxed Rossellini to announce the forthcoming September 1990 VHS and laserdisc releases of *Caligula*.<sup>39</sup> "We are doing this on your assurance that we have the right to do so. We trust that you have resolved the matter with Penthouse and that we are not liable to Penthouse for such action. To update you further, we at this moment have not received any form of communication from Penthouse." Rossellini confidently responded: "As you can see from the various documents that I have provided you, I am the only copyright owner of the film *Caligula*. So, go ahead with the distribution without warring [*sic*, should be worrying] about Penthouse. Penthouse bought, in the past, a percentage of theatrical exploitation, but that gives them no authority over the copyright of the film that is only mine."<sup>40</sup>

Rossellini ordered one single 35mm print to be sent to Producciones Carlos Amador S.A. in México in June 1990.<sup>41</sup>

#### AUTUMN 1990 — PAYING BILLS

THE INCOMPLETE RECORDS that survive prohibit us from making full calculations of amounts owing and amounts paid, but we are not left in doubt about the severity of the debts. Massimo Ferrara-Santamaria, despite having worked on *Caligula* from the beginning, had never been paid a cent. When Giuseppe Biagiotti asked for a full accounting, Ferrara provided one that totaled £35,700,000 (US\$26,168.79).<sup>42</sup> Rossellini had pledged to pay Ferrara £50,000,000 (US\$34,827.33) upon the first receipts from the film, and he did this through the agency of Pietro Bolognini.<sup>43</sup> Ferrara in turn had vowed to pay Jacques-Georges Bitoun about a million francs (US\$151,783.42).<sup>44</sup>

Rossellini himself, as we have seen all too painfully, was desperately in arrears with numerous creditors, not least Technicolor. Rossellini, as noted above, paid an instalment, but for the balance he offered promissory notes.<sup>45</sup>

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38. Entertainment Film Distributors, Ltd., *Caligula*: Fault and Quality Report, 30 August 1990. FRC.

39. Indra Suharjano of Filmax: fax to Rossellini of Uniexport, 30 July 1990. FRC.

40. Rossellini for Felix: fax to Indra Suharjano, 3 August 1990. FRC.

41. BNL-SACC: letters to Technicolor SpA with copies to Felix Cinematografica Srl: 17 September 1990. FRC.

42. Massimo Ferrara-Santamaria: letter to Giuseppe Biagiotti, 29 September 1989. FRC.

43. Rossellini: letter to Ferrara-Santamaria, 19 May 1989 (FRC); Rossellini for Felix Cinematografica Srl: letter to Bitoun, 20 September 1989 (FRC).

44. Ferrara-Santamaria: letter to Bitoun, 20 September 1989. FRC.

45. Rossellini: letter to Technicolor SpA, 29 March 1990. FRC.

Now that income was at last coming in from distributors around the world, the first order of business was not to Uniexport or to Felix, but to creditors. The longstanding panic induced Rossellini and his colleagues to spend the money the moment it arrived, before the sales were complete. That was a dangerous manoeuvre but, considering the pressure, it was an understandable gamble.

Biagiotti and Rossellini plundered the receipts to pay off as many overdue bills as possible, but this led to another problem that alienated the long-faithful accountant Sergio Galiano, whose disgust prompted him to write to the Felix board of directors:

Let our response to previous communications summarize, point out, and restate all your defaults.

1) The financial books and other company documents needed for analyzing were not deposited at the registered office at least 15 days before the meeting of 9 February 1990, and not even the budget was sent there (see our letter 27 June 1990).

2) The financial statements referred to above were replaced at the meeting by another budget other than what you sent to our legal attorney Stanislao Aureli.

3) The Administrator has not brought any document relating to 1) (documents required to verify the accuracy of the budget) and only after our protests did our partner and also the company accountant Biagiotti say he was willing to provide all the required documents.

4) The registered office is only a postal address (see our letter of 27 June 90) and not the place where the books and all other documents are to be kept. At present they are scattered between Biagiotti's home and Rossellini's home.

On 14 July 1990 you sent us the following documents:

A) "FILM DISTRIBUTION AGREEMENT" from the movie "CALIGULA" signed 2 January 1989 with a Cypriot company, CVF Film Ventures Limited.

We dispute every single word of the agreement, in the first place because we have been kept in the dark for 18 (eighteen) months and then it reduces our entitlements, already limited, of 50%.

B) No film distribution, television and video contract has yet been signed, so our counsel M. Lupoi informs us, with the following countries: France, England, Spain, Portugal, Japan, Greece, Belgium, Denmark, Sweden, Finland, Hong Kong, Brazil, Chile, Germany. This was exhibited to us on the pretext that the company's contractually mandated distributor, CVF Ventures, did not send the report. However, if that mandate has been granted it should be revoked immediately, but it is not; in fact, Dr Pietro Bolognini, who in turn enters into rental and distribution contracts as a representative of CVF Film, said he was

always available within 5 minutes of the authorization of your lawyer, Lupoi.

This authorization has already been applied for by our legal counsel Mr. Aureli but was denied by your lawyer with the same trivial excuse.

So your behavior demonstrates that you do not want to show the contracts that are in your hands or at your fingertips, Dr. Bolognini is stationed in Rome, so as not to let us know the nature of the acts and to hide the extent of the sums collected.

C) Also on 14 July 1990 you sent us only the detail of the suppliers' overheads and self-employed employees.

For the first two entries there were no attachments submitted in support and then the details are of no use and even sound like a joke.

For the self-employed entry of about 160,400,000 [US\$137,053.97] it is little wonder that they are Felix company members Biagiotti and Natale.

D) No other document relating to other budget items has been exhibited.

E) The Technicolor bills were flashed before our eyes with the promise that photocopies would be sent to us and once again on our good faith; it is precisely those photocopies that never arrived.

This is to signify to once again that your behavior, Gentlemen, continues to hamper, hiding facts concerning the actual performance of the company, the shareholders' audit.

We invite you once again, expressing all our reservations about the contract with CVF Film Ventures, Ltd., to want to help you in our work immediately, otherwise we will have to instruct our lawyers to take another energetic action.

Best regards<sup>46</sup>

#### 21 SEPTEMBER 1990 — WHO IS MR MEYERSON?

**N**EXT IN QUEUE is a handwritten fax, without a confirmation sheet, addressed to an unidentified Mr. Meyerson, referring unquestionably to *Caligula* in its new edited-for-television version:

Dear Mr. Meyerson

I was indeed happy to see you yesterday!!

I pray God that wisdom will prevail and by working together we can deliver a perfect "chain of titles" that will protect us from "pirates". I include this information that is so important for the "new edition" that will be more successful than before.

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46. Sergio Galiano: letter to Felix Cinematografica, 19 September 1990. FRC.

my regards

Franco Rossellini

my hand writing is so bad because I have a big problem with  
reumatisms.

Grazie

Appended to this two-page fax was not the expected information about the mysterious "new edition," but a letter to the editor in *The New York Times* concerning the closing of the Paris cinema, where Roberto Rossellini's *Il miracolo* had had such a tumultuous US opening.

### 3 OCTOBER 1990 — THE ENEMY OF MY ENEMY IS MY ENEMY

PENTHOUSE HAD MADE A LONG CAREER of issuing videos to crowd Franco Rossellini out of the market, and another as-yet-unidentified entity had made a career of issuing videos of *I, Caligula* in Italy to crowd Franco Rossellini out of the market, while Franco Rossellini fought back by issuing videos around the world to crowd Penthouse out of the market. Now it was Penthouse's turn to return the fire.

