

**ALEXANDER LINDSAY, Plaintiff, -against- The Wrecked and Abandoned Vessel R.M.S. TITANIC, HER ENGINES, TACKLE, EQUIPMENT, FURNISHINGS, Located Within One Nautical Mile of a Point Located at 41 [degrees], 43'32" North Latitude and 49 [degrees], 56'49" West, and ARTIFACTS, and VIDEO Located at 17 Battery Place, New York, NY, in rem, and R.M.S. TITANIC, INC., TITANIC VENTURES LIMITED PARTNERSHIP, OCEANIC RESEARCH AND EXPLORATION LIMITED, SUAREZ CORPORATION INDUSTRIES, INC., and DISCOVERY COMMUNICATIONS, INC., d.b.a. THE DISCOVERY CHANNEL, in personam, Defendants.**

**52 U.S.P.Q.2D 1609 (S.D.N.Y. 1999)**

**HAROLD BAER, JR., District Judge:**

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The plaintiff, a citizen of the United Kingdom and resident of the State of New York, is an independent documentary film maker engaged in the business of creating, producing, directing, and filming documentaries. Defendant R.M.S. Titanic, Inc. ("RMST") is a publicly traded U.S. corporation, organized under the laws of the State of Florida, which conducts business within and has its office and principal place of business in New York City. Defendant George Tulloch ("Tulloch") is a shareholder, president and member of the board of directors of RMST. Defendant Titanic Ventures Limited Partnership ("TVLP") is a limited partnership organized under the laws of Connecticut and currently doing business in the State of New York. Defendant Oceanic Research and Exploration Limited ("OREL") is a Delaware corporation and general partner of TVLP. Defendant Tulloch is also the president and sole shareholder of OREL (defendants RMST, Tulloch, TVLP and OREL collectively as "RMST"). Defendant Suarez Corporation, Inc. ("SCI") is an Ohio corporation doing business in the State of New York. Defendant Discovery Communications, Inc. ("DCI") is a Maryland corporation doing business as "The Discovery Channel", and is engaged in the business of making, financing and distributing documentary films.

In 1993, RMST was awarded exclusive status as salvor-in-possession of the Titanic wreck site and is therefore authorized to carry on salvage operations at the vessel's wreck site. As a condition of obtaining these rights, RMST allegedly agreed to maintain all the artifacts it recovered during the salvage operations for historical verification, scientific education, and public awareness.

In 1994, the plaintiff, under contract with a British television company, filmed and directed the British documentary film, "Explorers of the Titanic," a chronicle of RMST's third salvage expedition of the Titanic. To film this documentary, Lindsay sailed with RMST and the salvage expedition crew to the wreck site and remained at sea for approximately one month. The plaintiff alleges that during and after filming this documentary in 1994, he conceived a new film project for the Titanic wreck using high illumination lighting equipment.

The plaintiff later discussed his idea with defendant George Tulloch and, according to the plaintiff, the two agreed to work together on the venture. In March 1995, the plaintiff traveled to New York and developed a comprehensive business plan for the new film project entitled, "Titanic: A Memorial Tribute." Tulloch allegedly informed the plaintiff that he would agree to the plan -- which purported to include provisions for compensating Lindsay for his work on the project -- but

that Tulloch would have to obtain approval from the RMST Board of Directors. The plaintiff agreed to join RMST to raise money not only for the film project, but for other aspects of the 1996 salvage operation as well.

Lindsay moved into an office at RMST in and around April 1995. Around this time, Tulloch repeatedly told Lindsay that he would obtain approval from RMST's Board of Directors for a contract for the plaintiff based upon the terms of Lindsay's film plan. The contract was to include terms of Lindsay's compensation, including sharing in the profits derived from any film, video and still photographs obtained from the 1996 salvage operation. This contract was never executed.

