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CAN INTELLECTUAL PROPERTY RIGHTS FORM A PART OF THE SALVORS' TRADITIONAL RIGHTS, AND CAN A BALANCE BE ACHIEVED BETWEEN THEM? THE POSITION OF ENGLISH, AMERICAN AND SOUTH AFRICAN SALVORS IN LIGHT OF THE RECENT DECISIONS OF THE 'R.M.S. *TITANIC*' CASES IN THE UNITED STATES OF AMERICA'

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM Shipping Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Supervisor: Professor John E. Hare

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“The stately ship is seen no more,  
The fragile skiff attains the shore;  
And while the great and wise decay,  
And all their trophies pass away,  
Some sudden thought, some careless rhyme,  
Still floats above the wrecks of Time.”

- *On an Old Song*,

William Edward Hartpole Lecky (1838-1903)

“Antiquities are history defaced, or some remnants of  
history which have casually escaped the shipwreck of time.”

- *Advancement of Learning*, bk.II.ii.I, Francis Bacon

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## CHAPTER ONE: The Law of Salvage

### I. Introduction

It has been estimated that there have been as many as *three hundred thousand* ships lost per century from the moment man took to traversing the open waters in man-made vessels, harnessing first the waves, and later on the wind.<sup>1</sup>

The riches of the cargoes carried by vessels which had succumbed to the sea were enticing, and naturally led to efforts at recovering them from an environment which was “*A dark/illimitable ocean without bound,/Without dimension, where length, breadth, and highth,/And time and place are lost.*” The methods used initially were simple and rudimentary – nets, hooks and unencumbered but courageous divers – until developments in technology, spurred on by the rewards of plundering the deep, led to the invention of the brass diving bell, the hard-hat diving suit, and the self-contained underwater breathing apparatus (SCUBA), which made diving and submarine exploration accessible to almost everyone. Today, the use of robotics, Global Positioning Systems and improved diving submersibles have increased the stakes in recovering wrecks and their cargoes from what was once thought to be depths unreachable by man.

Of course, ancillary to these activities was also the question of who owned the items recovered, and the law of salvage was developed to deal with the issue of salvors’ rights.

<sup>1</sup> Craig J.S. Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law & Commerce*, Vol. 34, No.2, April 2003, p. 311

<sup>2</sup> John Milton, *Paradise Lost*, 1.891, Penguin Books, London 2003 (reprinted).

This dissertation will endeavour to examine and summarise the scope of rights granted to salvors, in light of the decision of the cases of *R.M.S. Titanic Inc., Successor in Interest to Titanic Ventures, Limited Partnership v. Christopher S. Haver; Deep Ocean Expeditions*<sup>3</sup> and *R.M.S. Titanic, Inc v. The Wrecked and Abandoned Vessel*.<sup>4</sup>

The dissertation will question the viability and legality of including the profits made from any exploitation of intellectual property as forming a part of the salvor's rewards, and in the process, expanding upon the traditional methods of assessment of awards.

An overview of the historical law of salvage will also be made, and a discussion and explanation of the related intellectual property laws of the United Kingdom, the United States of America and South Africa, the scope of the salvors' past and present rights will be included.

## II. A History Of Salvage Law From The English Perspective

A service of salvage is defined as

“a service which confers a benefit by saving or helping to save a recognised subject of salvage when in danger from which it cannot be extricated unaided, if and in so far as the rendering of such a service is voluntary in the sense of being attributable neither to a pre-existing obligation nor solely for the interests of the salvor.”<sup>5</sup>

<sup>3</sup> (1999) 171 F.3d 943 (U.S.C.A. 4<sup>th</sup> Circuit).

<sup>4</sup> (2002) U.S.C.A. 4<sup>th</sup> Circuit.

<sup>5</sup> Kennedy, *Law of Salvage*, Stevens & Sons, 1985, pg. 8.

Thus, salvage occurs when a person, in the absence of a contractual or legal obligation, volunteers to exert efforts to preserve or save a vessel or its contents from peril. Once the property has been successfully salvaged, the salvor is entitled to recover salvage remuneration not surpassing the value of the property so salvaged. This value is determined at the time and place the salvage service is concluded. But in the absence of success, the salvor is entitled to nothing. This is the famous principle of “No cure – no pay” which first appeared in Lloyd’s Form of Salvage Agreement in the nineteenth century.

The salvor’s right is enshrined in a maritime lien on the property to be salvaged, and this creates a trident of rights for the salvor: the lien may be enforced *in personam* against the vessel owner, *in rem* against the vessel, and *in rem* against a “sister ship.”

The law of salvage has its roots entrenched in antiquity, branching out from the principles derived from civil law, such as the *Consolato del Mare*, which Abbot in his *Law of Merchant Shipping*<sup>6</sup> termed the earliest European maritime code. The Rhodian Maritime Code (circa 500 B.C. to 300 B.C., and which covered maritime matters in Greece and the surrounding Mediterranean) granted voluntary salvors a reward for their services.

Until 1910, the law of salvage was not uniform. References were made by practitioners to a combination of principles derived from the *Laws of Oleron*, 960 A.D., the *Marine Ordinances of Trani* 1063, the code of the *Hanseatic League* 1597, the *Marine Ordinances of Louis XIV* 1681, although these were not regarded as forming a part of the law of England.

Before 1633, salvors in England had only a precarious right to sue for half or some of the share of the “findals, derelicts or waifs.”<sup>7</sup> Where services had been provided to a property which was not considered a true wreck, the salvors had a right to claim only for work and labour from the owners of the property, or from the Admiral or Vice-Admiral, who employed them.

<sup>6</sup> Brice’s *Maritime Law of Salvage*, Sweet & Maxwell, London 1993, p.2.

<sup>7</sup> *Ibid.*, at p.6.

A more customary form of claim that could be requested from salvors in the seventeenth and eighteenth centuries was to ask for “a verie good and sufficient reward.”<sup>8</sup> Although the courts should look first into the degree of effort and labour expended in salvaging a vessel, other factors should also be considered, namely, as was held in *The Industry*<sup>9</sup>:

“the state of the weather, the degree of damage and danger as to ship and cargo, the risk and peril of the salvors, the time employed, the value of the property...”

Just as importantly, the court also noted that

“there is still another principle – to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce...”

The salvage jurisdiction of the English Court of Admiralty grew in importance by the end of the eighteenth century with the advent of steam ships, which facilitated the salvage of distressed vessels, and inevitably in turn increased the number of disputative cases of salvage to be heard and adjudicated upon. As Lord Esher M.R. in *The Gas Float Whitton No.10*<sup>10</sup> expounded:

“...whence is the original or common law jurisdiction of the High Court of Admiralty of England to be ascertained? The answer is from the judgments of the great judges who have presided in the Admiralty Court, and from the judgments of the Courts at Westminster.”

Thus, it can be seen that English salvage law was mainly sourced not from statutes, but also from decisions, traditions and various policies which combined became a body of maritime law.

<sup>8</sup> *Ibid.*, at p. 6.

<sup>9</sup> Sir John Nicholl, (1835) 3 Hagg. 203 at 204.

<sup>10</sup> [1896] p. 42 at 47.

At present, Section 21 of the Supreme Court Act 1981 governs the English High Court of Admiralty's salvage jurisdiction salvage matters. Reference must now also be made to The International Convention on Salvage 1989 ("the Salvage Convention"), the provisions of which have the force of law in the United Kingdom by way of the Merchant Shipping Act 1995, section 224(1) Schedule 11 Part 1. The Salvage Convention came into force on 1 July 1996.<sup>11</sup>

### The Salvage Convention 1989 And The English Common Law

Under the common law provisions (which are recognised by the Convention), salvage services include raising a sunken vessel<sup>12</sup> or its cargo,<sup>13</sup> and saving a derelict or a wreck.<sup>14</sup>

Historically, the Crown had ownership of all wrecks and shipwrecked goods, whether taken from the sea or from the shore. This wide-ranging right was gradually and eventually limited to only unclaimed wrecks, and granted to the Admiral and became known as the civil droits of Admiralty. When the High Court of Admiralty was established, "all wreck found at sea unclaimed or not, came within jurisdiction of that court, and it rewarded salvors."<sup>15</sup>

Traditionally, a wreck has been defined as "*ie wreckum maris significat illa bona quae naufragio ad terram appelluntur*"<sup>16</sup> or 'property cast ashore within the ebb and flow of the tide after a shipwreck.' The property must be a ship or her cargo or a portion of it.<sup>17</sup>

<sup>11</sup> See Halsbury's Laws of England vol. 434(1), Fourth Ed. Reissue, Butterworths, London 1997.

<sup>12</sup> The *Catherine* (1848) 6 Notes of Cases xliii.

<sup>13</sup> The *Cadiz* and The *Boyne* (1876) 3 Asp MLC 332.

<sup>14</sup> The *Samuel* (1851) 15 Jur 407.

<sup>15</sup> Kennedy, *op. cit.* at p. 42.

<sup>16</sup> Sir Henry Constable's Case (1601) 5 Co Rep 106a.

<sup>17</sup> *Palmer v Rouse* (1858) 3 H&N 505, quoted in Halsbury's Laws of England.

Section 255 (1) of The Merchant Shipping Act 1995 has extended the common law definition of wreck to include “jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water.”

A derelict can include either a vessel or cargo which has been abandoned at sea. To constitute abandonment, there must be no hope of recovery.<sup>18</sup> There must also be no *spes recuperandi* and no *animus revertendi*.<sup>19</sup> There must have been an abandonment of the ship by the Master without any intention of returning to her, or any hope of recovery.<sup>20</sup> It has also been held that a vessel which is found at sea in a circumstance of danger and with no crew on board can be considered a derelict.<sup>21</sup>

A noted academic is of the view that salvage law will apply to a wreck as well, as, the meaning of “wreck” would fall under the definition of “vessel” or “property” in Article 1 of the London Salvage Convention, “subject to the rights of States to make reservations as regards archaeological, etc. property under Article 30.1(d). In addition, the “immobilisation of property on the sea bed” would be sufficient ‘danger’ and that “[t]he same would, it is submitted, cover the many cases of ‘finds’ or ‘treasure’ salvage in the United States.”<sup>22</sup>

<sup>18</sup> Sir W. Scott, in *The Aquila* (1798) 1 Ch. Rob. 37, 41.

<sup>19</sup> *The Zeta* (1875) L.R. 4 A. & E. 460, 462.

<sup>20</sup> Held by the House of Lords, *Bradley & Ors v. H. Newsom, Sons & Company* [1919] AC 16.

<sup>21</sup> *The Cosmopolitan* (Irish) (1848) 6 Not. Of Cas. Suppl. Xvii.

<sup>22</sup> See Brice, *op. cit.* at p. 220.

### III. The Law Of Salvage In South Africa

Salvage is recognised as a maritime claim under Section 1(i)(j) of the Admiralty Jurisdiction Regulation Act 1983, as such, it would be heard by the Admiralty jurisdiction of the High Court. Due to a quirk in history, the South African courts would apply English law as at 1 November 1983, but all British cases and legal developments from 1983 onwards would only be persuasive.<sup>23</sup> As laid down in Section 6(1) of the Admiralty Jurisdiction Regulation Act No. 105 of 1983:

“Notwithstanding anything to the contrary in any law or common law contained a court in the exercise of its admiralty jurisdiction shall

- (a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act, 1890, of the United Kingdom, had jurisdiction immediately before the commencement of this Act, apply the law which the High Court of the Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such a matter at such commencement, in so far as that law can be applied;
- (b) with regard to any other matter, apply the Roman-Dutch law applicable in the Republic.”

The 1989 International Salvage Convention is also given the force of law by way of the Wreck and Salvage Act, 94 of 1996. However, where the latter act is mute on a point of contention or law, the maritime lawyer must cast his net wider to haul in the provisions and decisions contained in the common law of salvage.

The Wreck and Salvage Act, 1996, defines a wreck as “...any flotsam, jetsam, lagan or derelict, any portion of a ship or aircraft lost, abandoned, stranded or in distress, any portion of the cargo, stores, or equipment of any such ship or aircraft...”<sup>24</sup>

<sup>23</sup> Section 6(5) of the ARJA.

<sup>24</sup> Section 1(xii).

The advantage of an action under the admiralty jurisdiction can be seen in the court's recognizance of the maritime lien, of which a claim under the AJRA can give rise to an action *in rem*. In any event, under traditional English maritime laws, salvage would also give rise to a maritime lien.