Nigel Green of Entertainment Film Distributors, as we know, had licensed *Caligula* for the UK home market but received from Technicolor not a usable submaster, but the work of a saboteur. As Rossellini was trying to repair that situation, Penthouse took the opportunity to move in and issue videos in the UK through its affiliate, Penthouse Video Club. Green faxed Bolognini, with a copy to Rossellini, about this new development, which he regarded as a "breach" of contract, and demanded that his deposit be returned.<sup>47</sup> When Rossellini tried to repair the situation, Green responded simply that "I do not think there is any point in manufacturing new material on this film until such time as you have resolved the ownership of the Rights."<sup>48</sup>

To make matters worse, Penthouse had been involved in further dealings with Mathias Schwarz, the attorney for Neue Constantin, who examined the documents provided and reached a conclusion contrary to his original. He was now convinced that Penthouse's version of events was the true one.

Following the perennial pattern, Penthouse once again made its case by presenting Schwarz with a copy of the Joint Venture Agreement of October 1975,

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47. Green of Entertainment Film: fax to Bolognini of Uniexport, 3 October 1990. FRC. Included an advertisement from *Video World*, November 1990. Curiously, this advertisement used an image of the earlier Electric Video edition of *Caligula*, which had since been banned. The new art work had not yet been prepared, and so the earlier image was used as a place holder.

48. Green of Entertainment Films: fax to Rossellini, 25 October 1990. FRC.

which “clearly stipulated that Penthouse shall have the sole and exclusive right under agreement to designate, negotiate with and otherwise make all arrangements for the distribution of the Photoplay in the United States and Canada,” as Schwarz summarized to Lupoi. Penthouse’s emissary chose not to present the Joint Production Contract of June 1976, since it had supplanted the earlier Agreement and changed the terms, giving Felix all rights and granting Penthouse only exhibition rights. We should also recall that on 6 February 1990, in the Supreme Court of the State of New York, Bob Guccione signed an affidavit that stated, among many other things, that there was no June 1976 Contract, and that Franco Rossellini’s claims of such were a “fabrication” and a “fantastic tale.”<sup>49</sup>

Schwarz, though, was shown the first amendment to the June 1976 Contract, though Penthouse misrepresented it as an amendment to the October 1975 Agreement. Explained Schwarz (spelling errors corrected):

In an amendment to the Joint Venture Agreement dated July 23, 1976[,] and signed by Mr. Franco Rossellini it is stipulated in § 3 that Felix will recoup thanks to the Italian receipts and Italian Government contributions and bonuses, while Penthouse will first recoup thanks to the foreign receipts up to the limit of its investment. In § 2 of this amendment it is further stipulated that Penthouse reserves the right to sell or have the Film sold in the rest of the world (excluding Italy) without requesting Felix for any further expenditure nor commission.

Thus, concluded Schwarz: “According to these documents Felix has never had any right to distribute the original film outside of Italy.” Schwarz explained to Lupoi that the Settlement Agreement of 1984 “expressly recognizes the full validity and legal effect” of the previous agreements, including the October 1975 Joint Venture Agreement, which was certainly not the case at all. Schwarz did concede “that Art. 14 of the Settlement states that the contracts entered into between the parties and named in Art. 1 and 12 of the Settlement Agreement shall irrevocably be revised according to the stipulations of said Art. 14,” but according to his analysis, this only modified the percentage shares, and in Penthouse’s favor. “Art. 14 contains no language, whatsoever, by which the right of Penthouse to distribute the Film... was changed to the detriment of

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49. Affidavit of Robert Charles Guccione 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. FRC.

Penthouse.... It seems clear to us that this language is a manifest confirmation of Penthouse's right to distribute the Film."

Schwarz continued that the Settlement Agreement's Article 14 did indeed reference certain theatrical distribution costs, but argued that:

...this can not be construed as an argument to the effect that Penthouse should only hold theatrical distribution rights. It is common practice in the motion picture industry that a distributor besides the commission to be received by it is only allowed to deduct costs relating to the theatrical distribution as the grant of video licences and television licences is not connected with substantial costs. I could produce a large number of distribution agreements documenting such a common practice.

Schwarz further offered that:

The decision of the Roman Court against this background seems to be in a flagrant contradiction to the language of the agreements entered into between the parties. We assume that it will not be confirmed in the Court of Appeals. Even if it were to be confirmed, however, such a court ruling would probably not be binding on the German Courts if Penthouse was to sue Neue Constantin as it is threatening.

Schwarz did make one observation that was completely incorrect:

As to the distribution agreement between Felix and C.V.F. I may draw your attention to the fact that in § 2 of that agreement Felix expressly excludes from the distribution mandate given to C.V.F. the theatrical distribution rights. It seems therefore deeply astonishing that C.V.F. purported to be able to grant such theatrical distribution rights to Neue Constantin.

There was nothing astonishing about this. While Lupoi's initial correspondence leading up to the contract specified that CVF would hold only television and video rights,<sup>50</sup> by the time the contract was signed on 29 September 1987 the terms were reversed, and in § 2 Felix granted CVF only cinema rights, leaving Felix with the video and television rights.<sup>51</sup> This should not have been a concern, since Schwarz and Neue Constantin had been dealing with both Felix and CVF, which were free to modify their terms by mutual consent.

Schwarz concluded with three succinct paragraphs:

It is self evident that our client will not continue any payments until this situation has been clarified in full. We further have to ask C.V.F., Felix and Mr. Rossellini who personally guaranteed the obligations of C.V.F.

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

51. Contratto di Distribuzione Cinematografica del Film "Caligola," 29 January 1987. FRC.

and Felix to provide our client with sufficient securities for the repayment of the monies already effected by Neue Constantin.

If a full and sufficient clarification can not be obtained by October 20, we will be forced to provide Penthouse with a copy of this letter.

Let me end in stating that I personally believe that it would be wise for Felix to settle with the Penthouse Group. In case your client should feel that I could be of any help in soliciting such a settlement I would be quite willing to act as a go between.

The offer to act as a go-between was remarkably kind, but woefully unrealistic. While Felix had in the past offered Penthouse generous settlements, Penthouse invariably responded with breaches of contract and hostile legal maneuverings. The damage was beyond any hope of repair.

Maurizio Lupoi responded with a brief letter six days later:<sup>52</sup>

I am in receipt of your faxed letter of the 5th. I am startled to read paragraph 4 for at least three reasons:

1. I, for one, would never express an opinion on the decision handed down by a foreign court which has applied its own law.
2. How on earth can you assume what our Court of Appeals would do? Would you like to place a friendly bet on its decision?
3. What about the Brussels Convention?

The Joint Venture Agreement you refer to has been declared to be ineffective by the Court and the language of the Settlement Agreement is clear in this respect. Do you believe otherwise? It is your privilege and your responsibility.

I thank you for your advice concerning the wisdom of a settlement with Penthouse Group. I will gladly pass it on to my client together with a copy of your letter.

Schwarz should have accepted the offer to place a friendly bet, because he would have won.

Then negotiations broke down. On 5 November 1990 Rossellini hired an Italian-speaking German attorney, Peter Wieloch, to convince Neue Constantin either to fulfill its side of the contract or to withdraw.<sup>53</sup> Rossellini sent a fax to Schwarz,<sup>54</sup> thanking him for his kind collaboration, and requesting, "I would ask

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52. Lupoi: fax to Schwarz, 11 October 1990. FRC.

