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Bullfrog Films, Inc. v. Wick: Can the Government Condition Filmmakers' Access to Duty-Free Foreign Distribution Based on Ideology?

I. Introduction

In 1971, independent filmmakers produced the award-winning film, *In Our Own Backyards*, that explored health hazards caused by uranium mining and milling operations.¹ When the filmmakers sought to export the film to Canada and Australia, where the uranium industry has become a topic of public debate, they applied to the United States Information Agency (USIA) for certification of the film's educational character.² This certificate would have made the film eligible, under an international agreement, for exemption from import duties and licensing requirements in other countries.³ The USIA consulted with the Department of Energy which recommended that certification be denied because the film was "emotional rather than technical."⁴ The USIA denied certification on the grounds that the purpose of the film was to present a certain point of view.⁵

Arguing that the government had suppressed the film because it contained information "the Energy Department would rather the public not have,"⁶ the producers accused the USIA of "political censorship."⁷ They joined other filmmakers in a lawsuit against the

¹ Rosenberg, *For Our Eyes Only*, AMERICAN FILM, July-Aug. 1988, at 40.

² *Id.*

³ *Id.* See *infra* notes 13-14 and accompanying text.

⁴ *Id.*

⁵ *Id.* A similar situation occurred with the 1979 ABC News-produced documentary, *The Killing Ground*, that investigated the problems of toxic waste disposal in the United States. *Id.* at 40-41. The film was a watershed for public awareness of the hazards of toxic wastes, and won "a dozen honors, including two Emmys, First Prize at the Monte Carlo Film Festival, the Sidney Hillman Prize for Courage in Journalism from Columbia University, and an Academy Award nomination." *Id.* ABC sought to export *The Killing Ground* to other countries and applied for Beirut Agreement certification from the USIA. The USIA consulted with the Environmental Protection Agency (EPA) which recommended that the film not be certified. The EPA suggested that the ABC film was out of date since the government had "made great progress in managing hazardous wastes." *Id.* ABC News took the position that the government had suppressed the film because it embarrassed the EPA. *Id.* EPA director Anne Burford was later forced to resign "amid charges that federal officials allowed chemical companies to selectively edit government reports." *Id.*

⁶ *Id.* Susanna Styron, coproducer of the film, said further that the government has "a vested interest in protecting uranium mining operations for nuclear-power and nuclear-weapons productions programs." *Id.*

⁷ *Id.*

USIA, challenging the regulations by which that agency had denied certification to *In Our Own Backyard* and several other films.⁸

This Note examines the opinion of *Bullfrog Films, Inc. v. Wick*⁹ in which the United States Court of Appeals for the Ninth Circuit, held the USIA regulations unconstitutional as vague and violative of the first amendment right to freedom of speech.¹⁰ This Note also examines the new regulations promulgated by the USIA in response to *Bullfrog's* mandate as well as alternatives to the present certification process.

II. Statement of the Case

The Beirut Agreement¹¹ is a multinational treaty designed to foster international and cross-cultural understanding by facilitating the "free flow of ideas by word and image" between the peoples of member nations.¹² This purpose is to be achieved by exempting audio-visual materials of an educational, scientific, or cultural nature from customs duties, licensing restrictions, and other limitations¹³ aimed at highly profitable commercial feature films.¹⁴ The United States ratified the Beirut Agreement in 1966, and Congress implemented it by authorizing the President to designate an agency to carry out necessary duties under the treaty.¹⁵ The USIA now performs that function.¹⁶ To qualify for exemption under the treaty, films or other materials must be certified as being of an educational, scientific, or cultural character by the government of the country where they were created.¹⁷ The certificate is presented upon entry of the materials into another signatory state¹⁸ which then decides for itself "whether the material is entitled to the privilege provided by" the treaty.¹⁹ In actual practice, "USIA certificates are accepted by

⁸ See *Bullfrog Films, Inc. v. Wick*, 646 F.Supp. 492 (C.D. Cal. 1986), *aff'd* 847 F.2d 502 (9th Cir. 1988) [hereinafter *Bullfrog I*].

⁹ *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988) [hereinafter *Bullfrog II*].

¹⁰ *Id.* at 514.

¹¹ Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, or Cultural Character, opened for signature July 15, 1949, 17 U.S.T. 1580, T.I.A.S. No. 6116, 197 U.N.T.S. 3 [hereinafter the Agreement].

¹² *Id.*, preamble.

¹³ *Id.*, art. III, para. 1. Such materials include film, filmstrips, sound recordings, slides, models, maps and posters. *Id.*, art. II.

¹⁴ Rosenberg, *supra* note 1, at 40-41. "Tariffs can be imposed based on the assessed value of the raw film itself, or on the developing costs, or they can even equal the production budget. Experts say duties as high as \$50,000 per print have been levied." *Id.*

¹⁵ Pub. L. No. 89-634, 80 Stat. 879 (1966). Ratification was held up in Congress for some fifteen years after the statute's inception. The legislative history of this statute is explained in 22 C.F.R. § 502.1(a) (1988).

¹⁶ 22 C.F.R. § 502.1(a) (1988).

¹⁷ Beirut Agreement, art. IV, para. 1.

¹⁸ *Id.*

¹⁹ *Id.*, para. 4.

importing states as a matter of course."²⁰

The USIA certifies thousands of films for exportation under the treaty each year.²¹ Although the USIA or its predecessor organizations have been certifying films and other materials by essentially the same rules for two decades,²² in recent years the agency has been criticized for applying these standards with an ideological bias.²³ Arguably, the USIA denied certification to each of the seven films involved in *Bullfrog* because of the controversial nature of the views they presented.²⁴ The films deal with such issues as uranium mining in the United States, environmental effects of Agent Orange and other tactics used in Vietnam, nuclear war, nuclear power, United States-Nicaraguan relations, and problems facing American young people including drugs, sex, and suicide.²⁵ The filmmakers alleged that the government engaged in "selective censorship" by using vague regulations to turn the Agreement into a "vehicle for social and political propaganda" and certifying only films that were in

²⁰ *Bullfrog II*, 847 F.2d 502, 507 (9th Cir. 1988).

²¹ Comment, *The Beirut Agreement: A License to Censor?*, 7 *LOY. L.A. INT'L & COMP. L.J.* 255, 257 (1985). The court found it unlikely that other signatory nations were applying any test as stringent. "So far as we can discern, with the exception of Canada, none of the approximately sixty other Beirut Agreement participants . . . has promulgated any formal regulations to the treaty whatsoever." *Bullfrog II*, 847 F.2d at 507.

²² The regulations were initiated on July 14, 1967. 32 *Fed. Reg.* 10,352 (1967). At the time of the litigation, §§ 502.6(a)(3) and (b)(5) were still in their original language. Section 502.6(a)(3) was amended Oct. 19, 1968. 33 *Fed. Reg.* 15,547 (1968). Since this suit commenced, the regulations have been amended three times. See *infra* notes 54-62 and accompanying text.

