Chapter VI: Regulation of Media Flow Out of the United States

A. *Regulation of Outgoing Information Flow in General*

If there is surprisingly little United States law on the application of the First Amendment to information flowing into the United States,[858] there is even less on information flowing out of the country. There appears to be only one court decision directly in point: the 1986 ruling by a federal district court in *Bullfrog Films, Inc. v. Wick*.[859] In that case, involving the U.S. government's certification of films as »educational« for the purpose of duty-free import to other countries under the Beirut Agreement,[860] the court squarely considered »whether the First Amendment applies with equal force to communications directed toward foreign audiences as it does to domestic communications.«[861]

The U.S. government took the position in *Bullfrog Films* that »the exercise of free speech within foreign nations by Americans is subordinate to significant foreign policy considerations and, as such, subject to reasonable regulation.«[862] The court disagreed. Analyzing *Haig v. Agee*[863] and other Supreme Court »right to travel« cases relied on by the government,[864] the court found that they did not establish a lower level of constitutional protection for speech by Americans abroad than for domestic speech.[865]

However that may be, speech by Americans abroad is not necessarily the same as speech by Americans in the United States to audiences abroad.

858 *See supra* text accompanying notes 786–98.

859 646 F. Supp. 492, 502 (C.D. Cal. 1986), *appeal docketed*, No. 86-6630 (9th Cir.).

860 *See supra* notes 405–18 and accompanying text; *infra* notes 910–35 and accompanying text.

861 646 F. Supp. at 502.

862 *Id.* at 503, Previously, in Haig v. Agee, 453 U.S. 280 (1981), *see supra* text accompanying notes 377–78, the government had told the Supreme Court that the secretary of state could refuse to issue a passport to a U.S. citizen who proposed to go to a foreign nation to denounce U.S. policy toward that nation, since »the freedom of speech that we enjoy domestically may be different from that that we can exercise in this context.« 453 U.S. at 319 n.9 (Brennan, J., dissenting) (quoting oral argument of solicitor general).

863 453 U.S. 280 (1981).

864 *E.g.*, Regan v. Wald, 468 U.S. 222 (1984); Zemel v. Rusk, 381 U.S. 1 (1965); Kent v. Dulles, 357 U.S. 116 (1958).

865 676 F. Supp. at 503–04.

When media content flows from the United States to other countries, what crosses the border is »pure speech,« unencumbered by the movement of persons and by such attendant government powers as the control of foreign travel.[866] When what *enters* the United States is speech alone, like the mail in *Lamont*,[867] the protection afforded by the First Amendment may be substantially stronger than it is, for example, when what enters is live foreign visitors, subject to the government's power to exclude aliens.[868] Similarly, the constitutional protection of outgoing speech may be stronger when the speaker remains in the United States and pure transborder speech is involved.

Still, the audience is foreign, and this fact arguably undercuts the First Amendment claim. If the chief purpose of the First Amendment is to let truth prevail in the marketplace of ideas,[869] and specifically to enable Americans to enlighten themselves in order to govern themselves,[870] these objectives arguably do not apply when the audience is foreign. The government thus contended in *Bullfrog Films*: »the world at large is not a ›First Amendment forum.‹«[871]

The government was wrong. When the audience is foreign, the constitutional protection accorded to speech should not be diminished. In the first place, what the Constitution protects is »freedom of speech.«[872] It would elevate the asserted purpose of the First Amendment over the Amendment itself to deny protection to the speaker or the speech because of the location or nationality of the audience.[873] Second, facilitating the search for truth, political or otherwise, is not the only respected purpose of the First

866 *See, e.g.*, Haig v. Agee, 453 U.S. at 306–09.

867 Lamont v. Postmaster General, 381 U.S. 301; *see supra* text accompanying notes 308–13.

868 *See, e.g.*, Kleindienst v. Mandel, 408 U.S. at 762–65; *supra* text accompanying notes 346–58.

869 *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting); T. EMERSON, *supra* note 26, at 6.

870 *See, e.g.*, Whitney v. California, 274 U.S. 357, 375–77 (Brandeis, J., concurring); A. MEIKLEJOHN, *supra* note 28, at 37–39; T. EMERSON, *supra* note 26, at 6–8; Carey v. Brown, 447 U.S. 455, 467 (1980):

871 646 F. Supp, at 503 n.16. The government additionally contended, as stated by the court, »that when United States citizens direct their speech at foreign audiences, the government may regulate such speech on the basis of content; further, that the traditional standards for determining if a law is unconstitutionally vague should be relaxed when foreign audiences are involved, since the government must be permitted to fashion foreign affairs-related regulations in a broad manner.« *Id.* at 503.

872 U.S. CONST. amend. I.

873 As the court in *Bullfrog Films* said with respect to an American speaking abroad: »[T]he government obviously could not constitutionally prohibit, say, an American professor of political science from expressing his or her opinions before an international symposium in Paris on the ground that his or her foreign listeners do not participate in the American political process.« 646 F. Supp. at 506–07.

Amendment. In addition to the social ends served by freedom of expression, »[s]peech is protected not as a means to a collective good but because of the value of the speech conduct to the individual.«[874] This purpose applies regardless of the nationality, the location or perhaps even the existence of the audience.

Third, the world at large *is* a First Amendment forum. The interdependence of nations and the worldwide reach of communications media in today's world make the »marketplace of ideas« no less international than the marketplace of trade. Political, military, economic and other decisions made abroad can affect the United States almost as readily as decisions made in the United States. Speech conveyed from the United States to a foreign audience can have an impact, directly or indirectly, on domestic debate in the United States.[875]

The court in *Bullfrog Films* thus correctly concluded that »in the absence of some overriding governmental interest such as national security, the First Amendment protects communications with foreign audiences to the same extent as communications within our borders.«[876]

Against that background, the following sections review the relatively few pertinent provisions of U.S. law that restrict information flowing out of the country.

