

Sanctions Regulations Involving Media in a Post-‘Chevron’ World

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When many consider U.S. sanctions, they think about familiar targets: foreign banks, oligarchs, energy companies. But what people may not realize is that for years now, the United States has similarly used sanctions to pursue individuals and entities that operate in the creative space: for example, recently OFAC has sanctioned foreign TV networks and movie studios, while DOJ has indicted art collectors and movie producers.

As a result, particularly given the increased use of such tools in response to, among other things, the 2022 Russian invasion of Ukraine and human rights violations in China, companies like American film studios, TV networks, and social media platforms that may not have paid much attention to sanctions in the past, now had no choice. Can they release a new film in a foreign jurisdiction? How about basing some of their creative workforce in their another one? Increasingly, sanctions compliance has become a bigger thorn in



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the side of in-house counsel and compliance groups at content creators and facilitators.

Going forward, however, U.S. regulators may find it hard to police creative industries after the Supreme Court’s decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). In *Loper Bright*, the Supreme Court discarded so-called “*Chevron* deference” to federal government agencies’ interpretations of statutory terms.

When it comes to regulating traditional First Amendment material like TV programming,

movies, or music, U.S. regulators have relied on a cramped interpretation of the governing statutes. Without the protection of *Chevron* deference, however, U.S. regulators are likely to have a more difficult time defending that interpretation. And that may mean more breathing room for content creators and facilitators trying to do business in an increasingly global, and fraught, market.

The Informational Materials Exemption

The primary statutory authority for the U.S. sanctions regime is the International Emergency Economic Powers Act (50 U.S.C.

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§§1701 *et seq.*) (IEEPA). IEEPA gives the president the power to restrict or prohibit a wide range of transactions involving "property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." 50 U.S.C. § 1702. Once sanctions are imposed, OFAC adopts regulations to implement the sanctions and to enforce them.

In 1988, concerned by OFAC's seizure of magazines and books and the potential harm to the free flow of ideas and information, Rep. Howard Berman sponsored what became known as the Berman Amendment to IEEPA. This provision added an "informational

materials" exemption to IEEPA, denying the president (and thus OFAC) the "authority to regulate or prohibit, directly or indirectly, the importation from any country, or the exportation to any country, whether commercial or otherwise, of publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, or other informational materials." Pub. L. No. 100-418 §2502, 102 Stat. 1107, 1371-72.

The informational materials exemption in the Berman Amendment does not contain any carve-outs. OFAC, nevertheless, interpreted the exemption narrowly, adopting regulations that excluded "informational materials not fully created and in existence at the date of the transaction" or "intangible items, such as telecommunications transmissions." 54 Fed. Reg. 5229-35 (Feb. 2, 1989).

In response, in 1994, Rep. Berman sponsored another amendment (the "1994 Amendment," and with the Berman Amendment, the "IEEPA Amendments") specifically designed to reject OFAC's interpretation. That amendment expanded the exemption to "information," not just "informational materials"; clarified that it included intangible information "regardless of format or medium of transmission"; expanded the illustrative list of informational materials; and explicitly noted that scope of the exemption was "not limited to" that list. Pub. L. No. 103-236, § 525, 108 Stat. 382, 474 (1994) (codified as amended at 50 U.S.C. §1702(b)(3)).

Undeterred, OFAC continues to interpret the exemption not to apply to "information or informational materials not fully created and in existence at the date of the transactions, or to

the substantive or artistic alteration or enhancement of informational materials, or to the provision of marketing and business consulting services.” See, e.g., 31 C.F.R. §560.210(c)(2).

For example, on Oct. 30, 2020, OFAC issued guidance to “to highlight sanctions risks arising from dealings in high-value artwork associated with persons blocked pursuant to OFAC’s authorities.” See <https://ofac.treasury.gov/media/49091/download?inline>. OFAC took the position that, although the exemption specifically includes “artworks” as material outside of OFAC’s sanctions reach, it nevertheless does

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not “allow blocked persons or their facilitators to evade sanctions by exchanging financial assets such as cash, gold, or cryptocurrency for high-value artwork or vice versa” and, consequently, that OFAC may prohibit such transactions “to extent the artwork functions primarily as an investment asset or medium of exchange.”

‘Chevron’ and the Informational Materials Exemption

Prior to *Loper Bright*, courts repeatedly afforded *Chevron* deference to OFAC’s narrowing interpretation of the IEEPA Amendments. For example, just two years after the passage of the Berman Amendment, the court in *Capital Cities/ABC, Inc. v. Brady*, 740 F. Supp. 1007 (S.D.N.Y. 1990) deferred to OFAC’s interpretation of the amendment under *Chevron*. There,

the plaintiff wished to broadcast a sports event held in Cuba, while OFAC argued that the informational materials exemption allowed it to regulate “intangible items such as telecommunications transmissions.”

Deferring to this interpretation, the court reasoned that the phrase “other informational materials” in the statute was “clearly susceptible to more than one reasonable interpretation,” and that the exclusion of intangible materials was one of them. *Id.* at 1011-1012.

Similarly, in *United States v. Amirnazmi*, 645 F.3d 564 (3d Cir. 2011), the court deferred to OFAC’s interpretation of the 1994 Amendment. In *Amirnazmi*, the defendant was convicted of providing software to purchasers in Iran. The U.S. Court of Appeals for the Third Circuit held that “a reasonable factfinder could have found the government proved beyond a reasonable doubt that [the software] was ‘not fully created and in existence at the date of the transactions,’ and was therefore subject to OFAC regulation.” *Id.* at 583.