²³ See Comment, *Silenced Screens: The Role of the United States Information Agency in Denying Export Certificates to American Films*, 17 *N.Y.U. J. INT'L L. & POL.* 77 (1984); Comment, *supra* note 21.

The Agency's problems stem largely from Director Charles Z. Wick's vision of the purpose of the Agency, which he described as "waging a war of ideas with our adversaries." Heiman, *Improving the Quality of America's Voice*, *NATION'S BUSINESS*, Apr. 1983, at 64. After his appointment, the USIA became a center of controversy and embarrassment for the Reagan Administration. *Wick's Last Tapes*, *THE NATION*, Dec. 29, 1984, at 704. During Reagan's first term, there were many reports by the Press involving Charles Wick including reports that he "had given jobs to the children of Cabinet members, had secretly tape-recorded his telephone conversations, and ordered the USIA to maintain a blacklist of liberals who would not be sent abroad under the Agency's auspices (among those banned, Senator Gary Hart and Walter Cronkite)." *Id.* Wick also admitted that the Voice of America had been used for covert action by former National Security Council aide Oliver North. Weaver, *When the Voice of America Ignores Its Charter: An Insider Reports on a Pattern of Abuses*, *COLUM. JOURNALISM REV.*, Nov. 1988, at 36.

²⁴ *Bullfrog I*, 646 F. Supp. 492, 496 (C.D. Cal. 1986); *Bullfrog II*, 847 F.2d at 505. For example, one of the plaintiffs' films is entitled *In Our Own Backyards: Uranium Mining in the United States*, and "examines the impact of uranium mining on the environment and on workers and nearby residents." 646 F. Supp. at 496; see *supra* notes 1-8 and accompanying text. Another film, *Secret Agent*, was originally denied certification but was later granted it through the Agency's appeal process. 646 F. Supp. at 496 n.5. Other films denied certification were *Peace: A Conscious Choice*, *Whatever Happened to Childhood?*, *Save the Planet*, *Ecocide: A Strategy of War*, and *From the Ashes . . . Nicaragua Today*. For a more extensive list of rejected films and the reasons given by the Agency for their rejection, see Comment, *supra* note 23, at 106-11 n.199.

²⁵ 646 F. Supp. at 496; See also Comment, *supra* note 23, at 106-11 n.199.

keeping with the views of the Reagan administration.²⁶

Three of the regulations set out by the USIA for determining certification of materials under the Agreement were at issue in *Bullfrog*.²⁷ Section 502.6(a)(3) follows verbatim the definition of "educational, scientific, and cultural" found in the Agreement:

Audio visual materials shall be deemed to be of international educational character:

When their primary purpose or effect is to instruct or inform through the development of a subject or aspect of a subject, or when their content is such as to maintain, increase or diffuse knowledge and augment international understanding and good will;

When the materials are representative, authentic, and accurate; and

When the technical quality is such that it does not interfere with the use made of the material.²⁸

The second disputed section, 502.6(b)(3), sets out criteria by which 502.6(a)(3) is to be interpreted:

The Agency does not certify or authenticate materials which by special pleading attempt generally to influence opinion, conviction or policy (religious, economic, or political propaganda), to espouse a cause, or conversely, when they seem to attack a particular persuasion. Visual and auditory materials intended for use only in denominational programs or other restricted organizational use in moral or religious education and which otherwise meet the criteria set forth under paragraph (a) of this section, may be determined eligible for certification in the judgment of the Agency.²⁹

Section 502.6(b)(5) also states interpretive criteria in similarly restrictive language:

The Agency does not regard as augmenting international understanding or good will and cannot certify or authenticate any material which may lend itself to misinterpretation, or misrepresentation of the United States or other countries, their peoples or institutions, or which appear to have as their purpose or effect to attack or discredit economic, religious, or political views or practices.³⁰

The dispute in *Bullfrog* centered on the meaning of "educational, scientific, and cultural" as required by the treaty and inter-

²⁶ 646 F. Supp. at 497.

²⁷ *Id.* Those regulations were 22 C.F.R. §§ 502.6(a)(3), (b)(3), (b)(5) (1987). Although not disputed in *Bullfrog*, other subsections of section 502.6 have also been criticized as unconstitutional. Sections 502.6(b)(1) and (b)(2), which exclude from certification any material "the primary purpose of which is to amuse or entertain," and material "the primary purpose of which is to inform concerning timely current events." Sobel, *Rated PP (for "Political Propaganda") by Uncle Sam's Movie Critics: Federal Regulations Concerning the Import and Export of Films that May "Influence" Public Opinion*, 5 ENTERTAINMENT L. REP. 3, 6 (1984); see also Comment, *supra* note 21, at 263.

²⁸ 22 C.F.R. § 502.6(a)(3) (1987). The last three paragraphs quote the Treaty, art. I, verbatim.

²⁹ 22 C.F.R. § 502.6(b)(3) (1987).

³⁰ 22 C.F.R. § 502.6(b)(5) (1987).

preted by the government.³¹ The filmmakers claimed that the USIA's application of section 502.6(a)(3), defining the kinds of materials to benefit under the treaty, was unconstitutional.³² They also charged that some of the interpretive criteria found in sections 502.6(b)(3) and (b)(5) were facially invalid.³³

The USIA defended the regulations, arguing that they did not "punish or directly obstruct plaintiff's ability to produce or disseminate their films."³⁴ The agency also argued that the denial of benefits under the treaty was similar to the Internal Revenue Service disallowing a tax subsidy, and was therefore constitutional.³⁵ Finally, they argued that the government's need to control foreign perceptions of the United States required a lower level of scrutiny under the first amendment,³⁶ and that these foreign policy considerations justified the use of content-based regulation of speech.³⁷

The U.S. District Court entered summary judgment for the plaintiffs on their first two claims, invalidating all three sections of the regulations.³⁸ The court went beyond the scope of filmmakers' claim and *sua sponte* reviewed the facial constitutionality of 502.6(a)(3), finding it deficient.³⁹ All three sections were held to be unconstitutionally vague.⁴⁰ The court stopped short of invalidating the same language in the treaty itself, reasoning that "a constitutionally acceptable definition of 'educational' could fit comfortably within the broad definition of the term set out in Article I of the Treaty."⁴¹

The U.S. Court of Appeals for the Ninth Circuit affirmed, following essentially the same rationale as the trial court. The court found that the regulations impinged on the plaintiff's freedom of speech by rejecting materials according to their content:⁴²

The challenged regulations require that in order to be certified,

³¹ *Bullfrog II*, 847 F.2d at 502.

³² *Bullfrog I*, 646 F. Supp. at 495-97.

³³ *Id.*

³⁴ *Bullfrog II*, 847 F.2d at 509.

³⁵ *Id.* See *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983).

³⁶ 847 F.2d at 511.

³⁷ *Id.* at 512.

³⁸ *Bullfrog I*, 646 F. Supp. at 510.

³⁹ *Id.* at 507-08.

⁴⁰ *Id.* at 504-07.