As part of his pre-production efforts, the plaintiff created various storyboards for the film, a series of drawings which incorporated images of the Titanic by identifying specific camera angles and shooting sequences "that reflected Plaintiff's [sic] creative inspiration and force behind his concept for shooting the Subject Work." The plaintiff also alleges that he, along with members of his film team, designed the huge underwater light towers that were later used to make the film. Lindsay also "personally constructed the light towers" and thereafter "for approximately 3-4 weeks directed, produced, and acted as the cinematographer of the Subject Work, underwater video taping of the Titanic wreck site, and otherwise participated in the 1996 salvage operation." He also directed the filming of the wreck site from on board the salvage vessel "Ocean Voyager" after leading daily planning sessions with the crew of the Nautilus, the submarine used to transport the film equipment and photographers to the underwater wreck site. The purpose of these sessions was to provide the photographers with "detailed instructions for positioning and utilizing the light towers."

The plaintiff now alleges that he was never fully compensated for his services and that, *inter alia*, the defendants are now "unlawfully profiting from the exploitation of the" film project at issue.

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The plaintiff's amended complaint ... includes 13 causes of action, including those based on copyright infringement, salvage claims, and state law causes of action for fraud, breach of contract, and conversion. The defendants now move pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Lindsay's copyright claims, and the plaintiff cross-moves for summary judgment on his copyright and salvage claims.

### III. DISCUSSION

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To withstand a motion to dismiss, a complaint based on copyright infringement must allege: (1) which specific original works are the subject of the copyright claim; (2) that the plaintiff owns the copyrights in those works; (3) that the copyrights have been registered in accordance with the statute; and (4) "by what acts during what time" the defendant infringed the copyright.

Although the complaint is not a model of clarity, it meets for the most part, these standards. With regard to the first element, the complaint refers to the plaintiff's copyright interest in the "Subject Work," and -- as the defendants point out -- makes several different references to what exactly this work constitutes.<sup>1</sup> However, piecing together these various allegations, and drawing all reasonable inferences in the plaintiff's favor, it becomes clear for purposes of this motion that the "Subject Work" consists of the illuminated underwater footage that was filmed utilizing the large light towers

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<sup>1</sup> Lindsay defines the "Subject Work" as: "a new film project for the Titanic wreck using high illumination lighting equipment"; "the documentary film Titanic: In a New Light"; and "the illuminated underwater video footage."

that Lindsay helped design and construct. Regarding the second and third elements, the plaintiff alleges that he owns these works, and that they were accepted and registered with the U.S. Register of Copyrights.

As to the fourth element -- how and when the defendants infringed the copyright -- the plaintiff has satisfied his burden as to all the defendants except SCI. With respect to RMST, the complaint alleges that RMST "unlawfully entered into the exclusive license agreement with DCI," "entered [sic] into contracts conveying video clips and still images . . . to various Titanic artifacts exhibitions throughout the world," and "RMST displays images from the Subject Work on its INTERNET web site." The complaint alleges that DCI incorporated portions of the illuminated footage into three separate documentaries that aired on certain dates in 1997....

## **2. Authorship**

The defendants first argue that the plaintiff cannot have any protectable right in the illuminated footage since he did not dive to the ship and thus did not himself actually photograph the wreckage. This argument, however, does not hold water.

The Copyright Act of 1976 provides that copyright ownership "vests initially in the author or authors of the work." 17 U.S.C. § 201(a). Generally speaking, the author of a work is the person "who actually creates the work, that is, the person who translates an idea into a fixed, tangible expression entitled to copyright protection." *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989). In the context of film footage and photography, it makes intuitive sense that the "author" of a work is the individual or individuals who took the pictures, i.e. *the* photographer. However, the concept is broader than as argued by the defendants.

