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Tyler T. Ochoa

Santa Clara University School of Law, ttochoa@scu.edu

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Copyright and Underwater Cultural Heritage*

Tyler T. Ochoa**

I INTRODUCTION

One of the goals of the UNESCO Convention on the Protection of Underwater Cultural Heritage is to encourage preservation of underwater cultural heritage *in situ*, in its original location on the ocean floor.¹ There is an obvious conflict between this goal and the traditional admiralty-law principles of the law of salvage and the law of finds,² both of which have the effect of encouraging the removal and disposition of valuable cultural artifacts from the ocean floor.³ Indeed, expeditions to locate historical shipwrecks

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**Professor, High Tech Law Institute, Santa Clara University School of Law. A.B. 1983, J.D. 1987, Stanford University. The author would like to thank Prano Amjadi of the Santa Clara University Law Library for her assistance in locating some of the more obscure sources. The author also would like to thank Kristen van de Biezenbos of the University of Calgary Faculty of Law, for the invitation to speak on this topic at the 2018 AALS Conference and the other panelists for their informative presentations at the Conference.

¹UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40, Art. 2(5) & Annex, Rule 1 (2002). “Underwater cultural heritage” is defined as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years,” including “sites, structures, buildings, artifacts and human remains,” and “vessels, aircraft, other vehicles . . . [and] their cargo or other contents, . . . together with their archaeological and natural context[s].” *Id.* Art. 1(1).

²See Part II.A., *infra*.

³Under the law of finds, “[p]ersons who actually reduce lost or abandoned objects to possession and persons who are actively and ably engaged in efforts to do so are legally protected against interference from others, whereas persons who simply discover

were traditionally financed by the prospect of being able to share in any treasure that might be recovered.⁴ Since removal and disposition of artifacts is now expressly discouraged, parties are increasingly financing underwater exploration by selling the rights to broadcast underwater photography of the expedition.⁵ In other words, copyright law is rapidly becoming a more important part of the means of financing archeological exploration of the world's underwater cultural heritage.

This article will focus on three aspects of copyright law as it applies to the photography of underwater cultural heritage. First, to what extent can a salvor claim exclusive rights to photograph a particular site?⁶ Second, who is the author (or who are the authors)

or locate such property, but do not undertake to reduce it to possession, are not.” *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 572–73 (5th Cir. 1981). Similarly, “the law of salvage, like the law of finds, requires a salvor to establish possession over property before obtaining the right to exclude others.” *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 460 (4th Cir. 1992). To maintain exclusive salvage rights, salvage operations must be diligent, ongoing, and clothed with some prospect of success; so where a company fails to salvage property for a lengthy period of time, it can lose its rights to another who is willing and able to salvage the property. *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1061 (1st Cir. 1987).

⁴See, e.g., GARY KINDER, *SHIP OF GOLD IN THE DEEP BLUE SEA*, 188–89, 226–28, 281–82 (Vintage Books 1999) (expedition to discover lost treasure ship *Central America* raised \$200,000 in seed money, \$1.4 million for search, and \$3.6 million for verification and recovery); Eoghan Macguire, *Why Scouring Sea for Sunken Treasures is Big Business*, CNN, Mar. 14, 2012, at ¶¶ 7–8 (“The possibility to reap such bountiful rewards has inevitably led to increased industry investment in recent years Hedge funds, private equity firms as well as cash rich individual investors have all been eager to provide the capital to back increasingly specialized treasure ventures.”), at <https://www.cnn.com/2012/03/13/business/sunken-treasure-business/index.html> (last visited May 1, 2018).

⁵See, e.g., *RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 1996 AMC 2497, 2499 (E.D. Va. 1996) (listing “video sales, film documentaries, and television broadcasts as inventive marketing ideas that R.M.S. Titanic must resort to since it is not selling the artifacts.”). See also Kimberly L. Faulk & Rick Allen, *Lights, Camera . . . Shipwreck!?! Multimedia at Four Thousand Feet*, 51 *Hist. Archeology* 418 (2017) (discussing advantages of archeologists partnering with videographers to document salvage expeditions); Meson Capital Partners Investigative Report, *Odyssey Marine Exploration Co (OMEX): Do Investors Know What Lies Beneath the Surface?*, at 4 (“we believe UNESCO’s new regulations to protect national gravesites and heritage make for-profit historic shipwreck hunting unviable.”), at <https://s3.amazonaws.com/omextruth/omexreport.pdf> (last visited May 1, 2018).

⁶See Part III.A., *infra*.

of such underwater photography, which increasingly involves the use of remote-controlled robotic drones?⁷ Third, to what extent can a State control the use of underwater photography that falls within its territorial waters?⁸ All three of these aspects have been the subject of lawsuits and judicial opinions in the United States; and those opinions shed light on the utility of copyright to serve the new role that those who seek to protect underwater cultural heritage have thrust upon it.

II BACKGROUND

A. Admiralty Law⁹

There are two maritime-law doctrines that are relevant to underwater cultural heritage: the law of finds and the law of salvage. “The law of finds defines the circumstances under which a party may be said to have acquired title to ownerless property.”¹⁰ The law of finds “is applied to previously owned sunken property only when that property has been abandoned by its previous owners.”¹¹ In such a case, the law of finds follows “the ancient and honorable principle of ‘finders, keepers.’”¹²

The law of salvage, by contrast, “specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of property (e.g., vessels, equipment, and cargo) for the purpose of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid.”¹³ “Salvage is a reward given to persons who save or rescue a ship or a ship's goods from shipwreck, fire, or capture.”¹⁴ “Three elements

⁷See Part III.B., *infra*.

⁸See Part III.C., *infra*.

⁹Part II.A. can be skipped by those already familiar with general principles of maritime law.

¹⁰*Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 460 (4th Cir. 1992).

¹¹*Id.* at 461.

¹²*Id.* at 459.

¹³*Id.* at 460.

¹⁴*Zych v. Unidentified, Wrecked and Abandoned Vessel*, 19 F.3d 1136, 1141 (7th Cir. 1994).

are necessary to a valid salvage claim: (1) marine peril; (2) voluntary service rendered outside . . . of an existing duty or contract; and (3) success by the salvor . . . [in] contribut[ing] to saving the salvaged property.”¹⁵ A successful salvage claim gives the salvor a maritime lien upon the saved property; the amount of the salvage award requires consideration of several factors, including “the degree to which the salvors have worked to protect the historical and archeological value of the wreck and items salvaged.”¹⁶

The relationship between the law of salvage and the law of finds has been described as follows:

[W]hen sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds. Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. . . . Should the property encompass an ancient and longlost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case . . . an abandonment would have to be proved by strong and convincing evidence.¹⁷

Congress has modified traditional maritime law for shipwrecks located within three miles of the coast.¹⁸ Under the Abandoned Shipwreck Act of 1987,¹⁹ the United States claimed title to any abandoned shipwreck within three miles of the coast and

¹⁵*Id.*

¹⁶*Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992).

¹⁷*Id.* at 464–65.

¹⁸See 43 U.S.C. § 2012(f) (“For purposes of this chapter . . . (f) the term ‘submerged lands’ means the lands—

(1) that are ‘lands beneath navigable waters,’ as defined in section 1301 of this title”); 43 U.S.C. § 1301(a) (The term “lands beneath navigable waters” means—
(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State”).

¹⁹Pub. L. No. 100–298, § 102 Stat. 432 (codified at 43 U.S.C. §§ 2101–2106).

simultaneously transferred title to the respective States.²⁰ Congress expressly preempted traditional maritime law with respect to any such shipwrecks.²¹

Congress has also enacted the Sunken Military Craft Act,²² which prohibits “any activity directed at a sunken military craft that disturbs, removes, or injures any sunken military craft” except under an authorized permit or regulation.²³ The Act expressly preempts traditional maritime law with respect to “any United States sunken military craft, wherever located,” and “any foreign sunken military craft located in United States waters.”²⁴

In accordance with the United Nations Convention on the Law of the Sea,²⁵ the United States’ territorial waters extend 12 miles out from the coast.²⁶ Twelve miles beyond that is the United States’ contiguous zone, within which a nation can enforce its customs, taxation, immigration, and pollution laws.²⁷ The United States also claims an exclusive economic zone out to 200 miles from the coast,²⁸ within which it has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources . . . of the seabed and its subsoil.”²⁹ Finally, the United States also claims jurisdiction over the subsoil and seabed of the

²⁰43 U.S.C. § 2105(a)(1) (“The United States asserts title to any abandoned shipwreck that is . . . embedded in submerged lands of a State”); *id.*, § 2105(c) (“The title of the United States to any abandoned shipwreck asserted under subsection (a) . . . is transferred to the State in or on whose submerged lands the shipwreck is located.”). The United States retained title to shipwrecks located within the public lands of the United States. *Id.*, §2105(d).

²¹43 U.S.C. § 2016(a) (“The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies.”).

²²Pub. L. No. 108–375, Title XIV, §§ 1401–1408, 118 Stat. 2094–2098 (codified at 10 U.S.C. § 113 Note).

²³*Id.*, § 1402(a).

²⁴*Id.*, § 1406(c) (preempting law of finds); see also *id.*, § 1406(d) (preempting law of salvage).

²⁵Dec. 10, 1982, 1833 U.N.T.S. 397 (hereinafter UNCLOS). The United States has not ratified UNCLOS, but it generally follows its precepts.

²⁶*Id.*, art. 2; Presidential Proclamation No. 5928, 54 Fed. Reg. 777 (Dec. 27, 1988), 103 Stat. 2981.

²⁷UNCLOS, art. 33; Presidential Proclamation No. 7219, 64 Fed. Reg. 48701 (Sept. 22, 1999).

²⁸Presidential Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983).

