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SMART SALVAGE: EXTENDING TRADITIONAL MARITIME LAW TO INCLUDE INTELLECTUAL PROPERTY RIGHTS IN HISTORIC SHIPWRECKS

Justin S. Stern*

INTRODUCTION

Led by visions of sunken treasure, three salvors—an ocean engineer, a journalist, and a geologist—joined together in 1985 to form the Columbus-America Discovery Group (“Columbus Group”).¹ Their quest was to locate and recover the S.S. Central America, an American steamship that sank off the South Carolina coast during a storm in 1857 with close to three tons of gold bullion on board.² To begin operations, the Columbus Group initially raised $200,000 from investors for seed money.³ Using historical news accounts and contemporary meteorological data, the Columbus Group created a computer analysis that charted a 1400 square-mile area of the Atlantic Ocean in which they might find the wreck.⁴ In the spring of 1986, armed with another $1.4 million in investors’ capital, the Columbus Group launched a massive high-tech search expedition.⁵

The salvors used wide-swath sonar technology that scanned the ocean floor and relayed sonic images to computers aboard the Columbus Group’s research boat.⁶ The Columbus Group imaged the 1400 square-mile swath of seabed in forty days, and discovered a possible resting-place of the S.S. Central America within this area.⁷ The potential wreck site was located nearly a mile and a half below the water’s surface, however, and was subject to almost 4000 pounds-per-square-inch of pressure, temperatures of 38 degrees Fahrenheit, and complete darkness.⁸ Under these conditions, the salvors could not reach the vessel themselves. The Columbus Group instead

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* I would like to thank Fred and Rachel Stern for putting up with so much.
2. See id.
3. See id.
4. See id.
5. See id.
6. See id.
7. See id.
8. See id.

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deployed a 12,000-pound remote-operated robotic device named “Nemo” to search for and retrieve artifacts from the wreck.9

After two years of fruitless searching, the Columbus Group upgraded Nemo in the summer of 1988 and established a sonar grid for a more accurate measurement of the S.S. Central America wreck site.10 Only a few months later, while Nemo’s camera was scanning debris along the ocean floor, the robot’s sonar images suddenly revealed the “distinctive sidewheels” of the long lost ship.11 The Columbus Group had finally found its treasure, and the salvors began the painstaking process of raising the sunken wreck piece by piece. After 131 years of watery solitude, the S.S. Central America was returned to the realm of man.

The “rescue” of the S.S. Central America illustrates how rapid advances in nautical technology, used by persistent salvors and backed by considerable investor dollars, can reclaim a ship previously thought to be irrecoverable. The S.S. Central America is only one of a veritable fleet of ghost-ships that increasingly well-equipped salvors have uncovered.12 The pursuit and retrieval of these old shipwrecks have inspired the recent creation of a subset of the commercial salvage industry—historic salvage.

Salvage principles, as they developed over the centuries, could have anticipated neither the technological advances in locating deep-sea shipwrecks in international waters, nor the public’s interest in preserving the wrecks’ possible historical value. As a result, traditional application of salvage law in cases of historic salvage inadequately protects both the rights of the salvors and the archaeological integrity of the vessel.13 Accordingly, courts in admiralty hearing such cases have devised ways to expand the rights conferred under traditional salvage law in order to protect both the ships and salvors.14

9. See id.
10. See id. at 54.
12. See a limited list infra note 23.
14. See, e.g., Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992) (considering the salver’s efforts in preserving the archeological value of a shipwreck when determining a salvage award); Platoro, Inc. v. Unidentified Remains of a Vessel, 614 F.2d 1051, 1055 (5th Cir. 1980) (extending the application of salvage law to long sunken vessels); Marex Int’l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel, 952 F. Supp. 825, 830 (S.D. Ga. 1997) (granting salver title to all artifacts recovered from a shipwreck and issuing a preliminary injunction enjoining all others from interfering with ongoing salvage operations); R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 1996 A.M.C. 2497, 2499 (E.D. Va. 1996) (conveying to a salver an intellectual property
One of the most controversial of these expansions was instituted by a court in admiralty regarding perhaps the most infamous shipwreck ever—the R.M.S. Titanic. While the ill-fated ship had been active in the public's imagination since its sinking in 1912, the Titanic's wreck lay dormant on the ocean floor in international waters for seventy-three years until its discovery in 1985. Soon after being located, however, the Titanic was at the center of a legal battle between the salvor who had gained exclusive rights to salvage the wreck, and others who wanted access to the ship in order to photograph it. In 1996, the Eastern District Court of Virginia heard the controversy and devised a solution: it granted the Titanic's salvor exclusive rights to the images of the famed ship. This gave the salvor the option to exclude all potential photographers from diving onto and disturbing the wreck site. In effect, this decision re-formulated the concept of salvage to include intellectual property rights. Although immediately challenged and eventually overruled in part by the Fourth Circuit, the district court's decision may be the crest of a new wave in salvage law that expands the salvor's bundle of rights to include intellectual property rights.

This Note argues that the inclusion of exclusive imagery rights within the traditional grant of possessory rights to salvors is a proper and necessary expansion of salvage principles under maritime law for historic vessels found in international waters. Part I of this Note describes historic salvage and traditional salvage law, both in general and in the context of historic shipwrecks. It also examines relevant international agreements as possible influences on court-applied salvage law, and discusses recent historical shipwreck cases that have tested and expanded the limits of salvage law. Part II presents the Titanic case and analyzes the district court's invocation of exclusive photographic rights as part of a salvor's bundle of rights. Part III argues that these photographic privileges were correctly extended by the district court and that their grant is both legally justified under

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15. See R.M.S. Titanic, 1996 A.M.C. at 2498.
16. See id. at 2499.
17. See id.
18. See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970-71 (4th Cir. 1999) (affirming an injunction prohibiting other salvage operations and reversing a prohibition against others viewing, visiting, and photographing the wreck site), cert. denied, 120 S. Ct. 74 (1999).
19. This Note focuses primarily on shipwrecks found in international waters. Abandoned wrecks lying in United States territorial waters are subject to the Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 102 Stat. 432 (codified at 43 U.S.C. §§ 2101-2106 (1994)), which explicitly abrogates the maritime law of salvage, see id. § 2106, thus making any discussion of maritime salvage regarding historic shipwrecks found in United States waters moot. See infra note 151.
salvage law principles and consistent with public policy. This Note concludes that the expansion of traditional salvage law to include rights in intellectual property is necessary to preserve both the practice of historic salvage and the valuable shipwrecks themselves.

I. SALVAGE PRINCIPLES

The recent advent of the historic salvage industry calls for a reevaluation of established salvage law principles. Traditionally, there are two theories of law that United States admiralty courts may adopt in determining the existence and extent of a salvor's rights in shipwrecked property: the law of salvage and the law of finds. Additionally, the development of historic salvage has caused public concern for the archaeological protection of the wrecks, which has, in turn, inspired international preservationist agreements concerning historic artifacts. Based on this legal framework, courts in admiralty deciding cases involving ancient shipwrecks have modified and expanded traditional salvage law to accommodate historic salvage concerns.

This part first describes the industry of historic salvage and identifies its unique legal and practical context. It next outlines traditional salvage law, including both the law of salvage and the law of finds, and focuses on its application to historic shipwrecks. This part then discusses international agreements pertaining to historic salvage, and analyzes how they influence salvage law. Finally, it concludes with a survey of several salvage cases in which the courts expand traditional salvage law in light of the concerns accompanying historic salvors and their shipwrecks.

A. Historic Salvage

Historic salvage can be identified by the types of vessels historic salvors seek and by the purpose behind their capture. Put simply, historic salvage is the pursuit and recovery of shipwrecks whose value is partially, if not entirely, derived from their historic stature. In a practical sense, this places historic salvage in a distinct category,

21. See infra Part I.C.
22. See infra Part I.D.
separate from traditional commercial salvage. Commercial salvors attempt to save ships and cargo from present or impending danger,\textsuperscript{24} for example where a ship is stranded,\textsuperscript{25} on fire,\textsuperscript{26} or drifting.\textsuperscript{27} This type of salvage usually requires reaching a vessel while it is still afloat or recently abandoned. Commercial salvors then receive from the saved vessel a monetary award for their successful efforts.\textsuperscript{28} Such salvage operations generally have no purpose beyond commerce—the goal of the salvor is to save the cargo and the ship for their further use in trade.\textsuperscript{29}

Conversely, historic salvors hunt down vessels that have sunk and have been submerged for tens if not hundreds of years.\textsuperscript{30} Even if completely recovered, these ships can never be returned to the service of the sea, and their cargo is better suited to a museum than a dockyard. It is the antiquity and historical insight the ships provide, rather than their resale value, that gives these wrecks their significance and provides salvors with incentive to track them down.\textsuperscript{31} In fact, the intangible historic worth of the find often overshadows the actual commercial value of the vessel and its cargo.\textsuperscript{32}

In contrast to the great age of the vessels it targets, historic salvage is itself a young industry. Aside from the rare shipwrecks found in shallow, well-marked waters,\textsuperscript{33} most candidates for historic salvage, from antiquity to the twentieth century, were practically impossible to locate and retrieve until recently. Only in 1942, with Jacques Cousteau's invention of the self-contained underwater breathing apparatus (SCUBA), did the means for conducting underwater salvage operations become available.\textsuperscript{34} In the 1950s and 1960s, the well-publicized efforts of Florida treasure-hunters Arthur McKee and Mel Fisher introduced both the possibility and profitability of

\textsuperscript{24} See 3A Benedict, supra note 20, § 63, at 5-1.

\textsuperscript{25} See id. § 19, at 2-8.

\textsuperscript{26} See id. § 20, at 2-10 to 2-11.

\textsuperscript{27} See id. § 16, at 2-5.

\textsuperscript{28} See id. § 3, at 1-5.

\textsuperscript{29} See id. § 22, at 19-3. "The very object of the law of salvage'... 'is to promote commerce and trade, and the general interests of the country....'" Id. (quoting Seven Coal Barges, F. Cas. 12, 677 (C.C.D. Ind. 1870)).

\textsuperscript{30} Both the Titanic, which has been sunk for 88 years, see R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 951 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999), and the Nuestra Señora de Atocha, which has been sunk for 378 years, see Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel, "Nuestra Señora De Atocha," 546 F. Supp. 919, 923 (S.D. Fla. 1981), are considered subjects of historic salvage.


\textsuperscript{32} See infra notes 281-86 and accompanying text for a discussion on the commercial versus historic value of the Titanic salvage operation.

\textsuperscript{33} See 3A Benedict, supra note 20, § 31, at 2-26 & n.1 (citing cases involving vessels sunk in shallow water).

\textsuperscript{34} See Bederman, Historic Salvage, supra note 31, at 102.
salvaging ancient wrecks. It was not until the development of sonar and remote submersible technology in recent decades, however, that large-scale salvaging operations on underwater wrecks became feasible. Thus, although locating and recovering ancient wrecks has grown into a "multi-billion dollar activity for U.S. maritime interests," it is only in the last twenty-five years that historic salvage has established itself as a regular practice.

Although the aims of historic and commercial salvage differ, historic salvage, like its commercial cousin, is a profit venture. As with traditional salvage, historic salvors rescue vessels with the notion that they will be granted a reward for their effort. Usually, a commercial salvage award is derived from the profits made on the sale or use of the saved property, or else the court simply directs the owner of the rescued ship to compensate the salvor. The primarily archaeological value of the wrecks in historic salvage, however, can make the determination of the salvor's reward difficult. Historic salvage is concerned with recovering lost and valuable objects for archaeological study and public appreciation. As such, not only are these artifacts unsuitable for trade, but public interest in their preservation would bar their sale, just as the public discourages the vending of ancient Egyptian or Greek treasures. Because the very nature of some historic wrecks do not permit salvors to restore artifacts to the stream of commerce, historic salvors must frequently consider alternative means to finance their expeditions. Consequently, historic salvors have looked to museum exhibits, non-intrusive tours for amateur divers, and documentary films and photographic images as ways to share their discovery with the public and recoup their operational costs.

This concern for the historical value of the wreck is reflected in the techniques used by historic salvors to recover the sunken objects.

35. See id.
38. See id. at 102-03.
39. See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999); 3A Benedict, supra note 20, §§ 259-63, at 21-19 to 21-24. Of course, this second option is generally impossible in cases of historic salvage.
40. See Bederman, Historic Salvage, supra note 31, at 102-03.
43. See R.M.S. Titanic, 924 F. Supp. at 718.
44. See id. at 717.
46. See id.
Salvors use diligent operating techniques to preserve the wreck and its artifacts. The procedures used by commercial salvage for the efficient reclamation of ordinary vessels and their cargo are inappropriate for delicate historic ships. Historic salvage requires the salvor to use exacting excavation techniques to preserve the scientific, historic, and archaeological integrity and provenance of the wreck, thus increasing the time and expense involved in such operations. Salvors must be mindful of cataloging and detailing the process of their recovery and of maintaining the archaeological unity of the artifacts they uncover—or risk damaging the wreck’s market and historic value.

This preservationist aspect of historic salvage often creates controversy and competition among salvors and others regarding the best way to protect the wrecks. The salvors of ancient wrecks, often allied with sport divers, view historic salvage as a beneficial practice that furthers the interests of salvors and historical preservationists. Defenders of historic salvage believe that the commercial motive of salvage enables the discovery and rescue of otherwise forgotten wrecks, or those that are known but would be prohibitively expensive to pursue. Proponents further claim that the market incentive for well-preserved artifacts and the salvors’ professionalism serve to safeguard the vessels during their salvage. Ultimately, these salvors claim, their goals are aligned with those of museums and archaeologists.

The possibility of disturbing and exploiting artifacts recovered during historic salvage routinely draws opposition from historic preservationists and marine archaeologists. These opponents hold that, to ensure the artifacts’ preservation, only non-commercial
entities such as "pure" historians and governments objects of historical and cultural value can properly regulate historic salvage.\textsuperscript{57} Conservationists fear that the absence of mandatory archaeological oversight on historic salvage operations and the lack of proper excavation training for salvors, along with the temptation to plunder, leave salvors unqualified to adequately protect the wrecks.\textsuperscript{58} These concerns are reflected in preservationist-influenced international agreements limiting, if not banning, the private salvage of ancient shipwrecks.\textsuperscript{59} As a result of these administrative policies, historic salvage operations frequently clash with government statutes, with the state intervening or prohibiting the salvage of a sunken vessel within its jurisdiction.\textsuperscript{60} While the conflicting positions of the parties are clearly drawn, the resolution of this debate is hampered by the relative novelty of historic rescue and the vagaries in the law regarding this type of salvage.

