

# A “QUIZZICAL” LOOK INTO THE NEED FOR REALITY TELEVISION SHOW REGULATION

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## INTRODUCTION

The five-part documentary series on NBC’s Bravo cable network, entitled *The Reality of Reality*,<sup>1</sup> exposed lack of reality in the current trend of the reality television (“TV”) genre.<sup>2</sup> This series exposed certain “realities” of the behind-the-scenes deception of reality shows, specifically the manipulations by certain producers in

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<sup>1</sup> *The Reality of Reality*, a five-part documentary series which aired September 8-12, 2003, examined the history of reality TV from the earliest days of the medium, the instant celebrity culture, and most significantly, the willingness of reality producers to use production techniques to create an illusion of reality. *The Reality of Reality* (Bravo television broadcast, Sept. 8-12, 2003), available at [http://www.bravotv.com/The\\_Reality\\_Of\\_Reality/about/](http://www.bravotv.com/The_Reality_Of_Reality/about/) (last visited Nov. 1, 2004).

<sup>2</sup> Pete Schulberg, *Looks Like Reality Isn’t All It’s Cracked Up to Be* (Sept. 5, 2003), available at <http://www.portlandtribune.com/archview.cgi?id=20060> (last visited Jan. 19, 2005).

the hopes of achieving better ratings.<sup>3</sup> Accordingly, contestants are filing lawsuits and complaints with the Federal Communications Commission (“FCC”) alleging violations of federal rigging laws as a result of producer interference in the show and intentional defrauding of the audience and contestants alike.<sup>4</sup> These latest scandals raise serious questions about the need for regulation in reality TV.<sup>5</sup>

Many critics of reality TV point fingers at the FCC for its failure to apply federal laws governing fixing game shows to reality TV shows.<sup>6</sup> They argue that the game show regulations passed under 47 U.S.C. § 509<sup>7</sup> on September 13, 1960,<sup>8</sup> in the wake of the quiz show scandals of the late 1950s,<sup>9</sup> should also apply to reality TV shows.

By focusing on *Survivor*<sup>10</sup> contestant Stacey Stillman and her lawsuit,<sup>11</sup> the *Talk or Walk* scandal,<sup>12</sup> and the deceptions behind UPN’s *Manhunt*<sup>13</sup> that led to several FCC complaints,<sup>14</sup> the need for regulation in reality TV becomes apparent. Today, regulation is arguably more pressing because not only is the audience being duped, but so are the participants. Producers are rigging these shows and network executives are complying because their goal is to improve ratings.<sup>15</sup> These deceptions, illustrated through Stillman’s lawsuit, which alleges producer interference, in addition to

<sup>3</sup> *Id.* As one reality show producer stated succinctly on the first episode of *The Reality of Reality*, “[R]eality is boring. This is assisted reality, and the assists just keep coming.” *Id.*

<sup>4</sup> See *infra* Part V including a discussion of Stacey Stillman’s lawsuit against CBS, the FCC complaints made by David Lerman in *Talk or Walk*, and those complaints alleged by J.K. in *Manhunt*.

<sup>5</sup> See *infra* Part IV.

<sup>6</sup> Telephone Interview with Steve Beverly, Professor of Broadcasting at Union University in Jackson, Tennessee and expert on the history of game shows (Aug. 28, 2003). Beverly said that the FCC “is passive” and that in one particular episode of *Survivor* the contestants referred to their competition as “the game” forty-seven times, which is proof that it qualifies for FCC regulation under 47 U.S.C. § 509.

<sup>7</sup> 47 U.S.C. § 509 (2000) is entitled “Prohibited practices in contests of knowledge, skill, or chance.” A relevant part of section (a) states:

Influencing, prearranging, or predetermining outcome. It shall be unlawful for any person, with intent to deceive the listening or viewing public— (3) [t]o engage in any artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance.

<sup>8</sup> *Id.*

<sup>9</sup> See *infra* Part III.

<sup>10</sup> *Survivor* is a reality TV show where a contestant alleged rigging. See *infra* Part V.

<sup>11</sup> *Stillman v. CBS Corp.*, No. 318613, 2001 WL 34129688 (Cal. Super. Ct. Feb. 5, 2001).

<sup>12</sup> See *infra* Part V-B.

<sup>13</sup> See *infra* Part V-C.

<sup>14</sup> Several people filed these complaints to try to alert the FCC of its duty to regulate. See *infra* Part V.