²⁹UNCLOS, art. 56(1)(a).

outer Continental Shelf,³⁰ but this statute has been interpreted to extend only to natural resources, so it does not include any shipwrecks lying beyond the territorial waters of the United States.³¹ Finally, in international waters outside the 12-mile boundary, “[a]ll objects of an archaeological and historical nature . . . shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.”³² While Congress has jurisdiction to regulate the activities of United States citizens anywhere in the world, it has not done so with respect to underwater cultural heritage.³³

*B. Copyright Law*³⁴

Under the Copyright Act of 1976,³⁵ “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.”³⁶ “Original . . . means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity.”³⁷ Works of authorship include “pictorial, graphic, and sculptural works,”³⁸ including photographs,³⁹ and “motion pictures and other audiovisual works.”⁴⁰ “Fixed” means that a work is recorded in some “permanent or stable”

³⁰43 U.S.C. § 1331 (defining “outer Continental Shelf”); *id.*, § 1332(1); *id.*, § 1333(a)(1). See also UNCLOS, art. 77(1).

³¹*Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 338–40 (5th Cir. 1978). “It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.” *Id.* at 340.

³²UNCLOS, art. 149. “The Area” is defined as “the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.” *Id.*, art. 1(1).

³³*Treasure Salvors*, 569 F.2d at 343 & n.36.

³⁴Part II.B. can be skipped by those already familiar with general principles of copyright law.

³⁵Pub. L. No. 94–553, Title I, § 101, 94 Stat. 2541 (codified as amended in Title 17, §§ 101–805).

³⁶17 U.S.C. § 102(a).

³⁷*Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991).

³⁸17 U.S.C. § 102(a)(5).

³⁹17 U.S.C. § 101 (definition of “pictorial, graphic, and sculptural works”).

⁴⁰17 U.S.C. § 102(a)(6).

form.⁴¹ “A work is created when it is fixed . . . for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time.”⁴²

Thus, when an expedition takes a number of underwater photographs, each photo has a separate copyright; and when an expedition records hours of underwater video, all of the footage is protected by copyright. “In no case,” however, “does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁴³ Thus, the location of a historic shipwreck is not protected by copyright, even if an expedition was the first to discover and record that location.⁴⁴ Moreover, copyright in a photo generally is limited to the “angle of shot, light and shade, exposure, effects achieved by means of filters [or] developing techniques,”⁴⁵ and timing.⁴⁶ Others generally are free to take different photos of the same subject matter, unless the photographer posed or staged the subject.⁴⁷

The copyright in an original work of authorship is owned by “the author or authors of the work.”⁴⁸ The authors of a “joint work,” or

⁴¹17 U.S.C. § 101 (definition of “fixed”).

⁴²17 U.S.C. § 101 (definition of “created”) (internal quotes omitted).

⁴³17 U.S.C. § 102(b).

⁴⁴*Cf.* Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 347 (1991) (“No one may claim originality as to facts . . . because facts do not owe their origin to an act of authorship. . . . The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence.”).

⁴⁵*Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 452 (S.D.N.Y. 2005) (quoting HUGH LADDIE ET AL., *THE MODERN LAW OF COPYRIGHT AND DESIGNS* § 4.57 at 229 (3d ed. Butterworths 2000)).

⁴⁶*Mannion*, 377 F. Supp. 2d at 452–53. Similarly, for video copyright protects creative choices “concerning camera angles, types of shots, . . . and shot selection.” *See* Baltimore Orioles, Inc. v. Major League Baseball Players’ Ass’n, 805 F.2d 663, 668–69 (7th Cir. 1986).

⁴⁷*Mannion*, 377 F. Supp. 2d at 454 (“Insofar as a photograph is original in the rendition or timing, copyright protects the image but does not prevent others from photographing the same object or scene. . . . By contrast, . . . an artist who arranges and then photographs a scene often will have the right to prevent others from duplicating that scene in a photograph or other medium.”).

⁴⁸17 U.S.C. § 201(a). “As a general rule, the author is the party who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression

a work of joint authorship, are co-owners of copyright in the work.⁴⁹ “In the case of a work made for hire, [however,] the employer or other person for whom the work was prepared is considered the author . . . , and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”⁵⁰ The definition of “work made for hire” includes first, “a work prepared by an employee within the scope of his or her employment;”⁵¹ and second, for works created by independent contractors,⁵² “a work specially ordered or commissioned for use . . . as a part of a motion picture or other audiovisual work [or one of eight other types of works] . . . , if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.”⁵³ Thus, if an underwater archeological expedition hires a freelance photographer to document the expedition, typically the copyright would be owned by the photographer, unless the parties agree in a signed writing that the copyright will be owned by the hiring party.

The copyright owner has the exclusive right to reproduce the copyrighted work, to prepare derivative works based on the copyrighted work, to publicly distribute copies of the copyrighted work, and to publicly perform or publicly display the copyrighted work.⁵⁴ These rights are subject to numerous exceptions and limitations,⁵⁵ including the fair use doctrine. The statute states that “the fair use of a copyrighted work . . . is not an infringement of

entitled to copyright protection.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

⁴⁹17 U.S.C. § 201(a). A “joint work” is “a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.” 17 U.S.C. § 101 (definition of “joint work”). Courts generally add two additional elements: that each author must contribute some original expression, as opposed to ideas or research; and that each must have intended to be joint authors. *See, e.g., Childress v. Taylor*, 900 F.2d 500, 506–09 (2d Cir. 1991); *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233–34 (9th Cir. 2000).

⁵⁰17 U.S.C. § 201(b).

⁵¹17 U.S.C. § 101(1) (definition of “work made for hire”).

⁵²*See Reid*, 490 U.S. at 742–43 (“The structure of § 101 indicates a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors.”).

⁵³17 U.S.C. § 101(2) (definition of “work made for hire”).

⁵⁴17 U.S.C. § 106.

⁵⁵*Id.* (“Subject to sections 107 through 122 . . .”).

copyright,”⁵⁶ and it provides six illustrative purposes⁵⁷ and four factors for a court to consider in deciding whether a given use is a fair use.⁵⁸

III

THREE ISSUES IN COPYRIGHT LAW AS IT APPLIES TO UNDERWATER CULTURAL HERITAGE

A. Exclusive Photographic Rights

In 1985, a joint American-French expedition led by Dr. Robert Ballard of the Woods Hole Oceanographic Institution and Jean-Louis Michel of the French Research Institute for the Exploitation of the Sea (IFREMER)⁵⁹ discovered the wreck of the RMS Titanic in the northern Atlantic Ocean.⁶⁰ In 1986, Ballard returned to the Titanic and took some 57,000 photographs; but he decided not to

⁵⁶17 U.S.C. § 107.

⁵⁷*Id.* (“for purposes such as comment, criticism, news reporting, teaching . . . , scholarship, or research”). These uses are not automatically fair use; instead all uses must be judged according to the four factors. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985).

⁵⁸17 U.S.C. § 107. The four factors are “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” *Id.*

⁵⁹In French, Institut Français de Recherche pour l'Exploitation de la Mer. In subsequent litigation, U.S. courts have translated the name as “Institute of France for the Research and Exploration of the Sea,” see, e.g., *RMS Titanic, Inc. v. Haver*, 171 F.3d 943, 952 (4th Cir. 1999), but that translation is inaccurate in several respects. First, the French word is “exploitation” rather than “exploration,” and both words are spelled the same (and have the same meanings) in English. Second, the prepositions in the French name are “French Institute *of* Research *for* the Exploitation of the Sea,” rather than “French Institute *for* Research *and* Exploitation of the Sea.”

⁶⁰*Haver*, 171 F.3d at 952 (4th Cir. 1999); H.R. Rep. 99–393, at 4 (1986). See generally DR. ROBERT D. BALLARD, *THE DISCOVERY OF THE TITANIC* (Warner/Madison Press 1987). For an overview of the subsequent legal battles concerning the *Titanic*, see generally David G. Concannon, *Titanic Legal Battles*, at <https://www.davidconcannon.com/titanic-legal-battles> (last visited May 1, 2018) (the online article is a revised version of David G. Concannon, *The Battle for the R.M.S. Titanic*, *The Philadelphia Lawyer*, Summer 1999, Vol. 62, No. 2); and Ricardo Elia, *Titanic in the Courts*, *Archeology*, Vol. 54, No. 1 (January/February 2001).

recover any artifacts from the wreck.⁶¹ Instead, “he worked to promote an international agreement to protect the Titanic from commercial salvage.”⁶² His efforts resulted in the passage of the R.M.S. Titanic Marine Memorial Act of 1986,⁶³ which was enacted “to encourage international negotiations to develop an international agreement and guidelines to protect this unique shipwreck from potential harm caused by misguided salvage.”⁶⁴ Although the negotiations eventually resulted in a proposed Agreement Concerning the Shipwrecked Vessel RMS Titanic,⁶⁵ to date it has been ratified only by the United Kingdom.⁶⁶

Ballard’s French partners felt differently. In 1987, IFREMER mounted a joint expedition with Titanic Ventures, a Connecticut limited partnership, to conduct the first salvage operations of the Titanic, recovering approximately 1,800 artifacts.⁶⁷ Seven years later, after a skirmish over exclusive salvage rights between Titanic Ventures and a competing claimant,⁶⁸ the successor-in-interest to

⁶¹Concannon, *supra* note 60, ¶¶ 6,7.

⁶²*Id.* ¶ 7; see also H.R. Rep. No. 99–393, at 6 (1986).

⁶³Pub. L. No. 99–513, §1, 100 Stat. 2082 (codified at 16 U.S.C. §§450rr-450rr-6.).

⁶⁴H.R. Rep. No. 99–393, at 5 (1986).

⁶⁵The text of the proposed agreement is available at <https://www.gc.noaa.gov/documents/titanic-agreement.pdf> (last visited May 1, 2018). The negotiations also resulted in the promulgation by the National Oceanic and Atmospheric Administration (NOAA) of Guidelines for Research, Recovery and Salvage of *RMS Titanic*, 66 Fed. Reg. 18905 (Apr. 12, 2001).