The short existence of historic salvage is reflected by the recent vintage of its case law in admiralty.\textsuperscript{61} While the roots of salvage law can be traced to Rhodian times,\textsuperscript{62} the legal annals of historic salvage generally date back only to 1976 and the Florida case \textit{Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel}.\textsuperscript{63} Thus, courts in admiralty hearing historic salvage cases today have scant guidance from past decisions. This lack of well-established historic salvage law, coupled with the rapid growth of the historic salvage industry, necessitates the establishment of a definitive body of law regarding historic wrecks. Unfortunately, admiralty courts' decisions since \textit{Treasure Salvors} have done little to create a consensus on historic salvage. The courts are split on even the most basic issues, such as whether to apply the law of salvage or the law of finds to historic salvage cases.\textsuperscript{64} Moreover, the Supreme Court has on several

\textsuperscript{57} See Abbass, \textit{supra} note 41, at 266-67.
\textsuperscript{58} See Varmer, \textit{supra} note 13, at 289-90.
\textsuperscript{60} For examples of cases in which the state attempted to intervene in regional salvage operations by the authority of the Abandoned Shipwreck Act of 1987, see Deep Sea Research, Inc. v. Brother Jonathan, 89 F.3d 680, 683 (9th Cir. 1996), \textit{aff'd in part and denied in part}, California v. Deep Sea Research, Inc., 523 U.S. 491, 496 (1998), and \textit{vacated by}, Deep Sea Research v. Brother Jonathan, 143 F.3d 1299 (9th Cir. 1998); Zych v. The Unidentified, Wrecked and Abandoned Vessel, Believed to Be the "Seabird." 941 F.2d 525, 527 (7th Cir. 1991).
\textsuperscript{61} See \textit{infra} note 63 and accompanying text.
\textsuperscript{62} See 3A Benedict, \textit{supra} note 20, § 5, at 1-7.
\textsuperscript{63} 408 F. Supp. 907 (S.D. Fla. 1976).
\textsuperscript{64} For an example of how convoluted an analysis of the current law can be, see 2 Schoenbaum, \textit{supra} note 36, § 16-7, at 338-41 (showing the difference between what the "appropriate" principle of salvage law to be applied to cases of historic wrecks should be, and what the courts actually favor); \textit{see also} \textit{infra} note 132 (listing cases in
occasions declined to clarify the law with regard to historic salvage. To compound the problem, accepted admiralty law authorities, such as Gilmore and Black, and Norris in Benedict on Admiralty, do not explicitly acknowledge the field of historic salvage, and do not elucidate any "black-letter" law for practitioners to follow. Other scholars question whether historic salvage should be a part of admiralty law at all.

Due to the abbreviated case law and the lack of academic agreement on historic salvage, new finds immediately generate confusion and disagreement over the legal rights to the wrecks among the salvors, the successive owners, and the state and national governments involved with the ship and the wreck site. Indeed, along with caches of gold, precious antiques, and waterlogged cargo, recent historic salvors have also dredged up controversial issues such as ownership over long lost wrecks, standards for establishing abandonment, the extent of the rights of insurance companies, the monetary reward appropriate for historic salvors, and the need for archaeological preservation of the wrecks and wreck sites. These disputes revolve around the extent of the salvors' possessory rights in the wrecks they salvage, as courts attempt to delineate the boundaries which the courts found that the law of salvage applies and cases in which the courts found that finder's law was more appropriate.

65. See Deep Sea Research, 523 U.S. at 505-06 (holding that the issue before the Court involved the Eleventh Amendment, and therefore the adjudication of salvage rights was unnecessary); Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670, 699-700 (1982), on remand 689 F.2d 1254-56 (5th Cir. 1982) (same).


67. See Varmer, supra note 13, at 300-01.

68. See Schoenbaum, supra note 36, § 16-7, at 336.


71. See Columbus-America Discovery Group, 974 F.2d at 465-68; Moyer v. The Wrecked and Abandoned Vessel, Known as the Andrea Doria, 836 F. Supp. 1099, 1105 (D.N.J. 1993).


73. See Columbus-America Discovery Group, 974 F.2d at 468 (holding that the archaeological impact of a salvor's operation and the care taken to preserve the finds effects the rights and award granted to the salvor); Marex Int'l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel, 952 F. Supp. 825, 829 (S.D. Ga. 1997) (same); Moyer, 836 F. Supp. at 1107 (same).
of the salvors' claims to a piece of history while also trying to preserve and protect the public's interest in the wrecks. The first step in the resolution of these conflicts, therefore, is for courts to determine which legal framework should apply: salvage law, finders law, or, instead, international maritime agreements.\textsuperscript{74}

B. Law of Salvage Versus Law of Finds in Cases of Historic Shipwrecks

1. The Law of Salvage

Salvage law is the most likely candidate for courts to apply to historic shipwrecks. With its origins reaching back to Rhodian and Roman maritime laws, the law of commercial salvage is a system of allocating possessory property rights and expectations.\textsuperscript{75} The law of salvage was developed to protect distressed ships and their cargo in order to keep the property within the stream of commerce,\textsuperscript{76} discourage theft,\textsuperscript{77} and to restore rescued property to its owner.\textsuperscript{78} To achieve these ends, the law of salvage encourages aid from unsolicited ships by giving a right of compensation to the volunteer who preserved or improved the property of another.\textsuperscript{79}

To qualify as a salvor under the law of salvage, the potential salvor must satisfy three conditions: the salvor must show that the rescued ship was in “marine peril,” that the service was rendered voluntarily, and that, due in part or in whole to the salvor's efforts, the salvaging was at least partially successful.\textsuperscript{80} Once these factors are established, maritime law creates a salvage lien in the recovered property for the salvor.\textsuperscript{81} The salvage lien enables the salvor to proceed \textit{in rem} against the marine property in admiralty court.\textsuperscript{82} While the owner of the ship or cargo retains title to the property,\textsuperscript{83} the salvor maintains a right of possession in the property until a claim for compensation is adjudicated.\textsuperscript{84} The concept of possessory rights includes a broad bundle of privileges given at the discretion of the court.\textsuperscript{85} These general salvage rights include access to the ship and control over a limited area around the ship.\textsuperscript{86}

\textsuperscript{74} See 2 Schoenbaum, \textit{supra} note 36, § 16-7, at 336.
\textsuperscript{75} See 3A Benedict, \textit{supra} note 20, §§ 5-11, at 1-7 to 1-17.
\textsuperscript{76} See \textit{id.} § 232, at 19-2 to 19-3.
\textsuperscript{77} See \textit{id.}
\textsuperscript{78} See \textit{id.}
\textsuperscript{79} See \textit{id.}
\textsuperscript{80} See The “Sabine,” 101 U.S. 384, 384 (1879).
\textsuperscript{81} See 3A Benedict, \textit{supra} note 20, § 137, at 10-1 to 10-2.
\textsuperscript{82} See \textit{id.} at 10-1.
\textsuperscript{83} See \textit{id.} § 150, at 11-1.
\textsuperscript{84} See \textit{id.} at 11-1 to 11-2.
\textsuperscript{85} See \textit{id.} § 151, at 11-3 to 11-5.
\textsuperscript{86} See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 970 (4th Cir. 1999), cert.
Generally, courts in admiralty award salvors compensation based on six criteria collectively known as the *Blackwall* factors, which were coined after the case in which they were articulated.\(^{87}\) To deliver this compensation, the court may execute the lien by ordering the sale of the property with the proceeds going to the salvor.\(^{88}\) The court may also transfer title to the property to the salvor if the sale would not render a sufficient award.\(^{89}\) The amount of the salvage award will also depend upon whether the property is found to have been abandoned.\(^{90}\) If a court applying salvage law finds the wreck to be, for all intents and purposes, abandoned, it has the authority to give the salvor a larger, if not complete, share of the property.\(^{91}\)

Courts have broadened several of these traditional salvage law principles in order to address the unique circumstances of historic shipwrecks.\(^{92}\) The law of salvage has thus been modified in several ways, from its initial application to the granting of rights and final award calculation. Historically, if a ship is not in danger of "marine peril," the law of salvage could not be invoked.\(^{93}\) To assure the law's applicability to shipwrecks, however, courts have expanded the concept of "marine peril" to include a vessel that is discovered after being long lost, but is "still in peril of being lost through the actions of the elements."\(^{94}\) In this manner, courts have extended the law's protection to cover long lost shipwrecks.

Courts in admiralty have also recognized a special exception to the traditional *res* requirement.\(^{95}\) In typical salvage cases, the salvor is

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\(^{87}\) *See* Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992). The six *Blackwall* factors are:

1. The labor expended by the salvors in rendering the salvage service. 
2. The promptitude, skill, and energy displayed in rendering the service and saving the property. 
3. The value of the property employed by the salvors in rendering the service, and the danger to which such property was exposed. 
4. The risk incurred by the salvors in securing the property from the impending peril. 
5. The value of the property saved. 
6. The degree of danger from which the property was rescued.

*Id.* (citing *The Blackwall*, 77 U.S. 1, 13-14 (1869)).

\(^{88}\) *See* 3A Benedict, supra note 20, § 155, at 11-9 to 11-10.

\(^{89}\) *See* id. § 151, at 11-4 to 11-5.


\(^{91}\) *See* Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 56 F.3d 556, 573 (4th Cir. 1995) (upholding a district court's salvage award of 90% of the value of the wreck due to the salvor's efforts and the owner's inactivity).


\(^{93}\) *See* 3A Benedict, supra note 20, § 63, at 5-1.

\(^{94}\) Platoro, Inc. v. Unidentified Remains of a Vessel, 614 F.2d 1051, 1055 (5th Cir. 1980) (citations omitted).

\(^{95}\) *See* Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 567 (5th Cir. 1981); Hener v. United States, 525 F. Supp. 350,
granted possessory rights over the property it has saved and brought within the jurisdiction of the court. A salver has no claim to objects that are not rescued. In cases of shipwreck, however, a court of admiralty will also enforce an inchoate right of salvors in yet-to-be salvaged property for a reasonable period in order to protect the salver's rights. Under this practice, a court may rule that a solitary object brought into a court's jurisdiction constitutes effective control and constructive possession over the entire wreck from which it was taken. This exception allows historic salvors to rely on the court's protection during operations to safeguard their find. It should be noted that this constructive in rem exception is recognized under both salvage and finder's law.

The constructive in rem exception has great significance for historic shipwrecks lying in international waters. Generally, no single nation can claim sovereignty over the high seas. Therefore, a U.S. court in admiralty cannot assert exclusive jurisdiction over a wreck in international waters. Maritime disputes occurring in international waters must instead be settled by separate treaty or agreement, or more commonly by traditional principles of comity or deference to international boundaries. Comity would dictate, then, that a French

96. See 3A Benedict, supra note 20, § 151, at 11-3.
98. See id.; Moyer v. The Wrecked and Abandoned Vessel, Known as the Andrea Doria, 836 F. Supp. 1099, 1104 (D.N.J. 1993) (explaining that “this exception looks to the future, with the ‘reasonable likelihood’ that the salvage operation will result in other portions of the shipwreck being brought into the . . . court”) (citations omitted).
99. See David G. Concannon, R.M.S. Titanic: The Legal Leviathan, Del. Law., Spring 1999, at 25, 28 (reporting that the presence of a wine decanter taken from the Titanic wreck was sufficient for the Eastern District Court of Virginia to assert in rem jurisdiction over the entire wreck site); Drew F. T. Horrell, Note, Telepossession is Nine-Tenths of the Law: The Emerging Industry of Deep Ocean Discovery, 3 Pace Y.B. Int'l L. 309, 326 (1991) (noting that a “lump of anthracite coal” salvaged from the wreck of the S.S. Central America was used to establish in rem jurisdiction over the entire wreck site).
100. See Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 335 (5th Cir. 1978) (allowing parties to stipulate to the court's jurisdiction over the entire wreck located outside the court's district based on a single artifact in the courtroom), aff'd in part and rev'd in part, Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982).
101. See 2 Schoenbaum, supra note 36, § 16-7, at 336-37.
103. See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 967 (4th Cir. 1999) (finding that “when the res is . . . beyond the territorial limits of the United States, the court cannot exercise in rem jurisdiction over it, at least in the traditional sense”) (emphasis added), cert. denied, 120 S. Ct. 74 (1999).
104. The R.M.S. Titanic Maritime Memorial Act of 1986 is one such agreement. See infra notes 252-55.
105. See 2 Schoenbaum, supra note 36, § 16-7, at 337.
court may make the same jurisdictional claim to an international wreck site as an American court in admiralty, and would have no less authority in its judicial enforcement.\textsuperscript{106}

Nevertheless, due to the dual concerns of protecting historic shipwrecks from plunder and of ensuring that salvors enjoy a protected right of possession in the wrecks, authorities have argued that U.S. courts should claim this extraterritorial jurisdiction over wrecks on the high seas.\textsuperscript{107} At least one circuit court has agreed. In the case of the R.M.S. Titanic,\textsuperscript{108} which sank in international waters, the Fourth Circuit held that the notion of constructive \textit{in rem} jurisdiction can be used to properly establish jurisdictional control over the wreck.\textsuperscript{109} Although the court characterized this control as "shared sovereignty" or non-exclusive jurisdiction,\textsuperscript{110} the court concluded that this jurisdiction would serve to "declare[] salvage rights to the wreck as against the world."\textsuperscript{111} Further, once the wreck or all the salvors involved are physically brought into the U.S. or the district boundary, a court's ruling can be enforced exclusively.\textsuperscript{112} Thus, the concept of constructive \textit{in rem} jurisdiction can give historic salvors a manifest, though initially unenforceable, first right to a wreck lying in international waters.

Finally, courts have made concessions to historic salvage in the determination of the rights and awards granted to salvors.\textsuperscript{113} Courts in admiralty have consistently granted possessory rights in a shipwreck based on their care and attention to archaeological preservation, a consideration that was non-existent in traditional commercial salvage law.\textsuperscript{114} The courts' factoring of the preservation efforts into the determination of a salvor's rights acknowledges the unique goals and concerns accompanying the salvage of a fragile, historic wreck.\textsuperscript{115} Further, in the 1992 case of \textit{Columbus-Discovery Group v. Atlantic Mutual Insurance Company},\textsuperscript{116} the Fourth Circuit extended the application of this archaeological protection analysis by using it to establish not just the possessory rights of a salvor, but also the value of the salvage award.\textsuperscript{117} Accordingly, the court added a seventh factor to the classic \textit{Blackwall} analysis: "the degree to which the salvors have worked to protect the historical and archaeological value of the wreck

\begin{itemize}
\item \textsuperscript{106} See Haver, 171 F.3d at 967.
\item \textsuperscript{107} See 2 Schoenbaum, supra note 36, § 16-7, at 337.
\item \textsuperscript{108} R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943 (4th Cir. 1999).
\item \textsuperscript{109} See id. at 967-68.
\item \textsuperscript{110} Id. at 967.
\item \textsuperscript{111} Id.
\item \textsuperscript{112} See id. at 968.
\item \textsuperscript{113} See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 468 (4th Cir. 1992).
\item \textsuperscript{114} See supra note 73.
\item \textsuperscript{115} See supra notes 40-50 and accompanying text.
\item \textsuperscript{116} 974 F.2d 450 (4th Cir. 1992).
\item \textsuperscript{117} See id. at 468.
\end{itemize}
and items salved.”\textsuperscript{118} Thus, at least one court recognizes the value of historic preservation and rewards it accordingly.