The four South African requirements for salvage to exist are almost similar to the English ones. These requirements are derived mainly from the Salvage Convention. There must be:

- “(a) Salvage of a particular nature; rendered to
- (b) Salvaged maritime property - perhaps coupled with saving life; giving rise to
- (c) A salvaged fund from which an award is made; to
- (d) A salvor whose conduct does not vitiate or reduce the award.”<sup>25</sup>

These requirements are conjunctive. In addition, the salvage service must have been motivated by only voluntariness on the part of the salvor; the existence of danger (which need be real and sensible, but not immediate); and finally, the service rendered must result in success.

#### Possessory Rights Of First Salvors

The rights of salvors are wide and extensive, especially if they are in the position of being the first salvors.

These rights were first laid down in the case of *Cossmann v. West*,<sup>26</sup> wherein the Privy Council stated that,

“In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence.”

<sup>25</sup> John Hare, *Shipping Law & Admiralty Jurisdiction in South Africa*, Juta & Co. Ltd. 1999, p. 291.

<sup>26</sup> [1887] 13 App Cas 160.

These possessory rights are well-entrenched, and are often protected by way of an injunction. For example, in *The Tubantia*,<sup>27</sup> the Plaintiffs had in 1922 located a Dutch wreck sunk in 1916, but had to fight off an attempt at taking over by a subsequent salvor. The plaintiffs sought and obtained, among other things, an injunction to prevent the subsequent salvor from interfering. The court decided in the Plaintiffs' favour, and noted that:

“A thing taken by a person of his own motion and for himself, and subject in his hands, or under his control, to the uses of which it is capable, is in that person's possession... There was *animus possidendi* in the plaintiffs...”

The court then went on, “Must it be said that...the vessel, and her cargo, were incapable of possession? To my mind this would be an unfortunate conclusion, very discouraging to salvage enterprise at a time when salvage, by means of bold and costly work, is of great public importance.”

In South Africa the case of *The Antipolis*<sup>28</sup> the Court of Appeal decided that a tangible physical control over the wreck is required in order for the first salvor to be able to have possession over it.

#### The Salvor's Rights Of Ownership

English law grants a salvor the right to ownership of an abandoned wreck, as was entrenched by the court in the case of *The Lusitania*,<sup>29</sup> where the vessel in question had been torpedoed by a German submarine on the 7<sup>th</sup> of May 1915. Salvage operations were commenced in 1982, 67 years later. In a subsequent dispute between the English Crown and the salvors as to the ownership of the items recovered, the Court ruled in the salvors' favour as the salvors had acquired title via occupation and also because the owners had abandoned the rights in their property.

<sup>27</sup>[1924] P. 78.

<sup>28</sup>Reck v Mills 1990 (1) SA 751 (A).

<sup>29</sup>(1986) 1 Lloyd's Rep. 132.

In South Africa, the case of *The Hypatia*<sup>30</sup> was also decided along the lines of *occupatio*, on the condition that the owners must have abandoned their property. This requirement extends also to the underwriters, to whom the ownership of the wreck has been subsequently transferred to upon the owners' abandonment.

#### The International Convention On Salvage 1989

This Convention replaced the 1910 Brussels Convention and expanded on the earlier "no cure, no pay" principle by making allowances for situations where a salvor has prevented damage to the environment through his services, even where such services have not resulted in success. This principle of special compensation was incorporated to take into account the rise of the modern oil tankers. One of the aims of the Convention, was because the drafters were, as was stated in the Preamble,

"CONVINCED of the need to ensure that adequate incentives are available to persons who undertake salvage operations in respect of vessels and other property in danger."

Damage to the environment was defined in Article 1(d) the 1989 Convention as

"substantial physical damage to human health or to marine life or resources in coastal or inland waters or areas adjacent thereto, caused by pollution, contamination, fire, explosion or similar major incidents."

Unfortunately, there is no mention of any form of special compensation relating to maritime cultural property of prehistoric, archaeological or historic interests situated on the sea-bed.

Article 14(1) of the Convention states that:

"If the salvor has carried out salvage operations in respect of a vessel which by itself or its cargo threatened damage to the environment and has failed to earn a reward under Article 13 at least equivalent to the special compensation assessable in accordance with this article, he shall be entitled to special compensation from the owner of that vessel equivalent to his expenses as herein defined."

<sup>30</sup>(1968) (4) SA 190 (C).

This 'special compensation' may be increased to a maximum of 30% of the salvor's expenses. The amount may also, in certain circumstances, be raised to a maximum of a 100%.

One question that could be raised after the resolution of the R.M.S. *Titanic* cases (to be discussed below), and taking into account the explicitly stated aim of the Convention, is, why should such special compensation not be extended to situations as exemplified by the cases?

#### IV. The Law Of Salvage In The United States Of America Before 1800

Prior to the Declaration of Independence in 1776, the decisions of the Court of Vice-Admiralty in American colonies were based mainly on English law tempered and modified by indigenous circumstances and requirements. The judges obtained their commissions from England. After 1776, each of the individual states of the colony had its own Admiralty Courts until the passing of the Judiciary Act 1789, which created the appointment of Federal Judges.

Post 1776, the American courts continued its recognition and application of English maritime principles, and in the cases of *Thompson v. The Catharina*<sup>31</sup> and *The Sabine*<sup>32</sup> they also reiterated the compulsory elements of salvage being the existence of a marine danger, voluntary service not arising from contractual obligations, and success. These elements were similar to the requirements under English salvage law.

Thus, English and American salvage laws were connected, although there were of course differences as well, and it was not until the 1910 Brussels Convention that there was an attempt to unify the principles of salvage law into a more seamless entity. This finally culminated in the 1989 London Salvage Convention.

<sup>31</sup> 23 Fed. Cas. 1028 (1795) District Court, Pennsylvania, from Brice, *op cit.* at p. 12.

<sup>32</sup> 101 U.S. 382, 384 (1879).

It was noted that <sup>33</sup>

“The formal elements of a valid salvage claim under the general maritime law are well-known:

- (a) There must be a marine peril placing the property at risk of loss, destruction or deterioration;
- (b) the salvage service must be voluntarily rendered and not required by existing duty or by special contract; and
- (c) Salvage must be successful in whole or in part.”

#### The Concept of the Wreck in a Treasure Salvage Case

Schoenbaum makes the point that “The concept of marine peril is stretched to its limit in the treasure salvage cases, where an ancient wreck has lain undisturbed on or in submerged lands for hundreds of years or more. Even here, the courts consider there is marine peril as the vessel is in peril of being lost through the action of the elements.” <sup>34</sup>

The issue of whether a wrecked vessel can be categorised as being in ‘marine peril’ has been discussed in a variety of cases. The courts have come to the conclusion that:

- a) a marine peril will exist where the location of the ship was unknown;<sup>5</sup>
- b) “marine peril includes more than the threat of storm, fire or piracy to a vessel in navigation;...if the vessel was lost, then it would constitute marine peril and...[E]ven after the discovery of the vessel’s location it is still in peril of being lost through the action of the elements.” <sup>36</sup>

<sup>33</sup> Thomas J. Schoenbaum, *Admiralty And Maritime Law*, West Publishing Company, 1987, p. 502.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Platoro Ltd. Inc. v. The Unidentified Remains of a Vessel* (1980) 614 F.2d 1051 (5<sup>th</sup> Cir.), 1055-1056.

<sup>36</sup> *Treasure Salvors Inc. v. Unidentified, Wrecked, and Abandoned Sailing Vessel* (1982) 549 F.Supp 540 (S.D.Fla), 557.

- c) “Courts will usually find that underwater shipwrecks are in marine peril, because sunken vessels and their cargo are in danger of being lost forever.”<sup>37</sup>

### Treasure Salvage, Abandoned Property, and the Law of Finds

There exist deep schisms between the law of salvage and the law of “finds”. A discussion of these differences, as well as how the courts differentiate and apply them, must be undertaken here so as to ascertain later whether the expansion of the rights of salvors to include the rights under intellectual property law is justified or not.

One main and fundamental difference between the law of finds and the law of salvage is that, in the latter, the vessel which is being salvaged is usually owned by parties other than the salvor, even where the property is a ‘derelict’ – i.e. a property which has been abandoned by the persons in charge of it.

The purpose and rules of the law of salvage is to give the salvor a right to compensation, and not title. The term ‘abandonment’ in salvage law means that the owner has lost the right to prohibit salvage. However, the salvor has acquired only a right of possession, and not a title to the vessel, until and unless the court grants that and the award.<sup>38</sup>

The Law of Finds, on the other hand, proceeds on the assumption that the title to the property has already been lost, a situation which naturally requires a more substantial proof, for example, the owner expressly proclaiming that he has abandoned title, or where it can be inferred from the surrounding circumstances that the vessel had been abandoned. In such instances, the law of finds would apply.

<sup>37</sup> Bemis v. RMS Lusitania (1995) 884 F.Supp. 1042,1051 ; 1995 AMC 1665, 1667 (E.D.Va).

<sup>38</sup> Hener v. United States, 525 F. Supp, 350, 356, 1982 AMC 847; and *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981).

In the case of *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*,<sup>39</sup> the court termed the law of finds as being “the ancient and honorable principle of ‘finders, keepers.’”

Schoenbaum commented that: “These distinctions assume new importance because technological developments have made possible a new type of ‘salvage’ presenting different and more complex legal issues than traditional maritime salvage – the recovery of treasure and artefacts from ancient shipwrecks.”<sup>40</sup>

Furthermore, “the courts have had difficulty in such cases primarily because the issues presented cut across many different areas of law: admiralty, the law of the sea, the law of ‘finds’, sovereign immunity, and land and property rights under federal and state law.”

And, as we shall soon discover below, the issues of intellectual property will also come to add another ingredient in the brew, perhaps changing the flavour distinctly.

#### The Application of the Law of Salvage and The Law of Finds

Both areas of laws require that a salvor must have possession or control of the property in order for the courts to have jurisdiction. This is especially vital under the law of finds, for while salvage gives rise to a maritime lien and all its attendant rights, a find would not.

Once the matter of jurisdiction has been ascertained, the court must determine which law between the two is applicable. The law of finds would be applied where a situation of abandonment can be extracted from the lapse of time and the property’s lack of use.

<sup>39</sup> *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059.

<sup>40</sup> *Op. cit.* at . p. 513.

One view of the definition of “finds”, as opposed to salvage, is that “in the former instance the property found has never been owned by any person. It therefore belongs to the finder.”<sup>41</sup> Furthermore, the doctrine of “find” should be only used to label wrecks which have been lost a long time ago, for example the *Nuestra Senora de Atocha* (sunk with a cargo of gold in a hurricane in 1622, off the coast of Florida) and to situations where the owner of the property in question has publicly disavowed its ownership.

The American courts have preferred the law of salvage over the law of finds, because, in the latter, “would-be finders are encouraged by these rules to act secretly, and to hide their recoveries, in order to avoid claims of prior owners or of other would-be finders” while “[S]alvage law encourages less competitive and secretive forms of conduct than finds law. The primary concern of salvage law is the preservation of property...”<sup>42</sup>

In another case, the United States Court of Appeals was of the view that:

“...when sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favour applying the law of salvage over the law of finds.”<sup>43</sup>

The exception is where the owners are found to have abandoned their property. And this presumption would only be made upon cogent evidence that the owner had explicitly abandoned it. In the case of ancient shipwrecks, the courts may infer such an abandonment.

<sup>41</sup> Benedict on Admiralty, Volume 3A, The Law of Salvage, 7<sup>th</sup> ed., Matthew Bender, 1990, pg. 11-14.

<sup>42</sup> *Hener v. United States*, 525 F. Supp. 350, 1982 AMC 847 (S.D.N.Y 1981)] at 356, taken from Rachel Lin’s article, *Salvage Rights & Intellectual Property: Are Copyright and Trademark Rights Included in the Salvage Rights to the R.M.S. Titanic?* Tulane Maritime Law Journal [Vol. 23 1999] p. 488).

<sup>43</sup> *Columbus-America Discovery Group v. The Unidentified Wreck and Abandoned Sailing Vessel (The Central America)* 974 F. 2d (450) (1992) United States Court of Appeals, 4<sup>th</sup> Circuit

In the case of *Fairport International Exploration, Inc. v. The Shipwrecked Vessel*, known as the *Captain Lawrence*,<sup>44</sup> the United States Court of Appeals decided that “the claimant may prove abandonment by inference as well as by express deed,” and therefore, “the question becomes after what length of years may a court infer abandonment; rather than draw arbitrary (time) lines separating express from implied tests, we choose to view length of time as one factor among several relevant to whether a court may infer abandonment.”

The court also went on to “agree that lapse of time, alone, does not necessarily establish abandonment.” However, the court limited its ruling to apply only to private vessels and not vessels falling within the Abandoned Shipwreck Act.