⁴¹ *Id.* at 508. Before conducting a Constitutional analysis, the court examined the disputed regulations in light of the authorizing legislation. The filmmakers argued that the USIA had unlawfully narrowed the scope of the Agreement definitions of "educational, scientific, and cultural." *Id.* Nevertheless, the court found that the Agreement language was broad, and the statute equally so, such that the regulations were "not so restrictive that we may find them inconsistent with [the enacting legislation's] broad mandate." *Id.* Nor did the regulations conflict with the Treaty. "The fact that the Canadian regulations are similar to those challenged here, and that UNESCO referred to them without criticism, underscores our conclusion." *Id.* at 509.

⁴² *Bullfrog II*, 847 F.2d at 510.

a film must be balanced and truthful; must neither criticize nor advocate any political, religious or economic views; and must not "by special pleading" seek to influence opinion or policy. Each of these requirements draws content-based lines forbidden by the First Amendment.⁴³

The court also found that the government infringed upon the filmmakers' rights by "conditioning a valuable government benefit on the basis of speech content."⁴⁴ Specifically, "the USIA forces filmmakers to choose between exercising their right to free speech and foregoing benefits under the Agreement, or curtailing their speech and obtaining the benefits."⁴⁵

Finding that the filmmakers' rights were thus infringed, the court examined the regulations under strict scrutiny review. In order for the government to justify speech regulation under strict scrutiny it must have a compelling interest in doing so, and the regulations must be narrowly drawn to achieve that end.⁴⁶ The court rejected the Government's argument that a deferential standard of review was appropriate in the area of foreign relations.⁴⁷ Furthermore, the foreign policy considerations put forth by the Government did not rise to the level of a compelling interest, and the regulations were not narrowly drawn to effectuate such an interest.⁴⁸

The Ninth Circuit also held the regulations unconstitutionally vague.⁴⁹ The court was unable to find clear meaning in the language of section 502.5(b)(3), specifically such terms as "special pleading"

⁴³ *Id.*

⁴⁴ *Id.* at 511. In addition to the first amendment issue presented, this also involves the Equal Protection doctrine, to the extent that differing viewpoints receive unequal treatment.

⁴⁵ *Id.*

⁴⁶ "Level of scrutiny" is analogous to the degree of protection accorded to public expression. Under strict scrutiny, the government has a heavy burden to justify the Constitution's tolerance of restrictions on speech. *Id.* at 511. See *Boos v. Barry*, — U.S. —, 108 S.Ct. 1157, 1164 (1988); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972).

⁴⁷ *Id.*

⁴⁸ *Bullfrog II*, at 512.

⁴⁹ *Id.*

Laws that are vague are objectionable on a number of grounds. First, they may "trap the innocent by not providing fair warning." . . . Second, "[a] vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." . . . Third, a vague statute that implicates First Amendment freedoms discourages the exercise of those freedoms

Id. (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (citations omitted)).

After the district court decision, the USIA drafted a new set of interim regulations to replace § 502.6(a)(3). 52 Fed. Reg. 43,753 (1987). Four days before the Ninth Circuit ruled on the USIA's appeal from this, the district court rejected the interim regulations as unconstitutional. *Bullfrog Films, Inc. v. Wick*, No. CV 85-7930 AWT (C.D. Cal. May 13, 1988) [hereinafter *Bullfrog III*]. The USIA, in turn, drafted still another set of regulations. 53 Fed. Reg. 45,079 (1988). These never took effect, as the Ninth Circuit stayed the district court's order and temporarily reinstated the interim regulations, pending its decision on the May 13, 1988 ruling. See 53 Fed. Reg. 47,674 (1988). For a discussion of the interim regulations, see *infra* text accompanying notes 151-63.

and “attempt generally to influence opinion.”⁵⁰ Sections 502.6(b)(5) and 502.6(a)(3) were also deficient because they did not define objective standards by which their criteria could be understood.⁵¹ The filmmakers had no advance notice of what standards their films had to meet in order to be considered “educational,” and the regulations would “enable USIA officials to act in an arbitrary and discriminatory manner in granting or denying permits and still be completely within the scope of their regulations.”⁵² Like the trial court, the court of appeals suggested that “educational, scientific, and cultural” can be defined in ways sufficiently specific as to be consistent with both the Constitution and the Beirut Agreement.⁵³ As a result of the district court’s 1986 ruling, the USIA replaced section 502.6(a)(3) with a lengthy and more detailed set of rules (hereinafter 1987 regulations).⁵⁴

In a new suit, *Bullfrog III*, the plaintiffs complained that the 1987 regulations “suffer[ed] from many of the same constitutional infirmities present in the original regulations.”⁵⁵ The district court agreed, finding that the “[1987] regulations continue to allow impermissible content-based discrimination”⁵⁶ and “remain impermissibly vague.”⁵⁷ The district court enjoined the USIA from using the 1987 regulations, and ordered the agency to draft yet another set.⁵⁸

The USIA did draft a third set of regulations [hereinafter 1988 regulations], but at the same time appealed *Bullfrog III* to the Ninth Circuit Court of Appeals.⁵⁹ The Ninth Circuit accepted the appeal and stayed the injunction of the 1987 regulations—thus temporarily putting them back into effect.⁶⁰ As this Note goes to press, the Ninth Circuit has heard oral arguments but has not handed down an opinion.⁶¹ Thus, the 1988 regulations have never taken effect, and the 1987 regulations are applicable to films currently under review for certification.⁶²

III. Background

The first amendment environment from which *Bullfrog* emerges

⁵⁰ *Bullfrog II*, 847 F.2d at 513.

⁵¹ *Id.*

⁵² *Id.* at 514 (quoting amicus brief).

⁵³ *Id.* Such definitions would still need to include content-based distinctions to some degree. *Id.*

⁵⁴ 22 C.F.R. § 502.6(a)(3) (1988), as amended on Nov. 16, 1987, 52 Fed. Reg. 43,757 (1987). See *infra* note 153 for reproduction of text.

⁵⁵ *Bullfrog III*, No. CV 85-7930 AWT, slip op. at 1-2 (C.D. Cal. filed May 13, 1988).

⁵⁶ *Id.* at 2.

⁵⁷ *Id.* at 3.

⁵⁸ 22 C.F.R. § 502, Summary (1988).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

has been developed in the Supreme Court over the past two decades. The primary standard of analysis is whether or not a restriction on speech is based on content. The law regarding content-based distinctions and the first amendment right to free speech has traditionally required such regulations to withstand strict scrutiny by fulfilling a compelling government interest. So, while "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,"⁶³ there are times when the government, due to some compelling state interest, can restrict speech.⁶⁴

Much of the current rule regarding content-based regulation of speech arises from *Police Department of Chicago v. Mosley*.⁶⁵ Mosley was a postal worker who regularly and peacefully picketed against the racial practices of a local high school.⁶⁶ Chicago adopted an ordinance prohibiting picketing at schools, excepting labor disputes involving the school.⁶⁷ Mosley sued the city to enjoin enforcement of the ordinance so he could continue his protest.⁶⁸ The Supreme Court struck down the ordinance as unconstitutional because it discriminated against speech based on content.⁶⁹ "The essence of the forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."⁷⁰

Mosley also developed a second criterion of first amendment analysis, the public forum.⁷¹ "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions from a public forum may not be based on content alone."⁷² Public forum doctrine was set out in detail by Justice White in *Perry Education Ass'n v. Perry Local Educators' Ass'n*:

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held

⁶³ *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

⁶⁴ *Consol. Edison Co. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 544-45 (1980) (Stevens, J., concurring).