The law of salvage, with its grant of possessory rights and appropriate compensation to salvors, is commonly applied in cases of historic shipwrecks. The reason for this successful application is that courts have found the traditional law to be flexible enough to accommodate the concerns of historic salvage. The courts have easily modified the law of salvage to bring historic wrecks under salvage law’s protection; to give salvors constructive possession of a sunken wreck, even in international waters; and to protect the archaeological integrity of the wreck by rewarding a salvor’s preservation efforts.

2. Law of Finds

In contrast to the possessory rights granted under the law of salvage, the law of finds vests the first recognized salvor with complete title to the property that the salvor has recovered. Once the salvor is granted title to the wreck, the vessel and its artifacts are at the disposal of the salvor to use and exploit.\textsuperscript{119} Labeled as “finders keepers” law,\textsuperscript{120} this common law application results in a drastic title shift, and thus is used cautiously by courts sitting in admiralty.\textsuperscript{121}

Traditionally, courts applied the law of finds only to maritime property that had never been owned by anyone, such as ambergris,\textsuperscript{122} whales, and fish.\textsuperscript{123} As applied to shipwrecks, the law of finds holds that a salvor who discovers a long lost, abandoned shipwreck in navigable waters, reduces the property to his sole actual or constructive possession, and demonstrates an intent to possess the property, becomes the property’s owner.\textsuperscript{124} Under the law of finds, the threshold issue in granting a salvor ownership is whether or not the original owner has abandoned the property.\textsuperscript{125} This abandonment can be either expressed or implied.\textsuperscript{126} If the property is found to be abandoned, once the finder establishes possession, that finder holds

\textsuperscript{118} Id. For a discussion of the traditional Blackwall factors, see supra note 87 and accompanying text.
\textsuperscript{119} See Columbus-America Discovery Group, 974 F.2d at 460 (citing Hener v. United States, 525 F. Supp. 350, 356 (S.D.N.Y. 1981)).
\textsuperscript{120} See Martha’s Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir. 1987).
\textsuperscript{121} See Columbus-America Discovery Group, 974 F.2d at 459-60.
\textsuperscript{122} Ambergris is a waxy substance vomited by sperm whales which is found floating in tropical seas. Ambergris’ value is derived from its use in manufacturing perfume. See Webster’s Third New International Dictionary 66 (1986).
\textsuperscript{123} See Columbus-America Discovery Group, 974 F.2d at 459-60.
\textsuperscript{124} See Hener, 525 F. Supp. at 356.
\textsuperscript{125} See 3A Benedict, supra note 20, § 134, at 9-10 to 9-12.
\textsuperscript{126} See Columbus-America Discovery Group, 974 F.2d at 465 (warning that an inference of abandonment “would be improper... should a previous owner appear and assert his ownership interest”).
title to the property that is good against the world, including the original owner.127

Not wishing to unwittingly sever title of a ship still owned, courts in admiralty employ a strict standard of clear and convincing evidence to establish abandonment.128 These courts generally apply the law of finds only to those rare cases of actual disavowal,129 and to cases of ancient shipwreck where ownership can be presumed lost.130 When a salvor operates on a shipwreck under the "guise" of find, but the court is not convinced that the wreck has been abandoned, the salvor "risk[s] the loss of a salvage award or of diminishment thereof."131

The law of finds, then, allows a court in admiralty to transfer complete title in a clearly abandoned wreck to the first salvor who can prove possession. Because its application grants salvors ownership rights in a wreck only upon the permanent termination of another's rights, finder's law is cautiously invoked in cases of salvage.

3. Choice of Law

In instances of shipwreck, courts in admiralty generally prefer the law of salvage to that of finder's law, because the former discourages competition and secrecy.132 Generally, an open and responsible salvage is preferable to the free-for-all created under finder's law.


128. See Columbus-America Discovery Group, 974 F.2d at 467-68.

129. See 3A Benedict, supra note 20, § 158, at 11-15 to 11-17; Columbus-America Discovery Group, 974 F.2d at 461 (requiring a "strong actus element" to prove an owner's intent to abandon); Zych v. The Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin," 755 F. Supp. 213, 214 (N.D. Ill. 1990), rev'd, Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the "Seabird," 941 F.2d 525 (7th Cir. 1991) (holding that "[a] finding of abandonment must be supported by strong and convincing evidence").

130. See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 961 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999); Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569 F.2d 330, 337 (5th Cir. 1978) (applying the law of finds to an ancient Spanish wreck, stating that the "[d]isposition 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"), aff'd in part and rev'd in part, Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982); 3A Benedict, supra note 20, § 158, at 11-17 to 11-18.

131. See 3A Benedict, supra note 20, § 158, at 11-18.

132. See R.M.S. Titanic, 171 F.2d at 961; Columbus-America Discovery Group 974 F.2d at 459; Hener, 525 F. Supp. at 356; see also 2 Schoenbaum, supra note 36, § 16-7, at 340 (observing that courts in admiralty favor the application of salvage law). But see Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1065 (1st Cir. 1987) (applying the law of finds once it seemed likely that the owner of the wreck or its successor would not come forward); Klein v. Unidentified Wrecked and Abandoned Sailing Vessel, 758 F.2d 1511, 1514 (11th Cir. 1985) (same); Treasure Salvors, Inc., 569 F.2d at 337 (same); Indian River Recovery Co. v. The China, 645 F. Supp. 141, 144 (D. Del. 1986) (same); Cobb Coin Co., Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 525 F. Supp. 186, 213 (S.D. Fla. 1981) (same).
This is because a race to be the first possessor can lead to reckless salvage techniques, such as blasting an area with pressurized water to quickly uncover artifacts. Such acts can permanently damage fragile and irreplaceable historic shipwrecks and their contents. Further, because owned property or jointly recovered property is ineligible for a granting of rights under finder's law, the law's invocation would encourage salvors to operate in secret and to hide their discoveries in order to avoid claims of co-salvors and possible prior owners. This practice would lead to careless salvage techniques and the plundering of historic wreck sites.

Salvage law, however, creates disincentives for such destructive techniques and secrecy. Under salvage law, a salvor must give notice of its discovery and any property it has recovered in order to gain possessory rights to the wreck. The court can also punish any misconduct on the part of the salvor in finding the vessel, or for any unnecessary damage done to the wreck during the salvaging, by denying possession or by reducing the salvage award.

Moreover, once a salvor is granted ownership to a wreck under finder's law, the courts, and therefore the public, cannot regulate how the salvor runs its operations. Consequently, a "finder" salvor would be under no obligation to preserve the historical value of a wreck or employ archaeologically sound salvaging techniques. The law of salvage, however, provides courts with more flexibility in determining whether a salvor has commenced an operation worthy of protection. Unlike the transfer of title recognized by finder's law, the possessory grant under the law of salvage is not necessarily permanent. Thus, the court may revoke the salvor's rights if the operation is shown to be mismanaged, negligent, disruptive, or if the salvor's chances of success are drastically reduced due to financial losses or other factors.

Further, because the law of finds deprives the true owner of a
property right, the courts in admiralty disfavor its application. As one court stated, "[T]he law of salvage better serves the needs of maritime commerce by encouraging the saving of property for the benefit of its owner rather than the secretive discovery of property in an effort to deprive the owner of title."

Finally, salvors themselves may prefer the law of salvage because the rights granted under salvage law may be broader than those under the law of finds. While finder's law recognizes a salvor's ownership in the actual objects recovered, title is not necessarily extended to the wreck itself. Under the law of salvage, a diligent finder can be awarded a salvage prize the size of the ship—tantamount financially to full possession.

For all of these reasons, courts in admiralty generally apply the law of salvage to cases of historic shipwrecks. They thus aim to reduce the secrecy and destructive nature of "finder's" salvage, to exert greater control over the designation of a salvor and its subsequent operations, and to avoid permanently severing an owner's property right in a vessel.

Regardless of whether a court applies finder's law or the law of salvage in cases of shipwreck, however, the principles of commercial returns incorporated into both theories of law have been the subject of debate in the maritime community. Out of concern for protecting the historical value of shipwrecks while discouraging desperate and destructive acts of treasure-hungry salvors, some commentators believe that the traditional maritime laws of both salvage and finder's must be supplemented or discontinued in order to effectively protect

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143. See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 961 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999); Hener, 525 F. Supp. at 356. "'Possession' means something less in salvage law than in finds law. In the salvage context, only the right to compensation for service, not the right to title, usually results; 'possession' is therefore more readily found than under the law of finds." Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 460 (4th Cir. 1992).

144. Haver, 171 F.3d at 961. Courts have been especially reluctant to declare sunken property abandoned where it is unclear whether the owner even possessed the technology to salvage and locate the wreck. See Zych v. The Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin," 755 F. Supp. 213, 216 (N.D. Ill. 1990), rev'd, Zych v. Unidentified, Wrecked and Abandoned Vessel, Believed to be the "Seabird," 941 F.2d 525 (7th Cir. 1991).

145. See Timpany, supra note 90, at 88-89.


147. See Haver, 171 F.3d at 961-62; Columbus-America Discovery Group, 974 F.2d at 464; Hener, 525 F. Supp. at 355-56.

148. See supra notes 132-42 and accompanying text.

149. See supra notes 143-44 and accompanying text.
the historical integrity of the wrecks. This consensus is reflected in recent policies drafted by the international maritime community.

C. International Agreements on Historic Shipwrecks

In 1958, the international community of nations held the United Nations Conference on the Law of the Sea (UNCLOS) to delineate nautical territorial zones of sovereignty. Lingering inadequacies of this convention, and of the second convention (UNCLOS II), however, led the United Nations in 1982 to commence the third United Nations Conference on the Law of the Sea (UNCLOS III). In this third agreement, the maritime community voiced its concern over the protection of historic shipwrecks located in international waters. UNCLOS III declares that "archaeological and historical objects" in national and international waters should be preserved for the benefit of all of humanity. Unfortunately, the agreement does not explicitly define what qualifies as an archaeological object and what specific measures should be taken to preserve them. Article 303 does impose a duty on participating states to "protect objects of an archaeological and historic nature found at sea." UNCLOS III

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151. This Note is concerned primarily with wrecks lying in international waters. For abandoned wrecks found in United States territorial waters, the Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101-2106 (1994), may apply rather than finder's or salvage law. See California v. Deep Sea Research, Inc., 523 U.S. 491, 496 (1998), and vacated by, Deep Sea Research v. Brother Jonathan, 143 F.3d 1299 (9th Cir. 1998); Fairport Int'l Expl. Inc. v. The Shipwrecked Vessel known as the Captain Lawrence, 177 F.3d 491, 497 (6th Cir. 1999).

152. See Horrell, supra note 99, at 349.

153. For example, the first convention did not clearly delineate the width of the territorial sea. See id. at 349 n.173.

154. See id. at 349. UNCLOS has not been ratified by the United States, "although the Department of State regards much of it as customary international law." Sweeney, supra note 13, at 201.


156. Article 149 of the agreement states:
All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.


158. Horrell, supra note 99, at 349 (referring to Article 303(1) of UNCLOS III).
makes it clear, however, that this admonishment will not affect the law of salvage or the rules of admiralty in general.\textsuperscript{159}

Because of its vagueness and its explicit deference to admiralty law,\textsuperscript{160} UNCLOS III does not overrule any traditional principles of salvage or finder's law. Further, the agreement does not create any agency or means of enforcement, nor does it provide a procedure to settle disputes.\textsuperscript{161} Consequently, UNCLOS III's vision of international cooperation to preserve historic vessels is generally considered to be ineffective and unenforceable.

In 1994, the International Law Association (ILA) adopted the Buenos Aires Draft Convention on the Protection of Underwater Cultural Heritage (ILA Draft Convention).\textsuperscript{162} Building on the UNCLOS III agreement, the ILA Draft Convention reiterates the world maritime community's commitment to shipwreck preservation by requiring parties to the agreement to "take all reasonable measures to preserve underwater cultural heritage for the benefit of humankind."\textsuperscript{163} The ILA Draft Convention attempts to ensure this protection by incorporating by reference the terms of the "Charter for the Protection and Management of the Underwater Cultural Heritage" prepared by the International Council on Monuments and Sites (ICOMOS Charter).\textsuperscript{164} The ICOMOS Charter holds that permission to excavate historic wrecks should be granted only to institutions represented by qualified archeologists or to persons offering scientific guarantees.\textsuperscript{165} The ILA Draft Convention also attempts to delineate a state's duty and national jurisdiction regarding the protection of underwater heritage.\textsuperscript{166} For example, the ILA Draft Convention enables states to issue permits allowing the importation of appropriately salvaged artifacts, and to enforce penal sanctions against those who do so illegally.\textsuperscript{167} Its most significant provision is


\textsuperscript{160} See supra notes 157-59 and accompanying text.

\textsuperscript{161} See Harris, supra note 157, at 245; Nicholson, supra note 150, at 156-58.

\textsuperscript{162} See Nafziger, supra note 150, at 320. The United States has not signed the ILA Draft Convention. See Bederman, Historic Salvage, supra note 31, at 125.


\textsuperscript{164} See Nafziger, supra note 150, at 320-21.


\textsuperscript{167} See id. arts. 7, 8, 10, 11.
Article Four, which explicitly bars the application of the law of salvage to shipwrecks out of concern that economic motivation may encourage salvors to disregard preservation efforts.\textsuperscript{168}

In 1998, the United Nations Educational, Scientific and Cultural Organization (UNESCO) endorsed and largely adopted the ILA Draft Convention, and therefore the ICOMOS Charter, into its own Draft Convention.\textsuperscript{169} While making several minor revisions, the UNESCO Draft Convention expanded the Buenos Aires Draft's jurisdictional basis, expanded the protection given to abandoned objects, and established a partnership between scientific and commercial interests in preserving cultural heritage.\textsuperscript{170} Significantly, the UNESCO Draft Convention altered the ILA Draft Convention by endorsing the continued use of salvage law as applied to underwater cultural heritage.\textsuperscript{171}

The UNESCO Draft Convention, however, is not yet in force. Its ratification is complicated by the absence of any sufficient enforcement agency (much like UNCLOS III) to monitor, regulate, and discipline offenders.\textsuperscript{172} Further, maritime experts fear that a strict reading of the UNESCO Draft Convention would restrict, if not eliminate, a salvor's ability to sell any recovered objects.\textsuperscript{173} The ICOMOS Charter adopted by UNESCO states in Article 3 that "[p]roject funding must not require the sale of underwater cultural heritage or the use of any strategy that will cause underwater cultural heritage and supporting documentation to be irretrievably dispersed."\textsuperscript{174} Article 13 holds that "[u]nderwater cultural heritage is not to be traded as items of commercial value."\textsuperscript{175} These provisions would severely limit a salvor's ability to recoup its financial expenditures from the salvage. Both the law of salvage and the law of finds guarantee, either by award or title, the means for a salvor to recoup his or her expenses.\textsuperscript{176} If these financial rewards are outlawed,

\textsuperscript{168} See id. art. 4. Article 4 of the ILA Draft Convention states that "[u]nderwater cultural heritage . . . shall not be subject to the law of salvage," and the commentary notes that "the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation . . . of the site that is necessary to preserve its historic value." Id. art. 4 & commentary.


\textsuperscript{170} See Nafziger, supra note 150, at 323.


\textsuperscript{172} See Nafziger, supra note 150, at 326-27.

\textsuperscript{173} See Bederman, supra note 92, at 343-44.