Where abandonment has been proven, the law of finds would be applied. In the case of *Treasure Salvors, Inc v. Unidentified, Wrecked and Abandoned Sailing Vessel*,<sup>45</sup> the court applied the law of finds to the recovery of a Spanish wreck which had gone down in the Florida Keys in 1622, because the “disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches the fiction to absurd lengths.” Thus the ownership of the abandoned property would then be assigned to the finding salvor.

Conversely, where the law of salvage is deemed to be more suitable and relevant, then the salvor must show the necessary elements for the grant of a salvage award.

The case which originally laid down the criteria for salvage in the United States of America was *The Blackwall*.<sup>46</sup> For salvage to exist:

<sup>44</sup> Electronic citation: 1999 Fed App. 0171P (6th Cir.).

<sup>45</sup> 569 F.2d 330 (5th Cir. 1978).

<sup>46</sup> 77 U.S. (10 Wall.) 870, 2002 AMC 1789 (1870).

- a) there must be a property that is in marine peril on navigable waters;
- b) there must exist a voluntary effort to rescue the property;
- c) there must be partial or total success; and
- d) salvors must be acting bona fide, in the interests of the owners.

In another instance,<sup>47</sup> the court listed, in descending order of priority, the factors it would look at in deciding the quantum of the salvage award:

1. The degree of the danger which threatened the property.
2. Value of the property.
3. The risk inherent in saving the property.
4. The skill and reaction of the salvors.
5. The value of the property used by the salvors, and the risks it was exposed to.
6. The amount of effort used in the service.

An additional factor was considered by the American courts<sup>48</sup>— namely, have the salvors taken precaution and care to preserve the wreck from the viewpoint of archaeological interests?

A vessel which has been abandoned and which has no hope of recovery, the inherent property still remains with the owner, and the salvor merely retains a maritime lien on the property, which would enable him to make a claim to an award. The owner of a sunken vessel or one which has been wrecked close to shore does not lose his title to his property. The salvor can thus only expect to receive, in exchange for his services, a salvage award granted by court.<sup>49</sup>

<sup>47</sup> B/V Bureau Wijsmuller v. United States (702) F.2d 333 (2<sup>nd</sup> Circuit 1983).

<sup>48</sup> Columbus-American Discovery Group, Inc. v. Atlantic Mutual Insurance Company (CADGIII), 56 F.3d 556 (4<sup>th</sup> Cir. 1995), *cert denied*, 516 U.S. 938 (1995).

<sup>49</sup> Benedict, *op. cit.* at Section 11-1.

As with the situation in the United Kingdom, for a situation of salvage to exist, the property must be in peril, there must be a voluntary service on the part of the salvors, and there must be success in the endeavour.

Lord Lushington in the classic case of *The Charlotte*<sup>50</sup> first laid down the parameters, where he stated that there was no requirement that the danger be ‘immediate and absolute’, as long as there was a possibility that the vessel in distress might be destroyed if the salvor’s assistance is not given.

A slew of American cases from 1929 onwards have decided that abandoning a vessel to her watery fate after an accident has rendered it lost puts the ship in a perilous situation<sup>51</sup>

### The Rights of Salvors

A successful salvor is granted a lien over the properties he has salvaged. The lien empowers him to proceed in rem against the vessel or its cargo. The rights envisaged under the salvage lien are extensive, giving the salvor a high position of priority in terms of ranking when the claims are made against the vessel. The question to be considered in this dissertation is: does the salvor’s lien encompass the right to restrict others from taking visual images of the wreck or of the work in progress?

### The Salvor’s Rights of Possession:

General salvors and salvors involved in abandoned properties or wrecks have the right of possession if they were the first salvors.<sup>52</sup> The owner of a vessel which has been abandoned – or sunk - with no further hope of salvation or recovery, does not surrender his title to it. The salvor does not step into the titular shoes of the owner, but obtains, instead, a maritime lien.

<sup>50</sup> [1848] 3 W Rob 68.

<sup>51</sup> Benedict, *op. cit.* at section 5-5

<sup>52</sup> *Ibid.*

No subsequent parties may interfere with the rights of possession of the abandoned vessel, unless the competence of the first salvors is clearly lacking in executing the task at hand.

Whilst working on a vessel, the salvor has the right to prevent other parties from entering the operation, although under Article 8 of the London Salvage Convention 1989, it is stated that

“1. The salvor shall owe a duty to the owner of the vessel or other property in danger:

- (c) whenever the circumstances reasonably require, to seek assistance from other salvors; and
- (d) to accept the intervention of other salvors when reasonably requested to do so by the owner or master of the vessel or other property in danger; provided however that the amount of his reward shall not be prejudiced should it be found that such a request was unreasonable.”

The 1989 Salvage Convention does not cover the rights of the salvors where visual images are concerned. The watershed case which decided on this was *R.M.S. Titanic Inc., Successor in Interest to Titanic Ventures, Limited Partnership v. Christopher S. Haver; Deep Ocean Expeditions*.<sup>53</sup>

<sup>53</sup> (1999) 171 F.3d 943 (U.S.C.A. 4<sup>th</sup> Circuit).

## CHAPTER TWO: The R.M.S. *Titanic*

### I. The Situation of Salvage Before the Discovery of the R.M.S. *Titanic*

None of the early cases before the R.M.S. *Titanic* ever considered the intellectual property rights of photographing and documenting a shipwreck site, which was understandable, since the technology for obtaining such images were still in its infancy or even non-existent at all. Furthermore, there was no existing market for such ventures.

The earliest case which involved anything nearly similar to the imbroglio which would later enmesh the R.M.S. *Titanic* was *Indian River Recovery Co. v. The China*.<sup>54</sup> This particular case concerned two competing salvors who fought for exclusive rights to work a wreck site. The plaintiff, IRCC, battled Ocean Watch, a non-profit organisation comprised of amateur divers and recreational fishermen. The court granted a preliminary injunction to Ocean Watch as it felt that the organisation had been more effective in returning “the salvage items to the stream of commerce.” This, the court felt, was “one of the fundamental policies underlying the maritime law of salvage.”

Ocean Watch had also been conducting paid divers to the wreck site, and letting them remove artefacts, providing “substantial recreational enjoyment and commercial success,”<sup>55</sup> a factor taken into consideration by the court.

In *Moyer v. The Wrecked and Abandoned Vessel, Known as the Andrea Doria*,<sup>56</sup> an amateur diver who was keen to obtain the wreck’s bell and some Italian mosaics, obtained an injunction to prevent other divers from searching for the same objects. However, he did not ask that the other divers be prohibited from approaching the wreck or recovering other items.

<sup>54</sup> 645 F. Supp. 141, 1989 AMC 50 (D. Del.1986).

<sup>55</sup> Rachel Lin, *Salvage Rights & Intellectual Property: Are Copyright and Trademark Rights Included in the Salvage Rights to the R.M.S. Titanic?* Tulane Maritime Law Journal [Vol. 23 1999] p. 494.

<sup>56</sup> 836 F. Supp. 1099, 1994, AMC 1021 (D.N.J. 1993).

The Court noted that “[a]rchaeological preservation is most important in cases involving treasure ships where the preservation may constitute a ‘window in time...to an earlier era.’”

The court’s criteria in granting the injunction included:

- i) the protection of archaeological interests, in particular the efforts taken to preserve the “archaeological integrity of the shipwreck”;
- ii) the extensive effort invested in the project by the plaintiff, the meticulous documentation of the exercise, via video and photography

Thus the court awarded the plaintiff rights over the photographs and videotapes made by the plaintiff, although other salvors were allowed to visit the site of the wreck and to create their own photographic images on the condition that their intrusion would not impede the plaintiff’s efforts. But the court did state that it did not “purport to adjudicate pre-existing rights of public access and salvage of the ANDREA DOREA.”<sup>57</sup>

Contrast this with the salvors’ conduct in *Bemis v. The R.M.S. Lusitania*,<sup>58</sup> a case involving the salvage rights over the luxury vessel destroyed by a German torpedo during the First World War. The diligence of the plaintiff was called into question (the three trips by them to the wreck from the time of its discovery thirteen years previously were deemed to be insufficient, as was the near-apathy of the plaintiff in its involvement). Eventually the court felt that it was highly unlikely that the plaintiff would persevere in the salvage operation, and therefore the plaintiff’s application for exclusive salvage rights was turned down.

The consistency with which the American courts decided the issue of the salvors’ rights would soon be changed by the variety of cases all emanating from the same source: the discovery of the wreck of the most famous commercial vessel of the twentieth century, the R.M.S. *Titanic*.

<sup>57</sup> Op. cit. at 1032.

<sup>58</sup> 884 F. Supp. 1042, 1995 AMC 1665 (E.D. Va. 1995).

While the spheres of salvage law and intellectual property law appear to have nothing in common, the advancements made in the technology used for salvaging and the growing awareness of the potential for media exploitation would find these two fields of law spinning into one another's orbit more and more often. Modern salvage techniques, as opposed to the archaic method of visual searchers, include:

- i) **Magnetic Remote Sensing:** whereby magnetometers are utilised to chart the fluctuations in the earth's magnetic field, normally caused by large quantities of metallic materials. Data collected are then harvested into a computer to produce a magnetic contour map.
- ii) **Acoustic Remote Sensing:** which are sonar systems emitting high-frequency sound waves which are then bounced off the ocean floor, an acoustic image of which is then created by the weakness and strength of the returning sound wave.

In addition, the salvors of the R.M.S. *Titanic* used specially developed manned and unmanned deep-sea submersibles such as remote operated vehicles ("ROVs") and autonomous underwater vehicles ("AUVs") in conducting the search. Many of these vehicles were also provided with video imaging equipment and mechanical arms which could be remotely controlled to physically investigate a wreck site. With a plethora of such complicated and costly equipment, perhaps it is understandable that the salvors' initial capital outlay would require more innovative rewards, which the court in the R.M.S. *Titanic* cases tried to innovate and provide.

It was noted by an author<sup>59</sup> that "[f]inancial implications also have a profound influence on salvage operations for another reason. Some two hundred years after Tracey's attempts to raise the *Royal George* modern salvage technology stands at the very frontiers of science. The innovative high-tech engineering equipment required for the salvage and offshore operations of the late 20<sup>th</sup> century is *comparable with that developed for the space exploration industry.*"<sup>60</sup>

<sup>59</sup> David L. Williams, "Salvage! Rescued From The Deep" Ian Allan Ltd, London, 1991, p. 16.

<sup>60</sup> Emphasis added.

And, he went on to state, “All the very latest scientific techniques are employed to preserve delicate treasures that would otherwise decompose when brought to the surface. All this demand on resources, both human and material, represents a considerable investment by the specialised salvage organisations, a commitment of assets which is difficult to justify when the return is so precarious.”

## II. The Discovery of the R.M.S. *Titanic* and the Subsequent Legal Disputes

Setting sail from Southampton, England on the 10<sup>th</sup> of April 1912, the R.M.S. *Titanic* was sunk by an iceberg spotted too late by Frederick Fleet, a lookout in the crow’s nest, just before midnight on the 15<sup>th</sup> of April 1912, approximately 400 miles southeast of Newfoundland, Canada. Of the 2,228 passengers on board, 1,523 lost their lives, and only 705 of them survived.<sup>61</sup>

Close to a century later, the R.M.S. *Titanic* was located again on the 1<sup>st</sup> of September 1985, “2.5 miles under the surface of the Atlantic Ocean, 560 miles off the coast of Newfoundland.”<sup>62</sup> The discovery was made by Dr. Robert Ballard, in a joint-venture operation between the Americans and the French, through the Woods Hole Oceanographic Institution and the Institut Francais de Recherches Pour L’Exploitation des Mers (INFREMER) respectively.

Two years later, in 1987, INFREMER teamed up with Titanic Ventures, Inc. to recover approximately over 1800 artifacts from the wreck, using the submersible, *Nautilus*. Subsequently, another corporate entity, RMST Titanic, Inc (RMST) took over Titanic Ventures, Inc.’s interests in the matter, and proceeded to salvage the area from 1987 to 1994. RMST also entered into an agreement with the governments of France and Britain *not to sell the items found*.<sup>63</sup>

<sup>61</sup> See Encyclopaedia Titanica, [www.encyclopaedia-titanica.org/articles/legal](http://www.encyclopaedia-titanica.org/articles/legal)

<sup>62</sup> Rachel Lin, *op. cit.* at p. 496.

<sup>63</sup> Emphasis added.

It is important to take note of this last point, since the consequence of the agreement was that RMST would have to find other novel ways of bankrolling the entire project and make their investment profitable in the long run.