⁶⁵ 408 U.S. 92 (1972).

⁶⁶ *Id.* at 93.

⁶⁷ *Id.* at 92-94.

⁶⁸ *Id.*

⁶⁹ *Id.* at 102.

⁷⁰ *Id.* at 96 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

⁷¹ Buchanan, *Toward a Unified Theory of Government Power to Regulate Protected Speech*, 18 CONN. L. REV. 531, 535, 556-75 (1986). See *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96-97 (1972).

⁷² *Mosley*, 408 U.S. at 96.

in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.⁷³

Forum and content are closely interdependent variables. Assuming that expression is in a traditional public forum, the state may not regulate the content of expression without a compelling need to do so.⁷⁴ Where the regulation is neutral as to content, seeking to control only the time, place, or manner of the speech, then the government need only show a "significant" interest in the rule.⁷⁵ In either case, the restrictions must be "tailored" so as to allow as much in alternative means of expression as possible.⁷⁶

This analysis was applied recently in *Boos v. Barry*,⁷⁷ in which a Washington, D.C. law regulating the picketing of foreign embassies was challenged by some people who wished to demonstrate at the Nicaraguan and Russian embassies. The law prohibited picketing that was intended to "bring into Public odium" the embassy, its employees, or the government represented.⁷⁸ The court found that because the prohibited activity was within the traditional public forum of the streets and sidewalks, it impinged on the first amendment's protection.⁷⁹ The justices disagreed, however, on whether the prohibition drew content-based distinctions.⁸⁰ Arguably it was content-

⁷³ 460 U.S. 37, 45 (1983) (citations omitted). The government can also create a forum for expression that is subject to the same protections. *Id.* at 46. By entering into the Beirut Agreement, the Government has created a forum in the sense of a channel for information. *See id.* at 45. Fora either exist "by long tradition" or are created "by government fiat." *Id.* "Once a forum is opened up . . . to some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Mosley*, 408 U.S. at 96. However, the public forum issue was not raised in *Bullfrog*.

⁷⁴ *Perry*, 460 U.S. at 45; *see also* Buchanan, *supra* note 71, at 564. For example, the Chicago ordinance tried to regulate Mr. Mosley's picket sign on the basis of content, because it distinguished between labor picketing and other subjects. *Mosley*, 408 U.S. at 95. "The central problem with Chicago's ordinance is that it describes permissible picketing in terms of its subject matter. Peaceful picketing on the subject of a school's labor-management dispute is permitted, but all other peaceful picketing is prohibited." *Id.*

⁷⁵ *Perry*, 460 U.S. at 45.

⁷⁶ *Id.* "The Court, albeit in dicta, has clearly determined that no matter how compelling the state interest, the Constitution does not permit government to ban all expressive activity from the traditional public forum." Buchanan, *supra* note 71, at 564. Citizens have an absolute right to expression in some forum. *Id.*

⁷⁷ — U.S. —, 108 S.Ct. 1157 (1987).

⁷⁸ *Id.* at 1161.

⁷⁹ *Id.* at 1162.

⁸⁰ *See id.* at 1162-63, 1171-73 (Brennan, J., concurring), 1173 (Rehnquist, C.J., dissenting).

neutral, since "the government is not itself selecting between viewpoints."⁸¹ Justice O'Connor compromised, somewhat, by saying that the regulation was viewpoint-neutral, but not content-neutral.⁸²

In *Boos*, the government argued that its duties under international law, enforced by the anti-picketing law, constituted a compelling government interest which justified the use of content-based regulation.⁸³ The government relied upon three Supreme Court decisions which emphasize the executive's control over matters involving foreign policy.⁸⁴ The first of these cases is *Zemel v. Rusk*,⁸⁵ where the State Department refused to validate appellant's passport for travel into Cuba, and the appellant argued that this violated his right to liberty, which includes the freedom to travel.⁸⁶ The Supreme Court noted, "[t]he Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel."⁸⁷ The Court went on to say, "[t]hat the restriction which is challenged in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months."⁸⁸

*Regan v. Wald*⁸⁹ was a 1984 case also involving restrictions on travel-related transactions with Cuba. There, the Court held, "[m]atters related to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."⁹⁰

⁸¹ *Id.* at 1162-63.

⁸² *Id.* at 1163.

[W]e agree the provision is not viewpoint-based. The display clause determines which viewpoint is acceptable in a neutral fashion by looking to the policies of foreign governments. While this prevents the display clause from being directly viewpoint-based, a label with potential First Amendment ramifications of its own . . . it does not render the statute content-neutral. Rather, we have held that a regulation that "does not favor either side of a political controversy" is nonetheless impermissible because the "First Amendment's hostility to content-based regulation extends . . . to prohibition of public discussion of an entire topic." . . . Here, the government has determined that an entire category of speech—signs or displays critical of foreign governments—is not to be permitted.

Id. (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530 (1980)).

⁸³ *Id.* at 1163.

⁸⁴ *Zemel v. Rusk*, 381 U.S. 1 (1964); *Haig v. Agee*, 453 U.S. 280 (1981); *Regan v. Wald*, 468 U.S. 222 (1984).

⁸⁵ 381 U.S. 1 (1964).

⁸⁶ *Id.* at 4.

⁸⁷ *Id.* at 15.

⁸⁸ *Id.* at 16.

⁸⁹ 468 U.S. 222 (1984).

⁹⁰ *Id.* at 242 (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952)).

Finally, in *Haig v. Agee*,⁹¹ the Secretary of State revoked a former CIA employee's passport when it became apparent that the former agent was engaged in a campaign to expose CIA operations and agents in foreign countries.⁹² There the Court recognized that the revocation was based at least in part on the content of Agee's speech, especially his repeated disclosures of confidential information.⁹³ The Court emphasized that in cases such as this, speech that jeopardizes U.S. intelligence personnel is certainly not protected by the first amendment and that the government had to take whatever steps were within its power to ensure national security and the ability to conduct foreign relations.⁹⁴

In *Boos*, however, the Court found that while "the United States has a vital national interest in complying with international law,"⁹⁵ the fact that it is recognized in international law does not automatically render that interest "compelling" for the purposes of first amendment analysis.⁹⁶ This created a significant inroad into the principle that foreign policy questions rest solely in the executive branch and are generally non-justiciable.