\textsuperscript{174} International Charter for the Protection and Management of the Underwater Cultural Heritage, supra note 165, art. 3.

\textsuperscript{175} Id. art. 13.

the salvor's incentive to discover and recover historical shipwrecks may also disappear, leaving cultural treasures lost on the ocean floor.\textsuperscript{177}

Taken together, the above international conventions do little more than reflect a consensus in the world maritime community that historic and archaeological artifacts found in international waters must be protected. The means by which this preservation can be accomplished relative to extant salvage law, however, is not clear from the agreements. UNCLOS III, for example, maintains that its directives will not affect any rights granted under traditional salvage law.\textsuperscript{178} The Buenos Aires Draft Convention, conversely, explicitly bans the application of the law of salvage in cases of historic artifacts.\textsuperscript{179} The subsequent UNESCO Draft Convention then rescinded the Buenos Aires ban,\textsuperscript{180} but in its place initiated measures to restrict the sale of recovered artifacts, which would eliminate any incentive for commercial salvors and, in effect, eliminate the need for salvage law.\textsuperscript{181} Courts in admiralty seeking to follow the tenets of these agreements would be understandably confused. Instead, courts hearing cases of historic salvage have found a viable alternative by expanding the traditional rights granted under salvage law. As described below, these recent decisions have faithfully enforced the salvage principles of encouraging the rescue of lost vessels by rewarding salvors, while remaining sympathetic with the concerns over preserving historic wrecks as espoused in UNCLOS III and the UNESCO Draft Convention.

D. The Expansion of Salvage Law

Courts in admiralty hearing historic salvage cases face difficulties in balancing the aims of salvage law with the goals of historic preservation. Salvage law, for example, is concerned with returning the recovered property to the marketplace.\textsuperscript{182} This objective is accomplished by granting a salvor possessory rights in the ship and a commensurate monetary award upon completion of the salvaging.\textsuperscript{183} The historical nature of these ancient wrecks, however, precludes the ship's return to the stream of commerce.\textsuperscript{184} Archaeologists and historians argue that artifacts recovered by salvors must be specially preserved and possibly even remain intact on the ocean floor.\textsuperscript{185} This

\begin{itemize}
  \item \textsuperscript{177} See Harris, supra note 157, at 252-53 (referring to similar measures under UNCLOS and ASA).
  \item \textsuperscript{178} See supra note 159 and accompanying text.
  \item \textsuperscript{179} See supra note 168 and accompanying text.
  \item \textsuperscript{180} See supra note 171 and accompanying text.
  \item \textsuperscript{181} See supra notes 173-77 and accompanying text.
  \item \textsuperscript{182} See supra note 29 and accompanying text.
  \item \textsuperscript{183} See supra notes 81-86 and accompanying text.
  \item \textsuperscript{184} See supra notes 41-42 and accompanying text.
  \item \textsuperscript{185} See Varmer, supra note 13, at 287 ("Under historic preservation laws and
concern for historic preservation, then, would necessarily limit a salvor’s right to control the wreck site (i.e., barring the physical recovery of objects) and in the objects he or she recovers (i.e., barring their sale). Several recent salvage cases illustrate the potential conflicts faced by courts in admiralty between securing salvors’ rights and protecting historically valuable ships. The litigation surrounding the wrecks of the Andrea Doria, the S.S. North Carolina, and the S.S. Central America required the courts to balance the rights of salvors with the public’s interest in historical artifacts within the framework of traditional salvage law. The result of the courts’ decisions was an expansion of salvage law in the historic shipwreck context in accordance with both the underlying principles of salvage law and social policy.

1. The Andrea Doria

On July 25, 1956, the Italian ocean liner Andrea Doria collided with the Swedish liner Stockholm some 200 miles off the coast of New Jersey. Eleven hours passed before the Andrea Doria finally sank to the bottom of the Atlantic in international waters. The location of the crash was well known, however, and divers began to descend to the wreck site the following day. The remains of the Andrea Doria quickly became a popular dive site, and expedition groups regularly visited and took artifacts from the hapless liner. One such diver was John F. Moyer, who dove to the site over fifty times and amassed an extensive archive of information and expertise on the Andrea Doria. Moyer was interested in salvaging the ship’s primary bell and certain Italian mosaic friezes within the wreck, but without the constant interference of recreational and professional divers. Moyer petitioned the District Court of New Jersey to enjoin other

policies, there is a general preference for on-site preservation.”).

189. See Moyer, 836 F. Supp. at 1102.
190. See id.
191. See id.
192. See id. The liner settled in waters only 240 feet deep, enabling recreational divers to access the wreck. See id.
193. See id.
194. See id. at 1103. There had been two prior commercial salvage operations conducted on the Andrea Doria: one in 1964 that raised a bronze statue of the liner’s namesake; and a second in 1981 that recovered the ship’s safe containing “thousands of notes of water-logged Italian Lira currency.” Id.
salvors and divers from entering the area while he and his crew worked to retrieve the artifacts.\footnote{195}

Moyer admitted that he did not discover the site of the Andrea Doria.\footnote{196} He also was not the first diver to explore and remove artifacts from the wreck.\footnote{197} Further, Moyer was not the only person salvaging the ship at the time of the suit.\footnote{198} Still, the court granted Moyer a preliminary injunction.\footnote{199} Citing Moyer’s dedication to archaeological preservation and his ability to continue the salvage while maintaining the historical integrity of the wreck, the court gave Moyer the right to exclude those salvors who were directly interfering within his limited zone of operations.\footnote{200}

\textit{Moyer} represents a significant expansion of traditional salvage law in several respects. First, the district court asserted jurisdiction over the wreck even though it lay beyond the court’s territorial boundaries in international water.\footnote{201} Further, the court held that it could grant customary equitable relief to the salvor based on its extraterritorial jurisdiction.\footnote{202} Finally, the form of the relief—a preliminary injunction enjoining rival salvors—gave Moyer significant protection of his exclusive salvage rights to the Andrea Doria.\footnote{203} The court’s decision sent a clear message to would-be salvors: in cases of historical shipwrecks, great deference must be made for archaeological preservation, even at the expense of the rights of other salvors.

2. The S.S. North Carolina

A district court in Georgia expanded the protection provided to salvors of historic wrecks in the 1997 action involving the S.S. North Carolina.\footnote{204} The passenger ship S.S. North Carolina sank off the coast of South Carolina early in the morning of July 26, 1840, following a collision with another ship in international waters.\footnote{205} In August 1996,
through scrupulous research and remote electronic sensing, a United States corporation called Marex International (Marex) ascertained that a shipwreck site, known to the local divers as the “Copper Pot Wreck,” contained the S.S. North Carolina. Marex filed a motion to assert its rights to the vessel based on the artifacts it had recovered. Because the ship had no booty or treasure on board when it sank, Marex’s goals were to put the collected artifacts on public display and to archive an archaeological report on the wreck.

The court granted Marex exclusive salvaging rights to the S.S. North Carolina because of Marex’s perceived commitment to archaeological preservation of the wreck. The court also granted Marex a preliminary injunction against any would-be salvor or diver and other third party from interfering with Marex’s efforts, on account of the historic and delicate nature of the wreck and the sporadic visitation by divers and fisherman.

Like the court in Moyer, the district court here determined that it had jurisdictional authority over a wreck in international waters. The court also factored in archaeological considerations and found that it could grant equitable relief to a salvor. Unlike the injunction in Moyer, however, which targeted only rival salvors, the Marex court broadened the reach of salvage law by putting all potential interlopers, including recreational divers and tour groups, on notice that Marex would be the only entity allowed access to the wreck for the entire salvage season.

3. The S.S. Central America

On September 8, 1857, the S.S. Central America, a three-decked, side-wheeled steamship, left Panama en route to New York. The ship carried about 580 passengers and $1,219,189 worth of gold rush bullion. The gold, weighing approximately three tons, was earmarked for New York banks to help stave off the effects of the financially ruinous Panic of 1857. The S.S. Central America, however, was

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206. See id.
207. See id. at 826.
208. See id. at 828. While Marex’s first commitment was to the preservation and display of the S.S. North Carolina’s artifacts, the company may have had plans to auction off some pieces to help finance the salvage operation. See id.
209. See id. at 829-30.
210. See id.
211. See id. at 828.
212. See id. at 829.
213. See supra notes 199-200 and accompanying text.
214. In the southeastern United States, the salvage season generally lasts from March until August. See Marex, 952 F. Supp. at 826 n.1.
216. See id. at 453-56.
headed for her own disaster. After leaving a port of call in Havana, the ship was caught in a violent storm and experienced massive flooding.\textsuperscript{217} A subsequent leak in the engine room extinguished the S.S. Central America's boilers, causing the pumping system to fail and exacerbating the flooding.\textsuperscript{218} The ship was overcome by water. Shortly after 8:00 p.m. on September 12, the S.S. Central America sank to the bottom of the sea, taking with it 425 passengers and the whole of the gold bullion.\textsuperscript{219}

In 1985, the Columbus-America was formed and began searching for the famed wreck of the S.S. Central America.\textsuperscript{220} In September 1988, after much effort, expense, and several false starts, Columbus-America located the wreck 160 miles off the South Carolina coast and 8000 feet below the surface of the Atlantic.\textsuperscript{221} Columbus-America successfully petitioned the federal district court in Norfolk, Virginia, for a permanent injunction granting control over the salvage area of the wreck and of the sunken gold, now worth up to one billion dollars.\textsuperscript{222} The court awarded Columbus-America interim title to the objects retrieved from the wreck site and conferred upon them exclusive possession of the wreck.\textsuperscript{223}

A significant development in the district court's analysis of the case was its legal recognition of "telepossession."\textsuperscript{224} Because of the danger and expense of deep-sea salvaging, Columbus-America used remotely operated vehicles (ROVs) instead of human divers at the wreck site.\textsuperscript{225} Consequently, the district court awarded title to the wreck based on salvage operations that exercised control through ROVs and their real-time video images.\textsuperscript{226} The traditional requirement of effective control was therefore established "not through physical presence of a human being at the ocean bottom, but instead through a combination of live imaging coupled with the capability to manipulate the

\begin{footnotes}
\footnote{217. See id. at 456.}
\footnote{218. See id.}
\footnote{219. See id.}
\footnote{220. See Seanor, supra note 1, at 50; supra notes 1-10 and accompanying text.}
\footnote{221. See Columbus-America Discovery Group, 974 F.2d at 457-58.}
\footnote{222. See Horrell, supra note 99, at 328-29 (citing Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel Believed to be the S.S. Central America, No. 87-363-N, slip op. at 4-5 (E.D. Va. Aug. 18, 1989)).}
\footnote{223. See id. The extent of the Columbus-Discovery Group's possessory right to the S.S. Central America was challenged and reaffirmed in later decisions. See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 56 F.3d 556, 562 (4th Cir. 1995).}
\footnote{224. See Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, S.S. Central America, 1989 A.M.C. 1955, 1958 (E.D. Va. 1989). The court defined telepossession as "(1) locating the object searched; (2) real time imaging of the object; (3) placement or capability to place teleoperated or robotic manipulators on or near the object, capable of manipulating it as directed by human beings exercising control from the surface; and (4) present intent to control . . . the location of the object." Id. at 1958.}
\footnote{225. See Seanor, supra note 1, at 50-52.}
\footnote{226. See Columbus-America Discovery Group, 1989 A.M.C. at 1958-59.}
\end{footnotes}
environment through teleoperated or robotic vehicles."\textsuperscript{227} This decision overcame the need to retrieve a portion of the wreck in order to assert an \textit{in rem} claim.\textsuperscript{228} The images of the wreck and the presumed capacity to recover objects served to demonstrate effective control as a basis for a maritime lien.\textsuperscript{229}

The court's creation of the doctrine of telepossession in \textit{Columbus-America Discovery Group v. S.S. Central America} shows not only the ingenuity of admiralty courts in extending traditional salvage protection to novel shipwreck scenarios, but also reveals the value of imaging in deep-sea salvage operations. By admitting photographs and videotapes of the wreck as a basis for effective control, the images represent a legally recognized \textit{res} and, as such, are endowed by the court with possessory properties.\textsuperscript{230} If an image of a wreck, and the ability to secure such images, are powerful enough to establish rights in the wreck, a competing salver can jeopardize a rival's claim simply by producing his or her own images. A salver would thus desire to enjoin rivals from taking images of a wreck, much like one would attempt to stop the plunder of artifacts.\textsuperscript{231} While the occasion for this type of protection might seem remote, this exact issue was at the center of a controversy surrounding the rights to the most famous shipwreck in this era—the R.M.S. Titanic.

The above cases illustrate how courts in admiralty have grappled with the issue of historic salvage by expanding traditional salvage law. Historic salvage is a special type of salvage that, due to its dual preservationist and industrial nature, is not easily governed by existing maritime law. The archaeological and historical concerns implicated in the salvaging of long-lost shipwrecks are not well served by a strict reading of traditional salvage law, either in the law of salvage or the law of finds. In addition, international maritime agreements drafted specifically to protect these preservationist concerns are contradictory and do not adequately protect a salver's legal and economic interest in the artifacts recovered. Only by broadening extant law to include innovative rights and obligations can the courts properly address the delicate concerns of historical salvage. The next part describes in

\textsuperscript{227} Id.
\textsuperscript{228} See Nicholson, \textit{supra} note 150, at 147.
\textsuperscript{229} See \textit{id}.
\textsuperscript{230} See Horrell, \textit{supra} note 99, at 339-40 (noting that the traditional requirement of possession for salvage is satisfied by telepossession); see also Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, 1999 A.M.C. 69, 71-73 (S.D.N.Y. 1998) (establishing the court's \textit{in rem} jurisdiction over the Titanic solely on the basis of film and video taken of the wreck), \textit{claim dismissed in part} by, Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, Copy. L. Rep. (CCH) 27967 (S.D.N.Y. 1999).
\textsuperscript{231} See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 1996 A.M.C. 2497, 2499-2500 (E.D. Va. 1996) (granting an injunction under the theory that images can be considered salvageable artifacts at risk of being looted, and thus merit protection under the law).
detail a court's decision to act in just such an innovative manner by extending exclusive photograph rights to the R.M.S. Titanic.

II. The R.M.S. Titanic

Through a series of cases in the Eastern District of Virginia, the salvage of the R.M.S. Titanic tested the boundaries of traditional salvage law, and illustrated how those limits must expand to accommodate the unique circumstances of historic salvage. In recognition of the Titanic's salvor's efforts at preservation, the economic realities of the salvage operation, and the public's interest in the historic wreck, the district court applied intellectual property principles to traditional salvage law. Building upon the right of a salvor-in-possession against interference from rival operations, the court issued an injunction to prevent others from diving onto and taking images of the Titanic. As the court reiterated in a later decision, it considered the grant of exclusive photographic rights the best means to protect the economic interests of the salvors, the historical integrity of the wreck, and the public's interest in the famous ship. Although the Fourth Circuit ultimately scaled back these rulings, the granting of intellectual property rights for salvors of historic wrecks remains a potentially crucial development in salvage law.