<sup>15</sup> Telephone Interview with Steve Beverly, *supra* note 6. Beverly said, “this is deception . . . and by having ratings as bottom lines there is no place for integrity.”

the purported manipulations on the shows *Talk or Walk* and *Manhunt*, will hopefully induce FCC action. As the outer limits continue to be pushed and the FCC does not take the initiative to regulate these abuses, the future of reality TV is in great danger.<sup>16</sup> The trend toward transgressions by reality shows' deceptions creates an environment ripe for audience cynicism and backlash at the networks. Presently, television consumes children, who spend more time in front of the box than they do in school.<sup>17</sup> By permitting producer manipulation and rigging, America's youth are being sent the message that breaking the law in the name of entertainment is socially acceptable. Though the FCC is a deregulated body, it must respond to the latest complaints filed. This Note takes the position that there is nothing wrong with tweaking a television show, as long as the audience *knows* that the producers are doing this. However, if contestants are competing in a game-show format, federal laws passed after the *Twenty-One* quiz show scandal should govern and these laws may not be violated.

Part I of this Note provides a brief background of the reality TV genre. Part II analyzes the role of the FCC from both a historical perspective and from today's realities. It also describes how the FCC is a regulatory body and why it can regulate reality TV shows. Since reality TV shows have attributes identical to the quiz shows of the 1950s, the FCC can regulate them by simply applying 47 U.S.C. § 509. Part III provides a background of the quiz show scandals of the 1950s to lay the foundation upon which one can see the connection between today's reality TV shows and the potential role of the FCC in regulating this genre. Part III also examines the legal reaction to the scandals with a focus on the FCC statute 47 U.S.C. § 509 passed in 1960. Part IV explores the statute as it was passed in the wake of the quiz show scandals. This section applies the statute to both the quiz shows and reality TV shows to see if its language encompasses elements of reality TV. Part V focuses on the various reality TV scandals that arguably violate the FCC statute. Particularly, Part V examines Stacey Stillman's lawsuit stem-

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<sup>16</sup> As Richard Goodwin points out in his article, *Committee Investigator Reveals How Fixers Seduced Innocents*, LIFE, Nov. 16, 1959, "the powerful medium of television comes into our homes and helps shape the value of our children, and with this great responsibility, television's morality must be beyond reproach."

<sup>17</sup> See *Quiz Show: Television Betrayals Past . . . and Present?*, available at <http://www.annenberg.nwu.edu/pubs/quiz/quiz.htm> (last visited Oct. 15, 2004); see also American Academy of Child and Adolescent Psychiatry, *Children and Watching TV* (Mar. 1, 2001), available at <http://www.aacap.org/publications/factsfam/tv.htm> (last visited Nov. 1, 2004) (claiming that "[c]hildren in the United States watch an average of three to four hours of television a day. By the time of high school graduation, they will have spent more time watching television than they have in the classroom.").

ming from her experience on *Survivor* and the scandals on *Talk or Walk* and *Manhunt* that led to complaints of FCC violations. By analyzing the violations alleged within these shows and their similarities to those of the quiz shows of the 1950s, this Note will illustrate the pressing need for FCC regulation to prevent future abuses. Finally, Part VI will reemphasize the need for FCC regulation. The Note concludes with an overview of the negative consequences that will occur if the FCC does not regulate and other alternatives available to deal with this issue.

## I. REALITY TV GENRE

Reality TV shows are “fast, cheap, and totally addictive”<sup>18</sup> and have changed networks’ perspectives on the economics of television programming.<sup>19</sup> Reality TV shows are appealing to networks because they are much cheaper to make than dramas or sitcoms<sup>20</sup> and “allow the networks to create ‘stars’ that they can manipulate in ways that they could never exploit or control professional actors.”<sup>21</sup> These shows also do not require paying “A-list” actors’ salaries,<sup>22</sup> set costs, or fancy lighting. Rather, the overnight celebrity status conferred upon these reality show participants is most likely compensation enough. The number of reality shows born in the past four years has totaled 215.<sup>23</sup> Reality TV shows are so popular today that there are plans in the works for their own prime time awards show.<sup>24</sup> To understand how reality TV shows can be regu-

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<sup>18</sup> See Michelle Conlin, *America’s Reality-TV Addiction* (Jan. 30, 2003), available at [http://www.businessweek.com/bwdaily/dnflash/jan2003/nf20030130\\_8408.htm](http://www.businessweek.com/bwdaily/dnflash/jan2003/nf20030130_8408.htm).