1. *Restrictions on International Mail*

Although a U.S. restriction on incoming mail was held to violate the First Amendment in *Lamont v. Postmaster General*,[877] in handling outgoing mail the United States stands ready to enforce restrictions adopted by other countries.

This readiness is found in a provision of the Foreign Agents Registration Act authorizing the U.S. Post Office to block politically inflammatory mail

874 Baker, *supra* note 30, at 966; *see* Whitney v. California, 274 U.S. at 375 (Brandeis, J. concurring); T. EMERSON, *supra* note 26, at 3–11; *Bullfrog Films*, 646 F. Supp. at 507 (»Speech concerning public affairs is more than a tool of self-government; it is also an essential form of self-expression«).

875 *Cf. Bullfrog Films*, 646 F. Supp. at 503 n.16 (»matters occurring abroad, e.g., government ›news leaks‹ to the foreign press, are likely to find their way into this country and become a part of our domestic political debate«). As the *Bullfrog* court further pointed out, inhibition of a U.S. speaker who is addressing a foreign audience may »chill« that speaker's future speech to domestic audiences. *Id.* at 502 n.14.

876 *Id* at 502.

877 381 U.S. 301 (1965); *see supra* notes 308–13 and accompanying text.

sent by a foreign agent in the United States to another »American republic« whose law bars the material.[878]

More broadly, U.S. willingness to block international mail undesired by other countries is reflected in provisions of the Universal Postal Union to which the U.S. has subscribed. The United States has agreed through the Universal Postal Union to refuse to accept for mailing materials that are prohibited by the destination country.[879] A variety of prohibitions are currently listed for various countries: Peru will not accept »Communist propaganda.«[880] Indonesia bars printed matter in the Indonesian language that was printed outside Indonesia, except for educational books approved by the Indonesian Department of Commerce.[881] Iran prohibits fashion newspapers.[882] The Soviet Union excludes toys »of a military nature« or »in the form of a military firearm.«[883]

As Dean Price has observed, these regulations »assume that the United States can constitutionally be party to an international agreement for the exchange of information where one party reserves the right to censor.«[884] The regulations may not be constitutional, at least if the United States itself performs a censoring or blocking function. While the foreign addressees may have no First Amendment right to receive uncensored mail from

878 22 U.S.C. § 618(d) (1979). This section of FARA provides that if an »agent of a foreign principal« offers for mailing to »any other American republic« material that promotes »any racial, social, political, or religious disorder,« forceful conflict, or the forceful overthrow of a government in an American republic, and if the postmaster general is informed by the secretary of state that the diplomatic representative of that republic has declared »that the admission or circulation of such communication or expression in such American republic is prohibited by the laws thereof and has requested in writing that its transmittal thereto be stopped,« the postmaster general may declare the matter to be unmailable.
The material described in section 618(d) falls under clause (2) of FARA's definition of »political propaganda.« *See* 22 U.S.C. § 611(j) (1979). Unlike the rest of FARA, which requires the labeling, filing and reporting of foreign »political propaganda« distributed in the United States (*see* 22 U.S.C. § 614; *supra text* accompanying notes 426–30), this subsection provides for the actual stopping of »political propaganda« on its way out of the United States.

879 United States Postal Service, International Mail Manual (1986) § 131.32 (»Articles which are prohibited by the destination country, are unmailable.«) Moreover, mail containing such materials may be returned or seized by the destination country, »[w]hether or not notice of such prohibition or restriction has been provided to or published by the Postal Service.« *Id.* at § 131.33.

880 *Id.* at App. D.

881 *Id.*

882 *Id.*

883 *Id.*

884 Price, *supra* note 18, at 891 n. 63.

the United States,[885] the sender of the mail is a speaker in the United States who can claim the First Amendment's protection.[886]
Nonetheless, these regulations have been accepted and adopted by the U.S. government and are apparently enforced. They would provide a precedent for agreement by the United States, for example, to an international DBS convention recognizing rights of receiving states to regulate or help shape incoming DBS broadcasts.[887]

2. *Export Restrictions*

The United States has extensive restrictions on the export of information considered to have national-security significance. Under the Arms Export Control Act,[888] the State Department has issued regulations limiting the export of classified information and of unclassified information related to weapons and munitions.[889] Unclassified »technical data« may also require an export license.[890] However, these regulations are subject to a general exemption permitting the export of unclassified information in printed form that is available to the public through newsstands, bookstores, subscriptions or public libraries.[891]
Under the Export Administration Act,[892] the Department of Commerce has issued regulations requiring a license for the export of a large range of advanced technical information.[893] The information covered need not be classified, and its technical applications need not be military.[894]

885 *Cf.* Lamont v. Postmaster General, 381 U.S. at 307–08 (Brennan, J., concurring) (case might be troublesome if it turned on First Amendment rights of foreign senders); Kleindienst v. Mandel, 408 U.S. at 762 (alien speaker has no First Amendment right to enter U.S.).

886 *Cf.* Procunier v. Martinez, 416 U.S. 396, 408–09 (1974) (whatever the merits of prisoner's claim to uncensored correspondence with an outsider, the outsider has First Amendment interest in uncensored correspondence with the prisoner (citing *Lamont*)); Lamont v. Postmaster General, 381 U.S. at 308 (Brennan, J., concurring) (addressees in U.S. have First Amendment right to receive); Kleindienst v. Mandel, 408 U.S. at 762–65 (professors in U.S. may have First Amendment right of access to foreign speaker).

887 *See* Price, *supra* note 18, at 890–91.

888 22 U.S.C. § 2778 (1982).

889 22 C.F.R. §§ 125.1–125.10 (1987).

890 *Id.* at § 125.2.

891 22 C.F.R. § 125.11(a)(1) (1982).

892 50 U.S.C. §§ 2401–20 (Supp. 1987).

893 15 C.F.R. §§ 368.1–399.2 (1987).