The court, applying *Chevron* deference, also rejected a challenge to OFAC’s interpretation that the exemption did not to apply to works not yet in existence. *Id.* at 583-88. The court found it “critical” that “although Congress addressed one facet of OFAC’s [original] interpretation of the informational-materials exemption by stressing in 1994 that the Executive may not regulate informational materials ‘regardless of format or medium of transmission,’ it did not counteract” OFAC’s interpretation that it could regulate materials not yet in existence. *Id.* at 586-87.

It also upheld OFAC’s “determination that Congress’s paramount concern” behind the

exemption does not extend to informational materials not yet in existence, which “would not be produced but for financing from the United States.” *Id.* at 587.

Finally, in a criminal prosecution in the Southern District of New York, the court again deferred to OFAC’s view under *Chevron*. Specifically, in *United States v. Griffith*, 515 F. Supp. 3d 106 (S.D.N.Y. 2021), the government charged the defendant with a conspiracy to violate sanctions on North Korea by traveling there to give a presentation about cryptocurrency. The government urged the court to adopt OFAC’s interpretation that these types of presentations constituted informational materials “not yet in existence” and thus subject to U.S. sanctions. *Id.* at 115. Relying heavily on *Amirnazmi* and *Chevron* deference, the court agreed. *Id.* at 116-117.

A Post-‘Chevron’ World

Earlier this year in *Loper Bright*, the Supreme Court overruled *Chevron* deference. Although the Supreme Court noted that decisions decided under *Chevron*, “are still subject to statutory stare decisis,” *Loper Bright*, 144 S. Ct at 2273, the absence of this deference will, at a minimum, force OFAC and courts to confront whether OFAC’s interpretation of the IEEPA Amendments squares with the statute’s language.

Given OFAC’s prior overreach, there’s no reason to believe OFAC will reconsider its approach in light of *Loper Bright*. For example, one can expect OFAC to argue that had Congress disagreed with its interpretation that the amendments’ limitations do not apply to works that have not been completed, “or to the substantive or artistic alteration or enhancement of

informational materials,” or “to the provision of marketing and business consulting services,” then Congress would have said so in the 1994 Amendment. Indeed, that was one of the factors that the court in *Amirnazmi* determined to be “critical” in siding with OFAC.

Having said that, even *Amirnazmi* recognized that Congress itself thought OFAC had “narrowly and restrictively interpreted the language in ways not originally intended,” and the 1994 Berman Amendment was specifically designed to preclude at least part of it. *Amirnazmi*, 645 F.3d at 585-56. And equally important, cases like *Amirnazmi* were decided when courts were required to afford OFAC the benefit of the doubt under *Chevron*. Without that deference, will OFAC be able to prevail even though its interpretation seems to be inconsistent with the broad statutory language? A pair of cases from 2020 suggest that courts may not be willing to go along for the ride.

Specifically, on Aug. 6, 2020, President Donald Trump issued Executive Order 13942, in which he determined that TikTok’s foreign ownership and the extent of its data collection “threaten[ed] the national security, foreign policy, and economy of the United States.” 85 FR 48637.

The executive order directed the U.S. Department of Commerce to identify a list of transactions with “ByteDance...or its subsidiaries,” including TikTok, that would be prohibited. *Id.* The Commerce Department did so on Sept. 24, 2020 by identifying transactions, such as “provision of services...to distribute or maintain the TikTok mobile application” or “utilization... of the TikTok mobile application’s constituent code, functions, or services.” 85 FR 60061.

District courts in the Eastern District of Pennsylvania and the District of Columbia enjoined enforcement of the Commerce Department's action. See *Marland v. Trump*, 2020 WL 6381397 (E.D. Pa. Oct. 30, 2020); *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73 (D.D.C. 2020); see also *TikTok Inc. v. Trump*, 2020 WL 7233557 (D.D.C. Dec. 7, 2020).

The courts recognized that prohibiting such transactions would “limit, and ultimately reduce to zero, the number of U.S. users who can comment on the platform” and thus would “have the effect of shutting [it] down [] within the United States.” *TikTok*, 490 F. Supp. 3d at 81; *Marland*, 498 F. Supp. 3d at 640.

The courts reasoned that the regulations thus constituted “at minimum, an indirect regulation of these informational materials.” *Marland*, 498 F. Supp. 3d at 636; *TikTok*, 490 F. Supp. 3d at 81.

While Commerce argued *Chevron* deference to OFAC, neither court took the bait. *Marland* held that “regardless of whether TikTok users’ content ‘exists’ prior to engagement with the app, the...prohibitions will have the effect of shutting down, within the United States, a platform for expressive activity” and therefore fall “within the scope of the informational materials exception” because they “present[] a threat to the ‘robust exchange of informational materials.’” *Marland*, 498 F. Supp. 3d at 640-41.

The *TikTok* court took a different approach, finding that “[e]ven assuming OFAC’s exclusion

merits deference in this context...TikTok users can film and design content outside of TikTok’s ecosystem,” and when users “share pre-made videos, those videos are necessarily ‘fully created and in existence’ before they reach TikTok, which places them outside of OFAC’s exclusion.” *TikTok*, 490 F. Supp. 3d at 82, n.2. These decisions suggests potential judicial skepticism of OFAC’s interpretation absent *Chevron* deference.

Conclusion

Of course, the nation just held a presidential election, and that always prompts questions of the new administration’s enforcement priorities. The truth is no one can be sure. But given that administrations of both parties have aggressively used sanctions in this space for their foreign policy goals, there’s no reason to believe that this won’t continue simply because of a presidential changeover. But given *Loper Bright*, we can also expect that the targets of such regulatory efforts—whether a movie studio sanctioned by OFAC or an academic presenting on cryptocurrency in a sanctioned regime—will be emboldened to push back on OFAC’s interpretations. We’ll just have to get our popcorn ready.

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