RMST took extensive steps to preserve the artifacts and to exhibit them to the public. However, in August 23, 1993, RMST applied to the United States District Court of the Eastern District of Virginia for an order to be declared “the sole and exclusive owner of any items salvaged from the R.M.S. Titanic.” The judgment in which this order, given on June 7 1994, was unreported, but was later referred to and quoted in *RMS Titanic Inc. v. The Wrecked and Abandoned Vessel (“Titanic I”), et al.*<sup>64</sup> The court in its June 7 1994 order acquiesced and ruled that:

“The Court FINDS and ORDERS that R.M.S. Titanic, Inc. is the salvor-in-possession of the wreck...and that R.M.S. Titanic, Inc. is the true, sole and exclusive owner of any items salvaged from the wreck of the defendant vessel in the past and, so long as R.M.S. Titanic, Inc. remains salvor-in-possession, items salvaged in the future, and is entitled to all salvage rights...”

The order was based on the presentation of a wine decanter recovered from the R.M.S. *Titanic*, which U.S. District Judge J Calvitt Clarke Jr. decided gave the court an *in rem* jurisdiction over the vessel and the wreck site. “Essentially, it was the Court’s order of June 7, 1994 that was the crux of the ensuing litigation that resulted from the order.”<sup>65</sup>

This right was challenged a few times between 1994 and 1998 by RMST’s various competitors, although RMST was able to fight them off, by successfully arguing that the competitors’ presence would impede RMST’s salvage efforts.

<sup>64</sup> 924 F. Supp. 714, 722-724 (E.D. Va. 1996).

<sup>65</sup> McCormack, “The Titanic: Who Owns the Ocean Deep?” (<http://www.houstonmarineseminar.com/Titanic.pdf>).

In February 1996, John A. Joslyn applied to the Court to intervene in RMST's salvage operations, which he alleged had lay dormant since 1994, with RMST showing no evidence of any intention to continue to salvage the vessel. Joslyn was a competing salvor who wanted the court to rescind its order of June 7, 1994. His claim sought to supersede that order by claiming that RMST had "failed to diligently salvage the Titanic, has evidenced no intention to salvage it in the future, and, at this time, is financially incapable of utilizing its rights."<sup>66</sup>

Joslyn also alleged that RMST had failed to take advantage of a 1995 "weather window" to proceed with its salvage operations. This 'weather window' in the stormy North Atlantic ocean only occurs from June to August.<sup>67</sup>

Joslyn's intention was to salvage the wreck site, but was prohibited to do so by the court. This was seen by RMST as encroaching upon its own proposed activities, which informed the court of its plans to do the following:

- raising the R.M.S. *Titanic*'s hull
- bringing cruise liners to the site for public viewing
- bringing divers down to the wreck
- creating a two-hour documentary special in association with the Discovery Channel
- setting up public exhibitions of the relocated artefacts
- obtaining additional finances through the sales of videos and of the coal it had lifted from the site

These future activities went towards convincing the Court of RMST's continued interest in the venture. The court was impressed with the efforts RMST had expended, by making "...the artefacts available to the public through exhibitions, thereby benefiting the public more than the requisite on-site archaeological preservation would do."<sup>68</sup>

<sup>66</sup> RMS Titanic Inc. v. The Wrecked and Abandoned Vessel ("Titanic I") (1996) 924 F. Supp. 714 (E.D. Va) 716.

<sup>67</sup> RMS Titanic Inc. v. The Wrecked and Abandoned Vessel ("Titanic II") (1998) 9 F. Supp. 2d 624 (E.D. Va), 627.

<sup>68</sup> Titanic I, *op. cit.* at 724 .

And as RMST was not “selling artefacts like traditional salvors, it must be given the rights to other means of obtaining income.” The Court, in its order dated **May 10 1996**, therefore denied Joslyn’s application, and entrenched RMST’s position as the exclusive salvor-in-possession<sup>69</sup> and stated that:

“The case deals with one of the most famous shipwrecks in history, and thus the archaeological preservation of the wreck itself as well as the recovered artefacts is of extreme importance to this Court. In addition, unlike the majority of the wrecked vessels which are easily accessible to divers, the Titanic lies two and a half miles below the ocean surface and the use of manned submersibles is required to reach it.”<sup>70</sup>

Joslyn then took another tack by informing the court that he wished to visit the site for the sole reason of taking photographs for his own collection. This proposal of his necessitated another visit to the courts, and in an order dated August 13, 1996, the Court gave a preliminary injunction in favour of RMST, restricting Joslyn from carrying out any “search, survey, salvage operations or obtaining any image or photography of the Titanic wreck or wreck site.”<sup>71</sup>

The Court justified its decision by stating that, “the activity Joslyn contemplates is exactly the type of activity the Court contemplated in its May, 1996 Order, giving RMS Titanic exclusive possession. The Court specifically referred to video sales, film documentaries and television broadcasts as inventive marketing ideas that RMS Titanic must resort to since it is not selling the artefacts. It is clear that the presence of another in the marketplace would diminish the rights the Court has granted RMS Titanic.”<sup>72</sup>

While the court conceded that its earlier **Order of May 10, 1996** did not prohibit the photographing of the site by a party other than RMST, RMST did have specific authority and dominion over the site, as it therefore could decide who would be allowed into the area for whatever purpose.

<sup>69</sup> Titanic I, *op. cit.* at 723-724.

<sup>70</sup> *Ibid.*, at 722.

<sup>71</sup> R.M.S. Titanic Inc. v. The Wrecked and Abandoned Vessel, 1996 A.M.C. 2497.

<sup>72</sup> *Ibid.*, at 2497.

Furthermore, the court explained that RMST's rights would encompass the exclusive right to photograph the site. The said order of August 13 1996 would also "include determining who could enter the site for any purpose and who could photograph the ship and the locale."<sup>73</sup>

This was due to the special circumstances of the case, the court clarified. The court distinguished between a case involving the salvage of a historic wreck and one concerning a modern wreck. The Court's view was that, "in the case of 'historic salvage', it is desirable to keep these artefacts together for public display, and therefore, *traditional salvage rights must be expanded* for those who properly take on responsibilities of historic preservation..."<sup>74</sup>

Since RMST had been prohibited from selling off the artefacts to finance its operations, the entity had no other option but to exploit the situation in other novel and innovative ways in order to stay afloat. Joslyn's activities, the court felt, would have diluted the commercial efforts of RMST. The court noted that, "Allowing another 'salvor' to take photographs of the wreck and wreck site is akin to allowing another salvor to physically invade the wreck and take artefacts themselves...[S]ince photographs can be marketed like any other physical artefact, the rights to the images, photographs, videos, and the like belong to [RMST]."<sup>75</sup>

This was the first case wherein the court widened the parameters of salvage rights accrued to salvors, where the courts all but directly included the law of intellectual property (specifically the law of copyright) as one of the rights of the salvors, and in fact also analogized the act of unauthorised photography to that of the problem of subsequent salvors.

Another attempt to erode the rights of RMST was made in 1998, when a British company called Deep Ocean Expeditions (DOE) formulated a design dubbed "Operation Titanic" to transport tourists down to the wreck on private tours at the fare of US\$32,500 per person. This would also involve having the tourists take photographs as part of their experience as they scuttled around the wreck in a Russian submersible. The expedition was planned for August 1998, during one of the 'windows of opportunity' in the weather.

<sup>73</sup> Lin, *op. cit.* at p. 499, quoting RMS Titanic, Inc. v. The Wrecked and Abandoned Vessel, 9 F. Supp 2d 624, 627 (E.D. Va 1998).

<sup>74</sup> Titanic I *op. cit.* at p. 924. Emphasis added.

<sup>75</sup> *Ibid.*

RMST, on learning about the tour, on 4 May 1998 sought an injunction from the Federal Court in Norfolk to prevent the expedition from going forward, as well as the inevitable photographing of the wreck by the participants. One of the intended tourists, Christopher Haver, a United States national, initiated an *in personam* action to have the court recognise his right to enter the wreck site to observe and to photograph and make videos of the R.M.S. *Titanic* for his own purposes. RMST filed a counterclaim against Haver for a preliminary injunction prohibiting him from entering the wreck site. Haver's action was consolidated with RMST's claim by the district court.

The court took the side of RMST, and acknowledged the possibility that the actions of visits not sanctioned by RMST would have severe and negative impact on RMST's commercial ventures, namely its various deals for exclusive broadcasts with documentary and news networks. These deals at that time included:

- a live television broadcast of the second attempt at raising the hull of the R.M.S. *Titanic* on the Discovery Channel;
- a television special about this event on Dateline, an American news and current affairs program

RMST also contended that DOE's proposed activities would interfere with its own salvage operations which would run 24 hours daily.

The result was that, by an order dated 23 June 1998, RMST, the salvor in question was granted a right which extended very much beyond the scope of traditional law of salvage. The question raised by the granting of this order was, was this a natural extension of the law of salvage and finds? The court at this level seemed to think so, since it enjoined Haver and DOE, as well as other parties, from:

- “(i) interfering with the rights of [RMST], as salvor in possession of the wreck and wreck site of the R.M.S. *Titanic*, to exclusively exploit the wreck and wreck site,
- (ii) conducting search, survey, or salvage operations of the wreck or wreck site,
- (iii) obtaining any image, video, or photograph of the wreck site....,

- (iv) entering or causing anyone or anything to enter the wreck or wreck site with the intention of performing any of the foregoing enjoined acts.”<sup>76</sup>

The enjoined wreck site was a rectangular area measuring 168 square miles in the North Atlantic ocean. As the court noted, “Restricting freedom of navigation over a few square miles of the vast North Atlantic Ocean is hardly a significant intrusion.”<sup>77</sup>

The district court based its decision on the circumstances and complications of safety of the wreck site (two miles down into the lightless and cold waters of the North Atlantic ocean), the protection of the costly RMST’s project, as well as “the public’s interest in preventing unorganised, piecemeal salvaging of the Titanic, a shipwreck of great historical interest.”<sup>78</sup>

In addition, the court remarked that “RMST has exhibited considerable zeal as salvor in possession despite the fact that salvaging the wreck is extremely time-consuming, dangerous, and expensive.”<sup>79</sup>

What was interesting were the following statements of the court, that “RMST’s salvor-in-possession rights will be devalued if the photographic expedition is allowed because *the exclusive right to photograph the wreck is included in the salvor-in-possession rights.*”<sup>80</sup> This was a new expansion on the age-old rights of salvors, and understandably created some puzzlement.

Haver, naturally, proceeded to file the appeal against this order.

<sup>76</sup> RMS Titanic Inc. v. The Wrecked and Abandoned Vessel (“Titanic II”) (1998) 9 F. Supp. 2d 624 (E.D. Va), 627, at 640.

<sup>77</sup> *Ibid.*, 634-635.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*, 627.

<sup>80</sup> *Ibid.*, at 624. Emphasis added.

### III. The Criticisms of the Court's Decision

The court's decision has been criticised from several points. Firstly, the court seemed to have wilfully ignored DOE's willingness to reschedule their dives into the wreck site, so as to avoid intruding upon RMST's salvage works-in-progress. DOE's original schedule had been to dive in August 1998, but as this would interfere with RMST's operations during that same month, DOE stated that it would be willing to postpone the tour of the site to September 1998. But the court refused to countenance this concession, and stated that "Even comparing RMST's harm with the quixotic harm of a band of adventure tourists borders on the irrational."<sup>81</sup>

Secondly, the order prohibiting DOE was carrying out its tours of the wreck site applied not only to United States nationals, but also to everyone else. The court had placed the whole world on notice of the salvage rights of RMST: "It is in the interest of the whole world to have salvage claims decided in a single forum so that multiple, conflicting litigation is avoided."<sup>82</sup> Furthermore, "The whole world, it is said, are parties in an admiralty cause; and therefore the whole world is bound by the decision."<sup>83</sup>

It was said by a noted authority that "[t]he order went beyond the bounds of national jurisdiction. By placing 'the whole world' on notice of the salvage action, the court proposed to extend its grant of *in rem* jurisdiction beyond the normal limits to non-resident parties, as if they were within the territorial jurisdiction of United States courts. The order seemed to confuse *in rem* jurisdiction over the salvage action...with *in personam* jurisdiction over non-resident parties...the exercise of constructive *in rem* jurisdiction over the *Titanic* wreck site to exclude non-resident parties from exercising normal freedoms was deemed to be consistent with international law."<sup>84</sup>

<sup>81</sup> *Ibid.*, at p. 638.

<sup>82</sup> *Ibid.* at p.,634-635

<sup>83</sup> *Ibid.*, at p. 940.