894 *See id.*

Under the Atomic Energy Act of 1954,[895] the export of a wide range of information related to nuclear technology is prohibited unless approved by a number of U.S. officials.[896] In *United States v. The Progressive*,[897] the government claimed authority under this act to restrain the publication of unclassified material in the public domain concerning atomic technology, publication of which allegedly threatened »immediate, direct and irreparable harm to the interests of the United States.«[898] The court granted the government's request for an injunction, but the case was withdrawn when it became evident that the material was already publicly known.[899]

Under one or more of these statutes, particularly the Arms Export Control Act, the U.S. Department of Defense claims the right to restrict or cancel the presentation of unclassified research papers at international scientific conferences in the United States.[900]

The extent of U.S. export controls is a controversial subject inside and outside the U.S. government, pitting business interests against asserted national-security interests. In early 1987, the U.S. Commerce Department – which processes some 110,000 export licenses a year[901] – announced a broad proposal to limit the controls, primarily with respect to trade with U.S. allies.[902] The Defense Department was expected to resist at least some of the proposed changes.[903]

The *Progressive* case aside, it does not appear that any of these export restrictions have come under First Amendment attack. If they were to, the government could be expected to argue that the restrictions applied not simply to speech but to actions,[904] in the form of the export of the related goods; and perhaps that they applied only to the »secondary effects« of the speech,[905] in the form of the technological capability that the informa-

895 42 U.S.C. § 2011 (Supp. 1987).

896 10 C.F.R. § 810 (1987).

897 467 F. Supp. 990 (W.D. Wis. 1979), *dismissed mem.*, 610 F.2d 819 (7th Cir. 1979).

898 *Id.* at 991.

899 The Justice Department announced that the publication of similar material had mooted its attempts to block publication of the *Progressive's* article. *See* Kroll, *National Security: The Ultimate Threat to the First Amendment,* 66 MINN. L. REV. 160, 163 n. 15.

900 In 1985, for example, the Department ordered the Society of Photo-Optical Instrumentation Engineers to cancel the presentation of some twelve papers and to restrict the attendance by foreign scientists at the presentation of other papers. N.Y. Times, Apr. 8, 1985, at 11, cols. 5–6 (national ed.).

901 N.Y. Times, Feb. 10, 1987, at 1, col. 4, 41, col. 3 (national ed.).

902 *Id.* at 1, col. 4.

903 *Id.*

904 *See, e.g.*, Haig v. Agee, 453 U.S. 280, 304 (1981); United States v. O'Brien, 391 U.S. 367, 376–77 (1968).

905 *See* City of Renton v. Playtime Theatres, Inc., 106 S. Ct. 925, 929 (1986).

tion could give to U.S. enemies. The analogy of espionage laws, which also prohibit the export of information, might be invoked.[906] Given the grounding of the export controls in national-security considerations[907] and the exemption for unclassified information publicly available,[908] the government's position would probably find a sympathetic judicial reception in any case where the national-security claim were plausible.

3. *Certification of »Educational« Films for Duty-Free Import to Other Countries*

As discussed earlier,[909] under the Beirut Agreement[910] a person seeking duty-free transborder shipment for audiovisual materials must apply for a certificate of their educational, scientific or cultural character from the appropriate agency of the exporting country.[911] The certificate is then submitted to the importing country, which makes its own determination but must give »due consideration« to the exporting country's certification.[912] Under the terms of the Agreement, materials shall be deemed of »educational, scientific or cultural« character:

> (a) When their primary purpose or effect is to instruct or inform through the development of a subject or an 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.[913]

In the United States, the president has designated the United States Information Agency to administer the Agreement.[914] One of the USIA's imple-

906 18 U.S.C. §§ 791–98 (1985).
907 *Cf.* Haig v. Agee, 453 U.S. 280, 306 (1981).
908 *See supra* note 891 and accompanying text.
909 *See supra* text accompanying notes 405–18.
910 *Supra* note 405.
911 *Id.* at art. IV, para. 2.
912 *Id.* at art. IV, paras. 4–6; *id.* at art. IV, para. 6. On the administration of the Beirut Agreement by the United States with respect to audiovisual materials seeking duty-free import into the United States, *see supra* notes 408–18 and accompanying text.
913 Agreement, *supra* note 405, at art. I.
914 *See* Bullfrog Films, Inc. v. Wick, 646 F. Supp. 492, 495 (C.D. Cal. 1986); Pub. L. No. 89–634, 80 Stat. 879 (1966).

menting regulations,[915] defining the materials the Agency will certify, incorporates word-for-word the definition contained in the Agreement.[916] A second, »interpretive« regulation provides that the Agency will not certify 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.«[917] A third regulation, also »interpretive,« provides:

> 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.[918]

In *Bullfrog Films, Inc. v. Wick*,[919] the owners of seven films that the USIA had declined to certify challenged the USIA regulations as inconsistent with the First Amendment. The films included *In Our Own Backyards: Uranium Mining in the United States, Whatever Happened to Childhood?*, and *From the Ashes: Nicaragua Today*.[920] The USIA had found the films ineligible because they »espouse[d] a cause,« were »inaccurate« or »imbalanced,« or were capable of »being misinterpreted or misunderstood by foreign audiences lacking adequate American points of reference.«[921] While declining to certify these films, the USIA had certified such films as *To Catch a Cloud: A*

915 22 C.F.R. §§ 502.1–502.8 (1985). Under the regulations, applications for certification first are reviewed by an attestation officer; a denial by him may be appealed to a review board; and final Agency review is by the director of USIA. 22 C.F.R. § 502.3(g), 502.5(b), 502.5(c) (1986).

916 22 C.F.R. § 502.6(a)(3).

917 22 C.F.R. § 502.6(b)(3).

918 22 C.F.R. § 502.6(b)(5).

919 646 F. Supp. 492 (C.D. Cal. 1986).

920 *See id.* at 496. *See generally* Note, *supra* note 405.