⁶⁶National Oceanic and Atmospheric Administration, Office of General Counsel, *R.M.S. Titanic — International Agreement*, at https://www.gc.noaa.gov/gcil_titanic-intl.html (last visited May 1, 2018). Wikipedia incorrectly states that it has been ratified by both the United Kingdom and the United States. Wikipedia, *Wreck of the RMS Titanic*, at https://en.wikipedia.org/wiki/Wreck_of_the_RMS_Titanic (last visited May 1, 2018).

⁶⁷*RMS Titanic, Inc. v. Haver*, 171 F.3d 943, 952 (4th Cir. 1999).

⁶⁸See *Marex Titanic, Inc. v. Wrecked and Abandoned Vessel*, 805 F. Supp. 375 (E.D. Va. 1992), *rev'd*, 2 F.3d 544 (4th Cir. 1993). *Marex Titanic* was funded in part by Jack Grimm, a Texas oilman who had previously funded three expeditions to try to find the *Titanic* and claimed to have discovered its propeller in 1981. Ballard, *supra* note 60, at 45–51. *Marex* based its salvage claim on two items, a pill bottle and a hull fragment, which it claimed to have recovered, but which in fact had been surreptitiously taken during a 1991 filming expedition. 2 F.3d at 545 & n.1; JOHN P. EATON & CHARLES A. HAAS, *TITANIC: TRIUMPH AND TRAGEDY* 313 (W.W. Norton 2d ed. 1994). While a vessel chartered by *Marex* was at sea, the District Court awarded exclusive salvage rights to *Titanic Ventures* and enjoined *Marex Titanic* from any salvage operations. 805 F. Supp. at 376–77. Although the decision was reversed on a technicality (because *Marex* had

Titanic Ventures, RMS Titanic, Inc. (RMST),⁶⁹ was awarded exclusive salvage rights to the Titanic as salvor-in-possession.⁷⁰ To ensure continued access to IFREMER's scientific equipment, RMST agreed with the French government that it would not sell off any artifacts recovered from the wreck.⁷¹

In 1995, movie director James Cameron chartered a Russian vessel and two Russian submersibles to film the wreck for his movie *Titanic*.⁷² Although RMST initially threatened litigation, it decided not to seek an injunction, reasoning that Cameron only intended to photograph the wreck and not to take any artifacts.⁷³ During the filming, however, the Russian subs allegedly inflicted irreparable damage, leaving debris (including a broken propeller) behind.⁷⁴ RMST would not discover the damage until it returned to the site the following year;⁷⁵ but the experience may have contributed to RMST's determination not to allow any other filming expeditions in the future.

After fending off a claim that it was not sufficiently diligent or financially able to continue as salvor-in-possession,⁷⁶ RMST learned that John Joslyn, a television producer and shareholder of

filed a motion for voluntary dismissal before the ruling), 2 F.3d at 547–48, *Marex* did not renew its claims to the *Titanic*. *EATON & HAAS, supra*, at 313.

⁶⁹Titanic Ventures owns 43% of the shares of RMS Titanic, Inc. *RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 924 F. Supp. 714, 716–17 (E.D. Va. 1996). RMS Titanic, Inc. purchased the artifacts and salvage rights from Titanic Ventures in May 1993. *EATON & HAAS, supra* note 68, at 313. This article will refer to RMS Titanic, Inc., as RMST, in order to avoid confusion with the name of the vessel itself.

⁷⁰924 F. Supp. at 715–16 & n.2.

⁷¹*Id.* at 718 n.10.

⁷²JOHN P. EATON & CHARLES A. HAAS, *TITANIC: A JOURNEY THROUGH TIME* 205 (W.W. Norton 1999).

⁷³Concannon, *supra* note 60, ¶ 14, citing RMST Periodic Report, September 20, 1996. RMST was required to file periodic reports with the District Court as a condition of its salvor-in-possession status.

⁷⁴*EATON & HAAS, supra* note 72, at 205.

⁷⁵*RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 9 F. Supp. 2d 624, 636 n.11, 637 n.14 (E.D. Va. 1998), *aff'd in part, rev'd in part*, *RMS Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999).

⁷⁶*RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 924 F. Supp. 714, 722–24 (E.D. Va. 1996).

RMST,⁷⁷ was planning a trip to film and photograph the wreck.⁷⁸ RMST sought and obtained a preliminary injunction prohibiting Joslyn “and any other person having notice of this Order . . . from conducting search, survey, salvage operations, or obtaining any image or photography of the Titanic wreck or wreck site.”⁷⁹ The District Court explained:

The Court granted [RMST] possession of the wreck site for monetary gain in order to compensate it for these [salvage] efforts and to encourage their continuation. The Court is of the opinion that photographs can be marketed like any other physical artifact and, therefore, the rights to images, photographs, videos, and the like belong to [RMST]. . . .

[Because RMST] is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income. . . . [A]llowing another “salvor” to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artifacts themselves.⁸⁰

The court concluded that “[RMST] has the exclusive right to take any and all types of photographic images of the *Titanic* wreck and wreck site.”⁸¹

⁷⁷Joslyn was one of the original partners in Titanic Ventures, RMST’s predecessor-in-interest. See *Investors Sue Over Titanic Salvage*, Wash. Post, Oct. 21, 1987. His production company, Westgate Productions, helped fund the 1987 expedition in exchange for television rights. William F. Buckley, Jr., *Down to the Great Ship*, N.Y. Times Magazine, Oct. 17, 1987, at 40, 93. Joslyn was executive producer of the resulting television special, *Return to the Titanic: Live!*, in which host Telly Savalas opened a safe and a satchel recovered from the Titanic by the 1987 expedition. See John Corry, *TV Review: Safe from Titanic is Opened*, N.Y. Times, Oct. 28, 1987, at C32; Ken Ringle, “*Titanic . . . Live!*”: *A Night to Forget*, Washington Post, Oct. 29, 1987; John Joslyn, IMDb, <https://www.imdb.com/name/nm0430875/> (last visited May 1, 2018).

⁷⁸*RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 1996 AMC 2497, 2498 (E.D. Va. 1996).

⁷⁹1996 AMC at 2498.

⁸⁰*Id.* at 2498–99.

⁸¹*Id.* at 2500. Joslyn got his revenge in 1999, when he participated in “a plan by a group of insurgent RMS shareholders, including Joslyn, . . . to remove four RMS directors and two RMS officers, and to install [two others] as officers.” In the Matter of Joslyn, U.S. Securities and Exchange Comm’n, Admin. Proc. File No. 3-11718, ¶ 8 (Oct. 26, 2004). In 2004, the SEC ruled that Joslyn and the others had violated federal securities law. *Id.* ¶ III-3. After helping to seize control of RMST, Joslyn later opened

In 1998, Deep Ocean Expeditions, a British Virgin Islands corporation, announced that it would mount an expedition in August 1998 using the Russian vessels, and would take members of the public to visit the wreck for \$32,500 each.⁸² One of the tourists was Christopher Haver, a wealthy real estate developer from Arizona.⁸³ Upon learning of Deep Ocean's plans, RMST filed a motion for a preliminary injunction to prohibit them from coming within 10 miles of the *Titanic*, and specifically to prohibit them from taking any photographs or video.⁸⁴ Haver filed a lawsuit against RMST, which was consolidated with the pending action.⁸⁵

The District Court granted the preliminary injunction, reiterating its conclusion that allowing other expeditions would interfere with the salvor's rights:

First, the salvor in possession has a right to salvage the wreck free from the interference of others. In a case of historical and archeological salvage, interference may take two forms—interference with the salvor's active operations and interference with the wreck itself. If a photographic expedition is on the site at the same time RMST plans to carry on salvage operations, RMST may be forced to abort its salvage plans in the interests of safety. . . . Because photographers must work so close to the wreck, there is a significant risk of interference with or injury to the wreck itself . . .

The second rationale for excluding third-party photographers involves allowing RMST to at least recoup its investment in the salvage operations.⁸⁶

two Titanic Museum Attractions in Branson, Missouri and Pigeon Forge, Tennessee. *See* The Man Behind the Museum, <http://www.titanicpigeonforge.com/the-man-behind-the-museum> (last visited May 1, 2018).

⁸²RMS Titanic, Inc. v. Wrecked and Abandoned Vessel, 9 F. Supp. 2d 624, 628–29 (E.D. Va. 1998), *aff'd in part, rev'd in part*, RMS Titanic, Inc. v. Haver, 171 F.3d 943, 953 (4th Cir. 1999).

⁸³171 F.3d at 953; see also Wikipedia, Chris Haver, at https://en.wikipedia.org/wiki/Chris_Haver (last visited May 1, 2018).

⁸⁴9 F. Supp. 2d at 629–30. RMST mailed copies of its motion to Deep Ocean and the other participants, but it did not file a complaint against them or serve them with process. Concannon, *supra* note 60, ¶ 20.

⁸⁵9 F. Supp. 2d at 630.

⁸⁶*Id.* at 635–36.

The District Court also concluded that the balance of hardships favored RMST:

[I]n balancing the alleged sentimental harm of failing to view and photograph the wreck “firsthand” against RMST’s harm of losing a salvage season, losing the exclusive rights to license photographs of the wreck for fees, and having the wreck tampered with, the Court finds that RMST’s harm significantly outweighs any harm to the photographic expedition. . . . Even comparing RMST’s harm with the quixotic harm of a band of adventure tourists borders on the irrational.⁸⁷

Despite the injunction, Deep Ocean Expeditions went ahead with its expedition in September 1998 (after RMST had completed its own August expedition).⁸⁸ Both Haver and Deep Ocean appealed the ruling to the U.S. Court of Appeals for the Fourth Circuit. In March 1999, the Fourth Circuit held that “the injunction against [Deep Ocean] must be vacated for lack of personal jurisdiction,”⁸⁹ because, although Deep Ocean had actual notice of the motion, it had never appeared in the *in rem* action and it had never been properly served.⁹⁰ Because Haver had filed a lawsuit and appeared, however, the injunction against him had to be considered on the merits.⁹¹ The Fourth Circuit held that the District Court had not erred in exercising “constructive *in rem* jurisdiction” over the wreck and in awarding exclusive salvage rights to RMST.⁹² It also held, however, that “the district court erred in extending the law of salvage to vest in RMST exclusive rights to visit, view, and photograph the wreck and wreck site of the Titanic at its location in international waters.”⁹³ It explained:

⁸⁷*Id.* at 638.