<sup>84</sup> Professor James A.R. Nafziger, "The *Titanic* Revisited", *Journal of Maritime Law and Commerce*, Vol. 30, No.2, April 1999, p. 316.

#### IV. Support for the Decision?

The same authority did concede that, “unlike most sought-after wrecks, the *Titanic's* insured cargo of shelled walnuts, rolls of linoleum, orchids, and other perishables is nearly worthless. Nor are the items of personal property in the vessel of much value except as souvenirs. The vessel therefore provides no opportunity for recoupment of the costs of salvage. The value of the cargo lies instead in the popular imagination and curiosity.”<sup>85</sup>

Taking into account the singularity of the facts, the court took a pragmatic approach in widening the rights given to salvors. Furthermore, as we shall see later, salvage law has never remained static, and this is an instance when it seemed correct to widen the booms.

#### V. The R.M.S. Titanic Maritime Memorial Act 1986

The Act, which was signed into force on 21 October 1986, was the result of the United States's Congress findings that:

- “(1) The R.M.S. Titanic, the ocean liner which sank on her maiden voyage after striking an iceberg on 14 April 1912, should be designated as an international maritime memorial to the men, women, and children who perished aboard her;
- (2) The recent discovery of the R.M.S. Titanic, lying more than 12,000 feet beneath the ocean surface, demonstrates the practical applications of ocean science and engineering;
- (3) The R.M.S. Titanic, well preserved in the cold, oxygen-poor waters of the deep North Atlantic Ocean, is of major and international cultural and historical significance, and merits appropriate international protection”

<sup>85</sup> *Ibid.*, pg. 317.

Among the purposes of the Act are the following:

- “(2) To direct the United States to enter into negotiations with other interested nations to establish an international agreement which will provide for the designation of the R.M.S. Titanic as an international maritime memorial, and protect the scientific, cultural, and historical significance of the R.M.S. Titanic;
- (3) To encourage, in those negotiations or in other fora, the development and implementation of international guidelines for conducting research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic;
- (4) To express the sense of the United States Congress that, pending such international agreement or guidelines, no person should physically alter, disturb, or salvage the R.M.S. Titanic in any research or exploratory activities which are conducted.”

By Section 6(a) of the Act, the Secretary is also

“directed to enter into negotiations with the United Kingdom, France, Canada, and other interested nations to develop an international agreement which provides for:

- (1) The designation of the R.M.S. Titanic as an international maritime memorial; and
- (2) Research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic consistent with the international guidelines pursuant to section 5 and the purposes of this Act.

What is relevant also is Congress’s disclaimer of an extraterritorial sovereignty. Section 8 of the Act states that: “By enactment of this Act, the United States does not assert sovereignty or exclusive rights or jurisdiction over, or ownership of, any marine areas or the R.M.S. Titanic.”

The district court did consider the R.M.S. Titanic Maritime Memorial Act 1986, but in the period of twelve years since the Act had been passed, no international treaty had been made to give effect to the lofty aims of the Act. Therefore the Court did not appear at all straitjacketed

by these provisions. There were also no references to the question of the rights of photography or other relevant intellectual property rights in the Act, which, it can be argued, was not an erroneous omission since the court rightly felt that the issue could have been decided by reference to the existing Intellectual Property laws. However, it would have been of great assistance to have clarity and certainty in such issues if the Act had laid down guidelines for such purposes, since Section 5 of the Act states that:

“(a) The Administrator is directed to enter into consultations with the United Kingdom, France, Canada, and other interested nations to develop international guidelines for research on, exploration of, and if appropriate, salvage of the R.M.S. Titanic which:

- (1) Are consistent with its national and international scientific, cultural, and historical significance and the purposes of this Act; and
- (2) Promote the safety of individuals involved in such operations.

It would not have taken much more to insert a clause specifying the limits of intellectual property rights of the various parties involved.

## VI. The Impact of the Two *Titanic* Cases

The courts seemed uncertain as to the status of the law after the decisions of the two *Titanic* cases. For example, Lin noted that in the case of *Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic*,<sup>86</sup> Judge Bauer of the United States district Court for the Southern District of New York was of the view that “video and photographic images have on occasion, in other circumstances, been treated as the equivalent of artefacts recovered from a shipwreck” and that “allowing another salvor to take photographs is akin to permitting the physical invasion of the wreck and seizure of the artefacts themselves.”

<sup>86</sup> No. 97 Civ. 9284 (HB) 1998 WL 557591 (SDNY Sept. 2 1998), discussed further below; quoted in Lin’s article *op. cit.* at p. 503, footnote 153.

RMST might also seek to protect its rights by categorising them as a ‘trade secret’ (for further explanation of this, please see below), by saying that access to the wreck qualified as a “secret” and was vital to its business, thus ensuring its commercial value.

The Order was, of course, appealed against, and we shall see below the decision the Fourth Circuit Court of Appeals arrived at. In the meantime, what were the rights RMST was striving so valiantly to protect? The prohibition against taking photographs of the wreck would, *prima facie*, fall within the ambit of intellectual property rights.

The courts’ decisions in extending the scope of orthodox salvage law to include intellectual law protection in the abovementioned cases can perhaps be best summarised by Article 1 s8 Clause 8 of the Constitution of the United States of America, namely, to “*promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.*”

## CHAPTER THREE: The Law Of Intellectual Property In The United States of America

### I. Introduction

This field of law covers the laws of trademarks, copyright, patents, and designs. The law most relevant to the cases under discussion would be the law of copyright, trademarks and trade secrets.

### II. The Law of Copyright

The parameters of the law of copyright in the United States of America are determined by Title 17 of the United States Code (1994), from sections 101 to 122, which seek to grant protection for “original works of authorship fixed in any tangible medium of expression...from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”<sup>87</sup>

To qualify for protection under the Code, a work must be:

- a) an original
- b) work of authorship, that is
- c) fixed in a tangible medium of expression.<sup>88</sup>

Once any of such works satisfies these requirements of the Code, the creator of the work would be granted the following rights:

- a) to reproduce the work;
- b) to replicate and distribute the work;
- c) to perform and display it;
- d) to create derivatives of the work.<sup>89</sup>

<sup>87</sup> 17 USC §102a (1994)

<sup>88</sup> *Ibid.*

<sup>89</sup> 17 USC §106

Copyright infringement occurs when all or any of the acts as described above are done without the copyright owner's license or consent. For example, computer software and DVDs and CDs which have been replicated and then sold, without authorisation by the owner (who in turn would receive no payment or royalties from such sales), or reprinting photographs and/or texts unlawfully.

The Copyright code sets out a list of works which would qualify for copyright protection:

- (1) literary works;
- (2) musical works;
- (3) dramatic works;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

“Derivates” of the work would include a work “based upon one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalisation, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted.”<sup>90</sup>

Under the copyright laws of the United States, RMST would have the right to reproduce, replicate and distribute photographs and video images of the R.M.S. *Titanic* it had created, as well as any other forms of works deriving from them, if it had satisfied the requirements of such works being original works of authorship fixed in a tangible medium.

Originality does not carry the requirement of substantial ingenuity, aesthetic merit, or novelty. “Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity...”

<sup>90</sup> 17 USC §101 (1994)

<sup>91</sup> Feist Publications, Inc. v. Rural Telephone Service Company, Inc. 111 S. Ct. 1282, 1287, 18 U.S.P.Q. 2d 1275, 1278 (1991).

A photograph of the wreck would fall under “pictorial, graphic and sculptural works,”<sup>92</sup> which have been defined by the Act as being “two-dimensional and three-dimensional works of fine, graphic and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.”<sup>93</sup>

The documentaries and television broadcasts of the salvage operations would be protected under “motion pictures and other audiovisual works.”<sup>94</sup>

However, like trademarks, the actual vessel itself is not open to being copyrighted, since the photographer did not actually create the vessel, but merely photographed it.

### III. The Law of Trademarks

Governed by the Lanham Act,<sup>95</sup> “the term ‘trademark’ includes

“any word, name, symbol, or device, or any combination thereof, - (1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register...to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods...”<sup>96</sup>

The protection afforded by a registered trademark is immense, since it allows an owner of the mark to ascertain that his reputation is kept his, and that no one is allowed to appropriate that reputation by adding that same mark on to his products, thereby riding on the legitimate trademark owner’s goodwill and reputation. The main thrust of trademark law is to protect consumers from being confused by the plethora of products in competition in the market, and is not to protect the author’s creations.

<sup>92</sup> 17 USC §102(a)(5).

<sup>93</sup> *Ibid.*, §101.

<sup>94</sup> 17 USC §102(a)(6)

<sup>95</sup> 15 U.S.C. §§ 1051-1127 (1995)

<sup>96</sup> *Ibid.*, § 1127

Examples of trademarks include the golden arches of McDonald's, Microsoft's 'Windows' logo or device, Nike's 'Swoosh' symbol, and any distinctive fonts or designs of companies' names which have been successfully registered or has, by use, become associated with the company or trademark owner, for instance, Sony, Acer, Nokia, Playstation 2, Guess?, Levi's, Armani, I&J.

Unauthorised marks are especially rampantly and indiscriminately used on pirated goods, which are invariably inferior imitations of the goods manufactured by the true trademark owners, and are often sold at a fraction of the original items' prices. Trademark law seeks to protect the manufacturer of the goods from having his logo or mark exploited by unscrupulous competitors, as well as to ensure that the consumer is not defrauded.

#### IV. The Law of Trade Secrets

This is a common law remedy, and some writers<sup>97</sup> have considered that it might be applicable to the case of a historic shipwreck. For a holder of a trade secret to qualify for protection, the information containing the trade method must be secret and relate to the procedures and machinations of a business, and must also have commercial value. The two authors are of the view that "controlling 'imaging access to a shipwreck' qualifies as a trade secret."<sup>98</sup>

<sup>97</sup> For instance, Bederman and Prowda in their article "*In Titanic Case, IP and Admiralty Laws Collide*" NLJ Oct 19, 1998, at C18, which was quoted by Lin in her article *op. cit.* at p. 493. I have attempted to locate the actual article but to no avail.

<sup>98</sup> *Ibid.*

## CHAPTER FOUR: The Law of Intellectual Property in South Africa

### I. The Law of Copyright

Copyright, in South Africa, need not be formally registered. It exists as soon as a particular comes into being, if it satisfies the conditions for the subsistence of copyright as laid down in section 41(4) of the Copyright Act 1978,<sup>99</sup> that “no copyright or right in the nature of copyright shall subsist otherwise than by virtue of this Act or of some other enactment in that behalf.”

Section 2(1) of the Act requires the work to be ‘original’, which means that the work must be the result of the creator’s own efforts and skill. It does not mean that the work must be unique or creative, rather, that the creator or author must have expended sufficient labour and endeavour upon it to make it his own work.

In addition, Section 2(2) of the Act states that “A Work, except a broadcast or programme-carrying signal, shall not be eligible for copyright unless the work has been written down, recorded, represented in digital data or signals or otherwise reduced to material form.”

This is in concert with the worldwide maxim that there can never be a copyright in ideas, but only in the material form in which the ideas were recorded.

For copyright to subsist, a particular work must also fall within the various categories of “works” in the Act.<sup>100</sup>

Under the Copyright Act 1978, photographs would fall under the category of “artistic works” and video recordings in the definition of “cinematograph films” as well as “sound and television broadcast.”

<sup>99</sup> As amended by Acts 56 of 1980, 52 of 1984, 39 of 1986, 13 of 1988, 125 of 1992, and 38 of 1997.

<sup>100</sup> Northern Office Micro Computers (Pty) Ltd & others v Rosenstein 1981 (4) SA 123 (C) at 129.

The ambit of “Artistic works” has been defined to mean:

“irrespective of the artistic quality thereof –

- (a) paintings, sculptures, drawings, engravings and photographs;”<sup>101</sup>

“Cinematograph films” is defined as “any fixation or storage by any means whatsoever on film or any other material of data, signals or by a sequence of images capable, when used in conjunction with any mechanical electronic or other device, of being seen as a moving picture...”<sup>102</sup>

R.M.S. *Titanic*'s various live and recorded broadcasts would also be covered in South African copyright law under “Sound and Television Broadcasts”.

Section 1(1) of the Act states that:

“Broadcast, when used as a noun, means a telecommunications service of transmissions consisting of sounds, images, signs or signals which –

- (a) takes place by means of electromagnetic waves of frequencies of lower than 3000 Ghz transmitted in space without an artificial conductor; and
- (b) is intended for reception by the public or sections of the public, and includes the emitting programme-carrying signals to a satellite, and, when used as a verb, shall be construed accordingly.”