For over 100 years, the Supreme Court has recognized that photographs may receive copyright protection in "so far as they are representatives of original intellectual conceptions of the author." *Burrow-Giles Lithographic Co. v. Saron*y, 111 U.S. 53, 58 (1884). An individual claiming to be an author for copyright purposes must show "the existence of those facts of originality, of intellectual production, of thought, and conception." *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340, 346-347 (1991) (citing *Burrow-Giles*, 111 U.S. at 59-60). Some elements of originality in a photograph includes "posing the subjects, lighting, angle, selection of film and camera, evoking the desired expression, and almost any variant involved." *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir.), cert. denied, 506 U.S. 934 (1992). Taken as true, the plaintiff's allegations meet this standard. Lindsay's alleged storyboards and the specific directions he provided to the film crew regarding the use of the light towers and the angles from which to shoot the wreck all indicate that the final footage would indeed be the product of Lindsay's "original intellectual conceptions."

The fact that Lindsay did not literally perform the filming, i.e. by diving to the wreck and operating the cameras, will not defeat his claims of having "authored" the illuminated footage. The plaintiff alleges that as part of his pre-production efforts, he created so-called "storyboards," a series of drawings which incorporated images of the Titanic by identifying specific camera angles and shooting sequences. During the expedition itself, Lindsay claims to have been "the director, producer and cinematographer" of the underwater footage. As part of this role, Lindsay alleges that he directed daily planning sessions with the film crew to provide them with "detailed instructions for positioning and utilizing the light towers." Moreover, the plaintiff actually "directed the filming" of the Titanic from on board the *Ocean Voyager*, the salvage vessel that held the crew and equipment.

Finally, Lindsay screened the footage at the end of each day to "confirm that he had obtained the images he wanted."

All else being equal, where a plaintiff alleges that he exercised such a high degree of control over a film operation -- including the type and amount of lighting used, the specific camera angles to be employed, and other detail-intensive artistic elements of a film -- such that the final product duplicates his conceptions and visions of what the film should look like, the plaintiff may be said to be an "author" within the meaning of the Copyright Act.

Indeed, the instant case is analogous to *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132 (3d Cir. 1991). There, the Third Circuit recognized that "a party can be considered an author when his or her expression of an idea is transposed by mechanical or rote transcription into tangible form under the authority of the party." The plaintiff in *Andrien* had received a copyright for a map of Long Beach Island, New Jersey which was created from a compilation of pre-existing maps and the plaintiff's personal survey of the island. To transform his concepts and the information he had gathered into the final map, the plaintiff hired a printing company to print the map in final form. The plaintiff testified that the maps were made by the printer "with me at her elbow practically" and that he spent time each day at the print shop during the weeks the map was made, directing the map's preparation in specific detail. In reversing the lower court's granting of summary judgment against the plaintiff, the court noted that the printers had not "intellectually modified or technically enhanced the concept articulated by Andrien," nor did they "change the substance of Andrien's original expression." It is too early to tell whether the allegations of the plaintiff here satisfy the copyright laws, but crediting his story as I must, dismissal is unwarranted at this stage of the litigation.

The defendants' argue that *Geshwind v. Garrick*, 734 F. Supp. 644 (S.D.N.Y. 1990), vacated in part, 738 F. Supp. 792 (S.D.N.Y.1990), aff'd, 927 F.2d 594 (2d Cir.), cert. denied, 502 U.S. 811 (1991), mandates dismissal. That case, however, is inapposite. The plaintiff there, a producer of computer graphics animation and special effects, had contracted to produce a 15-second animation piece. The plaintiff hired Digital, a computer graphics company to, in essence, produce the animated piece. The court in *Geshwind* found that Digital, by its employee, was the "author" within the meaning of the Copyright Act. In ruling that the plaintiff was not an "author," Judge Patterson found that the plaintiff there had made only minimal contributions to the final product and had only some, if any, of his "suggestions" incorporated into the final product. This is in stark contrast to the case at bar where Lindsay alleges that his *contributions* -- not suggestions -- were anything but minimal, and he describes himself as the driving force behind the final film product at issue here.