⁸⁸*RMS Titanic, Inc. v. Haver*, 171 F.3d 943, 955 (4th Cir. 1999); Concannon, *supra* note 60, ¶ 25; Elia, *supra* note 60, ¶ 11.

⁸⁹171 F.3d at 958.

⁹⁰*Id.*

⁹¹*Id.* at 959.

⁹²*Id.* at 966–67 (exclusive salvage rights) & 967–69 (jurisdiction). The Court cautioned, however, that because the wreck lies in international waters, it is subject to the “shared sovereignty” of all nations, limiting the district court’s ability to enforce its orders without obtaining *in rem* jurisdiction over artifacts actually brought into court, or *in personam* jurisdiction over the parties to be enjoined. *Id.* at 967–69.

⁹³*Id.* at 970.

To award, in the name of salvage service, the exclusive right to photograph a shipwreck, would . . . tend to convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors. . . . Salvors would be less inclined to save property because they might be able to obtain more compensation by leaving the property in place and selling photographic images or charging the public admission to go view it.

Even if we were to assume that the salvors had full title to the yet to be recovered shipwreck, . . . it is doubtful that such title to property lying in international waters would include the right to exclude others from viewing and photographing it while in its public site. Exclusive viewing and photographing of property is usually achieved by exercising exclusive possession and removing the property to a private or controllable location where it cannot be viewed or photographed except under conditions controlled by the owner. But a property right does not normally include the right to exclude viewing and photographing of the property when it is located in a public place.⁹⁴

The Fourth Circuit added, however, that the District Court could enjoin parties over whom it had jurisdiction from salvaging artifacts or interfering with RMST's salvage operations.⁹⁵ The U.S. Supreme Court denied RMST's petition for certiorari.⁹⁶

This ruling represents a serious obstacle to the UNESCO Convention's effort to promote in situ preservation of underwater cultural heritage in historic shipwrecks. "An historic salvor must balance the need to profit from salvaging a wreck with the need to preserve the archeological value of the wreck and its artifacts."⁹⁷ Denying exclusive rights to photograph the wreck places a would-be salvor in a catch-22: if it brings artifacts to the surface, it may

⁹⁴RMS Titanic, Inc. v. Haver, 171 F.3d 943, 970 (4th Cir. 1999). The court noted that "even under American copyright law, where an architect has a copyright in the design of a building, that right does not extend to prevent the viewing and photographing of the building, if it is located at a public site or is visible from a public place. See 17 U.S.C. § 120(a)." *Id.* at 970 n.5.

⁹⁵*Id.* at 970–71.

⁹⁶RMS Titanic, Inc. v. Haver, 528 U.S. 825 (1999).

⁹⁷Justin S. Stern, Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights of Historic Shipwrecks, 68 Fordham L. Rev. 2489, 2527 (2000).

violate the principles of the UNESCO Convention;⁹⁸ but if it fails to actively bring artifacts to the surface, it is in danger of losing its exclusive rights to another who is willing to salvage the artifacts.⁹⁹

Moreover, any solution to the problem of using exclusive photographic rights to finance UNESCO-compliant expeditions will have to lie in international law. Congress could pass a statute to alter the law of salvage (as it has with the Abandoned Shipwreck Act of 1988¹⁰⁰), but any such statute would apply only to citizens or permanent residents of the United States, or to shipwrecks located within the territorial waters of the United States.¹⁰¹ Congress does not have legislative authority to extend the traditional law of salvage to include the exclusive right to photograph historic shipwrecks located in international waters.

B. Ownership of Copyright

RMST's 1986 expedition to the Titanic also triggered a legal dispute concerning ownership of copyright in the resulting underwater photography. Alexander Lindsay, a British photographer, had filmed and directed a documentary, *Explorers of the Titanic*, during the 1994 RMST expedition.¹⁰² For the next two years, Lindsay worked with RMST, helping to plan and raise

⁹⁸Note, however, that the UNESCO Convention does not forbid salvage of historic artifacts, "provided such [recovery and] deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal." Annex, Rule 2(b). Instead, it states that "[u]nderwater cultural heritage shall not be commercially exploited," art. 2(7), and that "[r]ecovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation," art. 2(6). The Rules similarly provide that "[u]nderwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods." Rule 2.

⁹⁹*RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 924 F. Supp. 714, 724 n.19 (E.D. Va. 1996) ("if a salvor solely concerns itself with on-shore activities and shows no intention to continue salvaging the wreck site, the salvor should lose its exclusive salvage rights."); *id.* at 724 n.20 ("failure to complete a successful expedition during the forthcoming 1996 weather window may lead the Court to conclude that RMST's financial situation prevents it from being able to successfully salvage the site.").

¹⁰⁰See notes 18–21 and accompanying text.

¹⁰¹The Abandoned Shipwreck Act, for example, applies only to abandoned shipwrecks "embedded in" or "located on a State's submerged lands," defined as lands lying below navigable waters. 43 U.S.C. § 2105(a).

¹⁰²*Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic*, 52 U.S.P.Q.2d 1609, 1610–11 (S.D.N.Y. 1999). The cover of the VHS cassette of the documentary, however, says: "Directed and Filmed by Alexander Lindsay and Simon Normanton."

money for the 1996 expedition, during which he directed the lighting and underwater photography.¹⁰³ In December 1997, Lindsay filed a lawsuit alleging that he had not been paid, and that RMST was “profiting from the film, video and still photographs taken by him” during the 1996 expedition.¹⁰⁴ Relying in part on the not-yet-overturned photographic injunction in the main litigation, the court allowed Lindsay to maintain an *in rem* salvage action, saying:

The law of salvage advances the interest in the preservation of historic shipwrecks by providing a legal vehicle through which individuals who assist in the preservation of shipwrecks and their contents may be compensated financially. Undoubtedly [sic], the video and other photographic images of the Titanic wreck site taken by the plaintiff will contribute to the temporal preservation of this historic ship.¹⁰⁵

The court reasoned that failing to allow an *in rem* action might cause “a significant reduction in the video and photographic documentation of wreck sites . . . , given the fear that a monetary claim for services performed could not be satisfied [without] a legally enforceable salvage award against the ship.”¹⁰⁶

RMST filed a counterclaim “arising from the plaintiff’s use of certain video footage taken from the wreck during the 1996 expedition.”¹⁰⁷ Lindsay then filed an amended complaint alleging copyright infringement against RMST and joining the Discovery Channel as a defendant.¹⁰⁸ In his amended complaint, Lindsay

¹⁰³*Id.* at 1611.

¹⁰⁴*Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic*, 1999 AMC 69, 71 (S.D.N.Y. 1998). The parties stipulated that, pending the outcome of the action, the video would not be sold or licensed, and the copyright would not be assigned, without court approval. *Id.*

¹⁰⁵*Id.* at 73.

¹⁰⁶*Id.* The court also denied RMST’s motion to transfer the action to the Eastern District of Virginia, in part because “the film, video and still photographs that are in dispute . . . are located within the Southern District of New York.” *Id.* at 74–75.

¹⁰⁷*Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic*, 52 U.S.P.Q.2d 1609, 1611 (S.D.N.Y. 1999).

¹⁰⁸*Id.* Lindsay also sued Suarez Corporation, Inc., alleging that it “‘used plaintiff’s name and likeness’ to promote a 1996 cruise expedition to observe the salvage operations” and infringed “by unlawfully purchasing and/or otherwise obtaining copies of the Subject Work.” *Id.* at 1612. The Court granted Suarez’s motion to dismiss, ruling

alleged that he 1) “created various storyboards for the film, a series of drawings . . . identifying specific camera angles and shooting sequences;” 2) “for approximately 3–4 weeks directed, produced, and acted as the cinematographer of the Subject Work, underwater video taping of the Titanic wreck site;” and 3) “directed the filming of the wreck site from on board the salvage vessel ‘Ocean Voyager’ after leading daily planning sessions with the crew of the *Nautilus*, the submarine used to transport the film equipment and photographers to the underwater wreck site.”¹⁰⁹

RMST filed a motion to dismiss the copyright infringement action on two grounds: first, that Lindsay was not the “author” of the footage, since he “did not himself actually photograph the wreckage;”¹¹⁰ and second, that RMST, as employer of photographer Christian Petron, was at least a joint author of the footage.¹¹¹ The court denied the motion.

The U.S. Supreme Court has defined an “author” as the person “who actually creates the work, that is, the person who translates an idea into fixed, tangible expression.”¹¹² The District Court acknowledged that “[i]n the context of film footage and photography, it makes intuitive sense that the ‘author’ of a work is the individual or individuals who took the pictures, i.e., the photographer.”¹¹³ However,

[W]here a plaintiff alleges that he exercised such a high degree of control over a film operation—including the type and amount of lighting used, the specific camera angles to be employed, and other detail-intensive artistic elements of a film—such that the final product duplicates his conceptions and visions of what the film

that the “vague and conclusory allegations” against Suarez were insufficient to state a claim. *Id.*

¹⁰⁹*Id.* at 1611, citing Amended Complaint ¶¶ 38, 45–47. Lindsay also alleged that he “screened the footage at the end of each day to confirm that he had obtained the images he wanted.” *Id.* at 1613, citing Am. Comp. ¶ 48.

¹¹⁰*Id.* at 1612.

¹¹¹*Id.* at 1614. RMST alleged that it owned Petron’s contributions to the film under a work-made-for-hire agreement. *Id.*; see also notes 50–53 and accompanying text.