This part presents fully the case of the R.M.S. Titanic. It begins by describing the background to the case and the early litigation in the Eastern District Court of Virginia involving the sunken vessel. Next, it focuses on the court's extraordinary decision to include exclusive photographic rights as part of a salvor's traditional grant of salvage rights, and also analyzes the court's subsequent reaffirmation of this grant. Finally, this part discusses the Fourth Circuit's eventual repeal of the right to exclusive imagery, and the reasoning behind that decision.

232. See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 9 F. Supp. 2d 624, 640 (E.D. Va. 1998) (issuing a preliminary injunction against all others from entering and obtaining any image of the Titanic wreck site or wreck); R.M.S. Titanic, 1996 A.M.C. at 2499 (holding that photographic rights should be included in a salvor's possessory rights); R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 924 F. Supp. 714, 723-24 (E.D. Va. 1996) (finding that the court should take into account alternative means for a salvor to recoup its financial expenditures).


234. See R.M.S. Titanic, 9 F. Supp. 2d at 640; R.M.S. Titanic, 1996 A.M.C. at 2500.

235. See R.M.S. Titanic, 9 F. Supp. 2d at 637-38.

236. See R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 971 (4th Cir. 1999) (holding that a salvor can only prevent rivals from taking and marketing images of a wreck if such practices either constitute a rival salvage operation, or interfere with the salvor-in-possession's operation), cert. denied, 120 S. Ct. 74 (1999).
A. Background

On April 10, 1912, the R.M.S. Titanic, a luxury passenger liner touted as "unsinkable," began its maiden voyage from Southampton, England, bound for New York. Approaching midnight on April 15, 1912, the Titanic rammed into an iceberg approximately 400 miles southeast of Newfoundland, Canada, and sank two hours and forty minutes later. The lateness of the hour, the reluctance of the captain to acknowledge the damage of the impact, and the icy arctic waters all contributed to the great loss of life accompanying the wreck. Of the 2340 persons aboard the luxury ship, only 745 passengers survived. The Titanic itself split in half during the sinking and eventually came to rest 12,500 feet, or 2.5 miles, under the sea.

The British Board of Trade and the United States Senate hearings on the Titanic disaster determined not only that the Titanic had been warned of icebergs in the area, but that her captain had sped directly into a field of them. The investigation also revealed that the Titanic did not have enough lifeboats to accommodate all its passengers, thus adding to the death toll. These findings ushered in a new awareness regarding safety at sea. The U.S. Congress passed laws requiring ships to carry radios and have radio operators on duty at all times, and the International Convention on Safety of Life at Sea decreed that all ships must carry an adequate supply of lifeboats for all passengers and crew. It is appropriate, then, that while in sinking the Titanic spurred a movement in marine safety, her dramatic resurrection could now alter salvage law.

Although the ship had been long given up for lost, a joint French and American expedition located the possible wreck site of the Titanic in August of 1985. Later that month, the U.S. team, led by Dr. Robert Ballard of the Woods Hole Oceanographic Institute, brought in the ROV Argo, a deep-sea sled equipped with cameras and sonar-mapping equipment, to visually scan the ocean floor. On September 1, 1985, Argo found the Titanic. News of the find

237. See id. at 951.
238. See id.
239. See id.
240. See Concannon, supra note 99, at 25.
241. See Timpany, supra note 90, at 73-74.
242. See id. at 74.
243. See id.
244. See id.
245. See Concannon, supra note 99, at 34.
246. See Timpany, supra note 90, at 75.
247. See id.
traveled quickly and a Canadian newspaper published the wreck's geographic coordinates within days of its discovery.\footnote{249} Mindful of the historical value of the Titanic and also of the attraction it posed to would-be salvors and souvenir hunters, Dr. Ballard, on his final dive to the wreck in 1986, placed a bronze plaque on one of the capstans near the ship's bow.\footnote{250} The plaque commemorates the efforts of those who discovered the Titanic and requests that "any who may come hereafter leave undisturbed this ship and her contents as a memorial to deep water exploration."\footnote{251} Echoing the sentiment of this pledge, Congress passed the R.M.S. Titanic Maritime Memorial Act of 1986,\footnote{252} which provides for consultation between the United States, the United Kingdom, France, Canada, and other nations to develop guidelines for research and possible salvage of the Titanic.\footnote{253} To avoid plunder or disfigurement of the wreck prior to the establishment of these guidelines, the Act bars all physical alteration, disturbance, or salvage of the wreck.\footnote{254} The Act also calls for international negotiations to designate the Titanic as an international maritime memorial.\footnote{255} The United States, however, was unable to obtain the necessary intergovernmental cooperation to enforce the Act's provisions, principally from the French.\footnote{256} Less than a year later, the French government and a U.S. corporate partner began salvaging the Titanic, despite the Act's prohibition and Dr. Ballard's call for restraint.\footnote{257}

B. Preliminary Procedure

In 1987, Titanic Ventures, a private American corporation, joined forces with the Institute of France for the Research and Exploration of the Sea ("IFREMER") for the purpose of diving to the wreck site.\footnote{258} The partnership succeeded in salvaging in excess of 1800 items of property from the site.\footnote{259} The French government took possession of these objects and invited their original owners to file claims to the property.\footnote{260} Any unclaimed artifacts were transferred to the possession of Titanic Ventures.\footnote{261}
In 1992, a rival American salvor, Marex Titanic, Inc., filed an action in the Eastern District Court of Virginia for finder's rights or, alternatively, salvage rights to the Titanic.\footnote{262. See Marex Titanic, Inc. v. The Wrecked and Abandoned Vessel, 2 F.3d 544, 545 (4th Cir. 1993) (describing the history of the case in the lower court).} Despite having performed no direct salvaging on the wreck, Marex Titanic produced, as its basis for constructive possession, two objects it claimed were from the Titanic—a piece of metal and a prescription bottle.\footnote{263. See id.} The court granted Marex a warrant of arrest, but Titanic Ventures successfully intervened and obtained a temporary restraining order barring Marex from salvaging the Titanic.\footnote{264. See id.} The district court eventually granted Titanic Ventures the exclusive right to salvage the wreck, but the Fourth Circuit reversed that decision, finding that Marex had voluntarily dismissed its claim during the proceedings, and accordingly, Titanic Ventures could not have maintained its action as an intervenor.\footnote{265. See id. at 547-48.}

In 1993, Titanic Ventures' successor in interest, R.M.S. Titanic, Inc. ("RMST"),\footnote{266. As of 1996, Titanic Ventures owned approximately 43% of RMST. See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 924 F. Supp. 714, 716 (E.D. Va. 1996).} filed a new claim for an \emph{in rem} arrest of the Titanic on the basis of a wine decanter it had salvaged from the wreck.\footnote{267. See Nafziger, supra note 150, at 314.} Finding for RMST, the Eastern District Court of Virginia granted RMST possessory rights to the Titanic and conferred upon RMST exclusive rights to any salvaged items while RMST retained the status of salvor-in-possession.\footnote{268. See id.} The court based its decision on its belief that such a grant would secure the use of Titanic artifacts for public interest, and prevent a "free-for-all" looting of the famous ship.\footnote{269. See R.M.S. Titanic, 924 F. Supp. at 723 (referring to the reasoning behind the court's previous basis for granting RMST status as salvor-in-possession).} As such, this grant was conditioned upon RMST's promise to "keep the artifacts together and preserve them for the public."\footnote{270. Id. (same).}

In May 1996, John A. Joslyn, a California television producer, challenged the 1994 order.\footnote{271. See id. at 716.} Joslyn claimed that RMST had "failed to diligently salvage the Titanic, [had] evidenced no intention to salvage it in the future, and ... [was] financially incapable of utilizing its rights."\footnote{272. Id.} The district court, however, was satisfied with RMST's efforts, noting the operation's prior successful recovery of artifacts.\footnote{273. See id. at 723. At that time, RMST had recovered "approximately 3,600 artifacts." Id. at 722. The court also based its evaluation on RMST's fulfillment of its promise to preserve the unity and historical value of the artifacts it salvaged from the...}
its continuing diligence since the 1994 order,\textsuperscript{274} and its likelihood of successfully salvaging the wreck in the future.\textsuperscript{275} Accordingly, Senior Judge Calvitt Clarke, Jr. denied the motion and barred Joslyn from the wreck site.\textsuperscript{276} Undaunted, Joslyn filed a new request on August 12, 1996, this time asking only for the right to photograph the Titanic.\textsuperscript{277}

C. The Initial Establishment of Exclusive Photographic Rights

In Joslyn’s second action, the same district court focused its attention on the archaeological integrity of the Titanic and the feasibility of preserving this integrity through salvaging.\textsuperscript{278} The court was also concerned with the economic hardship RMST would encounter if rivals were allowed to access the wreck site and compete with RMST for photographic images and for lucrative diving tours.\textsuperscript{279} The district court determined that granting RMST exclusive photographic rights to the wreck, and barring others from the same, would satisfy both concerns.\textsuperscript{280}

For its voyage, the Titanic’s cargo consisted mainly of perishable items, such as 500 cases of shelled walnuts, 860 rolls of linoleum, and eight cases of orchids—all of which would be worthless today.\textsuperscript{281} Any other objects on the Titanic that might be valuable, such as the ship’s chandelier or decorated doors, were vital to the historical integrity of the wreck.\textsuperscript{282} Further, RMST had previously assured the court that it

\textsuperscript{274} See id. at 723.
\textsuperscript{275} See id. at 723-24.
\textsuperscript{276} See id. at 724. This final factor is typically based on the probability of a salvor maintaining the economic resources to safely and successfully continue its operations. See id. It is important to note that in this case, the court recognized that RMST was preserving its artifacts for the public welfare, rather than selling them. Because of this commitment to public interest over profit, the court was more generous in its assessment of RMST’s financial position. See id.
\textsuperscript{277} See id.
\textsuperscript{278} See Nafziger, supra note 150, at 314.
\textsuperscript{279} See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 1996 A.M.C. 2497, 2499 (E.D. Va. 1996). In response to Joslyn’s suit, RMST filed a motion for a preliminary injunction against Joslyn and all possible third parties from entering the Titanic wreck site. See id. at 2497-98.
\textsuperscript{280} See id. at 2498.
\textsuperscript{281} See id. at 2500.
\textsuperscript{282} See Timpany, supra note 90, at 78. The manifest record also shows that the Titanic was carrying “wine, cheese, fruit, furniture, textiles, a car, straw hats, champagne, books, potatoes, machinery, soap, two cases of grandfather clocks, a case of gramophones, horse hair, hair nets, rabbit fur, ostrich feathers, briar pipes, 76 cases of dragon’s blood, and $24,000 worth of opium.” Id. at n.57.

Although the storage room of the Titanic was supposedly full of jewels and money, including diamonds valued at seven million dollars in 1912, it is unlikely they would be found in the wreck. See id. at 78-79. Some jewels were given back to escaping passengers, and others were brought on deck to be saved, only to be washed overboard and eventually lost forever under years of sediment. See id.
would not break up and sell these objects. For RMST, then, the very nature of the wreck provided no direct opportunity for recouping the cost of salvage.

In recognition of RMST's predicament, the district court announced that "traditional salvage rights must be expanded for those who properly take on the responsibility of historic preservation." Because RMST was not selling artifacts in the manner of a traditional salvor, it was permitted to engage in other, non-intrusive means of obtaining funds necessary to continue its efforts in research and preservation. RMST had come to rely on revenue from the public exhibition of Titanic artifacts, sales of licenses for replicas of Titanic artifacts and Titanic souvenirs, as well as running tours to the wreck site. The district court, therefore, explicitly endorsed the use of inventive marketing ideas to finance the ship's salvage.

Principal in such alternative marketing schemes was the right to sell, or sell access to, the image of the Titanic. The district court concluded that imagery can be marketed like any other physical object, and, just as RMST possessed the right to Titanic artifacts, so too did the salvor have the right to its imagery. Necessary to the protection of these rights would be the right to control the image and photography of the wreck by prohibiting others from doing the same. Consequently, the court found 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 artifacts." Without such protection, the court theorized, the number of interested parties utilizing RMST's services for tours or imagery of the wreck would drastically decrease, while the proliferation of images from rival sources would dilute the value of RMST's images.

283. See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 924 F. Supp. 714, 718 (E.D. Va. 1996). RMST had also pledged not to sell artifacts to the French government and the National Maritime Museum of Great Britain. See id. at 718 n.10. RMST has sold lumps of coal from the wreck, however. Although accompanied by a display case and authenticating plaque, the coal itself is considered natural and therefore not within the prohibition on selling Titanic artifacts. See id. at 718. As of 1996, RMST has collected over $250,000 in sales of the coal. See id.


285. See id. "[I]f R.M.S. Titanic is not selling artifacts like traditional salvors, it must be given the rights to other means of obtaining income." Id.

286. See Nafziger, supra note 150, at 317. For example, in 1996, RMST and IFREMER returned to the Titanic with a cruise ship filled with celebrities and passengers who paid fares as high as $6950 to watch the expedition's failed effort to recover "The Big Piece" of the hull. See Concannon, supra note 99, at 28.

287. See R.M.S. Titanic, 1996 A.M.C. at 2499. This right includes exclusive control of "video sales, film documentaries, and television broadcasts." Id.

288. See id.

289. Id.

290. See id. A high market value for the images of the Titanic was necessary, the court theorized, in order to ensure RMST's continued salvaging of the wreck and its
The district court concluded that RMST's status as salvor-in-possession of the Titanic included the sole and exclusive right to photograph and market all images of the famous wreck. Accordingly, the court granted RMST's motion for a preliminary injunction and barred Joslyn, and any other possible rivals, from diving onto the wreck for any purpose. The Fourth Circuit dismissed with prejudice Joslyn's appeal of this decision, and the district court's broad grant of possessory rights to RMST remained, for the time being, intact.

D. The Reiteration of Photographic Rights

In the spring of 1998, RMST learned of a commercial venture run by a British Virgin Isle corporation named Deep Ocean Expeditions (“DOE”). DOE had organized and was prepared to provide private tours of the wreck using the Russian research vessel Akademik Mstislaw Keldysh and its advanced deep water submersibles, Mir I and Mir II. Promoted as “Operation Titanic,” the tour charged its customers $32,500 each to participate in research on the wreck with Russian scientists. The passengers would also be allowed to take photographs of the wreck for their personal use, and, at the end of the dive, they would receive videotapes of their adventures as mementos.

commitment to barring the sale of any physical artifacts. See id. at 2498.
291. See id. at 2499.
292. See id. at 2500. The injunction prohibited Joslyn and any other person having notice from:

conducting search, survey, or salvage operations, or obtaining any image, photographing or recovering any objects, entering, or causing to enter, anything on or below the surface of the Atlantic Ocean, otherwise interfering with operations conducted by [RMST], or entering the wreck site for any purpose not approved by [RMST], within a ten (10) mile radius of the following coordinates [marking the Titanic wreck site]:

Longitude: 41 degrees 43 minutes North
Latitude: 49 degrees 56 minutes West

Until further order of Court.

