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Constitutional Law Summary

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SUMMARY

BULLFROG FILMS v. WICK: STRIKING DOWN GOVERNMENT REGULATIONS REGARDING THE EXPORT OF U.S. MOVIES

I. INTRODUCTION

In Bullfrog Films v. Wick, the Ninth Circuit struck down federal regulations which permitted the United States Information Agency (USIA) to favor certain films for export credits over other movies based on the content of the films. The court found that the USIA had refused to certify certain movies for export credits because the films attempted to influence opinion. The court held that the USIA had violated the plaintiffs' first amendment freedom of speech rights. The court concluded that the regulations were void for vagueness under the fifth amendment due process clause.

II. FACTS

Central to this case is a movie certification program administered by the USIA. Certified movies are exempt from various export restrictions and import duties. The plaintiffs applied to

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1. Bullfrog Films v. Wick, 847 F.2d 502 (9th Cir. 1988) (per Poole, J.; the other panel members were Browning, J. and Fletcher, J.).
2. Id.
3. Id. at 511.
4. Id.
5. Id. at 512.
7. Id.
8. Plaintiffs were independent film makers, movie production and distribution companies and a membership organization. Bullfrog Films v. Wick, 847 F.2d 502 (9th Cir. 1988).

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the USIA for these export credits so they could exhibit their films in foreign countries without paying the export fees. Seven movies either produced or distributed by plaintiffs were denied certification. The USIA based its denial on the grounds that the films did not comport with its export regulations.

Plaintiffs sued in the U.S. district court challenging the constitutionality of the USIA's export credit certification regulations. The district court held that the USIA regulations were facially violative of the first and fifth amendments. In its decision, the court noted that the USIA required that the movies must be "accurate." This accuracy requirement was criticized sharply by the court. The court concluded that the regulations violated the first amendment by discriminating on the basis of the films' content. The court also concluded that "while not specifically alleged, common sense reveals that as a result of the denials of certification, plaintiffs' films are now at a competitive disadvantage in foreign markets relative to films that did receive certificates." The lower court permanently enjoined the USIA from enforcing the regulations and ordered the USIA to reconsider the eligibility of plaintiffs' films under standards consistent

9. Id. at 505. As a result of the denial of these export credits, the lower court found that the USIA had caused the film makers economic harm because "the international distribution of plaintiffs' films has been delayed, limited, hindered, and often effectively foreclosed" and the USIA regulations "result in a loss of revenue to plaintiffs, which impedes their ability to continue making similar films." Bullfrog Films v. Wick, 646 F. Supp. 482, 497-98 (C.D. Cal. 1986).

10. Id. The seven films denied certification were: (1) Save the Planet (Green Mountain Post Films, 1979); (2) Ecocide: A Strategy of War (Green Mountain Post Films, 1981); (3) From the Ashes. . .Nicaragua Today (International Women's Film Project, 1981); (4) Whatever Happened to Childhood? (Churchill Films); (5) Peace: A Conscious Choice (Bullfrog Films Inc.); (6) The Secret Agent (Green Mountain Post Films); and (7) In Our Own Backyards: Uranium Mining In the United States (Bullfrog Films, 1982).


12. Id.


16. Id.

17. Id. The court declared that a "determination concerning the accuracy of a film cannot help but be based on the content of the [film] and the message it delivers." Id., citing Regan v. Time, Inc., 468 U.S. 641, 648 (1984).


19. Id. at 498-99.

20. Id. at 510.
with the first and fifth amendments.21

III. COURT'S ANALYSIS

The Ninth Circuit considered several constitutional22 and nonconstitutional issues and the court found two key issues to be dispositive. First, the court held that the USIA's regulations were not content-neutral under the first amendment.23 Second, the Ninth Circuit agreed with the trial court that the regulations were unconstitutionally vague.24 The appeals court chastised the USIA and declared that the regulations handed governmental regulators "[u]nfettered discretion [which] is patently offensive to the notion of due process."25

A. BACKGROUND — BEIRUT AGREEMENT AND USIA REGULATIONS

At the heart of the Ninth Circuit decision are the Beirut Agreement and the USIA implementing regulations and their relationship to rights guaranteed by the first and fifth amendments.

The Beirut Agreement is a multilateral treaty.26 It is designed to facilitate international circulation of certain audiovisual materials (including movies) of the participatory nations27

21. Id. at 510-11. The district court found that the USIA's regulations violated the "void for vagueness" doctrine under the fifth amendment. Bullfrog Films, 646 F. Supp. at 510.

22. The Ninth Circuit rejected the defendant USIA's argument that the plaintiff movie producers lacked standing. Bullfrog Films, 847 F.2d at 506. First, the court decided that the plaintiffs suffered an "injury in fact" by alleging that they had to pay customs duties to export to Canada four of their films. Id. at 506. Second, the court found the denial of a USIA certificate effected a "cognizably injury" on their ability to compete for benefits under the applicable treaty. Id., citing Regents of University of California v. Bakke, 438 U.S. 265, 280-81 note 14 (1978). See supra note 19.