¹¹²*Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

¹¹³*Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic*, 52 U.S.P.Q.2d 1609, 1612 (S.D.N.Y. 1999).

should look like, the plaintiff may be said to be an “author” within the meaning of the Copyright Act.¹¹⁴

Assuming the facts as pleaded were true, “Lindsay’s alleged storyboards and the specific direction he provided to the film crew regarding the use of the lightowers [sic] and the angles from which to shoot the wreck all indicate that the final footage would indeed be the product of Lindsay’s ‘original intellectual conceptions.’”¹¹⁵ Thus, “[t]he fact that Lindsay did not literally perform the filming, i.e. by diving to the wreck and operating the cameras, will not defeat his claims of having ‘authored’ the illuminated footage.”¹¹⁶

As for joint authorship, the court noted that, in addition to showing that the work was “prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole,”¹¹⁷ courts have also required evidence that “each of the putative co-authors (1) fully intended to be co-authors, and (2) made independently copyrightable contributions to the work.”¹¹⁸ Assuming the facts as pleaded were true, the court found that both of these additional elements were lacking in this case:

[W]here one contributor retains a so-called “veto” authority over what is included in a work, such control is a strong indicator that he or she does not intend to be co-authors with the other contributor. According to the pleadings, the plaintiff exercised virtually total control over the content of the film as “the director, producer and cinematographer” of the production. Additionally, he briefed the photographers with regards to, *inter alia*, the specific camera angles they were to employ, and Lindsay screened the film each day to make sure the proper footage was obtained. Based on these allegations, and implicit in the notion that the film crew was simply “following directions,” Lindsay retained what appeared to be exclusive authority over what was included in the footage.¹¹⁹

¹¹⁴*Id.* at 1613.

¹¹⁵*Id.*

¹¹⁶*Id.*

¹¹⁷17 U.S.C. § 101 (definition of “joint work”).

¹¹⁸*Lindsay v. Wrecked and Abandoned Vessel R.M.S. Titanic*, 52 U.S.P.Q.2d 1609, 1614 (S.D.N.Y. 1999).

¹¹⁹*Id.* (citations and footnote omitted).

Whether Lindsay's factual allegations were true was never adjudicated. After the ruling on the motion to dismiss, the parties quickly settled the case for an undisclosed amount.¹²⁰

Lindsay remains one of a handful of cases in U.S. copyright law in which the author is deemed to be someone with a creative vision who instructs others how to translate that vision into fixed expression, and the others simply carry out those instructions without any intellectual modification.¹²¹ This is consistent with the Copyright Act, which refers to a work "fixed by or under the authority of the author."¹²² The italicized language indicates that the "author" does not have to be the person who actually operates the camera or other recording device, so long as the operator is merely following instructions and does not make any creative choices in doing so.¹²³ But this inquiry is obviously very fact-specific: if the person carrying out the instructions adds copyrightable expression in doing so, he or she becomes at least a joint author;¹²⁴ and if the person giving instructions simply conveys general ideas about what the work should be, leaving the expressive details to the second person, then the second person becomes the sole author.¹²⁵

In the context of underwater photography, there are numerous possibilities. First, the "author" could be the person who actually operates the camera, if he or she makes creative choices in doing so. Second, the "author" could be the person who conceives of creative expression and gives others detailed instructions on how to translate that conception into fixed form, as was alleged in Lindsay. Or the director and the camera operator could be joint

¹²⁰Email of Apr. 30, 2018, from Alexander Lindsay to the author (on file with the author).

¹²¹See *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132, 134–35 (3d Cir. 1991); *Lakedreams v. Taylor*, 932 F.2d 1103, 1108 (5th Cir. 1991); see also 2 WILLIAM F. PATRY, *PATRY ON COPYRIGHT* § 3:22 (West 2018 ed.), and cases cited therein, at nn. 27–30.

¹²²17 U.S.C. § 101 (definition of "fixed") (emphasis added).

¹²³*Andrien*, 927 F.2d at 134–35.

¹²⁴*Id.* at 136; see also *Fleming v. Miles*, 181 F. Supp. 2d 1143, 1157 (D. Or. 2001).

¹²⁵See *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1991) ("A person who merely describes to an author what the commissioned work should do or look like is not a joint author . . . To be an author, one must supply more than mere direction or ideas"); *Childress v. Taylor*, 945 F.2d 500, 509 (2d Cir. 1991).

authors.¹²⁶ And, of course, if either or both of the authorial claimants are employees of the expedition's organizer, or if either or both are independent contractors that have signed work-made-for-hire agreements, then the employer or commissioning party will be deemed to be the "author" under the work-for-hire doctrine,¹²⁷ and the employer or commissioning party will own that person's share of the resulting copyright.¹²⁸

Contemporary technology gives the problem of determining authorship an additional wrinkle. Today, underwater photography is often carried out through the use of remote-operated vehicles, or drones. Thus, both the director and the operator may be on the surface, instructing the drone where to go and when and how to take pictures. Moreover, one can expect that in the future some drones will be equipped with artificial intelligence software, which "learns" how to photograph and document the underwater environment on its own. Thus, it is entirely possible that future underwater photography may be accomplished without any human input (other than bringing the drone to the wreck site). If that is the case, there is no human "author," and there will be no copyright in the resulting footage.¹²⁹ Without a copyright, financing the expedition by selling the rights to the resulting underwater photography becomes more problematic; although it is possible that a combination of contract law, the work-for-hire doctrine, and physical access to the underwater footage may be a sufficient basis for licensing, which may in turn cause a court to gloss over the

¹²⁶Note however that *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 260–61 & n.7 (2d Cir. 2015), appears to foreclose the possibility of inadvertent joint authorship, forcing the court to choose between two parties who each contributed significant creative expression.

¹²⁷17 U.S.C. § 101 (definition of "work made for hire").

¹²⁸17 U.S.C. § 201(b) ("In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.").

¹²⁹U.S. Copyright Office, *Compendium of Copyright Office Practices* § 313.2 (3d ed. 2014) ("To qualify as a work of 'authorship' a work must be created by a human being [T]he Office will not register works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author.") For a discussion of the problem of artificial intelligence and authorship, see Annemarie Bridy, *Coding Creativity: Copyright and the Artificially Intelligent Author*, 2012 *Stan. Tech. L. Rev.* 5.

issues of authorship in the event that judicial enforcement is needed.

C. State Regulation

A final issue arises out of a different historical shipwreck, the *Queen Anne's Revenge*. It was the flagship of "Edward Teach, more famously known as Blackbeard, [who] notoriously pirated vessels across the Caribbean and eastern coast of Britain's North American colonies"¹³⁰ for several years in the early 18th Century.¹³¹ "In 1717 Teach captured a French merchant vessel [*La Concorde*], renamed her *Queen Anne's Revenge*, and equipped her with 40 guns."¹³² In June 1718, "the *Queen Anne's Revenge* [ran] aground on a sandbar near Beaufort, North Carolina."¹³³ The wreck was lost for almost three centuries when it was rediscovered on November 21, 1996.¹³⁴ Because the wreck lies within three miles of the coast, under the Abandoned Shipwreck Act of 1987, the wreck is owned by the State of North Carolina.¹³⁵

The wreck was discovered by a marine salvage company, Intersal, Inc., under a permit issued by the State's Department of Natural and Cultural Resources (DNCR).¹³⁶ Although the permit allowed Intersal to claim 75% of any treasure recovered from the ship,¹³⁷ Intersal later agreed to assign all property rights in the ship and its contents in exchange for exclusive media rights to the salvage project.¹³⁸ By agreement dated Sept. 1, 1998, DNCR agreed that "Intersal shall have the exclusive right to make and market all

¹³⁰Allen v. Cooper, 244 F. Supp. 3d 525, 530 & n.2 (E.D.N.C. 2017), *rev'd*, 895 F.3d 337 (4th Cir. 2018).

¹³¹See generally ANGUS KONSTAM, BLACKBEARD: AMERICA'S MOST NOTORIOUS PIRATE (J. Wiley & Sons 2006).

¹³²Allen, 244 F. Supp. 3d at 530 n.2.

¹³³*Id.* Historians suspect that Blackbeard deliberately ran the vessel aground, so that he could disperse much of the crew, which had become too large with which to share the spoils of piracy. See KONSTAM, *supra* note 131, at 150–51, 181–86.

¹³⁴Intersal, Inc. v. Hamilton, 2017 WL 4574069, at ¶ 7 (N.C. Super. Ct. Oct. 12, 2017). See also MARK U. WILDE-RAMSING & LINDA F. CARNES-MCNAUGHTON, BLACKBEARD'S SUNKEN PRIZE: THE 300-YEAR VOYAGE OF *QUEEN ANNE'S REVENGE* (Univ. N. Carolina Press 2018).

¹³⁵See notes 18–21 and accompanying text.

¹³⁶Intersal, 2017 WL 4574069, at ¶¶ 6, 7.

¹³⁷*Id.* ¶ 7.

¹³⁸*Id.* ¶¶ 7, 8, 11.

commercial narrative (written, film, CD Rom, and/or video) accounts of project related activities undertaken by the Parties” for a period of 15 years.¹³⁹ Intersal designated Nautilus Productions, LLC, to document the project.¹⁴⁰

In 2013, both Intersal and Nautilus accused DNCR of violating the 1998 Agreement.¹⁴¹ The parties and Nautilus entered into a Settlement Agreement¹⁴² that gave Intersal the “exclusive right to produce a documentary film about the *QAR* project for licensing and sale”¹⁴³ and also restricted DNCR’s ability to post digital media to non-commercial websites.¹⁴⁴ The Settlement Agreement also provided that the parties would collaborate on other commercial ventures, including “books and e-books, mini- and full-length documentaries, and video games.”¹⁴⁵ Finally, DNCR paid \$15,000 to Nautilus to settle its past claims of copyright infringement.¹⁴⁶

In March 2015, Intersal accused DNCR of breaching the 2013 Settlement Agreement.¹⁴⁷ In July 2015, Intersal filed an action for breach of contract in Superior Court in North Carolina.¹⁴⁸ In

¹³⁹*Id.* ¶ 8 (quoting ¶ 16 of the 1998 Agreement), ¶ 12.