921 646 F. Supp. at 496. For example, *In Our Own Backyards: Uranium Mining in the United States* was found to »espouse a cause and influence opinion« because it presented »an antinuclear message« and had a purpose of »persuad[ing] the audience that all uranium mining should be prevented.« *Id. Whatever Happened to Childhood?* was found not to be »representative« because »the Agency does not find that the youth in the film are typical or representative of all American youth today.« *Id. From the Ashes: Nicaragua Today* was rejected because it led viewers to conclude »that the United States is the primary cause of instability, poverty, and oppression in Nicaragua,« thereby constituting both »an attempt to persuade« and »an attack on the institutions of the United States.« *Id.* at 496–97. The film was also found to be unbalanced because it did not discuss »any of the reasons for the policy adopted by the Government of the United States toward the present or former government of Nicaragua.« *Id.* at 497.

Thoughtful Look at Acid Rain, by the Edison Electrical Institute; *Radiation ... Naturally,* by the Atomic Industrial Forum; and *The Family: God's Pattern for Living,* by the Moody Institute of Science.[922]

Judge Wallace Tashima of the federal district court, ruling in October 1986, first found that the plaintiffs had standing to challenge the USIA certification process.[923] He then concluded that, in the absence of some overriding interest such as national security, »the First Amendment protects communications with foreign audiences to the same extent as communications within our borders.«[924]

Applying the First Amendment, the court held that the USIA's two »interpretive« regulations were unconstitutionally vague.[925] No one could know what was meant by terms such as »special pleading,« or »attempt generally« to influence opinion, or »seem to attack a ... persuasion,« the court said.[926] Further, the two regulations impermissibly »discriminate on the basis of political content.«[927] In particular, the provision rejecting materials that »misrepresent« the United States »places the government in the position of determining what is the ›truth‹ about America, politically and otherwise.«[928] The court held the first interpretive regulation additionally invalid because it prohibited certification of materials that state a point of view, thus impermissibly limiting expressions of opinion on issues of public controversy.[929]

The court also struck down the regulation that adopted verbatim the Agreement's definition of »educational.«[930] The requirements that the material »augment international understanding and goodwill« and be »representative, authentic and accurate« were unduly vague, and the term »accurate« also involved content discrimination and a government determination of

922 *Id.* at 497. The last film was certified under a section of the regulations making materials eligible if »intended for use only in denominational programs or other restricted organizational use in moral and religious education.« 22 C.F.R. § 502.6(b)(3); *see* 646 F. Supp. at 497 n.7.

923 646 F. Supp. at 497–502. Although the plaintiffs remained free to distribute their films anywhere in the world, and simply had to pay whatever customs duties the importing country might require, they had been denied the exporting country's certification, which is »an indispensable prerequisite to obtaining the benefits of the Treaty,« the court said. *Id.* at 501–02.

924 *Id.* at 502; *see supra* note 876 and accompanying text.

925 646 F. Supp. at 505.

926 *Id.* at 505.

927 *Id.* at 506.

928 *Id.* at 506.

929 *Id.* at 506–07.

930 *Id.* at 507–08.

truth, the court said.[931] The court did not strike down the Agreement itself, expressing the belief that regulations could be drafted that would fit within the Agreement's definition of »educational« and still be specific and neutral enough to comply with the United States Constitution.[932] The court ordered the USIA to reconsider the eligibility of each of the plaintiffs' films under proper constitutional standards.[933]

The district court's decision in *Bullfrog Films* – which the government has appealed[934] – is correct. Although denial of a certificate under the Beirut Agreement does not block export of the materials, it burdens their export more substantially than the statute in *Lamont* burdened the import of material through the mails.[935] The Beirut Agreement admittedly requires the U.S. government to determine, somehow, what films are »educational.« Developing neutral and specific standards for this task poses a difficult problem. Perhaps the solution lies not only in drafting better standards but also in delegating the job of applying them to a body insulated from direct government control. In any event, determinations founded on the vague and content-based standards at issue in *Bullfrog Films* cannot coexist with the First Amendment.

B. *Regulation of Outgoing Electronic Media Flow*

1. *Licensing of International Broadcast Stations*

While the USIA regulations in *Bullfrog Films* at least could claim their genesis in a treaty, no such explanation can be offered for the overt content regulation of outgoing media flow found in the FCC's licensing scheme for international broadcast stations. These are stations, licensed to private entities, that broadcast overseas from the U.S. on short-wave frequencies. The applicable regulations require licensees to »render only an international broadcast service which will reflect the culture of this country and which will promote international goodwill, understanding, and cooperation.«[936]

931 *Id.*
932 *Id.* at 510–11.
933 *Id.*
934 No. 86-6630 (9th Cir.).
935 381 U.S. 301 (1965).
936 47 C.F.R. § 73.788(a) (1986).

Although this provision was strongly opposed on its adoption in 1939,[937] it remains in effect 1986 and apparently has not been challenged in the courts.[938]

Another FCC regulation for international radio stations restricts their commercial advertising. Among other things, it requires that commercials »give no more than the name of the sponsor of the program and the name and general character of the commodity, utility or service, or attraction advertised.«[939] This requirement was adopted by the FCC »because it appeared that institutional advertising [as distinct from product advertising] would create a better impression of the United States.«[940]

The private international broadcast service of the United States, while still limited, has grown in recent years.[941] In 1973, the FCC set a flexible ceiling of 100 frequency-hours per day for all U.S. private international broadcasters as a group; each station used varying frequencies and had to apply for daily frequency assignments for each season.[942] At that time, no more than 75 frequency-hours per day were being used.[943] In 1986, U.S. private international broadcasters as a group used about 450 frequency-hours per day.[944]

One constant of private international broadcasting has been the dominance of religious programming. Of the stations operating in 1986, only one clearly did not have a religious format.[945]

The single nonreligious station, which went on the air in 1982, was the first

937 It was met by the »united opposition of the industry and ... attacked in Congress as being an entering wedge for censorship of domestic programs.« C.B. ROSE, *supra* note 604, at 244. But the protests were mooted when the wartime government took over private international broadcasting, and they have not resurfaced. *See* Garay, *WRNO Worldwide: A Case Study in Licensing Private US International Broadcast Stations*, 26 J. BROADCASTING 641, 642 (1982).