53. Peter Wieloch of Wieloch Ziegler Rechtsanwälte, Munich: fax to Rossellini, 23 November 1990. FRC.

54. Rossellini: fax to Schwarz, 7 November 1990. FRC.

you therefore, when you send me all the required documentation, to make sure that the copy of the Penthouse contract is the one duly signed by them. If I am not mistaken, the signature should be Barry Winston's."

While all this activity was occurring, Rossellini summarized the licenses he had signed:<sup>55</sup> Portugal (1" C PAL full-screen, full-length English version), the UK (1" PAL full-screen soft English version), Scandinavia (1" PAL full-screen of both the full-length and soft English versions), Chile (35mm of the soft English version with Spanish subtitles), Brazil (1" NTSC full-screen of both the full-length and soft English versions), México (35mm soft English version divided into two parts), and Domovideo of Italy. Of course, the UK and Domovideo licenses had been scuttled by interference. There was no mention of West Germany, presumably because the ongoing difficulties had placed the project into limbo, but Franco now decided to put in an enquiry with Tobis about distributing *Caligula* in East Germany, but was referred directly back to Neue Constantin.<sup>56</sup> That was unwelcome news, as by this time Neue Constantin had defaulted on its contract.

#### APRIL–NOVEMBER 1990 — A MOMENTARY GLIMMER OF HOPE

JOHN F. HORNICK, the attorney from Finnegan Henderson Farabow Garrett & Dunner, who had filed the Certificate of Supplementary Copyright Registration in June 1986 on behalf of Franco Rossellini and Felix Cinematografica, suddenly turned up again. He had some news that he thought might be useful.<sup>57</sup> He had not kept up with the case but he surmised, correctly, that the US federal ruling was being held in abeyance pending the forthcoming appeal in Italy. He suggested that, with a recent ruling, Rossellini should reactivate the case. Hornick would prefer to represent Rossellini and Felix, but there was a matter of an outstanding balance of \$11,038.76 in addition to the need for a new retainer. His firm was pressuring him to bring the account up to date, but he realized that Rossellini might not have the funds. In that circumstance, he suggested that Rossellini find a different firm that would operate on a contingency basis.

The ruling that so excited Hornick was *Daniel Wilson Productions, Inc., v Time-Life Films, Inc., et al.*, which cited William C. Conner's 19 October 1986 ruling in

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55. Oggetto: Film "CALIGOLA," faxed to the Hotel Notre Dame, 46 33 35 011, 17 October 1990. FRC.

56. Mariette Rissenbeek of Tobis Filmkunst GmbH & Co Verleih KG: fax to Rossellini, 17 October 1990. FRC.

57. John F. Hornick: letter to Rossellini, 8 August 1990. FRC.

*Felix Cinematografica v Penthouse International*, 671 F. Supp. (S.D.N.Y. 1987), as case law. More importantly, the ruling in *Wilson v Time-Life* cited *Felix v Penthouse* as aberrant case law, and ruled more traditionally, following *Kamikazi Music Corp. v Robbins Music Corp.*, 684 F. 2d 228 (2d Cir 1982), in which the court rejected the defendant's response that since there was a contractual issue there could not also be a federal issue. The court stated, "...it is frivolous for Robbins to contend that its contractual defense makes Kamakazi's suit one for breach of contract. The district court had jurisdiction because the claim was for copyright infringement..."

There was also the matter with the leading case in that circuit, *T. B. Harms Co. v Eliscu*, 226 F. Supp. 337 (S.D.N.Y.), which ruled against federal jurisdiction since the suit was not for copyright infringement *per se* but for declaratory judgment about copyright ownership. Taken together, *Harms* and *Kamikazi* established the parameters for future conflicts, determining what would and what would not "arise under" the Copyright Act.

Judge Thomas P. Griesa noted in his ruling in *Wilson v Time-Life* that there was a series of seven cases in the Southern District of New York that "are at odds with the teachings of *Harms* and *Kamikazi*," and the first in his list was *Felix Cinematografica v Penthouse International*, 671 F. Supp. 313 (S.D.N.Y. 1987). Griesa explained this series as having used the "essence test," and quoted Conner's ruling in the *Felix* case as epitomizing that test: "...plaintiff in essence seeks a declaration that the Settlement Agreement... did not transfer the rights of videocassette distribution to the defendants..." Griesa preferred the subsequent decision in *Foxrun Workshop v Klone Mfg.*, 686 F. Supp. 86 (S.D.N.Y. 1988), in which Judge Leval "declined to follow the essence-test cases." Judge Leval

...reasoned that even where the controversy centers on a contractual issue..., [w]here a complaint alleges a federally conferred right, such as a copyright, a trademark or a patent, then alleges violations of that right and requests remedies provided by federal statute, this should be enough to confer federal jurisdiction. The fact that such a claim arises in the context of a disruption of contractual arrangements and presents certain contract issues should not remove it from that jurisdiction.

Rossellini took this new case seriously. Since he did not pay Hornick a retainer we can only conclude that the income Felix had earned from its recent series of licenses would not cover a further \$11,000-plus retainer.

5 NOVEMBER 1990 — SUPREME COURT OF NEW YORK — IN LIEU OF A FORMAL MEMORANDUM (38TH LAWSUIT, CONTINUED)

JOHN J. SARNO, Felix's attorney in the current Supreme Court of New York cases, took up the torch. He responded to Judge Lebedeff's request for comments on "whether this Court may recognize a foreign judgment under New York law," "whether defendant had waived its right to rely upon a choice of forum clause," "whether federal copyright law divests this Court of jurisdiction," and "whether plaintiff has standing to bring the instant lawsuit."<sup>58</sup>

Sarno brought to Lebedeff's attention the Civil Practice Law and Rules of New York, Article 53, which specified money judgments granted in foreign courts, but did not limit itself to such, and would not prevent recognition of a declaratory judgment. Sarno also pointed out that Italy's highest court, the Supreme Court of Cassation, "has found that the Italian courts had proper jurisdiction over the parties and over the controversy." Sarno appealed to the principle of comity between nations. He pointed out case law, *Murty v Aga Khan*, 92 F.R.D. 478, 483 (E.D.N.Y. 1981) which recognized the validity of the Italian judicial system concerning due-process principles, and which stated that it was common knowledge that the Italian system was no less fair than that of the US. Further, the Italian court's final Order, entered in 1988, was now a matter of law, and had been recognized as enforceable in France and Belgium. (Sarno did not mention the overturning of the French injunction.)

Sarno acknowledged that Felix had brought a copyright-infringement complaint to the federal district court and that the judge had dismissed it, but he argued that "The copyright infringement action did not waive defendants' right to rely upon the choice of forum clause in this case, because a party, by its conduct, cannot divest a court of subject matter jurisdiction." More to the point, Sarno repeated that "All transfers of Italian motion picture rights to a non-Italian resident are subject to Italian law and jurisdiction.... Defendants' copyright action, an independent claim under the federal Copyright Act, cannot waive the jurisdiction of the Italian court...." He also pointed out that "plaintiff [Penthouse] was able to fully litigate the same dispute in Italy for three years and cannot now refute the forum it has freely chosen simply because it does not like the result."

Sarno took the opportunity to follow Hornick's advice and reference *Daniel Wilson v Time-Life, et al.*, noting that Penthouse's demand for judgment that it owns the copyright to the film is an allegation of a federally conferred right, and

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58. John J. Sarno: hand-delivered letter to Judge Diane A. Lebedeff, 5 November 1990. FRC.

therefore the Supreme Court of New York “must dismiss the Complaint in favor of federal jurisdiction.”