¹⁴⁰*Id.* ¶ 16. *See also* Allen v. Cooper, 244 F. Supp. 3d 525, 530 (E.D.N.C. 2017) (“Frederick Allen and his production company Nautilus Productions, have been the substantially exclusive underwater photographers of the shipwreck *Queen Anne’s Revenge* . . . Allen’s work documenting the shipwreck through video and still images began in 1998.”), *rev’d*, 895 F.3d 337 (4th Cir. 2018).

¹⁴¹Intersal, Inc. v. Hamilton, 2017 WL 4574069, at ¶¶ 13, 14 (N.C. Super. Ct. Oct. 12, 2017).

¹⁴²*Id.* ¶ 17. The Settlement Agreement expressly supersedes the 1998 Agreement. *Id.* ¶ 18.

¹⁴³*Id.* ¶ 19. This section of the agreement can be terminated on six months’ notice, beginning four years after the DNCR notifies Intersal that the project is complete. 2013 Settlement Agreement, at ¶14, available at nautilusproductions.com/nautilus/wp-content/uploads/2015/10/NCDOJ-Copyright-Opinion.pdf (last visited May 1, 2018). The 2013 Settlement Agreement includes the 1998 Agreement as an Attachment.

¹⁴⁴Specifically, DNCR agreed “to display non-commercial digital media only on [DNCR’s] website,” and it further agreed that any non-commercial digital media would bear a time code stamp and digital watermark, and would be accompanied by a link to the Intersal and Nautilus websites. 2013 Settlement Agreement, at ¶ 16(b). This section will expire on October 15, 2018. *Id.* ¶ 16(c).

¹⁴⁵2013 Settlement Agreement, at ¶ 15.

¹⁴⁶2013 Settlement Agreement, at ¶ 22; Allen v. Cooper, 244 F. Supp. 3d 525, 531 (E.D.N.C. 2017), *rev’d*, 895 F.3d 337 (4th Cir. 2018).

¹⁴⁷Intersal, Inc. v. Hamilton, 2017 WL 4574069, at ¶ 22 (N.C. Super. Ct. Oct. 12, 2017).

¹⁴⁸*Id.* ¶ 29.

October 2015, the Superior Court dismissed the action based on Intersal's failure to exhaust its administrative remedies.¹⁴⁹

Also in 2015, Nautilus accused DNCR of breaching the 2013 Settlement Agreement by posting and publishing some of its footage and photographs without its consent.¹⁵⁰ In response, DNCR allegedly lobbied for and obtained passage of a 2015 amendment to the North Carolina Public Records Act, "in an effort to convert [Nautilus's] copyright assets to State property without payment to [Nautilus]."¹⁵¹ As further amended in 2016, that amendment reads:

All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to Chapter 132 of the General Statutes.¹⁵²

Chapter 132 provides that, with certain exceptions, the State will provide copies of public records for a minimal fee,¹⁵³ and it permits third parties to bring an action against the State for failure to provide such copies.¹⁵⁴

Nautilus and its owner, Frederick Allen, filed a lawsuit against DNCR, various state officials, and The Friends of Queen Anne's Revenge (a non-profit group) for copyright infringement, and for a declaratory judgment that the statutory amendment was invalid and

¹⁴⁹*Id.* ¶¶ 46, 49–51. The breach of contract claim and a claim for declaratory relief were dismissed without prejudice; all other claims were dismissed with prejudice. *Id.* ¶¶ 81–89.

¹⁵⁰*Allen*, 244 F. Supp. 3d at 531.

¹⁵¹*Id.*

¹⁵²N.C. Gen. Stat. § 121–25(b). Before the 2016 amendment, the 2015 amendment had an additional sentence that read: "There shall be no limitation on the use of or no requirement to alter any such photograph, video recordings, or other documentary material, and any such provision in any agreement, permit, or license shall be void and unenforceable as a matter of public policy." *Allen*, 244 F. Supp. 3d at 531. It appears this clause was aimed at the digital watermark restriction in the 2013 Settlement Agreement.

¹⁵³N.C. Gen. Stat. § 132–1(b) ("it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law."); N.C. Gen. Stat. § 132–6(a) (inspection, examination, and copying of public records); N.C. Gen. Stat. § 132–6(a1) (section satisfied if agency "maintains public records online in a format that allows a person to view and print or save the public records to obtain a copy").

¹⁵⁴N.C. Gen. Stat. § 132–9.

unenforceable,¹⁵⁵ because it was preempted by the Copyright Act and because it constituted an unconstitutional taking of private property without due process of law or just compensation, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.¹⁵⁶ The state agencies and state officials filed a motion to dismiss, arguing primarily that the claims were barred by sovereign immunity, legislative immunity, and qualified immunity.¹⁵⁷

The District Court rejected the claims of immunity and allowed the causes of action for copyright infringement, and for a declaratory judgment of invalidity, to stand.¹⁵⁸ On appeal, however, the Fourth Circuit reversed, ordering dismissal of the claims against the state and state officials in their official capacities without prejudice (based on state sovereign immunity), and ordering dismissal of the claims against state officials in their individual capacities with prejudice (based on qualified immunity and legislative immunity).¹⁵⁹

With regard to state sovereign immunity, the plaintiffs first argued that the State had waived its sovereign immunity in the 2013 Settlement Agreement.¹⁶⁰ The Fourth Circuit rejected the argument, based on Supreme Court case law that “a State must *expressly* consent to suit *in federal court* to waive its immunity under the Eleventh Amendment.”¹⁶¹

¹⁵⁵Allen v. Cooper, 244 F. Supp. 3d 525, 531 (E.D.N.C. 2017), *rev'd*, 895 F.3d 337 (4th Cir. 2018). The plaintiffs also pled a deprivation of property under 42 U.S.C. § 1983, unfair and deceptive trade practices under state law, and civil conspiracy. *Id.* The latter two causes of action were dismissed on the merits, *id.* at 545, and all three of these causes of action were dismissed because of state sovereign immunity. *Id.* at 540.

¹⁵⁶See U.S. Const., amend. V (“No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”). The Fourteenth Amendment makes the limitations of the Fifth Amendment applicable to the states.

¹⁵⁷Allen, 244 F. Supp. 3d at 531. The state defendants also argued that plaintiffs lacked standing to bring the lawsuit, and that abstention was appropriate. *Id.* The District Court rejected both of the latter arguments. *Id.* at 541–42 (standing), *id.* at 542–43 (abstention).

¹⁵⁸Allen, 244 F. Supp. 3d at 545–46 (“Plaintiffs’ first and second claims remain against all defendants”).

¹⁵⁹Allen v. Cooper, 895 F.3d 337 (4th Cir. 2018), at 343, 358.

¹⁶⁰*Id.* at 346.

¹⁶¹*Id.* at 347 (emphasis in original), citing, *inter alia*, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 676 (1999).

On the merits of the sovereign immunity defense, the Fourth Circuit noted that the Copyright Remedy Clarification Act of 1990¹⁶² expressly makes states and state entities liable for copyright infringement.¹⁶³ Thus, the only question is whether the CRCA was a proper exercise of Congress's power under the Constitution.¹⁶⁴ In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,¹⁶⁵ the Supreme Court had held (5–4) that similar legislation, the Patent and Plant Variety Protection Remedy Clarification Act,¹⁶⁶ was an invalid attempt to abrogate the state sovereign immunity granted by the Eleventh Amendment.¹⁶⁷ In that case, the Court had reiterated that “Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause.”¹⁶⁸ The Court had held further that to validly exercise its power under section 5 of the Fourteenth Amendment,¹⁶⁹ Congress “must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct.”¹⁷⁰ Finally, although it affirmed that patents are “property” for

¹⁶²Pub. L. No. 101–553, 104 Stat. 2749 (codified in various sections of Title 17).

¹⁶³17 U.S.C. § 511(a) (“Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for a violation of any of the exclusive rights of a copyright owner”).

¹⁶⁴*Allen*, 895 F.3d at 347–348.

¹⁶⁵527 U.S. 627 (1999).

¹⁶⁶Pub. L. No. 102–560, 106 Stat. 4230 (codified in relevant part at 35 U.S.C. §271(h), 35 U.S.C. § 296(a)).

¹⁶⁷U.S. Const. amend. XI (“The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). Although *Allen* and *Nautilus* are both citizens of North Carolina, and are thus *not* “Citizens of another State,” the U.S. Supreme Court has held that the Eleventh Amendment provides sovereign immunity for state entities, in both federal court and state court, even in suits brought by citizens of that state. *Hans v. Louisiana*, 134 U.S. 1, 10, 15 (1890); *Alden v. Maine*, 527 U.S. 706 (1999).

¹⁶⁸*Florida Prepaid*, 527 U.S. at 636 (citing *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72–73 (1996)).

¹⁶⁹See U.S. Const., amend XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law.”); *id.* § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

¹⁷⁰*Florida Prepaid*, 527 U.S. at 639.

purposes of the Fourteenth Amendment,¹⁷¹ the Court had held that Congress “barely considered the availability of state remedies for patent infringement”¹⁷² and did not “respond to a history of widespread and persisting deprivation of constitutional rights . . . in enacting proper prophylactic § 5 legislation.”¹⁷³

Since *Florida Prepaid*, every other lower court to consider the question has concluded that the Copyright Remedy Clarification Act is likewise an invalid exercise of Congress’ power to waive the sovereign immunity of the States pursuant to section 5 of the Fourteenth Amendment¹⁷⁴ (notwithstanding Justice Stevens’ suggestion in his dissent that the CRCA might be distinguished¹⁷⁵). But the District Court in the *Allen* case held that the CRCA *was* a valid exercise of Congress’ power under the Fourteenth Amendment, because “Congress was clearly responding to a pattern of current and anticipated abuse by the states of the copyrights held by their citizens.”¹⁷⁶ Not content with that holding, the court then launched into a five-page tirade dissenting from the Supreme Court’s entire Eleventh Amendment jurisprudence.¹⁷⁷ Not

¹⁷¹*Id.* at 642.