The protection accorded under the 1978 Act is so wide as to include the contents of the work while they are being transmitted “through the ether from a satellite”<sup>103</sup> in the form of work the Act classifies as “programme-carrying signals”, with “programmed” being defined as “a body of live or recorded material consisting of images or sounds or both, embodied in a signal.”<sup>104</sup>

<sup>101</sup> Section 1(1) Copyright Act 1978.

<sup>102</sup> *Ibid.*

<sup>103</sup> O.H. Dean, Handbook of South African Copyright Law, p. 1-12, Juta & CO, Ltd 1987.

<sup>104</sup> *Op cit.* at section 1(1).

It has been noted that “the definition of cinematograph film is very wide in its scope and includes conventional celluloid films as well as video tapes, laser discs and compact discs.”<sup>105</sup>

The essence of copyright is “*the right to do or authorize others to do, or prevent others from doing, the acts which are designated in respect of each of the different types or categories of works which can be the subject of copyright, as the monopoly of the copyright owner.*”<sup>106</sup>

## II. The Law of Trade Marks

Note that the South African and English spelling of ‘trade mark’ differs from the American way of spelling.

The relevant statute governing the law of trade marks in South Africa is the Trade Marks Act No. 194 of 1993.<sup>107</sup> Section 2(1) of the Act defines a ‘mark’ as:

“any sign capable of being represented graphically, including a device, name, signature, word, letter, numeral, shape, configuration, pattern, ornamentation, colour or container for goods or any combination of the aforementioned”

A device is defined under Section 2(1) as “any visual representation or illustration capable of being reproduced upon a surface, whether by printing, embossing or by any other means.”

<sup>105</sup> Dean, *op. cit.* at p. 1-11.

<sup>106</sup> *Ibid.*, at p. 1-33. Emphasis added.

<sup>107</sup> Subsequently amended by the Intellectual Property Laws Amendment Act No. 38 of 1997.

A trade mark is “a mark used or proposed to be used by a person in relation to goods or services for the purpose of distinguishing the goods or services in relation to which the mark is used or proposed to be used from the same kind of goods or services connected in the course of trade with any other person.”<sup>108</sup>

Infringement of the trade mark’s owner’s rights occurs when the mark is used without the owner’s consent.<sup>109</sup>

The owner of an infringed trade mark has a wide variety of remedies under the Act. Under Sections 35(3)(a) to (c), the aggrieved trade mark may resort to applying for an interdict, an order that the offending and illegitimate mark be removed from all materials and delivered up to the legitimate owner of the mark, damages, and, in lieu of damages, a royalty or license fee.

<sup>108</sup> *Ibid.*, Section 2(1)

<sup>109</sup> For a full list of infringing acts see sections 35(1)(a) to 35(1)(g) of the Trade Marks Act.

## CHAPTER FIVE: The Law of Intellectual Property in the United Kingdom

### I. The Law of Copyright

Governed by the Copyright, Designs and Patents Act 1988 (“CDPA”), which repealed the Copyright Act 1956, and also, for our present purposes, by the Broadcast Act 1990. The CDPA states that copyright exists for the following types of works: original literary, dramatic, musical or artistic works; and sound recordings, films, broadcasts or cable programmes.<sup>110</sup>

By ‘original’ the CDPA only requires that the work be made by the creator or author, and that it had not been copied from another person’s work, as “a mere copyist does not obtain copyright in his copy.”<sup>111</sup> The word ‘original’ refers to the *expression* of the idea or theory or thought, and not to the intangible ideas themselves.<sup>112</sup>

Section 4(1) CDPA defines artistic works to mean “a graphic work, photograph, sculpture or collage, irrespective of artistic quality.”

Films are defined as “a recording on any medium from which a moving image may by any means be produced”<sup>113</sup> and broadcasts as “a transmission by wireless telegraphy of visual images, sounds or other information which is capable of being lawfully received by the members of the public or is transmitted for the presentation to members of the public.”<sup>114</sup>

<sup>110</sup> CDPA section 1(1).

<sup>111</sup> Per Lord James in *Walter v. Lane* [1900] A.C. 539 at 554.

<sup>112</sup> *University of London Press Ltd. V. University Tutorial Press Ltd.* [1916] 2 Ch 601.

<sup>113</sup> CDPA section 5(1).

<sup>114</sup> CDPA section 6(1).

Therefore the photographs and film recordings made of the R.M.S. *Titanic* would *prima facie* be protected by the intellectual property laws of the United Kingdom. Attention must be drawn to the fact that, for example, should a tourist who has seen a particularly unusual and striking shot of the R.M.S. *Titanic* taken by RMST, then decide to take the same photograph himself, using the same lighting techniques, angles, exposures, composition, “he will have copyright in his photograph although the idea of taking the photograph was derived from his having seen the first photograph.”<sup>115</sup> It could therefore be contended that should a case with similar facts arise in the United Kingdom, the court, in deciding to grant the exclusive rights of photography to the salvor, would be pragmatically correct in its approach, protecting the interests of the salvor in prohibiting anyone else from approaching the wreck site.

Prima facie, copyright which subsists in the United States of America is also protected in South Africa and the United Kingdom, as the three countries are signatories of the Berne Convention. We have also seen that the requirements and principles for the subsistence of copyright are almost completely similar between these three nations, and therefore, the subsistence of copyright in one country, will, it is argued, also mean its existence in the other two countries.

## II. The Law of Trade Marks

Section 1 of The Trade Marks Act 1994 defines a “trade mark” as:

“any sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.”

<sup>115</sup> Copinger and Skone James on Copyright, Sweet & Maxwell, London 1991, §3-31.

A trade mark, unlike copyright, has to be registered. Section 2 of the Act provides that a registered trade mark is a property right and the proprietor of the registered trade mark has rights and remedies under the Act. Registration can be in various and multiple classes of goods and services, according to Schedules 1, 2 and 3 of the Trade Marks Rules 2000, the categories of which are uniform for almost all countries.

Infringements of the rights emanating from a registered trade mark occur when

“A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.”<sup>116</sup>

A trade mark registered in one country must also be registered in another country in which the owner of the mark wishes to send or manufacture or market his goods and set up his services. In cases of infringement the Registrar of Trade Marks and the courts of a country often do look to see if the infringed mark has been registered by the true owner in other territories, but this in itself is usually not sufficient to have the case decided in the true mark owner's favour.

<sup>116</sup> Section 10(1) Trade Marks Act 1994.

## CHAPTER SIX: The Intellectual Property Issues

### I. The Berne Convention For The Protection of Literary and Artistic Works

The Berne Convention, which came into effect in 1887, and was subsequently revised by the Paris Act of 1971, aims to grant protection to the works of authors through three fundamental principles:

- (a) national treatment;
- (b) convention rights; and
- (c) conferment of copyright without any formalities

The principle of national treatment obliges a Berne Union country to grant the same copyright protection to the nationals or residents of other Berne Union countries it offers to its own citizens. Article 5(1) states that:

“Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.”

And Article 5(3) further states that:

“Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.”

South Africa became a party to it in 1928, and a party to the Paris Treaty in 1975; the United Kingdom in 1887, and signed the Paris Treaty in 1990, while the United States of America signed the Paris Treaty in March 1989<sup>117</sup> and also enacted the Berne Convention Implementation Act of 1988.

<sup>117</sup> See [www.wipo.org](http://www.wipo.org)

## II The Agreement on Trade Related Aspects of Intellectual Property Law (TRIPS)

TRIPS, similarly with the Berne Convention, requires that its member countries make provisions for the application of national treatment for protecting the intellectual properties of foreigners. “In dealing with the issue of enforcement of intellectual property rights, [TRIPS] prescribes civil and administrative procedures and remedies, special requirements related to border measures, and criminal procedures.”<sup>118</sup>

The TRIPS Agreement is administered by the World Trade Organisation, and it ensures the compliance with TRIPS’s provisions. South Africa, the United States of America, and the United Kingdom are all members. The main obligation of the members is to “provide a level of copyright protection commensurate with the standards laid down in the TRIPS Agreement and to afford such protection to works emanating from member countries of the WTO in the same manner and to the same extent as it protects South African works.”<sup>119</sup>

## III The Importance of the Intellectual Property Rights to RMST

The application of the protection of intellectual property rights is reciprocal among the member-nations of the Berne Convention and TRIPS. As we have seen, these intellectual property rights are extensive, and therefore the scope of protection granted is almost universal.

The extensiveness of the varieties of intellectual property which may qualify for legal protection show how crucial it is for a party to determine the extent of his rights. RMST *prima facie* by the ruling of the courts has the sole and exclusive right to reproduce the images of the R.M.S. *Titanic* on almost any product or merchandise. For example, should a book on the R.M.S. *Titanic* be written after the decisions, the publisher would have to obtain a license or permission from RMST to feature any photographs of the vessel in the book.

<sup>118</sup> Dean, *op. cit.* at p. 1-93.

<sup>119</sup> *Ibid.*, p. 1-93.

RMST, by virtue of the expansive court orders, can now market the image of the R.M.S. *Titanic* and obtain great monetary rewards by virtue of being the sole rights holder. Eventually RMST could become linked with the image of the vessel in the public's mind, thus laying down the sea lanes for obtaining a trade mark in the vessel's images. "As the exclusive owner of access rights to the wreck, such trademark rights could potentially become just as powerful as ownership of the wreck itself."<sup>120</sup>

In relation to trademarks,

"Theoretically, a company could obtain a trademark on an image of a particular historical artifact if the company began selling a product with an image of that artifact on the label and it could be shown that customers associated that particular artifact with the company's name and reputation. For example, an insurance company could trademark a particular image of the Statue of Liberty as its logo, such as an artist's particular depiction of it in drawing. But it could not trademark the Statute of Liberty itself; such a historical artifact would clearly not qualify as a 'word, name, symbol, or device' adopted by the company and used to distinguish a product in commerce."<sup>121</sup>

Therefore, it must be noted that the trade mark would only cover a graphic representation of the R.M. S. *Titanic* or the stylised rendition of the word "Titanic" as a "word, name, symbol, or device". The actual vessel itself, of course, may not be trade marked.

Since RMST would be the only party allowed to have direct access to the wreck, it would have a monopoly in producing a variety of merchandise all bearing the image of the R.M.S. *Titanic* in some form or other: postcards, books, videos, key-chains, T-shirts, mugs, caps, aprons, nautical tools. The list is limited only by crass commercialism. "Therefore RMST could potentially make a profit on its endeavour that would vastly surpass its expenses in salvaging the wreck."<sup>122</sup>

<sup>120</sup> Rachel Lin, *op. cit.* at p. 502.

<sup>121</sup> *Op. cit.* at p. 490.

<sup>122</sup> *Op. cit.* at p. 503.

It must be noted that the prohibition of taking photographs of well-known monuments and structures is not limited to this instance. In the case of the Eiffel Tower in France, the warning on its official website's Frequently Asked Questions page <sup>123</sup> states that:

“There are no restrictions on publishing a picture of the Tower by day. Photos taken at night when the lights are aglow are subjected to copyright laws, and fees for the right to publish must be paid to the SNTE.”

Another example can be taken from the policy of the management of the Victoria and Alfred Waterfront Mall in Cape Town, South Africa, which prohibits professional photographers from taking photos of their buildings and environment, unless a permit has been obtained from its offices beforehand. <sup>124</sup>

#### IV. The Use Of Photographic Images Of Public Figures And Institutions

A hypothetical situation closer to the issues at hand is advanced herein: “Copyright is an intangible property right that provides the owner with the ability to exploit commercially the reproduction of his or her work by preventing others from doing the same.” <sup>125</sup>

What happens then when the photograph is of a public figure or a well-known famous building or painting or structure, as in this instance?

In a United States case, it was decided that copyright may not subsist in colour transparencies of paintings which in themselves are in the public domain. This is due to the fact that photographic copies of public domain works of art may not be copyrightable in the United States as they lack the quality of originality. <sup>126</sup>

<sup>123</sup> [www.tour-eiffel.fr](http://www.tour-eiffel.fr).

<sup>124</sup> Based on the experiences of members of the Cape Town Photographic Society

<sup>125</sup> Ronan Deazley, “Collecting Photographs, Copyrights, and Cash”, [2001] EIPR, Issue 12, Sweet & Maxwell Limited.

<sup>126</sup> *Bridgeman Art Library, Ltd. V. Corel Corp.*, (36 F. Supp. 2d 191 (SDNY 1999))

Judge Niemeyer in his judgment in the case deciding Haver's appeal (see below) noted in an example he provided 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)."<sup>127</sup>

It is arguable that the R.M.S. *Titanic* lies in the public domain, in so far as any member of the public is able to, without the assistance of the salvors, enter the said domain. Yet the court had clearly marked out the territory of RMST, putting it off limits to other people. By so doing the court had in essence granted copyright to RMST, even though they are not the creators of the work.