23. Bullfrog Films, 847 F.2d at 512.

24. Id. at 514.

25. Id.


27. Twenty-nine countries including the United States formally participate in the treaty. 22 C.F.R. § 502.7 (1986). Those nations formally participating include: The United States of America, Brazil, Canada, Costa Rica, Cuba, Cyprus, Denmark, El Salvador, Ghana, Greece, Haiti, Iran, Iraq, Jordan, Khmer Republic, Lebanon, Libya, Mada-
that are of an “educational, scientific and cultural character.” 28 None of the key terms “educational, scientific and cultural” are defined in the treaty. 29 In order to achieve the goal of encouraging the international distribution of these materials, contracting nations agree to accord certain benefits to qualifying materials. 30 Benefits accorded to participatory nations under the treaty may be significant: customs fees are waived if a film receives certification. 31 Foreign import duties for a documentary film may equal as much as 100% of the film’s cost. 32 Furthermore, without the benefit of the treaty provisions, film makers may have to pay as much as $50,000 per print for import duties. 33 Absent the Beirut Agreement, exported American movies are regulated by foreign nations through various domestic taxes and controls. 34

The treaty describes the process that determines whether a

gascar, Malawi, Malta, Morocco, Niger, Norway, Pakistan, Peoples Republic of the Congo, Philippines, Syria, Trinidad, Tobago and Yugoslavia. Id. The United States formally entered into the treaty on July 12, 1967. Id.

28. Note, The Beirut Agreement: A License to Censor?, 7 Loy. L.A. INT’L & COMP. L.J. 255 (1984) (authored by Roxanne E. Christ) (hereinafter Christ). The Beirut Agreement at Article II defines audiovisual materials as: (a) films, filmstrips, and microfilm in either negative form, exposed and developed, or positive form, printed and developed; (b) sound recordings of all types and forms; and (c) glass slides, models, static and moving; wall charts, maps and posters. Id.

29. Beirut Agreement at art. I:

The present Agreement shall apply to visual and auditory materials which are of an educational, scientific or cultural character. Visual and auditory materials shall be deemed to be of an educational, scientific and cultural character: (a) when their primary purpose of effect is to instruct or inform through the development of a subject of aspect of a subject, or when their content is such as to maintain, increase or diffuse knowledge, and augment international understanding and goodwill; and (b) when the materials are representative, authentic, and accurate; and (c) when the technical quality is such that it does not interfere with the use made of the material.

30. Bullfrog Films, 847 F.2d at 504. See supra note 17.

31. Id. at 506-07.


33. Id.

movie qualifies as "educational, scientific" or is of a "cultural character." The country from which the film is being exported must file a certificate verifying the movie's educational, scientific or cultural character. The certificate is to be issued by the appropriate governmental agency of the participating nation or by the United Nations' Educational, Scientific and Cultural Organization. It is the responsibility of the exporting nation to determine whether the movie complies with the treaty terms.

As directed by Congress, the USIA established procedures for implementing the terms of the treaty by promulgating regulations. The applicant is subject to a formal review process. Applications for certificates are reviewed by the agency's chief attestation officer or his subordinates. If certification is denied, the regulations provide for appeal to a review board and, as a last resort, to the director of the USIA. In addition to setting application procedures, the USIA's implementing regulations establish substantive criteria for determining eligibility for certifi-

35. Beirut Agreement, supra note 26, art. IV § 2.
36. Id. at art. IV, § 1, which provides:
   To obtain the exemption, provided under the present Agreement for material for which admission into the territory of a contracting State is sought, a certificate that such material is of an educational, scientific or cultural character within the meaning of Article I, shall be filed in connection with the entry.
37. Id. at art. IV § 2, which provides:
   The certificate shall be issued by the appropriate governmental agency of the State wherein the material to which the certificate relates originated, or by the United Nations Educational, Scientific and Cultural Organization as provided for in paragraph 3 of this article, and in the forms annexed hereto. The prescribed forms may be amended or revised upon mutual agreement of the contracting States, provided such amendment or revision is in conformity with the provisions of this Agreement.
38. Id. at art. IV § 5, which provides: "The governmental agency of the contracting State into which entry is sought shall be entitled to impose regulations upon the importer of the material to ensure that it shall only be exhibited or used for non-profit making purposes."
40. USIA World-Wide Free Flow (Export-Import) of Audio-Visual Materials, 22 C.F.R. §§ 502.6(a)(3), 502.6(b)(3) and (b)(5) (1966), see Christ supra note 28 at 259.
42. Bullfrog Films, 847 F.2d at 505.
43. Id.
Three of these regulations were held by the Ninth Circuit to be unconstitutional. 45

The first objectionable regulation 46 repeats verbatim the definition of "educational, scientific or cultural" found in Article I of the Beirut Agreement. 47 The other two regulations 48 were promulgated by the USIA to interpret Article I of the Beirut Agreement. 49

45. Bullfrog Films, 847 F.2d at 514.
46. World-Wide Free Flow (Export-Import) of Audio-Visual Materials, 22 C.F.R. §§ 502.6(a)(3), 502.6(b)(3) and (b)(5) (1986). Section 502.6(a)(3) provides:

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.