### **3. Joint-Authorship**

In the alternative, the defendants argue that Lindsay is, at best, a joint author of the underwater footage with RMST. This contention is based on the notion that Christian Petron, the main photographer of the film, was at least a joint-author of the footage with the plaintiff. Since Petron's participation was accomplished under the auspices of a work for hire agreement with RMST, the defendants' argument continues, any rights to authorship Petron may have received via his filming were conferred upon RMST. As a joint author with the plaintiff then, RMST cannot be liable for copyright infringement since each co-author acquires an undivided interest in the entire work and has the right to use the work as he or she pleases. *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 1998).

Similarly, any copyright claim against DCI would fail since RMST, as a joint author, has the right to license the joint work to third parties. Thomson, 147 F.3d at 199.

A "joint work" under the Copyright Act is one "prepared by two or more authors with the intention that their contributions be merged into inseparable or independent parts of a unitary whole." 17 U.S.C. § 101. To prove co-authorship status, it must be shown by the individual claiming co-authorship status that each of the putative co-authors (1) fully intended to be co-authors, and (2) made independently copyrightable contributions to the work. Thomson, 147 F.3d at 200.

Drawing all inferences in favor of Lindsay, I conclude that no such status existed in the case at bar. With regard to the intent prong of the analysis, "an important indicator of authorship is a contributor's decision making authority over what changes are made and what is included in a work." 147 F.3d at 202-3 (citing *Erickson v. Trinity Theatre, Inc.*, 13 F.3d 1061, 1071-72 (7th Cir. 1994) (actor's suggestions of text did not support a claim of co-authorship where the sole author determined whether and where such suggestions were included in the work)). In other words, where one contributor retains a so-called "veto" authority over what is included in a work, such control is a strong indicator that he or she does not intend to be co-authors with the other contributor. According to the pleadings, the plaintiff exercised virtually total control over the content of the film as "the director, producer and cinematographer" of the production. Additionally, he briefed the photographers with regards to, *inter alia*, the specific camera angles they were to employ, and Lindsay screened the film each day to make sure the proper footage was obtained. Based on these allegations, and implicit in the notion that the film crew was simply "following directions,"<sup>2</sup> Lindsay retained what appeared to be exclusive authority over what was included in the footage. Assuming as I must at this stage of the litigation that this is true, it can hardly be said that the plaintiff intended Petron -- or any other contributor -- to be a co-author. Accordingly, the claims by RMST that it -- by virtue of Petron's role as a photographer under a work-for-hire agreement -- was a joint-author within the meaning of the Copyright Act must fail....

#### 4. Accounting

Lindsay's fifth cause of action seeks an accounting by DCI, SCI, and RMST of moneys these defendants received from their unauthorized use of the copyrighted footage at issue. Regardless of whether this Court -- or a jury -- ultimately finds that Lindsay and RMST are joint authors, with respect to DCI, the plaintiff's complaint here sinks under its own weight.

The duty to provide an accounting from profits obtained runs only between co-owners of a copyright. *Margo v. Weiss*, 1997 U.S. Dist. LEXIS 20867, \*26, No. 96 Civ. 3842, 1998 WL 2558, at \*9 (S.D.N.Y. Jan. 5, 1998) ("The duty to account for profits presupposes a relationship as co-owners of the copyright . . ."); cf. Thomson, 147 F.3d at 199 ("Each joint author has the right to use or to license the work as he or she wishes, subject only to the obligation to account *to the other joint owner* for any profits that are made.") (emphasis added). Because DCI is only a licensee of a putative joint owner of the copyright at issue here, Lindsay's claim for an accounting fails as a matter of law and must be dismissed. ...

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<sup>2</sup> Along these lines, Lindsay's alleged control over the filming rendered the film crew's role to one of no more than "rote or mechanical transcription that [did] not require intellectual modification," *Andrien*, 927 F.2d at 135, a contribution that would not be independently copyrightable. *Id.*; Thomson, 147 F.3d at 200. RMST's claims of joint-authorship would thus fail on this prong as well.