<sup>19</sup> *Id.* “By vaulting nobodies into overnight celebrities, these shows appeal to the flip side of American’s fascination with stardom: people’s secret resentment at being shut out of Hollywood’s second-carat system. Reality TV is revenge for the regular Jane and Joe.” *Id.*

<sup>20</sup> See *Reality TV, Variety Shows, Crowd Extras, and Booking Agents to Get Quick Media Exposure*, available at <http://www.actorschecklist.com/resources/realitytv.html> (last visited Jan. 19, 2005). “Production costs are approximately \$800,000 for an hour, compared with approximately \$1 million for a half-hour sitcom or about \$2 million for a drama.” *Id.*

<sup>21</sup> See Peter Lance, *What Really Happened on the Survivor Island: A Conversation with Peter Lance*, available at <http://www.writerswrite.com/features/lance.htm> (last visited Nov. 1, 2003) (responding to the popularity of reality TV saying “sadly, these human ‘ant farms’ are the wave of the future,” and that “reality TV is here to stay.”).

<sup>22</sup> See Lia Haberman, *NBC’s Friendship Extended* (Dec. 22, 2002), at <http://att.eonline.com/News/Items/0,1,11019,00.html>. During the final season on the NBC hit show *Friends*, each actor was paid one million dollars per episode. *Id.*

<sup>23</sup> See Reality TV Website, at <http://www.realitytvlinks.com/index2.html> (last visited Nov. 1, 2004).

<sup>24</sup> See *ABC to Air Awards Show for Reality TV* (Sept. 5, 2003), available at [http://www.backstage.com/backstage/news/article\\_display.jsp?vnu\\_content\\_id=1969939](http://www.backstage.com/backstage/news/article_display.jsp?vnu_content_id=1969939) (where ABC announced it would honor broadcast and cable reality programs. The program “will feature both series honors like ‘Best Series’ as well as reality-appropriate categories like ‘Best Twist.’”).

lated, it is helpful to examine the role of the FCC and how it can perform its regulatory function with respect to reality TV shows.

## II. THE FCC

### A. *Background*

The Federal Communications Commission (FCC), “an independent executive agency formed to regulate interstate and foreign communications, was established under the Communications Act of June 19, 1934.”<sup>25</sup> Among its principal responsibilities, “[t]he FCC assigns broadcasting frequencies, makes all decisions regarding the granting, modification, or revocation of broadcasting licenses, and generally is expected to protect the public interest in matters of communications.”<sup>26</sup>

The role undertaken by the FCC to represent the public’s interest “began to be questioned more aggressively as the nation’s communications network matured.”<sup>27</sup> Additionally, “[t]he quality and propriety of television watched by children also became a matter of concern.”<sup>28</sup> Since its inception, the FCC has had eras characterized by intensive regulation practices and periods when policies of deregulation were the norm.<sup>29</sup> Since the Reagan era, FCC regulation has been in decline. Successive United States presidential administrations have pressed for deregulation and equated the public interest with nothing more than competition in the marketplace. The defining legislation of the deregulatory period was the

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<sup>25</sup> Houghton Mifflin, *Federal Communications Commission*, available at [http://college.hmco.com/history/readerscomp/rcah/html/ah\\_030300\\_federalcommu.htm](http://college.hmco.com/history/readerscomp/rcah/html/ah_030300_federalcommu.htm) (last visited Nov. 1, 2004) [hereinafter “Houghton Mifflin”]. The FCC replaced the Federal Radio Commission and “its commissioners were responsible for telephone communication as well as radio; supervision of telegraph and television was added in subsequent years.” *Id.* See also Fritz Messere, *Federal Communications Commission*, available at <http://www.museum.tv/archives/etv/F/htmlF/federalcommu/federalcommu.htm> (last visited Jan. 19, 2005) (explaining how the FCC was created during “The New Deal” with the blessings of President Franklin D. Roosevelt, and the commission was given broad latitude to establish “a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.”). “The Federal Communications Commission is an independent regulatory government agency. It derives its powers to regulate various segments of the communications industries through the Communications Act of 1934.” *Id.*

<sup>26</sup> Houghton Mifflin, *supra* note 25. The FCC consisted of seven members originally under the 1934 Act who each served a seven-year term; the president with, the consent of the Senate, appoints them. This number was reduced to five members in 1983 and today there are three Republicans and two Democrats. Messere, *supra* note 25.