938 *See* 47 C.F.R. § 73.788(a) (1986); Price, *supra* note 18, at 897.

939 47 C.F.R. § 73.788(b)(1) (1986). This requirement was waived by the FCC, however, for WRNO, the one clearly commercial international station it has licensed. Telephone conversation with Jonathan David, chief, international negotiations, Mass Media Bureau, FCC, Mar. 27, 1987; *see infra* text accompanying notes 946–51.

940 International Broadcasting Stations, 41 F.C.C.2d 736, 750 (1973).

941 In 1980, only four stations were transmitting. *Garay, supra* note 937, at 641. In 1986, twelve stations were listed as providing private international broadcast service. *See* 1985 BROADCASTING/CABLECASTING YEARBOOK, at B-350 (1986).

942 *See* Garay, *supra* note 937, at 644; 41 F.C.C.2d at ___.

943 Garay, *supra* note 937, at 644.

944 Telephone conversation with Tom Polain, Mass Media Bureau, FCC, Mar. 27, 1987).

945 *See* 1985 BROADCASTING/CABLECASTING YEARBOOK, at B-350-351. An attorney at the FCC's Mass Media bureau explained that the stations are not commercially attractive because of the relatively steep power requirements for international transmission. Telephone conversation with Jonathan David, *supra* note 939.

station licensed in nearly two decades.[946] Its license application met considerable resistance at the FCC, reflecting at least in part an official reluctance to have anyone but the U.S. government broadcasting abroad from the United States.[947] The FCC chairman said of the application:

> I think a ... fundamental issue is: Should we have this type of allocation of frequencies? Why should private entities be broadcasting viewpoints overseas? That's part of the VOA [Voice of America], RFE [Radio Free Europe], or other government entities. Why should foreign policy be determined by a private licensee's view?[948]

The chairman, however, was alone in opposing the application,[949] and his view was at odds with the 1948 Smith-Mundt Act, which created the United States Information Agency.[950] That act prohibits the U.S. government from monopolizing short-wave broadcasting and provides further that the USIA director »shall reduce such Government information activities whenever corresponding private information dissemination is found to be adequate.«[951] On the other hand, the limited scope of private overseas broadcasting from the United States suggests that the FCC chairman's view may better reflect the prevailing reality.

2. *U.S. Government Use of International Broadcast Frequencies*

Despite Congress's directive that the government not monopolize overseas broadcasting,[952] something close to that has happened. In 1973, overseas broadcasting by the Voice of America (VOA), the broadcasting arm of the USIA, had increased to about 440 frequency-hours per day, while private international transmissions had decreased to about 45 frequency-hours per

946 *See generally* Garay, *supra* note 937.
947 *Id.*
948 *See id.* at 649–50.
949 *Id.*
950 United States Information and Educational Exchange Act, 22 U.S.C. § 1462 (1985). The chairman also need not have worried about the foreign-policy predilections of the new licensee. The licensee's programming objective was to »play rock 'n' roll music for the world« and turn a profit in the process. Garay, *supra* note 937, at 652. Confronted with the regulation requiring service that »will reflect the culture of this country,« *see supra* text accompanying note 936, the licensee responded, reasonable enough, that »[t]here's nothing more American in our culture than rock music.« Garay, *supra* note 937, at 654 & n. 56.
951 22 U.S.C. § 1462 (1985).
952 22 U.S.C. § 1462 (1985); *see* International Broadcasting Stations, 41 F.C.C.2d at 737.

day.[953] The FCC at that time set a ceiling of 100 frequency-hours per day for private transmissions, over the protests of VOA that even this was too much.[954] Noting the statutory prohibition of a government monopoly, the FCC remarked that »[t]o set a ceiling on private international broadcasters that would give them less than one-fifth of the frequency-hours used by the U.S.-based stations of VOA borders on being contrary to this mandate.«[955]

By 1986, private international transmissions had increased to about 450 frequency-hours per day. But the 100-frequency-hour »ceiling« has not been formally changed[956] and serves, perhaps, to keep private international broadcasters on notice that they should not expect too much. The deterrent effect on actual and potential broadcasters is difficult to estimate.

The ceiling on private frequency-hours is not the only way the U.S. government discourages private international broadcasting and protects its own position on the international airwaves. By limiting private broadcasters to »institutional« commercials that give no more than »the name and general character« of the article advertised,[957] the FCC makes the service unattractive to potential commercial broadcasters. It is no wonder that, until 1982, all the private international stations had religious formats.[958] As the FCC in 1973 noted, ironically, in justifying its ceiling on frequency-hours, »we may not expect a great rush into international broadcasting since it is not a financially remunerative activity.«[959] Further government efforts to limit the private service were evidenced in the resistance at the FCC to licensing the one commercial station in 1982.[960]

These efforts by the U.S. government to keep international broadcasting mostly for itself not only seem inconsistent with the congressional directive that government information activities be reduced »whenever private information dissemination is found to be adequate,«[961] but they also contradict the FCC's own observation that »[a] credibility gap attaches to governmental broadcasting. Broadcasting by private stations is often more effec-

953 *Id* at 738, 740–41.
954 *Id.* at 739.
955 *Id.*
956 Telephone conversation with Jonathan David, *supra* note 939.
957 47 C.F.R. § 73.788(b)(1) (1985); *see supra* note 939 and accompanying text. *But see supra* note 944.
958 *See supra* note 945 and accompanying text.
959 41 F.C.C.2d at 741.
960 *See generally* Garay, *supra* note 937.
961 22 U.S.C. § 1462 (1985).

tive because it has a greater credibility.«[962] Further, for a nation that gives such a dominant role in its domestic broadcast system to private, commercial broadcasting, this reluctance to show the same face to the world suggests a lack of self-confidence about what goes on at home.