R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 953 (4th Cir. 1999) (emphasis added), cert. denied, 120 S. Ct. 74 (1999). This created a protective circular area measuring 314 square miles. See id. at 969.
293. See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 9 F. Supp. 2d 624, 627 (E.D. Va. 1998) (referring to the Fourth Circuit's dismissal on December 6, 1996). This dismissal was pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure (Voluntary Dismissal in the Court of Appeals). See id.
294. See Haver, 171 F.3d at 953.
295. See id.
297. See Concannon, supra note 99, at 28.
298. See id. The promotional material for “Operation Titanic” declares DOE's concern for the integrity of the Titanic and exhorts participants on the dive, both
In response, RMST filed a motion for a preliminary injunction to prevent DOE from visiting and photographing the site in accordance with the exclusionary rights previously granted by the district court. On the same day, Christopher S. Haver, a prospective customer of DOE, filed a separate *in personam* action against RMST seeking a declaratory judgment that he be allowed to enter and photograph the wreck site. RMST filed a counterclaim against Haver, and the district court consolidated all of the motions into RMST's underlying action.

In its decision, the same district court again found that RMST had an exclusive right of access to the photographic "booty" of the Titanic. The court, however, took the opportunity to clarify its earlier decision. The rationale behind including photographic rights in RMST's possessory interest in the wreck, the court explained, was based on two factors. First, under salvage law, RMST had the right to salvage the wreck free from interference of rivals. In the case of historical salvage, this can mean interference with the salvor's operations or interference with the wreck itself. The district court felt that having other divers on the Titanic wreck site, even for solely photographic purposes, would compromise RMST's preservation efforts and would constitute interference. Due to the depth and fragility of the wreck below and the vagaries of the weather above, RMST had a limited window of time to conduct operations, and thus any obstruction, even a minor one, could throw off the salvor's entire schedule. Consequently, RMST would potentially "incur substantial monetary losses" by being unable to fulfill contractual obligations and commitments related to the salvage. Further, the scientists and customers, to "categorically avoid any collection of artifacts or pieces of the wreck, neither interfacing with nor damaging the wreck in any way." R.M.S. Titanic, 9 F. Supp. 2d at 629. See R.M.S. Titanic, 9 F. Supp. 2d at 629. See id. at 630. See id. at 630. See id. at 640. At this time, RMST had developed approximately 500 hours of videotape footage and 7000 still photographs, and had exhibited its imagery artifacts all over the world. RMST also produced a three-hour television documentary in conjunction with the Discovery Channel entitled "Titanic: Anatomy of a Disaster." See id. at 628.

303. See id. at 635-36. Judge Clarke was the same judge who, in *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 1996 A.M.C. 2497 (E.D. Va. 1996), held that RMST had photographic rights to the Titanic wreck. See R.M.S. Titanic, 9 F. Supp. 2d at 635. See id. at 635-36. See id. at 636. See id. at 635. See id. See id. at 637. The court noted RMST's $1.5 million charter contract with IFREMER and a $6 million licensing agreement with The Discovery Channel and
presence of photographers at the wreck site might disturb and damage the Titanic because one would have to get very close to the wreck in order to properly view it in the darkness at 12,500 feet.\textsuperscript{310} The district court's second rationale for excluding third party photography of the Titanic was, as proffered in its earlier decision, to allow RMST to recoup its investment by marketing and selling its images.\textsuperscript{311} Without such an opportunity for financial gain, RMST would lose incentive to continue its preservation efforts and be tempted to either sell off its recovered artifacts, or else abandon the wreck site, inciting a destructive free-for-all among rival salvors.\textsuperscript{312} Accordingly, the court concluded that tourists should pay RMST, as the salvors in possession, for the right to dive on and photograph the wreck rather than paying DOE.\textsuperscript{313} Likewise, individuals who purchase photographs of the Titanic should purchase the images from RMST and not from other sources, lest RMST's market interest in the Titanic become diluted.\textsuperscript{314}

After reiterating its holding that RMST had exclusive rights to the imagery of the sunken wreck, the district court then turned its attention to RMST's motion for a preliminary injunction.\textsuperscript{315} Using a four-factor “hardship balancing test,”\textsuperscript{316} the court first considered the likelihood of harm to RMST if the injunction were denied, and second, weighted this against the detriment to DOE and Haver if the injunction were granted.\textsuperscript{317} The court also considered the probability that RMST would succeed on the merits, and, lastly, the court considered the public's interest in the Titanic.\textsuperscript{318} The court found that allowing others access to the wreck site would risk RMST losing a salvage season due to possible interference, reduce RMST's income from licensing tours and imagery of the vessel and invite tampering, if not destruction and looting, of the Titanic by competing salvors and souvenir hunters.\textsuperscript{319} Conversely, the court determined that DOE had “made an insufficient evidentiary showing concerning ... irreparable harm.”\textsuperscript{320} Only Haver produced evidence of such harm—he claimed “nostalgic injury” in being denied a first-hand opportunity to witness NBC, both contingent upon RMST successfully completing its salvage for the season. See id.

\textsuperscript{310} See id. at 636.
\textsuperscript{311} See id.
\textsuperscript{312} See id. at 636, 640.
\textsuperscript{313} See id. at 640.
\textsuperscript{314} See id.
\textsuperscript{315} See id. at 637.
\textsuperscript{316} This is the standard that the Fourth Circuit applies to any motion for a preliminary injunction. See id. at 637.
\textsuperscript{317} See id.
\textsuperscript{318} See id.
\textsuperscript{319} See id.
\textsuperscript{320} Id. at 638.
and photographic the Titanic's resting place. Not surprisingly, the court found that the harm to RMST significantly outweighed any possible injury to Haver and DOE.

Under the third factor of the "hardship balancing test," the court found that RMST would likely succeed on the merits of the case, because the same court had previously found for RMST on an identical issue under similar circumstances. Finally, the court held that the public's main concern was for the preservation and study of the Titanic wreck. A solitary salvor, the court continued, was best suited for this purpose. Because RMST had proven itself to be diligent in both salvaging and protecting the wreck, the court concluded that it was in the public's interest to designate RMST as the only salvor permitted access to the Titanic wreck site. The district court granted RMST's motion for an injunction and prohibited DOE, Haver, and any notified third party from entering the 120-square-mile area of the Titanic wreck site for an indefinite time. On September 9, 1998, however, passengers of DOE dove onto the Titanic in defiance of the court's ruling. Much like Dr. Ballard's and Congress' commands before it, the marine community ignored the court's pronouncement.

321. See id.
322. See id.
323. See id.
325. See R.M.S. Titanic, 9 F. Supp. 2d at 639. Interestingly, the court rejected Haver's argument that the purposes espoused in the R.M.S. Titanic Maritime Memorial Act, see supra notes 252-55 and accompanying text, should be used to determine the public's interest. See R.M.S. Titanic, 9 F. Supp. 2d at 638. The court found that because the protective treaty envisioned by the Act had not been negotiated, much less enacted, only the policies underlying traditional salvage law would hold here. See id. at 639.
326. See R.M.S. Titanic, 9 F. Supp. 2d at 639. "The ancient and modern salvage cases demonstrate that it is beneficial for a single salvor to return imperiled property to its owner." Id.
327. See id. at 640.
328. See id.
329. See id. The Fourth Circuit later calculates this to be "a 168 square mile rectangular area." R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 969 (4th Cir. 1999), cert. denied, 120 S. Ct. 74 (1999). The injunction reads, in part:
[Notified parties, including Haver and DOE] are ENJOINED [sic] 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 or wreck site, and (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.
Id. (citing the district court's 1998 injunction) (emphasis added).
331. See supra notes 250-55 and accompanying text.
E. The Repeal of Photographic Rights in Titanic

On March 24, 1999, the Fourth Circuit heard DOE and Haver's appeal of the district court's 1998 decision upholding the grant of photographic rights. The circuit court agreed with the district court's grant of salvage rights to RMST in the wreck of the Titanic, maintaining that these rights "include the right exclusively to possess the wreck for purposes of enforcing the [possessory grant]." However, the court limited the scope of these rights in order to make them consistent with traditional salvage principles. RMST could enjoin persons from diving onto the wreck, the court assented, but only to the degree that such dives would directly interfere with RMST's salvage efforts, and only against individuals within the personal jurisdiction of a United States court. In effect, this formulation would preclude RMST from asserting exclusive photographic rights, or any intellectual property rights whatsoever, as salvor-in-possession of the Titanic.

The circuit court found the district court's expansion of salvage rights to include the right to control photography of a wreck "unprecedented," and believed that such an expansion would conflict with what the court perceived to be the traditional purpose behind salvage practice. The court stated that the purpose of salvage law is to encourage the rescue and return to owners of "specific property at risk:" the court reasoned that images of a wreck were neither specific nor at risk. The circuit court categorized the potentially marketable imagery of a wreck as an intangible, and thus unprotected, feature of the physical wreck, and expressed its alarm at extending salvors exclusive rights over such "yet to be saved property." The court apparently felt that traditional salvage law protects only the actual and material commodities of a wreck that can be physically returned to an owner.

332. See Haver, 171 F.3d at 943.
333. Id. at 968.
334. See id. at 970.
335. See id. at 970-71. Both the district court and the circuit court asserted in rem jurisdiction over the Titanic, but the circuit court limited the scope of the injunction to those over whom the court has personal jurisdiction. Consequently, Haver, who brought suit in a United States court, would be bound by the Circuit's decision, but the Virgin Island corporation DOE would not be so bound. See id. at 958-59.
336. The court believed that to decide otherwise would "alarmingly expand salvage law." Id. at 970.
337. See id. at 969-70.
338. See id. But see Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, 1999 A.M.C. 69, 73 (S.D.N.Y. 1998) (holding that film and video of a shipwreck are valuable artifacts and are subject to salvage), claim dismissed in part by, Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, Copy. L. Rep. (CCH) 27967 (S.D.N.Y. 1999).
339. See Haver, 171 F.3d at 969.
340. See id. at 969-70. This, of course, ignores the additional, if not overriding,
Further, the court was not persuaded by the notion that RMST should be granted novel and creative means to fund its operations in consideration of the inherent unprofitability in the salvaging of the Titanic. Rather, the court found that "[to allow] property being salvaged for a commercial use to compensate the salvor when the property saved might have inadequate value" was outside the scope of traditional salvage law. To hold otherwise, the court feared, would mean that the nature of marine salvage might shift from an operation to save property on behalf of an owner to a profit-making venture for the salvor. As a consequence, the salvor might jeopardize the return of a vessel to the owner in order to secure his or her economic interest. Thus, the court prophesized, if it were to grant RMST, or any salvor, photographic rights to a wreck, the salvor would likely abandon its efforts to recover the ship if the salvor could greater profit by selling images of, and admission to, the wreck while it was still submerged.

Even if there were no owner to whom the wreck could be returned, the Fourth Circuit continued, the principles of intellectual property and international comity did not permit the grant of photographic rights to a salvor. The court contended that in normal circumstances, the law grants exclusive rights to viewing and image-recording in a property only where the owner has removed the property to a "private or controllable location." Just as an architect cannot prevent passersby from viewing his or her building on a public street, so too, the court reasoned, RMST could not have the right to exclude others from photographing the Titanic while it lay in public waters. Moreover, even if the court were to grant RMST exclusionary rights to photograph the Titanic, the court felt that this expansion would so alter salvage law that its invocation would risk upsetting the unity of traditional international admiralty law. At the very least, the court concluded, enforcing RMST's injunction on the open sea would interfere with navigation on international waters.

Ultimately, the Fourth Circuit upheld only part of the district court's original injunction. The court reaffirmed RMST's status as the sole salvor-in-possession, granting RMST exclusive salvage rights

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341. See Haver, 171 F.3d at 969-70.
342. Id. at 970.
343. See id.
344. See id.
345. See id.
347. See Haver, 171 F.3d at 970 n.5. Presumably, RMST would have photographic rights to the artifacts it removes and exhibits.
348. See id. at 970.
349. See id. at 971.

Purpose of historic salvage in preserving the archaeological integrity of a wreck for scientific study and public exhibition. See supra notes 40-55 and accompanying text.
to the Titanic as against salvors over whom the court has jurisdiction, but removed image-taking from the salvor's bundle of possessory rights. As such, RMST could prohibit Haver and others from visiting or taking photographs of the famous wreck, but only if RMST could show that these actions were part of a competing salvage effort, or that allowing the image-taking would interfere with RMST's own salvage operations. If it could not make this showing, rivals would be free to dive onto the wreck for the purpose of taking pictures and marketing the images, as long as the divers did not disturb the wreck itself. In October 1999, the Supreme Court refused to hear RMST's appeal of the Fourth Circuit's decision.

The litigation surrounding the wreck of the R.M.S. Titanic illustrates the difficulties faced by historic salvors in their operations, and the extent to which salvage law will be forced to accommodate the concerns of historic salvage. An historic salvor must balance the need to profit from salvaging a wreck with the need to preserve the archaeological value of the wreck and its artifacts. For a salvor working a large-scale or otherwise difficult operation, maintaining this balance between profit and preservation may be impossible. This is especially true in a situation such as RMST's, where the salvor runs costly salvage operations but agrees not to commercially exploit the find. Traditional salvage law, however, was not adequate to resolving this dilemma posed by historic salvage, leaving the Eastern District of Virginia court to craft a novel solution. The court did so by granting RMST exclusive photographic rights to the Titanic as a means for the salvor to continue its operations, and as a consequence, provided future incentive for potential salvors to locate and rescue what were once otherwise unprofitable shipwrecks. The next part analyzes the viability of an exclusive photographic right in historic salvage, and explores whether it is appropriate, both legally and according to public policy, to include this right in a salvor's bundle of possessory rights.

350. See id.
351. See id. The court did, however, limit the area of the original prohibition, concluding that a 168-square-mile injunctive area in international waters would unnecessarily interfere with general navigation. See id. at 970.
352. A more detailed consideration of the jurisdiction and enforcement of federal decisions regarding international waters is beyond the scope of this Note. For a discussion of these issues, see John D. Kimball, Case Note, Jurisdiction: A United States Admiralty Court Can Award and Enforce Salvage Rights in a Shipwreck in International Waters, 30 J. Mar. L & Com. 691, 693-94 (1999).
III. GRANTING INTELLECTUAL PROPERTY RIGHTS IS AN APPROPRIATE AND NECESSARY EXTENSION OF TRADITIONAL SALVAGE LAW

In deciding *R.M.S. Titanic, Inc. v. Haver*, the Fourth Circuit adhered to a strict reading of traditional salvage principles and resisted a shift in admiralty law that would accommodate the goals and policies implicated by historic salvage. In cases of ancient shipwrecks, other courts have focused less on securing the commercial interests of an owner in its cargo, and more on encouraging preservation of the imperiled vessel and protecting the financial interests of the historic salvor. Courts in admiralty have frequently recognized that traditional notions of salvage law do not serve these goals and, in response, have expanded the law in order to protect wrecks and equitably provide for their salvors. The grant of exclusive photographic rights in a submerged wreck by the Eastern District of Virginia court is one example of such an expansion. In view of the unique concerns raised by historic salvage, the district court’s call for creative and innovative applications of salvage principles is justified, and its merger of salvage and intellectual property rights is consistent with both the principles underlying traditional salvage law and with the public concern for historic shipwrecks. This part explores whether these photographic rights should be instituted as a supplement to salvage law using extant and intact intellectual property law, namely copyright or trademark law, or whether salvage law should instead be expanded to incorporate these rights simply using the principles underlying the law of intellectual property. This part argues that traditional salvage law, and its goals of protecting the salvor and the ship, rather than intellectual property law, is the proper vehicle for implementing the grant of photographic rights. This part concludes by examining how the public interest in historic salvage is served by such an incorporation.