In *Meese v. Keene*, another case dealing with the first amendment and international policy, the Supreme Court upheld regulatory language authorizing the Attorney General to require certain disclosures be attached to media materials imported into the United States which fit the statutory definition of "political propaganda."⁹⁷ In *Keene*, the Attorney General's Office designated three films which were imported from Canada⁹⁸ as propaganda pursuant to the Foreign Agents Registration Act (hereinafter FARA).⁹⁹ The plaintiff, an American politician who intended to exhibit the films, argued that this infringed on his free speech rights by attaching an official gov-

⁹¹ 453 U.S. 280 (1981).

⁹² *Id.* at 283-86.

⁹³ *Id.* at 308.

⁹⁴ *Id.* at 308-09.

⁹⁵ 108 S.Ct. at 1164.

⁹⁶ *Id.* at 1165. This suggested to the Ninth Circuit in *Bullfrog II* that the Beirut Agreement was not automatically a compelling reason for the government to regulate the films as it did. 847 F.2d at 512.

⁹⁷ 481 U.S. 465, 485 (1987).

⁹⁸ The films are entitled *If You Love This Planet*, *Acid Rain: Requiem or Recovery*, and *Acid From Heaven*. *Id.* at 468 n.3.

⁹⁹ 22 U.S.C. §§ 611-621 (1982 & Supp. V 1987); *Keene*, 481 U.S. at 468. The FARA itself required only that registered foreign agents bringing films or literature into the country register that material with the U.S. Attorney General, and mark it conspicuously "setting forth the relationship or connection between the person transmitting the political propaganda . . . and such propaganda." 22 U.S.C. § 614(b) (1982). The requirement that the materials be labelled as "political propaganda" is an administrative regulation under this section, which authorizes the Attorney General to "require the inclusion of such other information contained in the registration statement identifying such agent of a foreign principal and such political propaganda and its sources as may be appropriate." *Keene*, 108 U.S. at 468.

ernment censure to his actions in exhibiting the films.¹⁰⁰ The Court held that the term "political propaganda" did not mean "a form of slanted, misleading speech that does not merit serious attention," but primarily had a "broad neutral definition," and therefore did not affect the plaintiff's freedom of speech.¹⁰¹ The Court also stated that the statute had a legitimate purpose, to "better enable the public to evaluate the import of the propaganda."¹⁰²

Another first amendment issue germane to *Bullfrog* is whether a content-based tax or tax exemption is an impermissible selection by the government.¹⁰³ With regard to this, the Supreme Court said:

[E]ven though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.¹⁰⁴

While the government may not prevent a person from exercising a constitutional right, the government is not required to actively assist (or subsidize) a person in exercising a constitutional right.¹⁰⁵ In *Regan v. Taxation with Representation*,¹⁰⁶ the Court stated "although government may not place obstacles in the path of a [person's] exercise of . . . freedom of [speech], it need not remove those not of its own creation."¹⁰⁷ This was the deciding principle in *Maher v. Roe*¹⁰⁸ and *Harris v. McRae*.¹⁰⁹ In both cases the Court held that the government was under no obligation to help indigent women facilitate their right to have an abortion by paying for abortions, even though the government pays for other health care services for individuals in the same economic state, so long as the government does not create obstacles not already present.¹¹⁰

In *Big Mama Rag, Inc. v. United States of America*,¹¹¹ the Internal Revenue Service denied nonprofit organization status (and thereby a tax exemption) to a feminist publication.¹¹² The Service based its

¹⁰⁰ *Id.* at 473.

¹⁰¹ *Id.* at 471. The statute itself defines propaganda as communication which is intended either to persuade or influence the recipient with regard to a political or public interest matter (the broad, neutral definition), or to promote violence or social conflict (the perjorative meaning). *Id.* at 471-72; 22 U.S.C. § 611(j). *But see Keene*, 481 U.S. at 486-90 (Blackmun, J., dissenting).

¹⁰² *Keene*, 481 U.S. at 480.

¹⁰³ 847 F.2d at 509.

¹⁰⁴ *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

¹⁰⁵ *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549-50 (1983).

¹⁰⁶ *Id.* at 540.

¹⁰⁷ *Id.* at 549-50 (quoting *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

¹⁰⁸ 432 U.S. 464, 473 (1977).

¹⁰⁹ 448 U.S. 297, 316 (1980).

¹¹⁰ *Id.*; *Maher*, 432 U.S. at 473.

¹¹¹ 631 F.2d 1030 (D.C. Cir. 1980).

¹¹² *Id.* at 1033.

decision on finding that the magazine was commercial, political, and advocated lesbianism.¹¹³ The court held that the Service's definition of "educational," the status under which the magazine sought its tax exemption, was unconstitutionally vague.¹¹⁴ "Thus, although First Amendment activities need not be subsidized by the state, the discriminatory denial of tax exemptions can impermissibly infringe free speech. Similarly, regulations authorizing tax exemptions may not be so unclear as to afford subjective application by IRS officials."¹¹⁵

This rule was strengthened recently in *Arkansas Writers' Project, Inc. v. Ragland*.¹¹⁶ The Supreme Court held that an Arkansas sales tax on magazines, which exempted newspapers and religious, professional, trade, and sports journals, violated the first amendment by discriminating against certain kinds of publications.¹¹⁷ The Court found that the tax employed content-based distinctions that were not narrowly drawn to effectuate a compelling state interest.¹¹⁸

Justice Scalia, representing the other side in a long-standing constitutional debate, dissented in *Arkansas Writers' Project*.¹¹⁹ He noted that a tax exemption was tantamount to a government subsidy, and that the government permissibly subsidizes institutions on the basis of content all the time.¹²⁰ He argued that "[t]he reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily 'infringe' a fundamental right is that—unlike direct restriction or prohibition—such a denial does not, as a general rule, have any significant coercive effect."¹²¹ Justice Scalia suggested that a tax that was selective as to viewpoint (as opposed to content), should more appropriately be subjected to the highest scrutiny.¹²²

IV. Significance of the Case

In *Bullfrog*, unconstitutional USIA regulations enabled that agency to discriminate against films containing views adverse to the

¹¹³ *Id.*

¹¹⁴ *Id.* at 1035-39. The disputed regulation said, in part, "an organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion." *Id.* at 1034-35.

¹¹⁵ *Id.* at 1034 (citations omitted).

¹¹⁶ — U.S.—, 107 S.Ct. 1722 (1987).

¹¹⁷ *Id.* at 1729. See also, *Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983).

¹¹⁸ 107 S.Ct. at 1729. The Court reiterated the importance of not allowing content-based discrimination with regard to speech. *Id.* at 1731-32.

¹¹⁹ *Id.* (Scalia, J., dissenting).

¹²⁰ *Id.* at 1730-32. Scalia offered the Kennedy Center and special postal rates for non-profit organizations as examples of federal subsidies based on specific speech content.

¹²¹ *Id.* at 1731. But see, Sobel, *First Amendment Standards for Government Subsidies of Artistic and Cultural Expression: A Reply to Justices Scalia and Rehnquist*, 41 VAND. L. REV. 517 (1988).