The U.S. government's enthusiasm for its own overseas broadcasting was demonstrated anew in 1985 by the inauguration of a new Voice of America service, called Ratio Marti, broadcasting to Cuba.[963]

As far as the content of the U.S. government's overseas broadcasting is concerned, the Congress has required that Voice of America news broadcasts be »accurate, objective, and comprehensive.«[964] The statute also requires that VOA »present a balanced and comprehensive projection of significant American thought and institutions,« that it »present the policies of the United States clearly and effectively,« and that it »also present responsible discussion and opinion on these policies.«[965] After some debate, Congress made Radio Marti subject to the same standards.[966]

The extent to which VOA broadcasts meet these standards is difficult to gauge from the United States. One reason is a statutory directive that information disseminated abroad by the USIA »shall not be disseminated within the United States,« except that it shall be available on request, »for examination only,« to members of the press, scholars, and members of Congress.[967] While this provision presumably seeks to protect the U.S. public from government propagandizing, it also has the effect of denying to the U.S. public knowledge about the content of the information, or propaganda, disseminated by their government to the rest of the world.

3. *Sale of U.S. Televison Programming Abroad*

There are no direct limits in U.S. law on the sale of U.S. television programming (or other media content) for distribution abroad. Any such limits not

962 41 F.C.C.2d at 739. The policy is not solely the FCC's, however. As the Commission noted, the increased budgets of the Voice of America demonstrate congressional support for VOA's proliferating broadcast activities. *Id.* at 737.

963 Radio Broadcasting to Cuba Act, Pub. L. No. 98–111, Oct. 4, 1983; 22 U.S.C. § 1465 (1985).

964 22 U.S.C. § 1463 (1985).

965 *Id.*

966 22 U.S.C. § 1465(b) (1985).

967 22 U.S.C. § 1461 (1985).

only would be inconsistent with U.S. trade interests but would raise constitutional problems as well.[968]

The foreign market for U.S. television programming is so substantial, however, that the control of this market by the three major U.S. networks has been limited in an attempt to reduce network control over the production of programming in the U.S. The FCC has barred the networks both from syndicating in foreign countries programs of which the network was not the sole producer and from acquiring financial interests in the exhibition or distribution of such programs abroad.[969] In 1983 the FCC proposed to lift these restrictions, along with parallel restrictions governing syndication and financial interests in the U.S.,[970] but opposition from the motion picture industry killed the proposal.[971] In any event, similar restrictions have been imposed on the three networks by consent decrees in antitrust suits brought by the U.S. government.[972] These decrees, which go somewhat farther than the FCC restrictions,[973] will remain in effect, unless modified, until the late 1980s or early 1990s.[974]

The limitations thus imposed on the export of television programming produced by the U.S. networks seem fundamentally different from other U.S. limitations on outgoing media flow. In this case, the regulation of transborder speech serves as an adjunct to a domestic regulatory policy – reducing network dominance – and is not based on reasons peculiar to transborder communications.

4. *Satellite Distribution of U.S. Programming Abroad*

Just as United States law restricts the use of satellites to bring television programming into the United States,[975] companies wishing to send program-

968 *See* Bullfrog Films, Inc. v. Wick, 646 F. Supp. 492 (C.D. Cal. 1986); *supra* notes 872–76 and accompanying text; *cf.* Lamont v. Postmaster General, 381 U.S. 301 (1965).

969 47 C.F.R. § 73. 658 (1984).

970 *See* 94 F.C.C.2d 1019 (1983).

971 *See* Broadcasting, Apr. 1, 1985, at 95; Kintzer, *The Proposed Repeal of the Financial Interest and Syndication Rules: Network Domination or Public Interest Representations?*, 6 COMM/ENT L.J. 513 (1984).

972 *E.g.*, United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978), *aff'd men.*, No. 77–3381 (9th Cir., Apr. 12, 1978); *see also* 45 Fed. Reg. 34,463, 58,441 (1980).

973 Unlike the FCC regulations, the consent decrees prohibit the networks from procuring the rights to foreign syndication of foreign-produced programming in the same negotiations in which they obtain domestic syndication rights. *See* 94 F.C.C.2d 1019 (para. 19).

974 *See* 45 Fed. Reg. 34,463, 58,441 (1980); 449 F. Supp. at 1132.

975 *See supra* text accompanying notes 810–57.

ming abroad by way of satellite also must contend with U.S. legal requirements.

If U.S. cable networks or other program distributors wish to use even INTELSAT satellites to send their programming abroad, they need the permission of the FCC. FCC permission is required under provisions of the Communications Act regarding new transmission services[976] and also under provisions of the Communications Satellite Act regarding construction and operation of international earth stations.[977] The FCC, however, now readily grants these permissions. In 1984 the Commission liberalized its policy on ownership of U.S. earth stations using the INTELSAT system.[978] It ruled that such stations no longer need be owned by a consortium of carriers, and it said further that applications to provide television services through such stations would be processed »in routine fashion.«[979] Thus in 1985 the Commission granted an application by Turner Teleport, Inc., a subsidiary of Turner Broadcasting System, to transmit television programming through INTELSAT satellites over the Atlantic.[980]

However, signal transmissions by way of satellite are expensive.[981] Therefore, just as receiving stations in the United States seek to receive programming from foreign domestic satellites already carrying the signals – where the »footprint« of the satellite falls on the United States[982] – carriers and programmers seek to distribute programming carried by U.S. domestic satellites to countries abroad in the same manner.

In its 1981 *Transborder* decision,[983] the FCC ruled not only that U.S. earth stations could be used to receive programming from Canadian domestic satellites[984] but also that U.S. domestic satellites could be used to distribute programming to Canada and countries in Central America and the

976 47 U.S.C. § 214, Title III (1982); *see In re* Modification of Policy on Ownership and Operation of U.S. Earth Stations that Operate with the INTELSAT Global Communications Satellite System (Ownership of INTELSAT Earth Stations), 100 F.C.C.2d 250, para. 13 n. 23, paras. 20, 22 (1984).