¹⁷²*Id.* at 643.

¹⁷³*Id.* at 645. *See also* Christina Bohannon & Thomas F. Cotter, When the State Steals Ideas: Is the Abrogation of State Sovereign Immunity from Federal Infringement Claims Constitutional in Light of Seminole Tribe?, 67 *Fordham L. Rev.* 1435, 1514 (1999) (concluding before *Florida Prepaid* that “any attempt by Congress to hold the states accountable in federal court to the same extent as private infringers probably exceeds its power under section 5 of the Fourteenth Amendment”).

¹⁷⁴*See, e.g.,* Nat’l Ass’n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Georgia, 633 F.3d 1297 (11th Cir. 2011); *Rodriguez v. Texas Comm’n on the Arts*, 199 F.3d 279 (5th Cir. 2000); *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000); *Issaenko v. Univ. of Minnesota*, 57 F. Supp. 3d 985 (D. Minn. 2014); *Coyle v. Univ. of Kentucky*, 2 F. Supp. 3d 1014 (E.D. Ky. 2014).

¹⁷⁵*See Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 658 n.9 (1999) (Stevens, J., joined by Souter, Ginsburg & Breyer, JJ., dissenting) (“The legislative history of th[e Copyright Remedy Clarification] Act includes many examples of copyright infringements by States—especially state universities. . . . Perhaps most importantly, the House requested that the Register of Copyrights prepare a study . . . [of] state government use of copyrighted works. . . . [See] Register of Copyrights, R. Oman, Copyright Liability of States and the Eleventh Amendment (June 1988) This report contains comments from industry groups, statistics, and legal analysis relating to copyright violations, actual and potential, by States.”).

¹⁷⁶*Allen v. Cooper*, 244 F. Supp. 3d 525, 535 (E.D.N.C. 2017), *rev’d*, 895 F.3d 337, 357 (4th Cir. 2018).

¹⁷⁷*Id.* at 535–40.

surprisingly, the Fourth Circuit reversed, because Congress had not relied on the Fourteenth Amendment in enacting the CRCA,¹⁷⁸ and because “the record before Congress contained at most a dozen incidents of copyright infringement by States that could be said to have violated the Fourteenth Amendment,”¹⁷⁹ so that the CRCA was not “tailor[ed] . . . to remedying or preventing [unconstitutional] conduct.”¹⁸⁰

There is one recognized exception to state sovereign immunity: where a violation of federal law is ongoing, a plaintiff may obtain an injunction under *Ex Parte Young*.¹⁸¹ The Fourth Circuit rejected this exception, however, because the six specific instances of alleged copyright infringement had ceased, and it was mere speculation that the state would resume infringing.¹⁸² It also rejected the claim that “enforcement” of the state statute was ongoing, because none of the state officials sued would or could have a sufficient role in enforcing the statute.¹⁸³

The Fourth Circuit also reinstated the individual defendants’ claims of qualified immunity. The 2013 Settlement Agreement permitted certain uses of the materials at issue, and it expressly reserved the State’s rights under state and federal public records laws.¹⁸⁴ Moreover, even before the enactment of the 2015 Amendment, state law had provided that “all . . . photographs [and] films . . . made or received pursuant to law . . . in connection with the transaction of public business by any agency of North Carolina” are “public records.”¹⁸⁵ Thus, it was not “clearly established”

¹⁷⁸*Allen*, 895 F.3d at 349–350.

¹⁷⁹*Id.* at 352–353.

¹⁸⁰*Id.* at 353.

¹⁸¹209 U.S. 123 (1908). See Mitchell N. Berman, R. Anthony Reese & Ernest A. Young, *State Accountability for Violations of Intellectual Property Rights: How to Fix Florida Prepaid (and How Not To)*, 79 Tex. L. Rev. 1037, 1095–96 (2001). Note, however, that state sovereign immunity may “increase the cost of obtaining such [injunctive] relief, as well as the risk of inconsistent verdicts, since an owner may need to bring two suits—one in federal court for an injunction and one in a state forum for compensation—where previously only one infringement suit in federal court had been needed to obtain both remedies.” *Id.* at 1096.

¹⁸²*Allen*, 895 F.3d at 354–355.

¹⁸³*Id.* at 355.

¹⁸⁴*Id.* at 357.

¹⁸⁵*Id.*, quoting N.C. Gen. Stat. § 132-1. In addition, although not relied on by the Fourth Circuit, a reasonable state official might have believed that the uses at issue were fair uses under the Copyright Act. See 17 U.S.C. § 107 (“the fair use of a copyrighted

beyond debate that the state officials' conduct was infringing.¹⁸⁶ The Fourth Circuit also held that the individual defendants were entitled to legislative immunity, because "the only actual conduct alleged in furtherance of the conspiracy—that the officers 'wrote, caused to be introduced, lobbied for passage of, and obtained passage' of [the 2015 Amendment]—is quintessentially legislative in nature."¹⁸⁷

Because the Fourth Circuit ordered the case dismissed on immunity grounds, it did not review the District Court's holding on the merits that the amendment to the North Carolina statute was preempted by the federal Copyright Act.¹⁸⁸ Nonetheless, because the case may be refiled in state court,¹⁸⁹ it is worth examining the District Court's reasoning on the issue.

Under section 301(a) of the Copyright Act,¹⁹⁰ a state cause of action is preempted if two elements are met: "(1) the work must be within the scope of the subject matter of copyright . . . and (2) the rights granted under state law must be equivalent to any exclusive

work . . . is not an infringement of copyright."); see also Berman et al., *supra* note 181, at 1127 ("Given the up-for-grabs state of fair use law, . . . it is hard to imagine a plaintiff successfully proving that a governmental official with a plausible fair use claim violated clearly established law.").

¹⁸⁶ *Allen*, 895 F.3d at 357.

¹⁸⁷ *Id.*

¹⁸⁸ *Allen v. Cooper*, 244 F. Supp. 3d 525, 544 (E.D.N.C. 2017), *rev'd*, 895 F.3d 337 (4th Cir. 2018).

¹⁸⁹ Note that there are several obstacles to such a refiled claim. First, states have sovereign immunity to federal statutory claims based on Congress' Article 1 powers in state court as well. *Alden v. Maine*, 527 U.S. 706 (1999). Thus, unless the state has waived its sovereign immunity, *Allen* and *Nautilus* are limited to pleading a Fourteenth Amendment violation. North Carolina has waived its sovereign immunity for breach of contract actions, *Smith v. State*, 222 S.E.2d 412, 421 (N.C. 1976), for certain kinds of torts (with exclusive jurisdiction in the North Carolina Industrial Commission), N.C. Gen. Stat. 143–291, and for claims for violations of the North Carolina Constitution, *Corum v. Univ. of North Carolina*, 413 S.E.2d 276, 290, 292 (N.C. 1992). Second, even valid claims may be subject to certain procedural requirements, such as exhaustion of administrative remedies. For example, any facial challenge to the validity of a state statute must be filed in Superior Court in Wake County, and heard by a panel of three judges. N.C. Gen. Stat. 1-267.1(a1). Third, it is unclear to what extent the defense of *res judicata* might be raised to bar claims that could have been filed with the original breach of contract suit. See notes 147–149 and accompanying text, *supra*.

¹⁹⁰ 17 U.S.C. § 301(a).

rights within the scope of federal copyright.”¹⁹¹ The District Court held that both elements were present: “North Carolina’s statute . . . purports to regulate the right to use and copy ‘photographs, video recordings, or other documentary materials,’ which is subject matter within the scope of the Copyright Act;”¹⁹² and the Copyright Act gives Nautilus the exclusive right to reproduce, distribute, publicly perform and publicly display those materials,¹⁹³ “but the state statute in question purports to transfer those exact same rights to the public domain.”¹⁹⁴

The District Court’s analysis of the preemption issue seems off the mark. Section 301(a) of the Copyright Act expressly preempts claims that are “equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.”¹⁹⁵ That means that state laws that attempt to prevent or remedy reproduction, distribution, public performance and public display of copyrighted material are preempted.¹⁹⁶ But the North Carolina statute doesn’t attempt to prevent or remedy any of those things; instead, it provides a *defense* to copyright infringement, by authorizing State officials to copy those materials.¹⁹⁷ That means the North Carolina statute isn’t “equivalent” to any of the exclusive rights, so it doesn’t fall under express statutory preemption. At best, it might fall under a residual implied conflict preemption analysis,¹⁹⁸ because it arguably “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁹⁹ At least three lower courts have held that state

¹⁹¹*Allen*, 244 F. Supp. 3d at 543 (quoting *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1463 (4th Cir. 1997) (internal quotation marks omitted)).

¹⁹²*Allen*, 244 F. Supp. 3d at 544 (internal citation omitted).

¹⁹³17 U.S.C. § 106(1), (3), (4) & (5).

¹⁹⁴*Allen*, 244 F. Supp. 3d at 544.

¹⁹⁵17 U.S.C. § 301(a).

¹⁹⁶17 U.S.C. § 106(1), (3), (4), (5).

¹⁹⁷N.C. Gen. Stat. § 121–25(b).

¹⁹⁸Several courts have applied conflict preemption in addition to or instead of express preemption. *See, e.g.*, *Brown v. Ames*, 201 F.3d 654, 659–60 (5th Cir. 2000); *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 381–83 (3d Cir. 1999) (en banc); *Estate of Graham v. Sotheby’s, Inc.*, 178 F. Supp. 3d 974, 981–82 (C.D. Cal. 2016), *aff’d in part on other grounds, rev’d in part sub nom. Close v. Sotheby’s, Inc.*, 894 F.3d 1061 (9th Cir. 2018).