<sup>27</sup> Houghton Mifflin, *supra* note 25.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* In President Ronald Reagan’s administration in the 1980s, the FCC, and the growth of relatively unregulated cable television, gave broadcasters a freer hand, but by the end of the decade discussion had turned again to the need for closer FCC supervision. *Id.*

1996 Telecommunications Act,<sup>30</sup> a vast bill that was virtually written by private industry. The Act, “[a]mong other things . . . extend[ed] the licenses of broadcasters from five to eight years and makes it virtually impossible for the FCC to revoke one.”<sup>31</sup>

### B. *FCC and Regulation*

Perhaps the most important function of the FCC today is its oversight over all broadcasting regulation.<sup>32</sup> The power to grant or revoke broadcast licenses is based upon the FCC’s discretion of “whether the station has served the public interest.”<sup>33</sup> Though the FCC has tremendous power to revoke licenses in order to enforce this standard, it has rarely used this power in its sixty-plus year history.<sup>34</sup> This is partially because the First Amendment to the Constitution serves as a quasi barrier, restricting the government’s ability to abridge freedom of speech.<sup>35</sup> Throughout its history, a primary goal of the FCC has been to regulate the relationship between affiliated stations and broadcast networks, as the Communications Act does not grant specific powers to regulate networks.<sup>36</sup>

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<sup>30</sup> See Michael I. Meyerson, *Ideas of the Marketplace: A Guide to The 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251 (1997). The author explains:

[T]his law represents a vision of a telecommunications marketplace where the flexibility and innovation of competition replaces the heavy hand of regulation. It is based on the premise that technological changes will permit a flourishing of telecommunications carriers, engaged in head-to-head competition, resulting in a multitude of communications carriers and programmers being made available to the American consumer.

<sup>31</sup> Jim Boothroyd, *Death of the Regulator*, available at <http://www.pushhamburger.com/regulator.htm> (last visited Nov. 1, 2004).

<sup>32</sup> See Messere, *supra* note 25. Under section 303 of the 1934 Communications Act, the FCC was granted the power to classify stations and prescribe services, assign frequencies and power, approve equipment and mandate standards for levels of interference, make regulations for stations with network affiliations, prescribe qualifications for station owners and operators, levy fines and forfeitures, and issue cease and desist orders. *See id.*

<sup>33</sup> *Id.* Much debate over the FCC’s function focuses upon what constitutes fulfillment of a licensee’s responsibilities under the “public interest, convenience, and necessity” standard. The FCC has held that competition and diversity are fundamental to federal policy. *See id.*

<sup>34</sup> *See id.* As a result, critics of the FCC argue it has been too friendly and eager to serve the needs of large broadcast interests. However, other scholars point to the FCC actions against big broadcast interests to reduce the influence of large multiple license owners.

<sup>35</sup> *See* U.S. CONST. amend. I; *see also* Associated Press v. United States, 326 U.S. 1, 20 (1945) (explaining that the First Amendment rests on the assumption that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”).

<sup>36</sup> *Id.* In the Supreme Court case *Nat’l Broad. Co., Inc. v. United States*, 319 U.S. 190 (1943), the Court upheld the constitutionality of the 1934 Act and the FCC’s rules related to business alliances. The FCC used this case as a precedent to ratify its broad discretionary powers.

C. *FCC Today*

The 1934 Act has been considerably amended since its passage because of the many technological changes that have occurred.<sup>37</sup> Today, the FCC relies upon “marketplace forces” to create competitive programming options for viewers believing that economic competition is preferable to FCC regulation in this industry.<sup>38</sup> The FCC has many critics today who feel that the agency is unnecessary and that the Communications Act of 1934 is outdated.<sup>39</sup> In early June 2003, the FCC approved 3-2<sup>40</sup> the most sweeping relaxation in a generation of media ownership rules.<sup>41</sup> This new legislation led by Chief Commissioner of the FCC, Michael Powell, succeeded in getting the Republican-controlled FCC to ease decade-old rules governing ownership of newspapers, television, and radio stations. This vote has become a magnet for those concerned that a few large companies control too much of the news and entertainment that people see, hear, and read.<sup>42</sup>

It appeared that the FCC overstepped its boundaries in this case, since not only did many Americans urge the FCC not to adopt

<sup>37</sup> Some of these changes include the introduction of television, satellite and microwave communications, cable television, cellular telephone, and PCS (personal communications) services. Though FCC responsibilities have broadened to include new supervision of these technologies, the flexibility incorporated into the general provisions of the 1934 Act has enabled it to survive for sixty years.