As for legal standing, Sarno argued that Penthouse International lacked standing to bring suit, since even assuming all its allegations were true, “it is Penthouse Clubs, a Li[e]chtenstein corporation, not plaintiff[,] which owns the rights to the Video. Accordingly, defendants respectfully urge this Court to grant summary judgment in their favor or, alternatively, to dismiss the Complaint.”

❧❧❧ THE FORTY-FIRST CALIGULA LAWSUIT ❧❧❧

15 NOVEMBER 1990 — PENTHOUSE SUES FELIX, CVF, AND CHATEAU IN FRANCE

JACQUES-GEORGES BITOUN represented not only Franco Rossellini, but also René Chateau, who had received a summons dated 15 November.<sup>59</sup> Chateau had asked Bitoun to intervene.<sup>60</sup> Rossellini dutifully faxed Chateau the sentence contained in the concluding pages of the Tribunale di Roma from 30 September 1988, in which the court found Felix the sole owner of video and television rights to *Caligula* and fined Penthouse £2,237,500 (US\$1,598.56).<sup>61</sup>

The summons called for a hearing on 13 February 1991, and its claims were most extraordinary. For years the Penthouse companies had been arguing against the effectiveness, or even the existence, of the June 1976 contract between Felix and Penthouse. This time they reversed their strategy and sued Felix, CVF, and Chateau based upon Felix’s failure to fulfill its obligations under the June 1976 contract! Penthouse further argued that upon default, Felix assigned its rights to Penthouse in 1977 (this is a reference to the ineffective and never-completed draft, of course). When the Court of Rome declared that Felix was owner of all video and television rights, and when Felix obtained a French exequatur, Penthouse appealed, arguing that pending settlement, Felix, CVF, and Chateau had no legal authority to exploit *Caligula* by video or television. As it had done in the past, Penthouse now turned the argument around by using the terms that Felix had previously used against it. Penthouse asked the court to determine that Chateau, CVF, and Felix “must cease all forms of exploitation or

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59. *Penthouse Films International, Ltd., and Penthouse International, Ltd., v CVF Filming Ventures, Ltd., Editions René Chateau, and Felix Cinematografica*, Tribunal de Commerce de Paris. Diedler-de la Robertie Partners for plaintiffs; Maître Chantal Bodin-Casalis, Solicitor, and Maître Jacques-Georges Bitoun, Barrister, for appellant. 1991. The summons is included in Jacques-Georges Bitoun: fax to Franco Rossellini, 13 December 1990. FRC.

60. Jacques-Georges Bitoun: fax to Rossellini, 13 December 1990. FRC.

61. Rossellini: fax to René Chateau, 29 November 1990. FRC.

distribution in France of the film CALIGULA and this under a 10,000 franc [US\$2,000.48] penalty for a known infraction." Penthouse further asked the court to "order the destruction, under the control of a process server, assigned by this court, of all counterfeit copies of the film CALIGULA in the possession of the defendants." The plaintiffs also demanded that total revenues be ascertained in order "to determine the damage suffered by the coproduction." Finally, Penthouse asked the court to fine the defendants 50,000 francs (US\$10,002.37) as per Article 700 of the New Civil Procedural Code.

The Penthouse companies explained the logic behind their requests. Despite the exequatur order, and despite the pending appeal, the French Court of Commerce had ruled that decisions of Italian courts "have no relationship to the case." The Court of Commerce agreed with Penthouse that the October 1975 Joint Venture was the governing contract, and that the Settlement Agreement of 1984 did not specify that Felix had exclusive video and television rights. The court's ruling "prevails over the Italian decisions even when vested with the exequatur." Penthouse went further, and insisted falsely that the Italian judgment of 9 December 1985 did not declare that Felix had television or video rights, and that Felix thus had no authority to cede its rights to CVF, "a tax-haven company, pretending to be an assignee." René Chateau, Penthouse argued, thus had no rights to exploit the film.

Penthouse found another loophole. The exequatur had been granted on the basis of the Brussels Convention, but since nobody had been notified of the exequatur it could have no legal effect, especially since the time for appeal had expired prior to Penthouse's learning about it. That claim was not true in any way, of course, but Penthouse used it to argue that the contract between Chateau and CVF "is devoid of all legal basis, and the only conclusion that can be drawn from this unlawful manifestation is but an overly cunning set-up."

#### 16 NOVEMBER 1990 — ARGUMENTS IN THE PARIS COURT OF APPEALS

JACQUES-GEORGES BITOUN, though a secretary who misaddressed the fax to "Monsieur Frédéric Rossellini," forwarded Penthouse's and his own concluding arguments, and from these documents we learn that neither side had put much love into the process.<sup>62</sup> Penthouse's response, arguing for the court to

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62. Bitoun: fax to Rossellini, 16 November 1990. FRC. Appended is Maître Fanet, Solicitor with Diedler-de la Robertie Partners, Conclusions, 18 October 1990, and Maître Chantal Bodin-Casselis, Conclusions, n.d., in *Felix Cinematografica Srl contre Penthouse International, Ltd., and Penthouse Films International, Ltd.*, Cour d'Appel de Paris, 1ère Chambre C, Docket Number 90000065. Maître Chantal

uphold its dismissal of Felix's claims, submitted several pages of filler and word salad, arguing, in essence, that *Caligula* was subject to the Geneva and Berne Conventions, by which rights disputes were to be settled only by reference to the law in force in the country in question. As a coproduction, rights were determined by the October 1975 contract which granted Penthouse full scope to release the film in France. Infringement was not an issue, defendants argued, since it was not possible for Penthouse to infringe its own property. Italian court rulings, which were pending appeal, should have no weight in France, especially since they contradict the Geneva and Berne Conventions, and even more so since the US had never signed on to the Berne Convention. Most forcefully, Penthouse made a case that Felix's acquisition of author cessions from Vidal and d'Amico was done in furtherance of fraud. Such cessions, Penthouse maintained, were merely regularizations of producers' and licensees' reports, and it was in bad faith for Felix to present these documents as evidence that it alone had authors' rights. (This was in stark contrast to Penthouse's previous allegations that d'Amico was never even a coauthor, and that Vidal's transfer was by contract acquired by the 1975 Joint Venture.) In the present case, Penthouse's legal counsel, Maître Fanet, brought up the old legal tradition of "*fruas omnia corrumpit*" (fraud negates everything), concluding that Felix's fraud negated all prior agreements, thus vesting Penthouse with all rights.

Fanet had carelessly handed Bitoun more than enough ammunition. Bitoun could have pulverized his opposition. Yet he did not. He perfunctorily stated that the Settlement Agreement of 1984 specified that any disagreements about ownership rights could be settled only in Italy, and that an argument for French television and video rights need not invoke the Geneva and Berne Conventions. Had he demonstrated his point that Penthouse was never a coproducer, he could have made a powerful and definitive argument, but instead he merely stated it without proof, using that as a basis for his argument that:

Not being a coproducer of the film, the respondent companies are not assignees of copyright and therefore they are not entitled to invoke the provisions of the Berne Convention and the Geneva Convention, which pertain only to holders of copyrights, whether they are authors themselves or assignees of copyright, as producers can be.