A. Legal Basis for Exclusive Photographic Rights in Salvage

There are two ways to interpret the Eastern District of Virginia court’s call for exclusive photographic rights for salvors: one option would be to apply intellectual property doctrine to salvors’ claims as an intact supplement to salvage law; the other option is for courts to

354. 171 F.3d 943 (4th Cir. 1999).
355. See supra notes 92-112 and accompanying text (discussing general trends in modifying salvage law to accommodate historic salvage); see also supra Part I.D (describing particular cases in which courts expanded salvage law in response to the concerns raised by historic salvage).
356. See supra notes 113-18 and accompanying text (noting the addition of a factor for archaeological preservation to a salvor’s award).
357. See supra Part I.D.
expand salvage law to incorporate the characteristics of intellectual property principles, though not necessarily the codified rights themselves. The district court was not clear about which construction it believed should apply. An analysis of the two options, however, reveals that while both are feasible and serve, to some extent, to protect the salvor’s interest in a wreck, the latter option of merging salvage law with principles of intellectual property is more expedient and grants salvors the comprehensive rights envisioned by the district court in *R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel.* This section discusses the viability of each option in turn.

1. **Photographic Rights Under the Doctrine of Intellectual Property Law**

Under copyright law, an historic salvor would have limited rights in any image of a wreck the salvor may have taken. Copyright law, as governed by the 1976 Copyright Act ("Act"), is designed to protect an author’s property interest in works the author has created. As such, the Act recognizes a creator’s right to reproduce a work, to prepare derivative works, to distribute the work, and to perform or display the work. Federal copyright law limits this protection to literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial, graphic and sculptural works, motion pictures and other audiovisual works, sound recordings, and architectural works. For a salvor’s work to be eligible for copyright protection, then, its property-in-interest must fit within one of these eight categories.

A salvor’s images of a sunken wreck or wreck site would likely merit copyright protection under section 102(5) of the Act, which

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358. See Bederman & Prowda, supra note 296, at C18.
359. See id. (stating that the District Court of Virginia was discussing salvage law, but “infused the subject with at least the idiom of intellectual property rights”).
360. 9 F. Supp. 2d 624 (E.D. Va. 1998). Significantly, neither the Eastern District of Virginia court in its initial and subsequent decisions, nor RMST in its brief, even mention intellectual property law as a basis for a salvor’s exclusive photographic rights. See Bederman & Prowda, supra note 296, at C18.
361. See Bederman & Prowda, supra note 296, at C18.
363. See id. § 102(a) (extending protection only to “original works of authorship”).
364. See id. § 106(1)-(6).
365. See id. § 102(a)(1).
366. See id. § 102(a)(2).
367. See id. § 102(a)(3).
368. See id. § 102(a)(4).
369. See id. § 102(a)(5).
370. See id. § 102(a)(6).
371. See id. § 102(a)(7).
372. See id. § 102(a)(8).
373. See id. § 102(a).
protects photographic images, or under section 102(6) of the Act, which protects documentaries and films. The Act would consider these "creations" protected works as they are secondary, or derivative, images of the original wreck. The shipwreck itself, however, cannot be copyrighted because the author did not create the wreck. Further, the Act would not extend its protection to the discovery of the wreck. Thus, a salvor's rights in copyright would be limited to protection against the copying and distribution of the images the salvor took of the wreck, but the salvor would have no proprietary interest in the physical wreck itself.

In a claim of infringement of a salvor's copyrighted images, then, a salvor would have a cause of action only against a rival if that party copied or distributed the image the salvor made of the wreck. Because the salvor does not have a copyright in the wreck itself, however, the salvor would have no claim in copyright against a rival who dove onto the wreck site and made its own original image of the wreck. Thus, a salvor cannot maintain exclusive control of the imagery of the wreck based on copyright law by prohibiting others access to the wreck site. If a court finds that a rival is infringing a salvor's copyrighted image, the court can only issue an injunction barring the rival from producing or distributing illicit copies of the salvor's copyrighted image. This injunction would limit a rival's ability to create and distribute the offending work, but it would not physically bar the infringer from visiting the site and creating its own derivative work. According to copyright law, therefore, a court in

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374. See id. § 102(a)(5), (6). This is assuming that the images are both original and fixed as required by the Constitution. See Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340, 346-47 (1991).

375. See Bederman & Prowda, supra note 296, at C18.

376. See 17 U.S.C. § 103(b) (distinguishing protected derivative works from the unprotected, pre-existing material on which the works are based). A building, conversely, may be copyrightable, or at least its non-utilitarian parts may be, due to a person's act of design and creation. See Hunt v. Pasternack, 192 F.3d 877, 876 (9th Cir. 1999) (discussing the Architectural Works Copyright Protection Act of 1990, Pub. L. No. 101-650, 104 Stat. 5133 (codified at 17 U.S.C. §§ 101, 102(a)(8) (1994)), which amended the Copyright Act of 1976 to include "building[s], architectural plans, or drawings").

377. See 17 U.S.C. § 102(b) (“In no case does copyright protection... extend to any... discovery, regardless of the form in which it is described, explained, illustrated, or embodied in [a copyrightable] work.”).

378. See Bederman & Prowda, supra note 296, at C18.

379. See 17 U.S.C. § 501(a); Arnstein v. Porter, 154 F.2d 464, 468-69 (2d Cir. 1946) (establishing the test for copyright infringement of “copying” and “improper appropriation”).

380. See Reed-Union Corp. v. Turtle Wax, Inc., 77 F.3d 909, 914 (7th Cir. 1996) (holding that while derivative photographic works by Ansel Adams of a natural rock formation are copyright-protected, the plaintiff could not prohibit anyone from taking and selling their own photos of the formation).


382. See Reed-Union Corp., 77 F.3d at 914.
admiralty cannot restrict rivals from accessing and photographing a sunken wreck.

Moreover, a rival who visited and independently created its own image of a wreck would also have a copyrightable work. The Act would give any subsequent pictorial or video work with a modicum of originality identical copyright protection as the original salvor's images. Consequently, it is possible for a court to find that the original salvor is infringing upon the copyrights of subsequent divers to a wreck. This result would be contrary to the deference courts in admiralty have traditionally given to the first recognized salvor. Thus, a salvor seeking protection for its photographic imagery of a shipwreck under copyright law would receive less priority in obtaining the rights to the wreck than under admiralty law.

Trademark law is equally unpromising for expanding a salvor's rights in photographic imagery. Federal trademark law, as governed by the Lanham Act, applies to "any word, name, symbol, or device, or any combination thereof . . . [that serves] to identify and distinguish his or her goods [in commerce]." Trademark law is designed to preserve a holder's commercial interest in the mark, such as its use in advertising, and to prevent consumer confusion among competing products. Accordingly, once a mark holder proves that he or she was the first to use a particular and distinctive symbol in commerce, the Lanham Act protects the integrity of the symbol by prohibiting others from employing an identical or similar mark.

In the context of historic salvage, a salvor might obtain trademark rights in the imagery of the wreck under three theories of protection. First, the salvor who had established a mark based on imagery of the wreck would have a general cause of action against the infringer of the specific image upon a showing of commercial use of the same work by both the salvor and the infringer, and customer confusion between the two. Second, the salvor may garner protection against trademark dilution upon a showing of "fame" of the original mark and loss of reputational value of the mark based on a subsequent use of a

385. See MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F. Supp. 308, 311-12 (S.D. Fla. 1986) ("[I]n a first finder situation, the law of finds and salvage merge to give the first finder/salvor sole possession of the property." (citation omitted)).
387. Id. § 1127.
390. See id. § 1125(a).
391. See id. This is, however, an unlikely cause of action because salvors generally do not have customers.
competing or similar image. Lastly, the salvor may be able to apply a form of "publicity principles" to the wreck to prevent against an implication of false endorsement.

Under a general infringement action, if a salvor appropriated an image of a wreck it was salvaging as a mark of its business, it would receive trademark protection in the use of this image. This would conceivably prevent other salvors from using this same image to promote their services. To merit this protection, however, the original salvor would have to show that the image is distinct, that customers associate that particular image with the company's name and reputation, and that the rival's unlicensed use of the image would likely create confusion among customers. This can be a high burden for an historic salvor, who often does not have customers, and thus may make general enforcement of a trademark difficult.

A salvor may, however, have a better claim to the imagery of a wreck under a theory of trademark dilution. Trademark dilution occurs when another's actions tarnish or blur a holder's trademark, thus diminishing the value of the mark. Several states have anti-dilution statutes and, while the original Lanham Act did not protect against dilution, the Act was amended in 1995 to include federal anti-dilution protection. The amendment enables holders of "famous" trademarks to bring a cause of action against others who subsequently use a similar mark and thereby cause, or potentially cause, reputational dilution of the original mark. Importantly, in contrast

392. See 4 Epstein, supra note 388, § 7.06, at 7-44.
394. See id. § 1051(a)(1).
395. See id. § 1125(a).
396. See 4 Epstein, supra note 388, § 7.03[B][1], at 7-26.
397. See id. § 7.03[B][2], at 7-26. The key factors for determining a likelihood of confusion include: "(a) the strength of the plaintiff's mark, (b) the relatedness of the goods, (c) the similarity between the marks, (d) evidence of actual confusion, (e) the marketing channels used, (f) sophistication of the buyers, (g) the defendant's intent in selecting the mark, and (h) the likelihood of expansion of the product lines." Id. at 7-27.
398. See Bederman, Historic Salvage, supra note 31, at 102-03.
399. See 4 Epstein, supra note 388, § 7.06, at 7-44.
400. See 4 Epstein, supra note 388, § 7.06, at 7-44.
401. See id. § 7.06[E][1]-[2], at 7-55 to 7-59 (discussing anti-dilution statutes in New York and California).
402. See id. § 7.06[D], at 7-48.
404. See id. § 1125(c)(1). The amendment does not define "famous," but it does supply non-exclusive factors a court may use to determine a mark's fame:
(A) the degree of inherent or acquired distinctiveness of the mark; (B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used; (C) the duration and extent of advertising and publicity of the mark; (D) the geographical extent of the trading area in which the mark is used; (E) the channels of trade for the goods or services with which the mark is used; (F) the degree of recognition
to a claim for trademark infringement, anti-dilution statutes do not require proof of consumer confusion. A holder of a trademark need only show damage to the mark's inherent value, which can be caused by the mark's overexposure or its use on inferior products.

Theoretically, protection against dilution can be applied generally to all claims of infringement of derivative images of a famous item. One example of such an anti-dilution claim might be in challenging the unauthorized use of images of famous buildings designated as historic landmarks. Similarly, under this theory of trademark dilution, a salvor of an equally famous and distinctive shipwreck may enjoin others from taking and marketing the image of the ship. This action, of course, would be contingent upon a showing by the salvor that the salvor uses the image of the wreck as a trademark, and that the use of additional images of the wreck by others would unduly dilute the value of the salvor's mark.

A salvor could also argue that the imagery derived from the wreck has become so inextricably associated with the salvor that any image of the wreck would constitute a protected mark. This would occur if the image of the wreck is used consistently and is invariably identified with the salvor-in-possession as the source. The salvor could then claim a "trade identity" in the sunken wreck and receive trademark protection from any image taken of the wreck by others. The protection of the image of the wreck thus becomes akin to the protection of the reputation of a famous celebrity.

The Lanham Act prohibits the use of any mark that identifies a person or name that falsely suggests endorsement or connection with that person. This right of publicity can extend to well-known and

of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought: (G) the nature and extent of use of the same or similar marks by third parties; and (H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

Id. at 836-38.

See 4 Epstein, supra note 388, § 7.06[D], at 7-49. (finding such a right of publicity for buildings).
distinct objects and institutions, as well. Accordingly, section 43(a) of the Lanham Act could be invoked to enjoin any unauthorized use of a famous shipwreck image in order to protect a salvor's right to choose not to use the image for commercial purposes. Although untested in the case of shipwrecks, commentators have urged the application of this line of reasoning to historic buildings, but it has not proved successful in the courts.

Aside from the difficulty of proving customer confusion in an infringement claim, another difficulty for salvors under trademark law is that, while a trademark may give a salvor exclusive rights to the use of a singular distinctive image of a wreck as a trademark, the Lanham Act would not cover other images of the wreck. Much like copyright law, trademark protection would extend to the image the salvor derived from the wreck, but not to the physical wreck itself. Just as a physical wreck cannot be a creation of the artist under copyright, neither is it a word, name, symbol, or device necessary for trademark protection. Thus, even though a salvor may have a protected trademark in an initial image of a particular wreck, others would be able to take and create their own images of the wreck, so long as the second image was distinguishable from the first. Moreover, even if a court finds an infringement of an image, the Lanham Act only authorizes an injunction against the use of the

415. See Christ, supra note 411, at 122.
417. See Christ, supra note 411, at 122-23 (theorizing such a cause of action for owners of landmark buildings). If rival salvors are allowed to take and exploit images of a historic wreck for commercial use, it could hamper the archaeological reputation of the salvor-in-possession. This could be especially harmful in a situation like that of the Titanic, where the salvor, RMST, has developed a reputation for public preservation of a wreck's artifacts. See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 924 F. Supp. 714, 722-23 (E.D. Va. 1996).
418. See Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods., 134 F.3d 749, 755 (6th Cir. 1998) (finding that the plaintiff museum cannot obtain trademark protection for every derivative image of its building); see also University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 703 F.2d 1372, 1377 (C.A.F.C. 1983) (holding that the plaintiff university was not unmistakably associated with the Notre Dame Cathedral, and therefore could not prevent others from using the Cathedral's image).
420. See id.
421. An alternative argument would be that the wreck itself constitutes a trade dress, or "total image" of a product. See 4 Epstein, supra note 388, § 7.04[A], at 7-36. For a device to qualify as a trade dress, it must "convey[] a 'source'-related commercial impression." Id. That is, all the elements of the work, here the wreck, are needed to identify the product or service. However, it is unlikely that a complex physical object, such as a ship, would be viewed as a trade dress. See Christ, supra note 411, at 122 (stating that buildings cannot be source-related).
422. See 15 U.S.C. § 1114 (such a distinguishable use would not cause the requisite consumer confusion necessary for a cause of action).
image, which would not extend to prohibiting access to the source of the image, such as the wreck.\footnote{423}

Alternative causes of action in dilution and rights of publicity suffer from the same failings. Additionally, dilution protection requires additional showings of such abstract values of "fame" and damage to the wreck's inherent reputation.\footnote{424} Rights of publicity, on the other hand, have been rejected by the courts as a source of protection for physical objects, like shipwrecks.\footnote{425}