Furthermore, in the United States, the 1990 Architectural Works Copyright Protection Act (AWCPA) allows a creator of architectural designs to protect his plans not only under the Copyright Act as a "graphic" or "pictorial" work, but also as an "architectural work" under the AWCPA.

"Architectural work" has been defined under the AWCPA as "[T]he design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings...."

However, the AWCPA, which complements the Copyright Act, does not allow the copyright holder the right to prevent "the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place."<sup>128</sup>

A similar argument can thus be extended to cover the R.M.S. *Titanic* and other wrecks lying in the public domain.

English law is also clear on this matter. Laddie in his book notes:<sup>129</sup>

<sup>127</sup> Footnote no. 5 in the judgment.

<sup>128</sup> Section 120(a).

<sup>129</sup> Hugh Laddie, Peter Prescott, & Mary Vitoria, *The Modern Law of Copyright and Design*, s. 3.56, at 238, 2<sup>nd</sup> Ed. 1995, Butterworths.

“It is obvious that although a man may get a copyright by taking a photograph of some well-known object like the Westminster Abbey, he does not get a monopoly in representing Westminster Abbey as such, any more than an artist would who painted or drew that building.” Laddie also outlined three instances wherein copyright may subsist in a photography of an item in a public domain:

- 2) “First, there may be originality which does not depend on creation of the scene or object to be photographed or anything remarkable about its capture, and which resides in such specialities as angle of shot, light and shade, exposure, effects achieved by means of filters, developing techniques etc...in such manner does one photograph of Westminster Abbey differ from one another...
- 3) “Secondly, there may be a creation of the scene or subject to be photographed...a montage...[or] a more common instance would be arrangement or posing of a group...”
- 4) “Thirdly, a person may create a worthwhile photography by being at the right place at the right time. Here his merit consists of capturing and recording a scene unlikely to recur...”<sup>130</sup>

An example was given of the National Gallery in London, wherein visitors are informed that the paintings housed belong to the public. But should any of the visitors wish to photograph any of these “publicly owned, public domain works, one can only do so with the Gallery’s permission, having paid a licensing fee, which varies depending on the nature and extent of the proposed use...”<sup>131</sup>

Furthermore, the Gallery had its own business of supplying colour transparencies and photographs of all the paintings, which could be obtained for a fee.

<sup>130</sup> *Ibid.*

<sup>131</sup> Ronan Deazley, ‘Photographing Paintings in the Public Domain: A Response to Garnett’ [2001] E.I.P.R. issue 4, Sweet & Maxwell, p. 18.

“That the Gallery can continue to regulate, for financial gain, the reproduction of public domain works of art rests on the fact that they allow the licensee access, not to the actual painting, but to a photograph or transparency of the painting.”<sup>132</sup>

A similar case therefore exists with the court's decision in granting the various orders in favour of RMST. On closer inspection it would appear that the basis of the rights granted by the district courts to RMST originate not from the realms of intellectual property law, but more from the nature of prohibitive injunctions. That the end results seem to give rise to a situation where intellectual property rights are involved can be said to be misleading.

<sup>132</sup> *Ibid.*

## CHAPTER SEVEN: Haver's Appeal

### I. The Court's Decision

#### Haver's Appeal And The Court's Decision in R.M.S. Titanic Inc., Successor in Interests to Titanic Ventures, Limited Partnership v. Christopher Haver; Deep Ocean Expeditions<sup>133</sup>

The District Court's Order of 13 August gave RMST the right to prohibit visits to the wreck site and unauthorized photography of the said site. The District Court was of the view that this was a case of a salvage of a "historic salvage" and therefore it was "desirable to keep these artefacts together for public display and, therefore, traditional salvage rights must be expanded for those who properly take on responsibilities of historic preservation."<sup>134</sup>

Haver and Doe, the appellants, claimed that there exists no theory which authorizes "an injunction prohibiting persons from viewing and photographing a wreck when a salvor is not actively conducting salvage operations"

The Appeal Court in its decision ran extensively through the history of the law of salvage, and confirmed the district court's decision in prohibiting Haver from disturbing the site of the salvage operations. However, it then raised the following questions for consideration:<sup>135</sup>

<sup>133</sup> (1999) (U.S.C.A. 4<sup>th</sup> Cir.) The judgment of the case was taken off from the internet at: [www.law.emory.edu/4circuit/mar99/981934.p.html](http://www.law.emory.edu/4circuit/mar99/981934.p.html). The pagination is therefore based on the one provided when printing out the document, and the document runs from page 1–51.

<sup>134</sup> RMS Titanic Inc. v. The Wrecked and Abandoned Vessel, 1996 U.S. Dist. Lexis 22227.

<sup>135</sup> R.M.S. Titanic Inc., successor in interests to Titanic Ventures, limited partnership v. Christopher Haver; Deep Ocean Expeditions, p. 46.

- 1) did salvage rights encompass the right to prevent others from visiting, observing, and photographing the wreck; and
- 2) whether, in enjoining others from interfering with the ongoing salvage operations, the district court could exclude others from an area within a 10-mile radius

The Appeal Court thought that the District Court's expansion of traditional salvage rights to be "creative and novel" but was of the view that it was ultimately erroneous, based on the following reasons:

- a) there did not exist a case in the United States or in the *jus gentium* which has widened the rights of salvors to include such a right.
- b) The Appeal Court was not satisfied that it would be proper to enlarge the law of salvage to accord salvors exclusive rights to include rights in recordings of imagery of property which has yet to be taken off from the ocean floor.

The Appeal Court went on to explicate that:

"The underlying policy of salvage law is to encourage the voluntary assistance to ships and their cargo in distress. And the salvage service is useful to owners only when it effects a saving of the property at risk. The law does not include the notion that the salvor can use the property being salvaged for a commercial use to compensate the salvor when the property saved might have inadequate value. Traditionally, the inducement for salvage service is limited to the court's award of compensation and reward, which may be enforced *in personam* against the owner without regard to the property saved, or *in rem* against the property saved. To award, in the name of salvage service, the exclusive right to photograph a shipwreck, would, we believe, also tend to convert what was designed as a salvage operation on behalf of the owners into an operation serving the salvors. The incentives would run counter to the purpose of salvage. 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 public admission to go view it."<sup>136</sup>

<sup>136</sup> *Ibid.*, at pp. 46-47

The Appeal Court then proceeded to state that:

“...if we were now to recognize, as part of the salvage law, the right to exclude others from viewing and photographing a shipwreck in international waters, we might so alter the law of salvage as to risk its uniformity and international comity, putting at risk the benefits that all nations enjoy in a well-understood and consistently applied body of law. This risk is heightened when it is understood that such an expansion of salvage rights might not encourage salvage and might, additionally, discourage free movement and navigation in international waters.”<sup>137</sup>

Ultimately the Appeal Court reversed the district Court’s order “insofar as they purport to prohibit the visiting, viewing, searching, surveying, photographing, and obtaining images of the wreck or the wreck site, as long as these activities do not constitute any salvage effort or interfere with RMST’s salvage rights.”<sup>138</sup>

R.M.S. Titanic Inc. subsequently petitioned the United States Supreme Court for a Writ of Certiorari, but this was refused.<sup>139</sup>

## II. Was the Decision a Correct One?

The Appeal Court’s decision seemed to echo that of Professor Nafziger’s comments on the second R.M.S. *Titanic* case, which involved John A. Joslyn’s attempt to photograph the wreck.<sup>140</sup> He noted there that:

“The extension of ordinary salvage rights to preclude any photography of the wreck and to vest in the salvor exclusive rights to sell photographs and license photography of the Titanic is certainly questionable. It is hard to accept the determination that photography is within the salvor’s bundle of exclusive rights to rescue a vessel in marine peril. Indeed, photography might serve in some instances as a substitute for rescue.”

<sup>137</sup> *Ibid.*, at p. 49.

<sup>138</sup> *Ibid.*, at p. 51.

<sup>139</sup> R.M.S. Titanic Inc. v. Haver, 528 U.S. 825 (1999).

<sup>140</sup> James A.R. Nafziger, “*The Titanic Revisited*” . Journal of Maritime Law & Commerce, Vol. 30, No.2, April 1999, pg. 311.

The Appeal Court's finding that RMST's exclusive prerogative to take photographs of the R.M.S. *Titanic* due to its position as a salvor in possession was erroneously granted has also resulted in greater consistency and uniformity with the accepted view that a property right would not prohibit the photographing and viewing of the property when it is still located in a public arena.

The decision is also consistent with the R.M.S. Titanic Maritime Memorial Act of 1986, wherein the provision of the Act specifically stated that “The United States does not assert sovereignty, or sovereign or exclusive rights or jurisdiction over, or the ownership of, any marine area or the R.M.S. Titanic.”

The Appeal Court's ruling that RMST did not have the exclusive right to photograph the vessel based on its position as the salvor in possession means that these particular intellectual property rights would not be part and parcel of the salvor's rights. Which is of course completely in line with the fact that a property right over an item would not prohibit the photographing of it so long as the item is located in a public area. This decision has effectively put a halt to the ever-widening circle of intellectual property rights.

On the other hand, it is argued that when the Appeal Court said that to grant salvors intellectual property rights “might so alter the law of salvage as to risk its uniformity and international comity, putting at risk the benefits that all nations enjoy in a well-understood and consistently applied body of law....” the court seemed to have ignored the fact that these IP rights are also a ‘well-understood and consistently applied body of law’ enjoying “uniformity and international comity” as well. If such IP rights had been applied, the result would not have provoked a tsunami of confusion or outrage, since such IP rights, as we have seen, are universally acknowledged and internationally reciprocated.

### III. Would the Application of the Law of Finds Have Provided a Different Result?

We have discussed in an earlier section above the distinction between the law of salvage and the law of finds. Would the end result have occurred differently had the court applied the law of finds instead of the law of salvage, since the application of the law of finds *may* have arrived at the conclusion that ownership and title in the R.M.S. *Titanic* resided in the hands of the salvors?

The Appeal Court did not think so, since it was of the opinion that:

“Even if we were to assume that the salvors had full title to the yet to be recovered shipwreck, as would be the case if the law of finds were applied, it is doubtful that such title to the 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.”<sup>141</sup>

#### IV. Arguments Against The Court’s Decision

With regards to the Court’s statement that there was no precedent for the enlargement of traditional salvors’ rights to justify the order granted to RMST, the following arguments can be advanced.

It must be noted that the law of salvage has not remained static. In fact, the US courts in deciding whether or not to grant an award for salvage, have in the recent past taken into account the successful recovery of objects of archaeological and historical importance, as well as the question of whether recognized archaeological principles have been followed by the salvors.<sup>142</sup>

<sup>141</sup> *Op. cit* at p. 48.

<sup>142</sup> *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 1992 AMC 2705, 2728 (E.D. Va. 1994); 1995 AMC 1985, 2001, 56 F.3d 556, 569, 573 (4<sup>th</sup> Cir. 1995); *MDM Salvage, Inc.*, 1987 AMC 537, 631 F.Supp 308 (S.D. Fla. 1986); *Klein v. Unidentified Vessel*, 1985 AMC 2970, 2975 (11<sup>th</sup> Cir.); *RMS Titanic Inc. v. Wreck*, 1996 AMC 2481, 2493 (E.D. Va. 1996).

It was also remarked that “[t]raditional salvage law, however, is not a rigid system of law. It is capable of adapting to new situations; and certainly in the US, Federal Admiralty Courts have begun to take into account preservation and historic values when applying the traditional admiralty law of salvage.”<sup>143</sup>

In the example of the case of *Cobb Coin Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*,<sup>144</sup> “the court suggested that Federal Admiralty principles, as applied to the law of salvage of historic shipwrecks, could be fashioned to safeguard the artefacts and invaluable archaeological information associated with the shipwreck, and the public’s interests in the shipwreck could be accommodated through a proper award of a portion of the artefacts to the state.”

In fact, the court also stated that, “in order to state a claim for a salvage award on an ancient vessel of historical and archaeological significance it is an essential element that the salvor document to the Admiralty Court’s satisfaction that it has preserved the archaeological provenance of the shipwreck.”

And in *MDM Salvage*<sup>145</sup> the court held that “Archaeological preservation, on-site photography and the marking of sites are particularly important...as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought.”<sup>146</sup>

<sup>143</sup> C.J.S. Forrest, “Salvage Law and the Wreck of the Titanic” [2000] LMCLQ Part 1 February, p. 10.