Bitoun did remark that the US had indeed joined the Berne Convention, and he further remarked that even if the Berne and Geneva conventions were to be applied in this case, Penthouse did not make clear how this would negate

findings by Italian courts that did not contradict those conventions. As for the allegation of fraud, Bitoun responded that it was only the Penthouse companies that were guilty of such.

When Franco Rossellini read Bitoun's Concluding Arguments, he dashed off a response, with exhibits, in the hopes of his lawyer making a stronger case.<sup>63</sup> It was almost too late, for Rossellini was responding to what were, after all, the concluding arguments. This makes it clear to us that Rossellini had not been given a chance to review those concluding arguments beforehand. A week later Bitoun incorporated Rossellini's additional arguments, along with a correction, in "Additional Conclusions," which added the information about the film's exclusively Italian nationality, as well as a demonstration that the transfers of author rights had occurred prior to the start of shooting.<sup>64</sup> Rossellini responded by fax the next day, reminding Bitoun that he had the Ministry of Tourism and Entertainment's Certificate of Origin translated into French and legalized by the French court, and also adding the Italian court ruling that granted Felix exclusive television and video rights.<sup>65</sup> Bitoun filed the "Additional Conclusions" with the Court of Appeals on 5 December 1990.

#### 28 NOVEMBER 1990 — FELIX OWES UNIEXPORT MONEY

**B**OLOGNINI'S SECRETARY Carla Di Carlo supplied Rossellini with an inventory of past-due invoices along with printing and export costs as well as commissions, a total of \$28,302.58.<sup>66</sup> This bill concluded with a postscript notifying Rossellini that a replacement submaster had been sent to England, and that Entertainment Film Distributors, Ltd., should then pay its balance of \$44,000. Of course, that was a ludicrous situation, since Entertainment Film Distributors had canceled the contract since Penthouse Clubs had already released *Caligula* in that market.

#### 5 DECEMBER 1990 — FELIX OWES EVERYBODY MONEY

**T**HE GAMBLE OF SPENDING MONEY prior to completion of sales backfired. Cinecittà had made 35mm submasters of *Caligula* for Portugal, Scandinavia,

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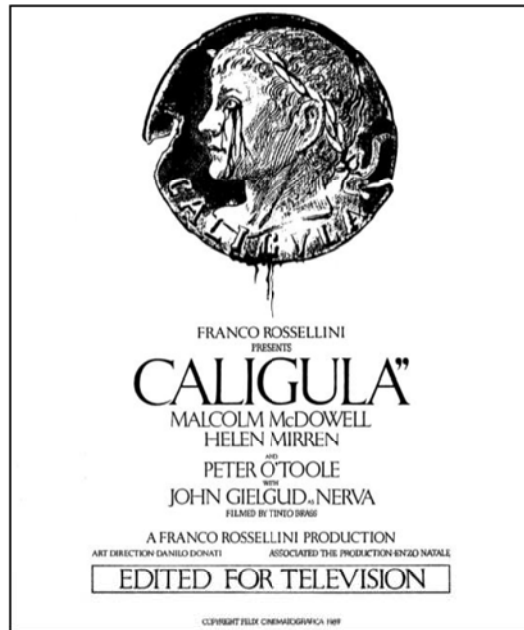
63. Rossellini: fax to Bitoun, 22 November 1990. FRC.

64. Bitoun: fax to Rossellini, including a draft of the "Conclusions complémentaires" for submission to the Court of Appeals. FRC. D'Amico had indeed transferred his author's rights prior to filming, but not on the officially recognized form. He corrected this oversight six years later, as we have seen.

65. Rossellini: fax to Bitoun, 30 November 1990. FRC.

66. Carla Di Carlo of Uniexport: fax to Rossellini, 28 November 1990. FRC.

and Brazil, but the courier, Transor International Srl of Rome, refused to touch the merchandise, having heard that the film was still sequestered. Rossellini worked desperately with a Dr Rocca of the Italian Ministry of Tourism and Entertainment to demonstrate that the order of sequestration had been lifted and that Transor was free to apply for a regular export license. In the meantime, the distributors were growing restless. To add to the troubles, there was no news of the 35mm masters of the soft version, destined for Señor Amador of México.<sup>67</sup>



#### 10 DECEMBER 1990 — *CALIGULA* EDITED FOR TELEVISION

**W**ITH HIS VIDEO MARKET largely stolen from him, and with his foreign-cinema market largely stolen from him, Franco Rossellini now turned to the one remaining market, television. As we learned above, he had been working on this at least as early as May 1989, and now he was ready to move forward. In November, he hired Deskey Associates, Inc., Design Consultants, on West 36th Street in Manhattan, use Daniel Maffia's logo as a basis for printing black-and-white as well as color layouts imprints for folder covers.<sup>68</sup> He paid \$1,732 to

67. Pietro Bolognini of Uniexport: fax to Rossellini of Felix Cinematografica, 5 December 1990. FRC.

68. Deskey Associates, Inc.: invoice 25979 to Rossellini, 26 December 1990. FRC.

Howard Printing Corporation on Madison Avenue in Manhattan the press kits.<sup>69</sup> Franco Rossellini himself drafted the brief press release, which contained a summary of his uncle's 1971 treatment and his own fantasies rather than of the actual film. There is no doubt that he had never bothered to watch his own movie. Some of his claims are ludicrous.

#### CALIGOLA

The film tells the story of the frenzied Emperor and the confrontation between absolute power and the institutions, between the authorities and the public opinion.

The historical background that inspired Rossellini suggests that Caligola after having tried to reestablish republican freedoms seeing that his rallies attracted none, realising that his efforts to awaken the people were unheeded, decided to destroy by virtue of his frenzied behaviour the Imperial institute, by exposing the people to the absurdities of absolute power.

The Emperor's murderous folly, described by historians who hated Caligola, was in reality his deliberate, keen and desperate way to shake the myth of the Empire and to awaken a slumbering people. It is therefore the impossibility to fulfill this democratic dream in a corrupted and power thirsty world, that leads Caligola to seek his death by Cherea's hand.

The Emperor death is in fact a suicide and it paves the way to the approaching decline of the Roman Empire which, with the arrival of the Barbarians seals up the Pagan era and marks the advent of Christianity.

Franco Rossellini

CALIGOLA is a film of Italian production.

This film is today the highest-grossing Italian film in the world.

Absurdly, it has never been shown in Italy — except for three days in November 1979.

The production of the film cost a good nine billion lire [US\$10,281,904.76] in 1976.

Performing in the film are the most prestigious players in the English Theatre — each a winner of Academy Awards.

The artistic direction — sets and costumes — was under the care of Danilo Donati, himself a winner of two Academy Awards.

The screenplay of the film, born from an original idea by Roberto Rossellini, was written by one of the most famous writers in the world: Gore Vidal and Masolino d'Amico.

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69. Howard Printing Corp: invoice 07141 to Mr Rossellini, 10 December 1990. FRC.

**19 DECEMBER 1990 — PENTHOUSE TAKES THE LEAD**

**F**RANCO ROSSELLINI HAD EARNED a few thousand dollars through his March 1990 Brazilian contract with Livio Bruni of Rede Nacional de Filmes Nacionais Ltda, and that prompted Penthouse to overtake that market. On 19 December 1990 Barry E. Winston for Penthouse signed a contract with Almir Roberto De Santos of Europa Home Video Ltda for video rights to *Girls of Penthouse*, *Love Stories*, *Penthouse on the Wild Side*, and the full-length *Caligula*. The contract would commence upon delivery of the 1" masters and would run for two years, in return for a flat fee of \$30,000.<sup>70</sup> This contract appears to have been rushed only for the sake of getting a foot in the door in Brazil, for it was followed a week later by a fax to Concine:

Dear Mr. Palacios;

This is to advise you that Penthouse Films International is the sole owner of the international rights worldwide (except for Italy) for the film "Caligula". Europa Home Video LTDA. is the only company in Brazil licensed by Penthouse for video distribution of "Caligula".