Neither the wholesale application of copyright nor trademark law would grant historic salvors adequate protection in the images of their wrecks. Copyright law would provide a salvor with protected rights in any specific images it makes of a submerged vessel, but the law would also grant any subsequent salvor the same right in images the second salvor captures.\footnote{426} Copyright law cannot prohibit the creation and marketing of an image independently derived from an original source—in this case, the shipwreck.\footnote{427} Similarly, trademark law may prevent a subsequent salvor from taking and using commercially a derivative image of a wreck that a original salvor had already registered as a trademark.\footnote{428} In this instance, however, the original salvor must prove that the subsequent image is so similar to its own mark that it causes customer confusion.\footnote{429} This would be difficult for a original salvor to demonstrate if a rival took its own distinct image. Although the trademark principles of "dilution"\footnote{430} and "right of publicity"\footnote{431} may give a salvor broader rights against subsequent salvors taking multiple and distinct images of a wreck, these trademark concepts may not be applicable to public, physical structures such as shipwrecks.\footnote{432} Further, both copyright and trademark law pertain only to the images of an object, and do not extend any protection to the object itself.\footnote{433} As such, a salvor cannot gain a protected interest in the wreck it is salvaging. Therefore, neither regime of intellectual property law could justify issuing a preliminary injunction against rivals diving on to the wreck and taking their own images, which only confirms the unsuitability of importing copyright and trademark law into historic salvage as a means of protecting a salvor's rights.

\begin{footnotes}
\footnote{423. See id. § 1117.}
\footnote{424. See supra notes 403-06 and accompanying text.}
\footnote{425. See supra note 418 and accompanying text.}
\footnote{426. See supra notes 380-84 and accompanying text.}
\footnote{427. See supra note 378 and accompanying text.}
\footnote{428. See supra notes 394-95 and accompanying text.}
\footnote{429. See supra notes 396-98 and accompanying text.}
\footnote{430. See supra note 400 and accompanying text.}
\footnote{431. See supra notes 410-13 and accompanying text.}
\footnote{432. See supra notes 409, 418 and accompanying text.}
\footnote{433. See supra notes 378, 420 and accompanying text.}
\end{footnotes}
The possessory right to photographic images of a wreck is better justified as an incorporation of the principles of intellectual property into a traditional salvor's bundle of rights as granted by salvage law. Unlike intellectual property law, which would focus solely on the image of the wreck, salvage law is concerned with the wreck itself. As such, the rights granted by salvage law apply to the physical wreck. Salvage law was initially developed with the purpose of returning lost or imperiled property to the stream of commerce. Salvage law thus recognizes the benefits of a quick and efficient recovery of sunken ships and their cargo. Salvage law also realizes that such beneficial salvaging will not occur unless salvors are given proper incentive. Accordingly, the law of salvage customarily grants salvors certain rights of operation and financial retribution that give salvors greater possessory interest in a wreck, and allow for greater profit from the wreck's salvage.

Among these possessory grants is the establishment of an inchoate lien that bestows upon salvors constructive possession over artifacts still submerged. Another protection granted by salvage law is the right of an exclusive salvor to conduct its operations free from the interference of others. Both of these measures encourage the orderly and non-destructive salvaging of delicate wrecks. Courts in admiralty also protect a salvor's financial stake in its salvaging operations by granting equitable rewards to a salvor on a case-by-case basis. This equitable evaluation is based on the salvor's performance, the expected value of the salvaged ship, and the risk of others reducing this value. These mechanisms of salvage law, designed to protect a salvor in exchange for its service, also allow for the incorporation of principles of intellectual property law, specifically exclusive photographic rights, into the extant law.

Traditionally, courts in admiralty allow a salvor to obtain rights in yet-to-be-recovered property, which grants a salvor an inchoate lien in the wreck to enforce its claim for compensation and reward. Once a

435. See id.
436. See id.
437. See id.
438. See id.
439. See id.
440. See id. § 139, at 10-3.
442. See 3A Benedict, supra note 20, § 155, at 11-9, 11-10.
444. See Haver, 171 F.3d at 963.
lien is established, the salvor has the right to exclusive possession, not only of the artifacts removed from the wreck, but also of the wreck itself.445 Otherwise, potential salvors would squabble and contest ownership of each piece found on the site. This inchoate right is reflected in a salvor's right to exclude others from the wreck.446

In the context of historical salvage, objects in this inchoate category should include photographic images. The practical importance of creating an archaeological record, and the legal importance of "telepossession,"447 make clear the sufficient, if not primary, value of photographs of an historic wreck to salvors. As valuable property, the images of a sunken ship should be classified as one of the ship's "artifacts," and thus the salvor's right to them would be protected by the enforcement of the maritime lien.448 The inchoate rights granted by the law of salvage would naturally extend to cover a salvor's right to control and sell these images, and thus a preliminary or directed injunction against rival salvors may include the right to prevent others from taking photographs.

Restrictions on photography are not an unprecedented remedy in salvage law.449 Admiralty courts have protected a salvor's ability to prevent others from photographing a wreck under the notion of preventing interference with the salvage.450 In such cases, others are barred from intruding on a wreck site, even to take photographs, as long as salvage operations continue.451 The nature of deep-sea salvaging, however, means that any operation by a rival salvor or tour group constitutes "interference."452 These interlopers crowd the salvage area, block access to the wreck, and possibly damage the wreck, even when present only to take photographs.453 Given the great expense and restrictive time-table involved in these types of operations, a court would be well within its bounds to ban as

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445. See id.
446. See id. at 971 (enjoining all parties from conducting salvage operations and interfering with the salvor-in-possession); Marex Int'l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel, 952 F. Supp. 825, 830 (S.D. Ga. 1997) (granting salvor title to all artifacts recovered from shipwreck and issuing a preliminary injunction enjoining all others from interfering with ongoing salvage operations); Moyer v. The Wrecked and Abandoned Vessel, Known as the Andrea Doria, 836 F. Supp. 1099, 1108 (D.N.J. 1993) (enjoining competing salvors from interfering with plaintiff's salvage operations).
447. For a definition of telepossession, see supra note 224 and accompanying text.
449. See Marex, 952 F. Supp. at 830 (issuing a blanket injunction that would assuredly include photography).
450. See id.
451. See id.
452. See R.M.S. Titanic, 1996 A.M.C. at 2499.
453. See id.
interference *any* dive upon a deep-sea, historic wreck—even when the salvor-in-possession is not on the site.\textsuperscript{454}

The invocation of intellectual property protection in salvage law can also be justified under principles of equity. When called upon to set salvage awards and delineate salvors' rights, courts in admiralty become courts of equity.\textsuperscript{455} In those instances, the courts must consider the economic harm to a salvor and the fairness of allowing a rival to profit from the salvor's work when determining a salvor's possessory rights. In cases of shipwreck, courts in admiralty have recognized that the equities favor a salvor who has expended much effort and expense in locating and recovering a wreck, as opposed to a rival who merely follows the original salvor to the site and begins its own operations.\textsuperscript{456} If courts decline to protect the original salvor's possessory right and allow rivals to seize and market scavenged artifacts, the rival will be unjustly enriched at the expense of the original salvor.\textsuperscript{457} In recognition of this potential unfairness, courts in admiralty can issue injunctions barring salvor rivals entry to the wreck site.\textsuperscript{458} Where an historic salvor has devoted time, effort, and expense to its salvaging operation, and is depending upon just compensation, not from the sale of artifacts, but from the marketing of images of the wreck, the photographs of the ship become as profitable and protectable as any other artifact.\textsuperscript{459} Accordingly, if a rival salvor were allowed to access and photograph the wreck, this rival could market these images and deny the original salvor a full profit.\textsuperscript{460} It would be equitable, therefore, for courts in admiralty to grant the original salvor exclusive intellectual property rights in the imagery of the wreck and prohibit entry to the wreck site to rivals who would compete with or dilute the value of those images.\textsuperscript{461}

Finally, courts in admiralty have the protection of invoked photographic rights to protect a salvor's privileged and valuable commercial information. At least one court has found that general

\textsuperscript{454} See id.


\textsuperscript{456} In the case of the sunken treasure ship Nuestra Señora De Atocha, the court issued a preliminary injunction prohibiting rival salvors from interfering with and removing any artifacts from the site. See Treasurer Salvors, 546 F. Supp. at 929. Citing the concepts of equity and the prevention of unjust enrichment, the court claimed that irreparable injury would occur if other salvors were free to “come in and reap the benefits that are bestowed upon a finder and/or salvagor [sic].” Id.

\textsuperscript{457} See id. at 927.

\textsuperscript{458} See id. at 930.

\textsuperscript{459} See R.M.S. Titanic, 1996 A.M.C. at 2499.

\textsuperscript{460} See id.

\textsuperscript{461} See Bederman & Prowda, supra note 296, at C18.
knowledge gathered by a salvor concerning a shipwreck is valuable and warrants exclusive protection. The court in that case specifically listed as proprietary: "(1) the location of a particular object; (2) the characteristics of a particular site...; (3) technology used [by the salvor to discover and rescue the vessel]...; and (7) general know-how." Logically, the exact location and characteristics of a wreck and its artifacts, along with information on the progress of a salvor's operation, can be recorded and exploited by a rival taking images of the wreck site. Courts in admiralty wishing to deter this "salvage spying" can grant a photographic injunction denying rivals access to the wreck site.

Intellectual property principles, in the form of exclusive photography rights, are appropriately applied to a historic salvor through extant maritime law. Recognizing that photographic images of a historic wreck are proprietary "artifacts," courts in admiralty can grant ownership of such images to the salvor as part of the salvor's inchoate possession of the wreck itself. As such, a salvor has a right of exclusion over the wreck that would prevent by injunction any others from visiting or capturing derivative imagery of the wreck site. Finally, traditional salvage principles of equity seek to ensure that the salvor is adequately protected and, if necessary, reimbursed for the value of the photographic "artifacts." Equity concerns thus warrant an injunction to prevent competing rivals and divers from taking unauthorized photography of a wreck site in order to protect the original salvor's commercial efforts. In this way, a court's grant of exclusive photographic rights through salvage law protects a historic salvor's possessory rights and economic interests in the wreck it is rescuing and encourages a salvor to undertake the delicate operation of salvaging a historic shipwreck. Moreover, the concept of photographic rights not only fits within the scheme of traditional salvage law, but as the following section discusses, its grant furthers the policy principles of salvage law by securing a historic salvor's possessory right in a wreck, while ensuring the protection of the vessel itself.

463. Id.
464. See Bederman & Prowda, supra note 296, at C18.
466. See supra notes 444-48 and accompanying text.
467. See supra notes 449-54 and accompanying text.
468. See supra notes 455-61 and accompanying text.
469. See supra notes 462-64 and accompanying text.
B. Public Policy and Exclusive Photographic Rights in Historic Salvage

The policy concerns accompanying historic salvage endorse the notion that exclusive photographic rights should be considered as forming part of a historic salvor's bundle of rights. Salvage law is only effective where salvors are granted an incentive, either monetary or possessory, in the rescued vessels. In cases where shipwrecked vessels and their cargo have a limited market value, salvors require alternative means to make a profit, such as image marketing. By denying salvors creative ways to recoup their losses, courts discourage salvage operations. Salvaging companies will be less likely to spend the time and cost necessary to locate these wrecks if they know that they cannot profit from the venture. Rather than protecting historic wrecks, measures to limit salvors' profits result in these ships remaining forever lost. Further, the grant of exclusive media rights to protect salvors' profits assures that these operations are less likely to become bankrupt. Granting salvage rights to a financially solvent salvor gives the courts greater control over the salvage operations, because courts need only act upon one entity. A succession of failed businesses wrestling for and ceding possession of a wreck may cause confusion, impede the salvage, and damage the artifacts.

Furthermore, if a salvor has located a wreck with historically valuable artifacts aboard, the salvor might be tempted to break up and sell these objects. Unless non-intrusive means of financing such as exclusive rights to photography are allowed, historians will lose the opportunity to study shipwrecks as a whole, and the value of rare artifacts will depreciate once removed from the wreck and separated from their sister pieces. By allowing and encouraging exclusive photographic rights, courts in admiralty would be ensuring a less

472. See 3A Benedict, supra note 20, § 234, at 19-5; R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 962 (4th Cir. 1999) ("Absent the promise of compensation and reward, we question whether a party, even one with the capacity to save the [wreck] would incur the costs to do so."). cert. denied, 120 S. Ct. 74 (1999). This would certainly be true if the UNESCO Draft Agreement, with its prohibition against selling any piece of cultural artifact, is adopted. See Harris, supra note 157, at 253.
473. See also William J. Broad, Seeking Pirate Treasure: Captain Kidd’s Sunken Ship, N.Y. Times, Feb. 22, 2000, at F1 (reporting on a salvage operation to uncover Captain Kidd's pirate ship, the Adventure, which, while unlikely to yield any treasure, was financed by the Discovery Channel, which plans to air footage from the wreck site).
474. See R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 9 F. Supp. 2d 624, 640 (E.D. Va. 1998) ("In accord with salvage law, the Court finds that it is in the public interest for a single salvor to salvage the wreck. . . .").
475. See Nicholson, supra note 150, at 167.
destruction with greater emphasis on documenting and recording the historical value of the shipwrecks.

Finally, granting exclusive photographic rights would reduce intrusion and damage to the wrecks. Apart from discouraging salvors from stripping wrecks, granting rights to the wreck's imagery would reduce the presence of competing salvors and tourists on the site. Acknowledging the fragility of historic wrecks and the painstaking salvaging methods necessary to remove sediment and debris, courts have determined that permitting fewer salvors and divers access to the wreck site increases the chances for preservation of the vessel. Much like cordonning off a delicate archaeological excavation, by limiting the access of those who come to visit the shipwreck site, a court in admiralty would be protecting the physical and historical integrity of the wreck.

Courts should, however, limit the grant of exclusive media and access rights to salvors to some degree. The enjoined area, for example, should be narrowly drawn so as not to interfere with navigational freedom. Researchers with purely scientific or noncommercial objectives should be permitted to access the wreck, as long as they would not unreasonably interfere with the salvage effort. Finally, the salvor's right in the images of the wreck should expire once the salvor is no longer assiduous in defending its exclusive rights, much like in the realm of trademark law. The granting of media rights with these limitations in place should equitably balance the public's interest in historical wrecks with the salvor's right to fair compensation.

CONCLUSION

With the discoveries of historic shipwrecks, the courts in admiralty have been compelled to balance protection of the wrecks with protection of the rights of historic salvors. If, in the interest of archaeological preservation, courts limit access to the wrecks or prohibit the sale of artifacts, potential salvors lose their incentive to locate and safely uncover these wrecks. By opening the wreck sites to public use and private sale, however, courts invite destructive competition and looting. The granting of exclusive photographic privileges as part of a salvor's bundle of possessory rights is an ideal solution that strikes a middle ground between these two extremes. The grant of exclusive photographic rights, as an expansion of traditional salvage law, is an effective means of encouraging

476. See R.M.S. Titanic, 9 F. Supp. 2d at 637 n.14 (noting the damage a rival submersible inadvertently caused to the Titanic by a dislodged propeller protector).
477. See Bederman & Prowda, supra note 296, at C18.
478. See id.
479. See id.
responsible salvage and of protecting both the ships and the rights of the salvors.