<sup>144</sup> (1982) 549 F.Supp. 540 (S.D. Fla), 599), the example given by Forrest.

<sup>145</sup> *Op. cit.*

<sup>146</sup> Forrest, *op. cit.*

Such policies were also followed by the Federal District Court for the Southern District of New York in the case of *Alexander Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic et al.*<sup>147</sup> In this instance, the Plaintiff, Lindsay, was seeking damages on the basis of his share of the revenues generated by the salvage operations of the R.M.S. *Titanic*, arguing, *inter alia*, copyright infringement by the defendant, RMST.

In 1994, after obtaining the rights to salvage the R.M.S. *Titanic*, RMST contracted Lindsay to direct and film a documentary, entitled “Explorers of the Titanic.” Subsequently, Lindsay was asked to develop another film, and to join RMST to raise money for other aspects of the salvage operations.

Lindsay had created some pre-production artworks, and also directed, produced and acted as the cinematographer, carrying out underwater videotaping of the wreck site. Lindsay also alleged that he carried out a host of other filmic duties.

The court recognised the fact that photographs taken of the R.M.S. *Titanic* could be considered artefacts. It said:

“These essential items promote the policy interest of shipwreck preservation that undergirds salvage law, albeit in a non-conventional fashion. Were the law otherwise, a significant reduction in the video and photographic documentation of wreck sites might occur, given the fact that a monetary claim for services performed which could not be satisfied by a legally enforceable award against the ship. Put another way, as technology advances, the law should be accommodating. Today, as we stand on the threshold of the next millennium, technology advances permit levels of video and photographic documentation of wreck sites unprecedented in maritime history. Such efforts should be encouraged – not chilled.”<sup>148</sup>

<sup>147</sup> 1999 AMC 69 U.S. D.C.S.N.Y. 73.

<sup>148</sup> *Op. cit.* at pg. 73.

It was also pointed out that “the awarding of the exclusive rights to RMST to photograph the wreck of the *Titanic* could be justified by the public policy of providing an incentive to those who would responsibly make available to the public information and scientific data about shipwrecks that would otherwise have been lost to the sea.”<sup>149</sup>

Furthermore, the following was also considered:

“The Appeal Court’s finding will undoubtedly undermine this development of salvage law, with the result that every ‘salvor’, including those undertaking archaeological excavation in international waters, will be forced to recover artefacts in order to raise the funds to finance the excavation. This policy would favour excavation to the detriment of conservation or investigation *in situ*. RMST, and other private organizations undertaking the recovery of historical wrecks, will no longer be able to rely on the sale of exclusive media rights to finance sound and time-consuming archaeological excavation and the conservation of recovered artefacts. The only form of financing that will be available will be the sale on the open market of these artefacts...”<sup>150</sup>

<sup>149</sup> Forrest, *op. cit.*, at p.11.

<sup>150</sup> *Ibid.*

## CHAPTER EIGHT: Recommendations and Suggestions

### I. Contractual Clauses

The history of the law of salvage is one of growing to adapt to changing times. “Indeed, from 1910 (the year of the International Convention of Brussels) up to the present, salvage and assistance had undergone considerable and continuous modifications, perhaps more so than any other maritime law...”<sup>151</sup>

The most significant changes were due primarily to the growing use of oil tankers and their susceptibility to leaking and sinking. The examples of the *Amoco Cadiz* and the *Torrey Canyon* illustrate the seriousness of the situation, bringing to IMCO’s attention the need for a study to be made for a situation for which there was no legislation or any effective laws. If something like SCOPIC could be annexed to a standard salvage agreement, it would be in the interests of the salvage industry to generate a similar agreement regulating the placement of intellectual property rights, especially in instances when public interest in the operation is intense. For instance, in the case of the salvaging of the Russian submarine, *Kursk*, the Dutch contractors Mammoet-Smit could have inserted a clause stipulating that all media rights to accrue to them as part of their fees. Such a clause would not have gone against salvage principles.

In fact, the entire legal foundation of the law of salvage is underpinned by an unprecedented principle: a person who voluntarily renders assistance to a distressed vessel is granted a reward. This is in starkly dichotomous to general legal principles. However, today, this is universally accepted and given force of law by domestic laws and international conventions such as The Brussels Salvage Convention 1910 and the London Salvage Convention 1989.

It has also been said of the London Salvage Convention that it “represents a decisive and innovatory turning point in international salvage law, introducing once and for all the special consideration of the protection of the environment as an element in evaluating the salvage and the *quantum meruit* of the salvors.”<sup>152</sup>

<sup>151</sup> Enrico Vincenzini, *International Law of Salvage*, Lloyd’s of London Press 1992, p.3.

<sup>152</sup> *Ibid.*, at p. 141.

If this can be done, then similar innovations can be considered in the case of wrecks and the expansion of salvors' awards to include Intellectual Property rights.

## II. Licensing of Rights

Article 6(1) of the London Salvage Convention 1989 states that: "This Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly or by implication."

Thus, it is submitted that one of the ways in which to circumvent the problem of media and intellectual property rights is to insert a clause in a salvage contract specifically identifying the scope and limits of the rights, in which party such rights reside, as well as to which party the exclusive rights would be licensed. For example, such a clause (or a series of clauses) could be added to the commonly employed Lloyd's Standard Form of Salvage Agreement 2000.

Under Section 95(1) of the United Kingdom's Copyright, Designs and Patents Act 1988, an 'exclusive license' is defined as:

"a license in writing signed by or on behalf of the copyright owner authorising the licensee to the exclusion of all other persons, including the person granting the license, to exercise a right which would otherwise be exercisable exclusively by the copyright owner."

Section 106 of the United States of America Code 1976 also allows for the copyright owner to authorise the performance of any its exclusive rights to another.

Under Section 1(1) of the South African Copyright Act 98 of 1978, an "exclusive license" means "a license authorizing a licensee, to the exclusion of all other persons, including the grantor of the license, to exercise a right which by virtue of this Act would, apart from the license, be exercisable exclusively by the owner of the copyright; and 'exclusive license' shall be construed accordingly." Such a license, to be exclusive, must be formalised in writing.<sup>153</sup>

<sup>153</sup> Section 22(3).

The parties to the salvage contract could adopt the wording and phraseology used by reference to the standard contracts of licenses.

Licenses are usually a form of written agreement which is subject to the law of contract. “While there is no set of standard contract provisions that necessarily applies to all intellectual property licenses, several categories of provisions, in addition to the grant of license itself, are often found.”<sup>154</sup> What the parties should pay particular heed to are the following elements:

- Royalty payments: the amount and the terms of payment.
- The standards and the scope of performance concerning the rights licensed.
- The duration of license, and the conditions of termination.
- Choice of law clause.

### III. Rationalization For RMST’s Expansive Rights

Their efforts are almost akin to underwater archaeology, and therefore considerations based on that must be taken into account, in that the wreck should be seen also as an ‘underwater cultural heritage’ (UCH)

- a) UCHs are often fragile and therefore require extended, expensive and complicated techniques in dealing with them;
- b) The wreck and its contents are not only valuable in monetary terms, but also priceless in terms of history. “A scientifically excavated complete collection will not only supply archaeological evidence, but may offer as well aesthetic rewards, economic gain...”<sup>155</sup>

<sup>154</sup> Neil J. Wilkof, *Trade Mark Licensing*, Sweet & Maxwell, London 1995, p. 5.

<sup>155</sup> Craig J.S. Forrest, “*Has the Application of Salvage Law to Underwater Cultural Heritage become a thing of the past?*” – *Journal of Maritime Law and Commerce*, Volume 34, Number 2, April 2003. p. 309.

- c) The complex equipment used for deep-sea salvage operations are adapted from equipment utilised in activities such as oil exploration, and are thus prohibitively expensive and out of the range of most governments.

It has been said that “*They that go down to the sea in ships, that do business in great waters; these see the works of the Lord, and his wonders in the deep.*”<sup>156</sup> Due reverence should be given to RMST’s efforts in salvaging the R.M.S. *Titanic*. (The company has spent over US\$20 million in their operations.) This is especially more so when the vessel did not contain sufficient treasures to warrant the expense and effort made in recovering it, aside from cultural and historical concerns.

To put things in perspective, Christie’s raised US\$16 million from the sale of 3,786 lots of Chinese porcelain and gold ingots from the “Nanking Cargo” carried by the Dutch vessel *Geldermahlsen*, which sunk in 1752 in the South China Seas. In 1992, porcelain raised from a wreck off the coast of Vietnam was sold for almost US\$7.2 million. Where a wreck lies somnolent in the bed of the ocean, its knowledge and contents would never be shared, unless there was sufficient financial inducements for salvors to disturb its sleep.<sup>157</sup>

<sup>156</sup> The Bible, King James Version, Psalm 103:23-24.

<sup>157</sup> Sue Williams, *Underwater Heritage, A Treasure Trove to Protect*, UNESCO Sources No. 87, February 1997, p.7

## CHAPTER NINE: Conclusion

When the United States Court of Appeals for the Fourth Circuit reversed the district court's expansion of salvage rights originally granted to RMST, it kept silent on the future possibility of the court giving explicit intellectual property rights to a salvor. Granted, the Court of Appeals was of the firm view that the rights of salvage would not be enlarged to such an extent as to include intellectual property rights.

However, the question has been raised as to “whether such rights can still be granted under an intellectual property theory...”<sup>158</sup> This is because the rights granted by the district court were, in essence, the widening of salvors' rights to create a raft of pseudo intellectual property rights. At the moment, no court in the United States, the United Kingdom or South Africa has yet to grant a salvor in clear and distinct terms protection for copyright and trade marks arising from the exclusive rights to take and market photographs of any wreck. As Bederman and Prowda noted, RMST “disclaimed any intellectual property basis for its exclusive right to control media access, preferring to rely on an extension of traditional salvage law principles.”<sup>159</sup>

Therefore, as the Court of Appeals' decision was founded upon and limited to salvage principles, could there be a possibility that a party in future may plead for the same rights, but in an action founded on the principles of intellectual property laws?

<sup>158</sup> Lin, *op. cit.* at p. 505.

<sup>159</sup> Lin, *op. cit.* at p. 506. Lin quoted their viewpoints.

It must always be borne in mind that RMST's intellectual property rights resided *only* in the photographs and images and video and sonic recordings they created. RMST has no such rights over the R.M.S. *Titanic* itself, as they did not own the vessel nor the blueprints for its design. Therefore, barring an injunction prohibiting other parties from approaching the wreck site, any other person would be well within his rights to take photographic images and video recordings of the vessel. Such a person would then have copyright in the images which he himself had created. Anyone using them without his license would then be infringing his rights.

Will the cases of the R.M.S. *Titanic* “forever be remembered as a bizarre ruling tailored to fit the unique circumstances of a truly unusual ship, or the first in a new trend of broadening admiralty rights governing salvage of shipwrecks”?<sup>160</sup>

Although it seems doubtful that the exact combination of facts would come into alignment again in the future, bringing with them the convergence of two very dissimilar tidal patterns of law, namely salvage and intellectual property, the cases involving the venerable R.M.S. *Titanic* have raised the awareness of the potential for media exploitation of salvage operations, particularly in high-profile cases. Furthermore, the advancements made in salvage technology have made it more and more possible for salvors to target wrecks which were once thought to be beyond salvage. Such technology is highly expensive, and innovative ways and innovative legal arguments will be sought to finance these operations.

Ultimately, a balance between the rights of salvors and intellectual property rights can be achieved, since these two fields of laws were never in opposition. The rights granted to RMST were not truly intellectual property law rights if one analysed them thoroughly and rationally. Such rights, however, *can* and should form part of the modern-day salvors' award, in the on-going effort to upgrade and improve their lot, as well as the interests of the public.

<sup>160</sup> Lin, *op. cit.* at p. 506.

When properly created (in accordance with the relevant requirements of the law) and licensed, these rights — copyright and trade marks chiefly — can be easily added into the arsenal of rights granted to salvors, for all the reasons already given. The avidity of interest in ships and wrecks will always propel artists and authors to capture and record the tragedy of a ship succumbing to the waves, and such interest is only surpassed by the passion engendered by its recovery. Salvage of ships, especially of wrecks, more than any other areas in maritime law, is the one arena where tragedy, triumph, art, commerce and human greed all converge: all the elements for a good tale, to be protected by the laws of intellectual property.

“And make your chronicle as rich with praise  
As is the owse and bottom of the sea  
With sunken wrack and sunless treasuries.”<sup>161</sup>

<sup>161</sup> William Shakespeare, King Henry V, Act I.ii.163, Penguin Books.