Additionally, I want to confirm to you that I personally signed our formal letter agreement with Europa Home Video LTDA. on Wednesday, December 19, 1990 at our international headquarters in New York. This not only made Europa our "Caligula" licensee in Brazil, but it also licensed Europa for our current Penthouse video collection and we are working together with them in developing a market in Brazil for our famous name "Penthouse" and our future videos.

During 1991, Penthouse will be submitting many other new videos and films to Europa that we are currently filming here in the U.S. with our production and editing crews. If you have any questions about the licensing of the film "Caligula" or any of our other videos licensed to Europa Home Video LTDA., please feel free to call us or contact me by return fax at our New Jersey office which is 201-569-2998.

Sincerely,

Barry E. Winston

Vide President

cc: Chikako Lorenzetti — Penthouse, Manager International Division  
Almir Santos<sup>71</sup>

Alfredo Palacios's response is missing from the Rossellini files, but he was clearly worried. Winston sought to allay his fears:

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70. Winston of Penthouse Films International: contract with Almir Roberto De Santos of Europa Home Video Ltda, 19 December 1990. FRC.

71. Winston of Penthouse Films International: fax to Alfredo Palacios of Concine — Conselho Nacional de Cinema, 26 December 1990. FRC.

Dear Mr. Palacios:

I have received and reviewed the information which you have forwarded to me today.

For your information, the Italian court decision has not been/is not accepted in other jurisdictions; for example, in France — I can send to you the rather lengthy translation of the French court decision; in Japan; and in Germany — I do not think Mr. Rossellini is aware of the legal problems in Germany since we have only just begun legal proceedings there. In Italy, we have appealed the Italian court's decision.

Further, "Io Caligolati" [sic] is not a different motion picture. It is "Caligula" based upon the original footage of "Caligula" that was reedited by Mr. Rossellini as the 1984 Agreement states. If you have the opportunity to view the video of "Caligula" you will see that it is a Penthouse film with Mr. Rossellini as coproducer, not producer.

We are sorry to involve you in such awkward business/legal matters. Your understanding and cooperation is appreciated.

Sincerely,

Barry E. Winston

President

cc: Chikako Lorenzetti, Penthouse, Manager International Division  
Almir Santos<sup>72</sup>

Palacios was gracious enough to forward Penthouse's communications to Rossellini, who on 10 January 1991 said, simply, "Thank you for your collaboration in the struggle with 'piracy.'"<sup>73</sup>

#### 4 JANUARY 1991 — CASE DISMISSED! (38TH LAWSUIT, CONTINUED)

JUDGE DIANE LEBEDEFF found a way to clear an item from her schedule.<sup>74</sup> Penthouse Films International had sued, arguing it was copyright claimant as per its 1990 registration with the Copyright Office. Yet she found that Penthouse Films was not a proper claimant, since it had transferred whatever rights it held to *Caligula* to a Liechtensteinian firm called Penthouse Clubs International Establishment in early 1981. "Although this court has exhaustively studied the

72. Winston of Penthouse: fax to Palacios of Concine — Conselho Nacional de Cinema, 2 January 1991. FRC.

73. Rossellini for Felix Cinematografica: fax to Dr Alfredo Palacios of Concine, 10 January 1991 (only the cover page survives). FRC.

74. *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 St. John & Wayne for Defendants. FRC.

full range of issues presented, it would be futile to opine when no proper claimant is before the court." With that, she dismissed the case.

Rossellini received this dismissal on the evening of 10 January 1991 and he was elated. The following day he sent four triumphal fax messages. One was to Alfredo Palácios of Concine:

I just received yesterday the decision of the U.S.A. court which accepts my motion and rejects the request by Penthouse Films Int. to recognize their copyright of the film. I am happy about this and pray you to show this to Livio Bruni.

Cordially,

Franco Rossellini<sup>75</sup>

Another was to Livio Bruni of Rede Nacional de Filmes Nacionais Ltda:

As luck would have it, last night I received the response from the Court of New York that accepts my "motion" and declares that Penthouse Films International does not have any right to Caligula!!!

hugs

Franco<sup>76</sup>

To settle an old controversy, Rossellini also sent this news to New Select of Japan, in care of Madame Andret. Rossellini asked her to convey the information to Akira Sugiyama:<sup>77</sup>

Dear Madame Andret

I am sending you the decision of the U.S.A. Court.

Penthouse Film International had made a claim to the New York Court in order to stop the Italian Court decision that only Felix Cinematografica is the only copyright owner of Caligola.

The New York cou[r]t dismissed the case claiming that Penthouse Film International is not entitled to the copyright.

I hope that Mr Sugujama [*sic*] is finally satisfied and will understand that Penthouse has been trying to succeed with all sort[s] of frauds!!

regards

Franco Rossellini

P.S. please forward the message to Mr. Sugujama [*sic*].

He also expressed his delight to Maurizio Lupoi:

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75. Rossellini for Felix: fax to Palácios of Concine, 11 January 1991 (only the cover page survives). FRC.

76. Rossellini for Felix: fax to Bruni of Rede Nacional de Filmes Nacional Ltda, 11 January 1990 (only the cover page survives). FRC.

77. Rossellini for Felix: fax to Madame Andret on behalf of New Select of Japan, 11 January 1991 (only the cover page survives). FRC.

Dear Professor

I got back home yesterday and thank God I feel really well. I will come to Italy within 10 days. I am sending you a copy of the decision of the Judge of the New York Court. What do you think of it? Here the lawyers are satisfied.

I am attaching for you a letter by Penthouse in Brazil for selling the film. I was able, however, to stop them!

Thanks and see you soon

Franco Rossellini<sup>78</sup>

Franco Rossellini, after nearly fifteen years of legal and financial problems, impoverished and dying, let loose with the only weapon still in his possession: fury. He fired off a volley of invective to Dr Mathias Schwarz.

Attorney Schwarz  
For Neue Co[n]stantine  
MONACO

Attorney

Your letter to Professor Lupoi, dated 6 October 1990, is full of errors and is written in absolute bad faith. And I shall not list the vile insinuations.

In fact, as attorney Ziegler has already told you, my relationship with Neue Co[n]stantine is terminated due to your irresponsibility and shameful impropriety.

In fact in your Fax of 30 August 1990 you affirm — lying — that the internegative sent by me did not allow printing of copies as it was in terrible condition. Not only was the internegative of finest quality but Neue Co[n]stantine printed several copies and released them in cinemas without my knowledge and without having finalized the relationship via a final contract with Felix and its legal representative C.V.F. Filming Ventures. I give you, therefore, two weeks' time to return the copies to Felix Cinematografica.

For your information, I send you the decision of the Court of New York which establishes definitively that Penthouse Films International does not have any rights to the film. I understand that in the past Neue Co[n]stantine had signed a contract with Penthouse Films Int. or Penthouse International for the distribution of videocassettes.

This contract is a fraud against me.

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78. Rossellini: fax to Lupoi, 11 January 1991. FRC.