¹²² 107 S.Ct. at 1731. See Sobel, *supra* note 121, at 524. Professor Sobel argues that "content neutrality" includes "viewpoint neutrality," and "subject matter neutrality," and that the growing distinction between content and viewpoint is not necessary. *Id.*

Reagan administration.¹²³ Although the Ninth Circuit followed well-established Supreme Court precedent in finding the regulations discriminatory on the basis of content, and it appears unlikely that *Bullfrog* will be overturned, three issues appear to be vulnerable to attack on appeal.

A. Vulnerable Issues

1. Distinction Between Manner of Denial and Denial Itself

One issue is the distinction between the manner of denying a benefit and the denial of the benefit itself. The USIA argued that in denying certification to the films in question, the government was merely refusing to aid the filmmakers in exercising their first amendment rights.¹²⁴ Thus, the filmmakers were not barred from exporting their films; they were simply required to pay import duties and meet other restrictions imposed by the importing country.¹²⁵

The court of appeals rejected this argument and asserted instead that the denial of certification is "an absolute barrier to the benefits under the [Agreement]."¹²⁶ While it is not stated directly in the opinion, it can be inferred from this assertion that the denial of certification bars the film from receiving any assistance under the Agreement and is, therefore, an obstacle to free speech created by the government. This "absolute barrier" assertion is a distinguishing factor between *Bullfrog* and the *Regan*, *Harris*, and *Maher* line of cases advanced by the government as controlling.¹²⁷ In each of those cases the holding relied on the proposition that the denial of benefits had placed no barrier in the path of the exercising of one's rights.¹²⁸

The contention that denial of certification is a government-placed obstacle—in the sense anticipated in *Regan*—is appealing because it addresses the government's argument that the denial of certification does not interfere with the right to free speech; filmmakers can still disseminate their work to the world community.¹²⁹ However, on a practical level, the films that are denied certification are competing on the global market with films which have been granted certification. Since the uncertified films' cost to consumers in foreign countries will no doubt be inflated by the customs duties and licensing fees imposed on them, the films will not be as viable for successful exportation. An independent filmmaker may find it im-

¹²³ *Bullfrog II*, 847 F.2d 502, 509 (9th Cir. 1988).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ See *supra* text accompanying notes 105-10.

¹²⁸ Much like the indigent women in *Maher* and *Harris* could still have abortions, only not at government expense. See *supra* text accompanying notes 108-10.

¹²⁹ Comment, *supra* note 23, at 102-03; Sobel, *supra* note 27, at 9.

possible to distribute the film on an international scale, all due to the "obstacle" of denied certification.¹³⁰ The fact that the court adopted this practical approach is apparent in the "absolute barrier" designation, and a previous comment by the court rejecting the government's "benign characterization of the effect of their regulations."¹³¹

The "absolute barrier" distinction seems strained as applied here. Technically, the government was correct in its argument that the denial of certification is not a barrier to free speech. Filmmakers are still free to distribute their films regardless of their certification status. It is puzzling that the court was compelled to make the distinction at all. Even if the court had failed to distinguish *Bullfrog* from these cases on a factual basis, it seems certain that the outcome would have been the same. *Regan*, *Maher*, and *Harris* all deal with the question of whether or not the denial of a specific government benefit in and of itself constitutes a violation of constitutional rights and do not address the manner in which the benefit was denied.¹³²

While the difference between the manner of denial and the denial itself may seem insignificant in the abstract, it is an important concept regarding this area of constitutional law and was the essence of Justice Blackmun's concurring opinion in *Regan*.¹³³ If the manner of denying treaty benefits to the *Bullfrog* films was unconstitutional, it is immaterial to the ultimate outcome of the case whether or not the denial of this specific benefit was unconstitutional in and of itself.¹³⁴ Perhaps the court chose to make the distinction as a way of strengthening the argument for its holding, or perhaps the court wanted to make a strong statement regarding the selective allocation of government benefits as an indirect way of curtailing free speech.¹³⁵

2. The "Delicate Area" of Foreign Relations

Another issue that might be subject to debate on appeal is that the executive branch should be held to a lower level of scrutiny "be-

¹³⁰ *Bullfrog II*, 847 F.2d at 509.

¹³¹ Sobel, *supra* note 27, at 9.

¹³² 847 F.2d at 511.

¹³³ *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 551-54 (1983) (Blackmun, J., concurring). "I write separately to make clear that in my view the result under the First Amendment depends entirely upon the Court's necessary assumption—which I share—about the *manner* in which the Internal Revenue Service administers § 501." *Id.* at 552 (emphasis added).

¹³⁴ See Comment, *supra* note 21, at 266 n.88.

¹³⁵ The second possible explanation is consistent with Supreme Court decisions which have often looked upon indirect curtailments of free speech with as much disfavor as direct means of first amendment infringement. "For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.' Such interference with constitutional rights is impermissible." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randal*, 357 U.S. 513, 526 (1958)).

cause USIA certification decisions implicate 'the delicate area of foreign relations.'"¹³⁶ The government relied on *Zemel*, *Agee*, and *Wald*¹³⁷ to argue that foreign relations constitute an overriding interest.¹³⁸ All of these cases seem to support the argument that control of foreign policy is a compelling state interest, justifying the government's discretion in certification of films.¹³⁹ However, these cases were not found to be controlling in *Bullfrog*.¹⁴⁰ The court of appeals instead looked to the very recent Supreme Court decision in *Boos v. Barry* to determine that there was no compelling state interest, and furthermore, the regulations were not narrowly drawn to accommodate such an interest if it did exist.¹⁴¹

In light of *Boos*, it is easy to comprehend the Ninth Circuit's reasons for holding that the USIA regulations disputed in *Bullfrog* were not justified by the Government's foreign policy concerns.¹⁴² The restrictions in *Boos*, which prohibited the display of placards critical of a foreign government within five hundred feet of that government's embassy, are much more narrowly drawn than the USIA regulations in dispute here.¹⁴³

3. Content versus Viewpoint

The final vulnerable issue is the debate as to whether state regulation of speech content or speech viewpoint is the appropriate subject of strict scrutiny under the first amendment. In *Bullfrog II* the Ninth Circuit followed the Supreme Court majority, holding, "[e]ven if the regulations could be deemed neutral with respect to their burden on viewpoint,¹⁴⁴ they may still 'interfere' with the exercise of plaintiffs' free speech interests if they improperly discriminate between exercises of protected speech on the basis of content."¹⁴⁵

The opposing view, advanced by the USIA and advocated by

¹³⁶ 847 F.2d at 511. The government argued that the means of regulation need only show a "rational relation" to the end sought. *Id.*

¹³⁷ See *supra* text accompanying notes 84-94.

¹³⁸ *Bullfrog II*, 847 F.2d at 511.

¹³⁹ *Id.* at 512.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See *supra* text accompanying notes 28-30.

¹⁴⁴ Even so, the court questioned the viewpoint neutrality of the regulations in a footnote to the opinion:

[T]he regulations forbid certification of films that "present a point of view." *In Our Own Backyards*, for example, was denied certification not because of its general subject-matter—nuclear energy—but because it expressed a "point of view" on that subject. However, *Radiation . . . Naturally*, a film on the same subject with the opposite point of view, was granted an educational certificate. Arguably, *In Our Own Backyards* was denied certification because its viewpoint was one with which USIA and Department of Energy officials did not agree.