977 47 U.S.C. § 201(c)(4), (6), (7) (1985); *see* Ownership of INTELSAT Earth Stations, *supra* note 976, paras. 13 n. 23, 20 n. 43, 22.

978 Ownership of INTELSAT Earth Stations, *supra* note 976, at para. 55.

979 *See id.* paras. 3, 21, 23, 24.

980 Turner Teleport, Inc., Nos CSG-85-001-P/L; I-T-C-85-033, Mar. 13, 1985.

981 *See infra* note 989.

982 *See supra* notes 759–85 and accompanying text; Transborder, 88 F.C.C.2d 258 para. 47 (1981). The footprint of a typical U.S. domestic satellite will cover the forty-eight contiguous states, parts of Canada and Mexico, and a substantial part of the Caribbean and Latin America. *See* 1983 Hearings, *supra* note 651, at 17 (statement of David Ladd).

983 88 F.C.C.2d 258; *see supra* notes 759–69 and accompanying text.

984 *See supra* text accompanying notes 759–69.

Caribbean.[985] Since these were non-INTELSAT satellites, the Commission ruled that the consultation process established in the INTELSAT Agreement must be observed.[986] As noted earlier, this requirement could hinder the reception of programming in the United States, including news programming, and thus presents constitutional problems.[987] The requirement may have the same effect on the transmission of news programming *from* the United States and so may present similar problems in the context of outgoing speech.[988]

In more distant lands where the footprints of U.S. domestic satellites do not fall, it has been necessary for U.S. programmers to use INTELSAT satellites to distribute their product abroad. The high price of INTELSAT service may have discouraged such distribution.[989] Currently, however, INTELSAT is losing its monopoly position over international satellite communications from the United States. In 1984 President Reagan determined that the U.S. national interest required separate U.S. systems providing international satellite service, as long as restrictions were imposed to protect the economic health of INTELSAT.[990] The FCC subsequently established policies for authorizing separate systems[991] and conditionally granted six applications, subject to the INTELSAT coordination procedure.[992] The first of these applications was approved by the INTELSAT Assembly of Parties in April 1987.[993]

The FCC initially restricted the separate-system operators to selling their facilities or leasing them for a minimum of one year, in order to protect

985 *See* 88 F.C.C.2d at 263–66.

986 *Id.* at 279–85.

987 *See supra* notes 796–98 and accompanying text.

988 *Cf. supra* notes 876, 886, 924, 968 and accompanying test.

989 At least one U.S. programmer complains that distribution of U.S. programming to distant countries has been impeded by monopoly prices charged by INTELSAT for the use of its satellites. The general counsel of Turner Broadcasting System, parent of Cable News Network, said in 1985 that efforts to »take CNN international« were impeded by INTELSAT's pricing policy. He said that networks in Australia and Japan wanted to receive CNN's news programming, that the reception costs were minimal because the footprint of CNN's INTELSAT satellite fell there, but that INTELSAT's extra charges for down-link points added a prohibitive cost of some $120,000 per receiving country. Telephone interview with Robert Ross, general counsel, Turner Broadcasting System, (Jan. 22, 1985).

990 Presidential Directive No. 85–2, Nov. 28, 1984; *see* 47 U.S.C. §§ 701(d), 721(a) (1985).

991 Establishment of Satellite Systems Providing International Communications (Separate Systems), 101 F.C.C.2d 1046 (1985).

992 *E.g.*, International Satellite, Inc., 101 F.C.C.2d 1201 (1985); Pan American Satellite Corp., 101 F.C.C.2d 1318 (1985); *see* Broadcasting, Jan. 5, 1987, at 144–46.

993 *Id.*

INTELSAT's basic revenues.[994] But the FCC subsequently ruled, reversing its earlier position, that the one-year lease requirement did not preclude contracts of one year or more for »occasional use television service.«[995] This ruling presumably will facilitate the use of the separate system by U.S. television networks and other programmers that do not use the facilities on a full-time basis.

Until recently it could be said, then, that the INTELSAT system posed substantial obstacles, both legal and financial, to the satellite distribution of private U.S. programming abroad – much as the U.S. government's domination of the short-wave frequencies impeded the terrestrial distribution of private U.S. radio programming.[996] The *Transborder* decision and the advent of private international satellite systems, however, may markedly liberate the distribution of U.S. programming by satellite.

C. *Conclusion Concerning Outgoing Media Flow*

United States restrictions on outgoing media flow are less developed than restrictions on incoming flow, largely because the available policy justifications are not as numerous or strong. There is less room to invoke national-security or foreign-policy considerations and no room to rely on the government's power to exclude aliens or on trade protectionism. Hence, there is no restriction on outgoing speech that is nearly as broad as either the regulation of all political speech distributed by »foreign agents« in the United States under the Foreign Agents Registration Act[997] or the facial exclusion under the McCarran-Walter Act of all would-be visitors who have been »communists.«[998]

At the same time, the restrictions on outgoing flow reflect some effort by the U.S. government to shape the content of transborder information. The government appears to acknowledge this objective by its claim in *Bullfrog Films* that »the exercise of free speech within foreign nations by Americans is subordinate to significant foreign policy considerations.«[999] The USIA

994 Separate Systems, 101 F.C.C.2d at 1105–06.

995 Separate Systems Reconsideration Order, CC Docket No. 84–1299 (Apr. 17, 1986); *compare* Separate Systems, 101 F.C.C.2d at 1105–06.

996 *See supra* notes 952-67 and accompanying test.

997 *See supra* text accompanying notes 419–70.

998 *See supra* text accompanying notes 337–72.