And now you should learn to read sentences before writing stupid and defamatory letters.

Franco Rossellini

P.C.

TOBIS

Signor Rebentrost

Included is the "summary judgement" of the Court in New York on the date 4-1-91<sup>79</sup>

If Neue Constantin had released the film at the time, the materials had surely been provided by Penthouse. We do know that Rossellini was not at all ashamed of having written the above letter, not even after a cooling-down period. He sent a copy to Kilian Rebentrost of Tobis Film, the original German distributor from back in 1980.

My dear Kilian

I am sending you for your information my correspondence with Neue Co[n]stantine and the "summary judgement["] of the New York court.

From the letter of M. Schwarz you can see the entety [*sic*] of their lies.

I had been advised that these people were dangerous gangsters but I would I have [*sic*] never expected to such an extent !!

My warm regards

Franco Rossellini<sup>80</sup>

Now that he had set Brazil, Japan, and Germany aright, Rossellini was determined to push forward with the United Kingdom.<sup>81</sup> Of course, since Penthouse had already grabbed the market, there was little to be done. Nonetheless, Rossellini forwarded the Supreme Court of New York's dismissal, as well as the corrected copyright registration. These two documents would supplement the Italian Certificate of Origin and the Tribunale di Roma's sentence which were already in Green's hands. He closed the letter with "My very best regards dear Nigel," demonstrating that Rossellini was personally quite fond of Nigel Green, and that this was more than just a mere cold business transaction. Three days later Rossellini sent Green yet more documentation, namely the letters his lawyers had written to Vestron.<sup>82</sup> Still, though, despite court rulings and a copyright registration and government papers, there was no way to get

79. Rossellini: fax to Schwarz, 13 January 1991. FRC.

80. Rossellini for Felix: fax to Killian Rebentrost of Tobis Film, 19 January 1991. FRC.

81. Rossellini for Felix: fax and D.H.L. package to Green of Entertainment Film, 21 January 1991. FRC.

82. Rossellini for Felix: fax to Green of Entertainment Film, 24 January 1991. FRC.

around Penthouse's VHS release of *Caligula* in the British market. Green himself stated as much in his response of 25 January 1991,<sup>83</sup> which, though it was not a cold response, was certainly not too warm either. Clause 16c of the contract, he reminded Rossellini, states that "the Licensor is in default if it fails to abide by any material requirement of the agreement," and since a guarantee of exclusivity was such a material term, CVF had clearly defaulted by not preventing Penthouse from releasing competing videos. "I look forward to hearing what form of action you will take in order to prevent continued distribution of 'Caligola', which according to you they have no right to do."

### THE FORTY-THIRD CALIGULA LAWSUIT

#### JANUARY 1991 — FELIX WINS IN BRAZIL

THE US RULING had surprising reverberations in Brazil as well, for a judge there ordered the confiscation of the 3,000 videocassettes that Penthouse and Europa Home Video Ltda had placed on the market.<sup>84</sup> This is the extent of the information available to us.

#### FEBRUARY 1991 — EXPENSES EXCEED EARNINGS

IN FEBRUARY CVF forwarded a statement of earnings from commencement in September 1986 through the end of 1990, a total of \$325,765, which once CVF's commission was deducted left Felix with a grand total of \$228,036.<sup>85</sup> Closing the statement was a handwritten note from a CVF representative, Franco's cousin, Fiorella Mariani:<sup>86</sup> "Give me news and stay well. Kisses kisses. Fiorella." Of course, the earnings were surely inferior to the expenses, but the gap was closing rapidly. It looked as though Felix would finally climb out of the quicksand and reactivate, and it looked as though Franco Rossellini would at long last have his dignity restored, but as we know, it is always brightest before the dusk. Rossellini had spent over a month at the Cabrini Medical Center in New York City, having been admitted on 13 February and discharged on

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83. Green of Entertainment Film: fax to Rossellini of Felix Cinematografica, 25 January 1991. FRC.

84. Enzo Natale of Felix Cinematografica: fax to Lupoi, 25 January 1991. FRC.

85. CVF Filming Ventures Limited: statement addressed to Felix Cinematografica, 15 February 1991. FRC.

86. Rossellini: letter to the SIAE, 15 March 1989, requested that further communications be addressed to "Fiorella Mariani Rossellini." FRC.

16 March 1991.<sup>87</sup> Though he was only 55 years old, photographs of the time reveal him looking as though he were in his 80's, and not a healthy 80's.

Now it was time to hear the ruling from the Rome Court of Appeals, the appeal that was to settle matters once and for all. Rossellini and Lupoi approached this new ruling with full confidence. In the matters of ownership, licenses, and chain of title, the Italian courts had invariably followed the letter and the spirit of the law, and this new ruling, they were convinced, would definitively solidify their rights to *Caligula*.

#### 15 APRIL 1991 — THE MAJESTY OF THE LAW (34TH LAWSUIT, CONCLUDED)

THE THIRTY-FOURTH of the multitudinous cases, after numerous appeals, had at last been decided on 23 January 1991, as Rossellini and Lupoi knew,<sup>88</sup> but the three-judge panel did not issue its conclusions until almost two months later.<sup>89</sup> Dr Mario Adamo accurately summarized the cases leading up to this appeal, and mentioned that the four Penthouse companies objected that though the Investigating Judge had scheduled a hearing on 13 May 1988, the President of the three-judge College had unexpectedly rescheduled the hearing for 19 September 1988 “without adequate preliminary investigation.” He also reminded the court that the Penthouse companies had objected to having been improperly served. Thirdly, the Penthouse companies argued that Judge Livio Fancelli's ruling in the Pretura (court of first instance, or Chancery) was hurried, illogical, and corrupted by a failure to examine the evidence in depth. Penthouse additionally argued that the Pretura's temporary restraining order had not taken into account the counterclaims filed at the Civil Court. (How could it have?) Another of Penthouse's objections was that the Pretura “had erroneously deemed it unnecessary to integrate the cross-examination with regard to Penthouse Products of Englewood, New Jersey, and to Penthouse Publications,

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87. Gloria Barton, Director, Medical Records Department, Cabrini Medical Center, New York NY: discharge notice, 22 March 1991. FRC.

88. Rossellini's “At-a-Glance” datebook has, in large letters, “FINALE CORTE D'APPELLO,” boldly highlighted, on this date. Interestingly, for 31 January 1991 Rossellini wrote, “CREDEVO CHE L'APPELLO FINISSE OGGI INVECE ERA IL 23 JANUARY” (“I thought that the Appeals [court] finished today but instead it was 23 January”). For 1 February 1991 he wrote “SENTENZA ITALIANA DI APPELLO” (“Italian Appeals ruling”). FRC.

89. *Penthouse Films International, Ltd., Penthouse Clubs International Establishment, Penthouse Records, Ltd., and Penthouse International, Ltd., contro Felix Cinematografica Srl*, La Corte di Appello di Roma, General Docket Number 822/89, Chronology Number 1233, Archive Number 1140. Three-Judge “College”: Dr Arnaldo Valente (President), Dr Vittorio Metta (Counselor), Dr Mario Adamo (Reporting Judge). Gianni Massaro for Plaintiffs, Maurizio Lupoi for Defendant. FRC.