847 F.2d at 509-10 n.11.

¹⁴⁵ *Id.* at 510.

Justice Scalia, would strictly scrutinize regulation of speech only if it pertained to viewpoint. The court also rejected the USIA's argument that the regulations "do not punish or directly obstruct" plaintiff's freedom of speech, and that "this is a case of the government simply declining to pay a subsidy" ¹⁴⁶ The Agency relied on *Regan*, in which the IRS denied a tax exemption to a lobbying organization. ¹⁴⁷ The Supreme Court there held that this decision "reflected Congress' choice under the spending power to refuse to use Treasury funds to subsidize the lobbying activity." ¹⁴⁸ The Agency's argument also echoed Justice Scalia's dissent in *Arkansas Writers' Project v. Ragland* ¹⁴⁹ that a tax exemption was like a subsidy which Congress properly granted within its discretion over the nation's purse strings. ¹⁵⁰

B. The Revised Regulations

Besides fighting the *Bullfrog* decisions in court, the USIA has been less than cooperative in rewriting the offending regulations. The set of regulations promulgated by the USIA in response to *Bullfrog II* appears unlikely to survive constitutional scrutiny by the Ninth Circuit. ¹⁵¹

¹⁴⁶ *Id.* at 509. It can also be argued that certification is a subsidy, since the government loses no income and incurs no cost from certifying films.

¹⁴⁷ *Id.*; *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 542 (1983).

¹⁴⁸ *Bullfrog II*, 847 F.2d at 509 (quoting *Regan*, 461 U.S. at 548).

¹⁴⁹ 41 U.S. 221, 235 (1987) (Scalia, J., dissenting).

¹⁵⁰ *Id.*

¹⁵¹ The set of regulations provide:

Audio visual materials which are deemed "educational, scientific or cultural" for the purposes of Article I of the Beirut Agreement of 1948 are those "whose primary purpose or effect is to instruct or inform through the development of a subject or aspect of a subject, or when their content is such as to maintain, increase or diffuse knowledge, and augment international understanding and goodwill," as defined below as comprising the following elements:

(i) The content of the audio visual material is presented in a primarily factual or demonstrative manner.

(ii) To the extent that the material reflects a viewpoint or viewpoints which purport to be supported by factual bases, the facts are not distorted. The facts will be deemed distorted if they do not represent the current state of factual knowledge of a subject or aspect of a subject, verifiable by generally accepted methods, or if the facts are presented in such a way as to constitute hate material (such as the racial supremacist material involved in *National Alliance v. United States*, 710 F.2d 868 (1983)).

(iii) To the extent that the material presents, promotes, or advocates a conclusion or viewpoint for which different viewpoint(s), theory(ies) or interpretation(s) may exist, the material acknowledges, presents or refers to the existence of a difference of opinion or other point of view.

(iv) The technical quality is such that it does not interfere with the use made of the material.

In the "Summary of Content" section of the certificate, the Agency, in its discretion, may identify material that in its opinion constitutes propaganda, in that it is substantially adapted to prevail upon, indoctrinate, convert, induce or in any other way influence a viewer or user with reference to any

For instance, subparagraph (iii) requires that where the material "presents, promotes, or advocates a conclusion or viewpoint for which different viewpoint(s), theory(ies) or interpretation(s) may exist, the material acknowledges, presents or refers to the existence of a difference of opinion or other point of view."¹⁵² This appears to exert some content-neutral prior control over expression by the government. Perhaps the government has an interest in forcing a balanced presentation,¹⁵³ or this may simply be a means of requiring that the viewer/listener be informed that a viewpoint is being advanced. This requirement would not inhibit expression on a particular point of view, or even alter the content of the discourse. Yet it is suspect merely for requiring that some mention be made of opposing views. The district court found that this raised practical problems of enforcement and, more important, intruded "on the editorial license of the filmmaker by requiring him or her to include views inimical to his or her own position."¹⁵⁴

Finally, the USIA reserves the right to label certified material that "*in its opinion constitutes propaganda*, in that it is substantially adapted to prevail upon, indoctrinate, convert, induce or in any other way influence a viewer . . ." ¹⁵⁵ This language apparently took impetus from *Meese v. Keene*.¹⁵⁶ Evidently the USIA took this as a blanket authorization for the government to label films being exported in the same way.

However, exporting films to other countries under the Beirut Agreement is an entirely different situation than in *Keene*. To begin with, although it may be inferred from *Keene* that foreigners have less freedom than U.S. citizens to communicate with U.S. audiences, it can hardly be assumed from this that U.S. citizens have less than full freedom of speech when communicating with other countries. Furthermore, the registration of imported films was intended to protect the U.S. public from misleading information.¹⁵⁷ The disclosure statement attached to the films in *Keene* never included the word "political propaganda." Unlike *Keene*, in this case neither the Beirut

specific political, religious or economic views, practices, movements, causes or systems or [sic] belief. Where an applicant identifies an intended audience the Agency may also express an opinion in the "Summary of Content" section of the certificate as to whether that audience possesses the background or training to understand the subject matter.

22 C.F.R. § 502.6(a)(3) (1988), as amended on Nov. 16, 1987, 52 Fed. Reg. 43,757 (1987).

The language in §§ 502.6(b)(3) and (b)(5) was simply deleted. 22 C.F.R. § 502.6(b) (1988).

¹⁵² 22 C.F.R. § 502.6(a)(iii) (1988).

¹⁵³ "The danger inherent in government editorial oversight, even in the interest of 'balance,' is well established." *Bullfrog II*, 847 F.2d 502, 510 (9th Cir. 1988).

¹⁵⁴ *Bullfrog III*, No. CV 85-7930 AWT, slip op. at 5 (C.D. Cal. filed May 13, 1988).

¹⁵⁵ 22 C.F.R. § 502.6(a)(3) (1988) (emphasis added).

¹⁵⁶ 481 U.S. 465 (1987).

¹⁵⁷ *Keene*, 481 U.S. at 481.

Agreement nor the enacting statute contemplates a government labelling material as to the effect or intended effect of their contents. Nor has it been advanced that the government has a legitimate interest in protecting foreign audiences.

Also, the labelling scheme in *Keene* was aimed at the audience receiving the information.¹⁵⁸ Here, the USIA seeks to warn the officials of the foreign government that the material is "political propaganda."¹⁵⁹ Such a label could easily be construed by the importing government as a condemnation of the materials or even as a signal that certification should be denied on their end. As the court in *Bullfrog* noted, "USIA certificates are accepted by importing states as a matter of course."¹⁶⁰ In the order striking down these interim regulations, the district court said, "the only conceivable purpose for labelling films propaganda would be to discourage foreign countries from granting the usual financial benefits accruing to recipients of Beirut certificates."¹⁶¹

Even in light of *Keene*, this provision is potentially unconstitutional for vagueness, for it leaves the USIA the discretion to determine what propaganda is and define the distinction between "indoctrination" and "instruction." One person's freedom fighter is another's pirate or mercenary, yet the USIA reserves the right to attach its own opinion regarding these distinctions to the speech of U.S. citizens.