47. Beirut Agreement, supra note 26, at art. I.
48. USIA World-Wide Free Flow (Export-Import) of Audio-Visual Materials, 22 C.F.R. §§ 502.6(b)(3) and (b)(5) (1986). Section 502.6(b)(3) states:

The Agency [USIA] 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 other restricted organizational use in moral or religious education and which otherwise meet the criteria set forth under paragraph (a) of this section and paragraph (b)(5) of this section, may be determined eligible for certification in the judgment of the Agency.

Section 502.6(b)(5) states:

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 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.

49. Bullfrog Films, 847 F.2d at 505.
B. USIA REGULATIONS FOUND CONSISTENT WITH TREATY

The plaintiffs contended that the USIA regulations were invalid because they were inconsistent with the Beirut Agreement. If the regulations are not consistent with their empowering legislation, they are void as contrary to law. However, the Ninth Circuit found that the regulations were not inconsistent with the statute's "broad mandate," nor were they inconsistent with the treaty.

C. USIA REGULATIONS VIOLATED FIRST AMENDMENT

The Ninth Circuit held that the USIA regulations were content-based and infringed upon the film makers' first amendment rights. The USIA regulations required that in order for a film to be certified, the film must be "balanced and truthful; [the film] must neither criticize nor advocate any political, religious, or economic views; and must not 'by special pleading' seek to influence opinion or policy." The court declared that the "USIA has gone so far as to deny certificates not only because certain views were assertedly missing, but also because viewpoints mentioned were, in the government's editorial judgment, insufficiently highlighted." The court concluded that the first amendment does not permit the government to require film makers to present all views contrary to the film maker's. Finally, the court held that by conditioning a valuable government benefit on the basis of speech content, the USIA forced film makers to choose between exercising their right to free speech and foregoing benefits accorded under the Beirut Agreement or

51. Appellees' Opening Brief at 46, Bullfrog Films v. Wick, 847 F.2d 502 (9th Cir. 1988). In order for U.S. regulations to be valid, they must be consistent with the legislation under which they are promulgated. Bullfrog Films, 847 F.2d at 508.  
53. Bullfrog Films, 847 F.2d at 508.  
54. Id.  
55. Id. at 510.  
56. Id.  
57. Id.  
58. Id., citing Big Mama Rag, Inc. v. United States, 631 F.2d 1030 n.18 (D.C. Cir. 1980).
curtailing their speech and obtaining their benefits.\textsuperscript{59}

D. USIA Regulations Were Unconstitutionally Vague

The Ninth Circuit agreed with the district court’s findings and found that the USIA regulations were “unquestionably . . . unconstitutionally vague.”\textsuperscript{60} Here, the court analogized \textit{Bullfrog Films} to another case, \textit{Big Mama Rag v. United States.}\textsuperscript{61} In \textit{Big Mama Rag}, a nonprofit feminist organization was denied tax-exempt status by the IRS on the basis that the organization did not comply with the IRS’s definition of “educational.”\textsuperscript{62} Likewise, the \textit{Bullfrog Films} court found the USIA’s requirements that the movies be “representative, authentic and accurate,”\textsuperscript{63} were unconstitutionally vague under the fifth amendment’s due process clause.\textsuperscript{64}

IV. CONCLUSION

The Ninth Circuit struck down federal regulations that required movie producers to comply with governmental standards regarding the film’s content prior to receiving export subsidies.\textsuperscript{65} The court found that these regulations, on their face, violate the first amendment.\textsuperscript{66} Second, the court found that the regulations were unconstitutionally vague under the fifth amendment’s due process clause.\textsuperscript{67} Ironically, the court found that the implementation of the Beirut Agreement “requires some content-based judgments.”\textsuperscript{68} In upholding the lower court’s injunction,\textsuperscript{69} the court concluded with the recommendation that the government issue new regulations that meet the constitutional standard of

\textsuperscript{59} \textit{Bullfrog Films}, 847 F.2d at 511.
\textsuperscript{60} \textit{Id.} at 511.
\textsuperscript{61} \textit{Id.}, see also \textit{Big Mama Rag}, 631 F.2d at 1030.
\textsuperscript{62} \textit{Big Mama Rag}, 631 F.2d at 1034.
\textsuperscript{63} See supra, note 46.
\textsuperscript{64} \textit{Bullfrog Films}, 847 F.2d at 513-14.
\textsuperscript{65} \textit{Id.} at 514.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.}
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Bullfrog Films}, 847 F.2d at 504.
being “more narrowly tailored and clearly drawn” than those reviewed by the court.\textsuperscript{70}

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\textsuperscript{70} \textit{Id. at 514.}  
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