Ltd., of New York as well as to Cosmopolitan Films." What is more, Penthouse argued that the Pretura had not taken into account that the videocassettes would not have been imported into Italy. (We have seen that statement before, and it is true, but only because the Pretura had forbidden the import of the videocassettes into Italy.) The Penthouse companies objected to Fancelli's having issued a decree pertaining to a film that had been confiscated, since confiscation would have necessarily transferred all ownership to the Public Minister, depriving Felix of all ownership of the film. Most seriously, the unspecified "court" had made numerous errors of interpretations of the various agreements, and no mention at all of the Joint Venture Agreement of October 1975 or of the early drafts of the Settlement Agreement of February 1984 or the correspondence relating to it.

The three-judge College turned the matter over to investigators, and upon review of their findings, issued its ruling. On the first point, the judges found Penthouse entirely wrong:

...after the proposal for ruling on jurisdiction by the Penthouse group of companies, the case was suspended by the order of 28 January 1987 by the College, after the case itself had been postponed pending decision.

From this it directly follows that the resumption, after the decision by the United Sessions of the Supreme Court, should have been taken up before the College and not before the Investigative Judge, having already divested himself of the case, for which, justly, the President of the College, in essence overturned the ruling of the Investigative Judge, brought the parties back before the College, which, deeming the case sufficiently prepared, therefore decided on the matter, after having deferred the decision of the case to the hearing of 19 September 1988, the parties being present and not objecting to anything, insisted, rather, on a decision on the dispute, referring to the conclusions aforestated.

As for Penthouse's objection to having been improperly served, that too was an invalid argument, since they had been served at their elected domicile, as defined in the Settlement Agreement of 1984.

The three-judge College likewise rejected Penthouse's argument that Penthouse Products and Cosmopolitan Cinematografica should have been integrated into the case.

The College similarly rejected Penthouse's claim that Felix lacked any capacity to sue, since the Public Minister had seized all ownership rights. In actuality, the Italian government had seized the means of exploiting the film, but had not and could not seize the abstract right of ownership of the film *per se*. Felix therefore had every right to sue, as spelled out explicitly in the Settlement Agreement of 1984.

Likewise rejected was Penthouse's insistence that the videocassettes would not have been imported into Italy. The College found that Felix's claim is not limited to Italian territory alone, but extends globally.

Then, inexplicably, the three-judge College ruled that the Settlement Agreement of 1984 was explicitly based on the Joint Venture Agreement of October 1975! How the investigators and judges could possibly have misread the document so radically we shall never know. Yet they did, and they regarded the Settlement Agreement of 1984 as simply a novation only of the Joint Venture Agreement of October 1975. That was Felix's doom.

The three judges then entirely disregarded Italian law, and considered the present case one solely pertaining to contract. The Settlement Agreement of 1984 merely readjusted the percentage share from 65/35 to 90/10, nothing more. There was nothing in the Settlement Agreement that would limit Penthouse's ownership only to cinema rights.

Leaping to an unfounded conclusion, the three judges ruled that Penthouse had funded "a good \$11,000,000," of the budget, "while Felix Cinematografica did not specify how much was its effective disbursement in the operation, which must have however been modest, given the division established by the parties themselves."

The three judges made a further pronouncement. In a telegram to his clients, Massaro had mentioned that Penthouse's accounting statements provided to Felix must include revenues from all sources, making clear that this would include video revenues from videos already put on the market. This, the judges ruled, proved beyond doubt that Penthouse legally had more than just cinema rights. Again, how a unilateral statement could constitute the meaning of a multilateral contract is beyond any hope of conception.

Felix's argument that it held the chain of title from Gore Vidal and Masolino d'Amico was entirely rejected. This, the judges ruled, was merely a regularization of a term in the Joint Venture Agreement of October 1975 and did not vest Felix with any exclusive right.

The judges also rejected Felix's argument that the film had Italian nationality. The Joint Venture Agreement of October 1975 had been signed prior to any determination of nationality. The documents demonstrating Italian nationality had been procured by Felix afterwards, at its request, and therefore had no validity. Further, the handwritten memo from Franco Rossellini to "Ben" Guccione dated 21 May 1978 clearly reasserted the Joint Venture Agreement "notwithstanding the documents sent to the Italian government." Of course, as

we saw in Chapter 30, the memo in question was quite vague and made no mention at all of the Joint Venture Agreement.

The three judges then made another incomprehensible determination:

Regarding finally the presumed nullity of the agreements that would have contained the cession of exploitation rights of the film, different from the right of projection of the film itself in movie theatres, it emerges that no legal norm prohibits such contracting which must only be submitted to the competent authorities for the eventual necessary authorizations upon import and export of currency.

While true in and of itself, that did not pertain to *Caligula*, since the competent authorities had never issued the necessary authorizations for Penthouse to exploit the film on video or television.

Felix had long argued that the Joint Venture Agreement was self-evidently invalid, for had it been there would have been no need for Felix to sell the nonsynchronous music-utilization rights to Penthouse International. The judges now rejected that argument as well, basing their reasoning on the Joint Venture Agreement of October 1975 which vested such music rights in the Joint Venture. Felix's sale of this right was, again, merely a regularization of a prior contractual term.

Therefore the appeal must be approved and in a reversal of the contested ruling the right of Penthouse Films International must be declared, as requested by the appellant companies, to utilize the film "Caligula" in any form in the entire world excluding Italy, without prejudice to the right of Felix Cinematografica Srl to the receipt of 10% of the proceeds deriving from the exploitation of the work, in whatever form, to be calculated according to the method established in the Settlement Agreement of 2 February 1984.

On the contrary, the part of the cross-claim by Penthouse Films International and Penthouse Clubs International Establishment aimed at obtaining the sentencing of Felix Cinematografica to the compensation of damages produced, should be rejected.

In this regard, it should in fact be specified that no proof was provided by the petitioners so that the relative requests should be completely disregarded for lacking every evidential foundation.

Finally, the preliminary motions advanced by the appellant companies must be declared absorbed in the preceding arguments.

The costs borne by the losing party and are determined as per the operative part of the judgment, in relation to the levels of proceedings that have taken place.

## FOR THESE REASONS

The Court,

rendering a definitive pronouncement on the appeal by Penthouse Film International, Ltd., Penthouse Clubs International Establishment, Penthouse Records, Ltd., Penthouse International, Ltd., with regard to Felix Cinematografica Srl, opposing the sentence of the Court of Rome of 15 November 1988, states:

- approves the appeal and the reversal of the contested ruling rejects the request by Felix Cinematografica;

- approves the cross-claim by Penthouse Films International, Ltd., and declares the right of said company to the economic exploitation of the film “Caligula” in every way, form, and time, including through reproduction on videocassette, in the entire world excluding Italy, without prejudice to the right of Felix Cinematografica Srl to receive 10% of the proceeds; calculated on the basis of the Settlement Agreement of 2 February 1984;

- rejects the request for compensation of damages put forth by the Penthouse Films International, Ltd. and Penthouse Clubs International Establishment companies;

- sentences Felix Cinematografica Srl to reimburse the Penthouse group of companies, appellants, the legal costs that are determined in relation to the first instance as a total of £4,039,800 of which £16,800 are for expenses, £1,023,000 [US\$822.28] for fees and £3,000,000 [US\$2,411.38] for honoraria and in relation to the second instance a total of £5,056,000 [US\$4,063.99] of which £96,000 [US\$77.17] are for costs, £460,000 [US\$369.75] for fees and £4,500,000 [US\$3,616.07] for honoraria.

Thus decided in Rome, in the council chamber of the first civil section, on the date of 30 January 1991.

And that is how Penthouse, retroactively, became copyright owner and producer of *Caligula*.