The USIA also reserves the right to inform the importing government of its opinion as to whether the intended audience "possesses the background or training to understand the subject matter."¹⁶² This is an appellation which is based on the Agency's discretion, based on content, and potentially affects the disposition of the materials. Thus the regulation is lacking the compelling justification that strict scrutiny review requires.

Ironically, the USIA's third set of regulations, which were stayed by the Ninth Circuit pending appeal, seem to hold the most promise for achieving the aims of the Beirut Agreement.¹⁶³ This set of rules

¹⁵⁸ *Id.* at 470 & n.6.

¹⁵⁹ 22 C.F.R. § 502.6(a)(3) (1988).

¹⁶⁰ *Bullfrog II*, 847 F.2d 502, 507 (9th Cir. 1988). The court points out that most other nations do not have uniform standards by which they qualify materials for treaty benefits, and therefore accept the USIA's certification without question. *Id.*

¹⁶¹ *Bullfrog III*, No. CV 85-7930 AWT, slip op. at 5 (C.D. Cal. filed May 13, 1988).

¹⁶² 22 C.F.R. § 502.6(a)(3) (1988).

¹⁶³ 53 Fed. Reg. 45,080 (1988) (to be codified at 22 C.F.R. § 502.6(a)(3)), (currently under injunction), quoted in full:

(3) Audio visual materials which are deemed "educational, scientific or cultural" for the purposes of Article I of the Beirut Agreement of 1948 are those whose "primary purpose or effect is to instruct or inform through the development of a subject or aspect of a subject, or when their content is such as to maintain, increase or diffuse knowledge, and augment international understanding and goodwill; when the materials are representative, authentic,

appears to comply with the constitutional requirements as defined in *Bullfrog*, by removing content-based standards, broadly and clearly defining "educational," setting out clear examples of how the rules will be applied, and dropping the matter of "political propaganda" altogether. However, these regulations are not in use as the injunction of the 1987 regulations is under stay. Therefore the USIA presently examines and certifies films for benefits under the Beirut Agreement according to the 1987 regulations.

C. *Alternative Solutions*

One commentator has suggested that the USIA is not the proper agency for carrying out the objectives of the Beirut Agreement because the agency's goal of providing a "correct" depiction of the United States is inconsistent with the goals set out in the treaty.¹⁶⁴ To avoid this conflict of purpose, an agency with goals related to culture or education rather than politics could be assigned the task of certifying films under the Beirut Agreement.

Another suggestion would have the USIA look only to the money-making potential of a film, since most educational films do not come close to the profit potential of "the money-making blockbuster motion pictures the Beirut agreement was intended to exclude."¹⁶⁵ Another suggestion was to have the film defined as educational or cultural depending on the identity of the purchaser.¹⁶⁶

and accurate; and when the technical quality is such that it does not interfere with the use made of the material." This means that:

(i) The subject matter of the materials must teach or explain through a reasoned development of a subject or aspect of a subject to aid the viewer or listener in a learning process. The educational character of the materials may be evidenced by a teacher's guide, study guide or similar collateral instructional materials prepared by a bona fide subject matter specialist.

(ii) Materials which present viewpoints, positions, facts or information so selectively as to constitute an incitement of hatred or violence against a government, group or person, or which make use of inflammatory or disparaging terms or express conclusions more on the basis of strong emotional feelings than objective evaluations, will not be deemed educational. For example, facts or information presented in such a way as to constitute hate material (such as the racial supremacist material involved in *National Alliance v. United States*, 710 F.2d 868 (1983)), does not qualify for certification.

(iii) The technical quality of the materials must be such that it does not interfere with the use of the materials. For example, sound tracks must be clear and distinct, and photography must be sharp and easy to watch.

Id.

¹⁶⁴ In fact, the USIA has so actively pursued its objective of providing a "correct" picture of the United States that it has been called the "propaganda arm" of the United States Government. Bollinger & Mudd, *Mixing Polls and Propaganda*, THE NATION, May 7, 1988, at 635.

¹⁶⁵ Comment, *supra* note 21, at 277. The commentator notes that this solution is not foolproof because a very popular educational or cultural film may go beyond the monetary limit. She suggests that even so, such a solution only deprives a small portion of otherwise qualified films of the benefits under the Agreement, and is more beneficial to the "free flow of ideas" than content-based regulations. *Id.*

¹⁶⁶ Comment, *supra* note 23, at 104.

For example, films purchased by foreign educational institutions and museums would qualify under such a criterion.¹⁶⁷ The administrative ease embodied in both suggested methods of certification is enticing. Both methods would alleviate discriminatory practices regarding the content of films, and filmmakers would know in advance whether or not their films qualify for benefits under the treaty.¹⁶⁸

It appears that the *Bullfrog* courts rejected solutions such as these that would completely do away with the content-based nature of the certification decision.¹⁶⁹ In the last paragraph of its opinion the Ninth Circuit "recognize[d] that the implementation of the Beirut Agreement requires some content-based judgments."¹⁷⁰ However, remedies such as those suggested above by commentators are possible. It is simply beyond the scope of the judiciary to transfer power from one agency to another or to decree that the regulations should be based on purely economic criteria. These are actions that rest appropriately with the legislative branch of the government. Perhaps, considering the effect the *Bullfrog* decisions will have on the plaintiffs and other filmmakers in future attempts to obtain certification under the Beirut Agreement, the time is ripe for such changes.

V. Conclusion

Bullfrog represents the continued protection of the first amendment's guarantee of freedom of speech. Where, under the Beirut Agreement, the United States created a channel for communication with the peoples of other countries, the government may not selectively limit such communication on the basis of the content of the viewpoint presented.

However, the USIA has sought to evade this rule and continues to impose its own views upon this channel of communication. Although the regulations, as altered, conform to the first amendment with regard to certifying audio visual material, section 502.6(a)(3) allows the USIA to effectively hamper distribution of material of which it disapproves by labeling it as propaganda or as beyond the understanding of the intended audience. This could lead to drastic effects on the certification process at the importing country. There is no justification sufficiently compelling to allow the USIA to make such determinations. It is evident that continued judicial scrutiny, and

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* This would alleviate the problems associated with content-based regulations and vague language within the regulations. *Id.*

¹⁶⁹ See Comment, *supra* note 21, at 277; Comment, *supra* note 23, at 103-05. These articles were published in 1985 and 1984, respectively, prior to *Bullfrog I*. One can safely assume that the *Bullfrog II* court was aware of these arguments, since it cited Comment, *supra* note 21, in the opinion. 847 F.2d at 509.

¹⁷⁰ 847 F.2d at 514.

perhaps legislative action, is necessary to protect the expressions of Americans in the worldwide marketplace of ideas.

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