¹⁹⁹*Hines v. Davidovitz*, 312 U.S. 52, 67 (1941).

public records statutes permitting or requiring disclosure or copying of materials protected by federal copyright law are partially preempted due to conflict preemption.²⁰⁰ The District Court is wrong, however, when it asserts that the North Carolina statute places the material in the public domain. Nautilus remains free to enforce its copyrights against any third parties that obtain those materials from the State; and to the extent the statute allows State officials to infringe, those state officials are already shielded by state sovereign immunity. Thus, it seems unlikely that the statute interferes substantially with the *valid* purposes and objectives of Congress.

The North Carolina statute would seem to present a straightforward claim for an unconstitutional taking of private property without due process of law and without just compensation.²⁰¹ Yet not all State infringements of intellectual property rise to the level of a taking,²⁰² and even when they do, the Supreme Court's Eleventh Amendment jurisprudence makes vindicating a takings claim unnecessarily complicated.²⁰³ A takings

²⁰⁰See *Ass'n of Am. Medical Colleges v. Carey*, 728 F. Supp. 873, 889 (N.D.N.Y. 1990) ("This court finds that the 'disclosure provisions' of New York State's Standardized Testing Act, . . . are preempted due to a direct conflict with Federal Copyright Law."), *rev'd & remanded sub nom. Ass'n of Am. Medical Colleges v. Cuomo*, 928 F.2d 519, 525–26 (2d Cir. 1991) (finding factual issues concerning fair use precluding summary judgment); *College Entrance Exam. Bd. v. Pataki*, 889 F. Supp. 554, 564 (N.D.N.Y. 1995) ("unless the STA's disclosure requirements constitute fair use, the STA directly conflicts with, and is therefore preempted by, the Copyright Act."), *on reconsideration*, 893 F. Supp. 152 (N.D.N.Y. 1995) (modifying terms of preliminary injunction); *Ali v. Philadelphia City Planning Comm'n*, 125 A.3d 92, 102–05 (Pa. Commw. Ct. 2015) (holding that state Public Records Act is partially preempted as to duplication of copyrighted material, but not as to inspection).

²⁰¹See U.S. Const., amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."). The Fourteenth Amendment makes the limitations of the Fifth Amendment applicable to the states.

²⁰²See Berman et al., *supra* note 181, at 1068–72; Bohannon & Cotter, *supra* note 173, at 1458–77; cf. Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 Fla. L. Rev. 529, 565 (1998) ("the only government uses one can be certain will qualify as takings are those few which deprive the owner of virtually all of the property's value."). For a thorough analysis, see Cotter, at 538–71.

²⁰³See Berman et al., *supra* note 181, at 1195 ("More than anything else, this discussion may convey a sense of the Byzantine complexity of the issues that Congress must confront if it seeks a comprehensive solution to the problem of providing remedies for state intellectual property violations.").

claim cannot be heard in federal court unless the State fails to provide an adequate remedy;²⁰⁴ but the federal government lacks the power to compel the State to provide an adequate remedy for copyright infringement in state courts.²⁰⁵ On the other hand, there are cases suggesting that the Fifth and Fourteenth Amendments might, of their own force, require a State to provide at least some type of adequate post-deprivation remedy for a taking,²⁰⁶ and at least two state courts have held they have jurisdiction to hear claims against the State for takings of federal intellectual property.²⁰⁷

It seems that the best procedure for Allen and Nautilus would have been to file an inverse condemnation claim in state court for just compensation.²⁰⁸ The remedies in such an action will be limited

²⁰⁴Hutto v. S.C. Retirement Sys., 773 F.3d 536, 552 (4th Cir. 2014) (“[W]e conclude that the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State’s courts remain open to adjudicate such claims.”). See also Bohannon & Cotter, *supra* note 173, at 1470–71 (“as long as a state renders itself amenable to inverse condemnation actions in its own courts, a property owner . . . cannot assert that the state has taken that property without just compensation until the state court rejects his claim”).

²⁰⁵Alden v. Maine, 527 U.S. 706, 712 (1999) (“the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”).

²⁰⁶See, e.g., Reich v. Collins, 513 U.S. 106, 108 (1994) (“In a long line of cases, this Court has established that due process requires a ‘clear and certain’ remedy for taxes collected in violation of federal law.”); *id.* at 109 (“a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment”) (quoting Carpenter v. Shaw, 280 U.S. 363, 369 (1930)). See also Berman et al., *supra* note 181, at 1091 (“due process for a state’s deprivation of property would seem to require the state at least to provide property owners with a postdeprivation action for compensation.”).

²⁰⁷See Wilcox Indus., Inc. v. State, 607 N.E.2d 514, 515 (Ohio App. 1992) (“if the state of Ohio cannot take a party’s patent right without just compensation, then a cause of action to enforce that right can be brought only in the courts of this state.”); Jacobs Wind Elec. Co. v. Dept. of Trans., 626 So.2d 1333, 1134 (Fla. 1993) (asking “whether a state court has jurisdiction over takings and conversion claims against the state with respect to property that is the subject of a patent when the state is immune from suit for patent infringement in federal court” and answering yes). The Supreme Court cited *Jacobs* in holding that state sovereign immunity bars patent infringement claims against States in federal court. See Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 644 n.9 (1999).

²⁰⁸Bohannon & Cotter, *supra* note 173, at 1512; Berman et al., *supra* note 181, at 1090 (“the Court has held that in takings cases the right to bring an inverse condemnation action—a form of postdeprivation remedy—is sufficient to satisfy the Constitution.”); see also Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 75 S. Cal. L. Rev. 1161, 1163 & n.5 (2000).

to the fair market value of the property taken;²⁰⁹ however, the remedies against the federal government are likewise so limited.²¹⁰ In this case, the North Carolina statute appears to authorize the alleged infringement at issue, and any claim for damages based on the Copyright Act is barred by sovereign immunity, making a takings claim the only viable alternative.²¹¹

IV CONCLUSION

Synthesizing these cases, one can see that underwater cultural heritage is subject to three different regimes, depending on where the artifacts are located. First, shipwrecks and other artifacts located within three miles of the coast are subject to the Abandoned Shipwreck Act of 1987 and are owned by the States.²¹² Because the Act preempts the law of salvage within these waters, the States can effectively use their property rights to negotiate for exclusive photographic rights, as the State of North Carolina did in the *Allen* case.²¹³ Moreover, because State officials enjoy sovereign immunity, a copyright owner's only remedy in the event of state infringement may be an inverse condemnation claim in state court.²¹⁴ This limitation may discourage parties such as *Nautilus* from being willing to undertake underwater photography in the future, without some greater assurances of compensation (such as an express waiver of sovereign immunity).

Second, shipwrecks and other artifacts located outside of the three-mile zone, but within 12 miles of the coast, are within the territorial waters of the United States.²¹⁵ Traditional admiralty law,

²⁰⁹See Berman et al., *supra* note 181, at 1090–94; Volokh, *supra* note 208, at 1163 & n.5.

²¹⁰See 28 U.S.C. § 1498(a) (patent infringement), *id.* §1498(b) (copyright infringement). See also Berman, et al., *supra* note 181, at 1106–09; Volokh, *supra* note 208, at 1162–65.

²¹¹For possible objections to a takings claim, see Berman et al., *supra* note 181, at 1098–99.

²¹²See notes 18–21 and accompanying text.

²¹³See notes 135–140 and accompanying text.

²¹⁴See notes 201–211 and accompanying text.

²¹⁵See notes 25–31 and accompanying text.

as interpreted in *RMS Titanic, Inc. v. Haver*,²¹⁶ currently does not provide an exclusive right to photograph shipwrecks in such areas.²¹⁷ Congress could choose to alter admiralty law in this zone if it wished, but except for sunken military craft,²¹⁸ it has not done so.

Third, shipwrecks and other artifacts located in international waters are subject to the shared jurisdiction of all countries.²¹⁹ Any court presented with a claim can declare what general principles of international admiralty law provide; but the court's ability to enforce its orders depends on its ability to exercise jurisdiction over the parties or over property actually reduced to possession.²²⁰ Under the *Haver* decision, traditional admiralty law currently does not provide an exclusive right to photograph such areas;²²¹ and as the futile international negotiations following the R.M.S. Titanic Marine Memorial Act of 1986 demonstrate,²²² Congress is without power to unilaterally change this decision without an international agreement with other countries.

In all three cases, ownership of the resulting photographs and video will have to be determined by copyright law. The *Lindsay* case suggests what the result will be under U.S. copyright law.²²³ If choice-of-law is disputed, however, a court would have to determine which country's law applies to a claim of photography that occurs in international waters. Although choice-of-law principles are beyond the scope of this article, one would expect the law of the country with the most significant relationship to the property and to the parties would prevail.²²⁴

As a practical matter, it is likely that the issues raised by this article will rarely be litigated. The *Titanic* is a shipwreck of unique historical importance, so the value of the photographic rights was

²¹⁶171 F.3d 943 (4th Cir. 1999).

²¹⁷*Id.* at 970; see notes 82–96 and accompanying text.

²¹⁸See notes 22–24 and accompanying text.

²¹⁹*Haver*, 171 F.3d at 968–69; see also UNCLOS, art. 149.

²²⁰*Haver*, 171 F.3d at 964–69.

²²¹*Id.* at 970; see notes 82–96 and accompanying text.

²²²See notes 63–66 and accompanying text.

²²³See notes 102–120 and accompanying text.

²²⁴See, e.g., *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 90 (2d Cir. 1998) (“Copyright is a form of property, and the usual rule is that the interests of the parties in property are determined by the law of the state with ‘the most significant relationship’ to the property and the parties.”).

far above what typically would be the case; and few states are likely to attempt to expropriate copyrights in the manner that North Carolina did in *Allen*. But because the UNESCO Convention on the Protection of Underwater Cultural Heritage tries to encourage preservation of underwater cultural heritage *in situ*, in its original location on the ocean floor,²²⁵ one can expect that at least some additional disputes concerning the application of copyright law to underwater cultural heritage will arise in the future. If that occurs, the author hopes this article will provide some guidance in resolving those disputes.

²²⁵See note 1, *supra*.