999 646 F. Supp. 492, 503 (C.D. Cal. 1986).

regulations struck down in *Bullfrog Films* show an effort by the U.S. to deny duty-free treatment under the Beirut Agreement to films critical of United States positions.[1000] These films appear to be much the same as those that are treated as »political propaganda« under the Foreign Agents Registration Act.[1001] Thus, while not attempting directly to stop the trans-border flow of such films, the U.S. government restricts that flow in both directions. It regulates the films as »propaganda« when they are distributed on behalf of a foreign entity within the United States, and it seeks to prevent the films from circulating duty-free to other countries.

Meanwhile, the U.S. government's domination of the international short-wave frequencies suggests a desire to maximize the government's own speech to the rest of the world at the expense of speech by private U.S. citizens.[1002]

Still, these efforts by the U.S. government to restrict outgoing media flow are quite limited in scope. The overwhelming proportion of that flow is unaffected. Moreover, the U.S. government's decision to license private international satellites outside the INTELSAT system may markedly facilitate the distribution of U.S. television programming to other countries.[1003]

1000 *See supra* 921–33 and accompanying text.
1001 *See supra* notes and accompanying notes 465–70.
1002 *See supra* notes and accompanying notes 952–67.
1003 *See supra* notes 989–96 and accompanying text.

onclusion

ited States regulation of transborder speech reflects pervasively the oppos- tendencies noted earlier.[1004] There are First Amendment rights to eive information from abroad and to send information abroad, rights ognized most clearly by the Supreme Court's decision in *Lamont,*[1005] Court's opinion in *Mandel*[1006] and the district court's decision in *Bullfrog* ns.[1007] But there also are various laws restricting transborder informa- n flows, and these laws generally have been upheld by the courts.[1008] rticularly hard to reconcile with the »free flow« and First Amendment nmitments of the United States are the visa restrictions of the McCarran- lter Act[1009] and the »political propaganda« provisions of the Foreign ents Registration Act.[1010] Both statutes show an unwillingness to allow eign speech to enter the United States and compete on equal terms with mestic speech.

th respect to the electronic media, the most important restrictions on nsborder flow are the ban on foreign ownership of U.S. broadcast facili-[1011] and the rules limiting reception of signals from foreign satel- s.[1012] The ban on foreign ownership, though antiquated and unneces- y, can claim some historical justification and apparently is consistent h international practice.[1013] It also is balanced by U.S. toleration of eign ownership in virtually all other media.[1014]

e restriction on the reception of signals from foreign satellites, insofar as pplies (in the view of the FCC) to reception with the consent of the ginator, is based on the treaty obligations of the United States to INTEL- T.[1015] On its face, this is a content-neutral consideration. But the

[1004] *See supra* text accompanying notes 305–07.
[1005] Lamont v. Postmaster General, 381 U.S. 301 (1965); *see supra* notes 308–13 and accompanying text.
[1006] Kleindienst v. Mandel, 408 U.S. 753, — (1972); *see supra* notes 346–58 and accompanying text.
[1007] Bullfrog Films, Inc. v. Wick, 646 F. Supp 492; *see supra* notes 859–76 and accompanying text.
[1008] *See supra* notes 337–520, 548–82, 603–59, 665–802, 810–55, 877–967 and accompanying text.
[1009] *See supra* notes 337–72 and accompanying text.
[1010] *See supra* notes 419–70 and accompanying text.
[1011] 47 U.S.C. § 310(a); *see supra* notes 548–78 and accompanying text.
[1012] *See supra* notes 660–809 and accompanying test.
[1013] *See supra* note 568 and accompanying text.
[1014] *See supra* notes 511–47, 583–602 and accompanying text.
[1015] *See supra* notes 684–87 and accompanying text.

FCC's position, as applied to incoming signals, harbors strains of content control. Content control is palpable in the FCC's imposition of conditions requested by the U.S. State Department limiting Cable News Network to a six-month license for reception of Soviet programming and stipulating that renewal depends on a »favorable foreign-policy finding.«[1016] Potential content control is inherent in the requirement than CNN or any other U.S. programmer get FCC permission to receive any programming from a foreign satellite, even for coverage of a news event.[1017] It is hard to see why this requirement is not a »prior restraint« inconsistent with the First Amendment.[1018]

Content control and the First Amendment aside, the FCC's insistence on FCC approval for reception of foreign-satellite signals with the consent of the originator is unauthorized. It lacks support in section 705 of the Communications Act or any other provision of U.S. law.[1019]

U.S. law does restrict the reception of foreign-satellite signals without the consent of the originator, even for private viewing at home or for educational viewing at universities.[1020] Present law appears to permit such reception only for *home* viewing of unscrambled signals being transmitted by the satellite to *cable* systems.[1021] This state of the law is difficult to fault on First Amendment grounds.[1022] The law should be amended, however, to legitimize nonprofit viewing of unscrambled foreign (and domestic) signals, preferably on a fair-use rationale.[1023]

Across the range of U.S. regulation of transborder media flows, a number of provisions seem inconsistent with the »free flow« position of the United States, if not with the First Amendment as well. This should not be surprising. The diverse laws brought together in this report were adopted at different times, in different political climates and for different purposes. They have never been systematically considered by the U.S. Congress from the point of view of their impact on transborder speech or their consistence with current U.S. principles concerning such speech. They are overdue for systematic reappraisal from these perspectives, in particular, for testing against the »free flow« commitment and the First Amendment. Lacking such a reappraisal, United States regulation of transborder speech will continue to reflect a wide gap between the nation's law and its principles.

1016 *See supra* note 777 and accompanying text.
1017 *See supra* notes 770–78 and accompanying text.
1018 *See supra* note 786 and accompanying text.
1019 *See supra* notes 693–700 and accompanying text.
1020 *See supra* notes 665–76, 701–57 and accompanying text.
1021 *See supra* notes 284–88, 701–11 and accompanying text.
1022 *See supra* notes 737–40 and accompanying text.
1023 *See supra* notes 743–54 and accompanying text.