<sup>38</sup> Before the present era of deregulation, the FCC promulgated complex and technical operating rules and regulations for broadcasters. Today, the “market” filing and renewal requirements for broadcasters are greatly reduced. This reliance on the marketplace rationale began under Chairman Charles Ferris (1977-81) and continued with Chairman Mark Fowler (1981). See Messere, *supra* note 25.

<sup>39</sup> *Id.* There have been cries to move communication policymaking into the executive branch at the National Telecommunications and Information Administration (NTIA) or to reform the FCC.

<sup>40</sup> See David Ho, *Deregulation Drive has FCC Boss in Hot Water*, SALT LAKE TRIB., Aug. 5, 2003. “This vote was along party lines, with Republicans prevailing 3-2. Small broadcasters complained about network domination of local television. The National Rifle Association warned that media giants would impose liberal views. Consumer advocates predicted squelched diversity.” *Id.*

<sup>41</sup> The new rules would allow a single company to own television stations reaching forty-five percent of the nation’s viewers up from thirty-five percent and to own newspapers and broadcasts in the same city, in part because of new technologies like the Internet. See David Lieberman, *How Will the FCC’s Action Affect Consumers?*, USA TODAY (June 3, 2003), available at [http://www.usatoday.com/money/media/2003-06-03-fcc2\\_x.htm](http://www.usatoday.com/money/media/2003-06-03-fcc2_x.htm) (last visited Jan. 19, 2005). Media conglomerates support these rules because their money can go further through broader reach or ownership of all media outlets in the same market. See Editorial, *FCC’s Rules: Court, Congress Act to Correct Commission’s Mistakes*, DETROIT FREE PRESS (Sept. 5, 2003), available at [http://www.freep.com/voices/editorials/efcc5\\_20030905.htm](http://www.freep.com/voices/editorials/efcc5_20030905.htm) (last visited Jan. 19, 2005).

<sup>42</sup> “Small broadcasters complained about network domination of local television. The National Rifle Association warned that media giants would impose liberal views. Consumer advocates predicted squelched diversity.” David Ho, *supra* note 40. Furthermore, “the rules could put the public airwaves into too few hands, allowing too little access for other voices.” Editorial, *FCC’s Rules: Court, Congress Act to Correct Commission’s Mistakes*, *supra* note 41.

such measures, but also both Congress and the courts intervened. The House of Representatives voted<sup>43</sup> in mid-summer 2003 to reverse part of the FCC's order, while the Senate Appropriations Committee made sure to solidify changes to these new FCC rules.<sup>44</sup> It was most likely the result in *Prometheus Radio Project v. FCC*,<sup>45</sup> despite Senator John McCain's action,<sup>46</sup> that enabled a cap at thirty-nine percent. These current events concerning this governmental body provide a better understanding of the political environment in which the FCC operates and the power wielded by interest groups that influence FCC policy. It is with this backdrop that we now turn to FCC regulation of reality TV shows.

FCC regulation of network television is almost never welcome since it infringes upon a network's creative freedom and usually ends up costing the network more money. Also, networks have to face the reality of competing with cable television channels that are exempt from FCC regulation.<sup>47</sup> However, networks, through their various mergers and partnerships, exert a powerful force upon the FCC that affects the manner in which the FCC may act. These networks are the players behind the current reality TV shows and their visible presence and notable command of power present an interesting dynamic with respect to the FCC. While the FCC must perform its regulatory functions in the public's interest, it must also contend with the powerful forces of these networks that exert much pressure upon it. However, with respect to regulating reality TV shows, the FCC has the weapon of 47 U.S.C. § 509 to justify regulation because of illegalities. To see how the FCC can employ

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<sup>43</sup> See Associated Press, *House Votes, 400-21, to Block Media Rule by the F.C.C.*, N.Y. TIMES (July 23, 2003), available at [http://laniels.org/media\\_ownership\\_reversal\\_house.html](http://laniels.org/media_ownership_reversal_house.html) (last visited Jan. 19, 2005). By a vote of 400-21, the House blocked this new increase of forty-five percent media ownership. *Id.*

<sup>44</sup> James Welsh, *US Media Cap Set at 39%* (Jan. 23, 2004), at <http://www.digitalspy.co.uk/article/ds13137.html> (last visited Feb. 7, 2005). The Senate Appropriations Committee passed a bill on January 22, 2004 that capped the amount of the United States television market that one company could reach at thirty-nine percent. *Id.*

<sup>45</sup> Dawn Scire, *FCC Rulings Temporarily Halted by "Little Guys"* (Sept. 8, 2003), available at <http://www.heraldtribune.com/apps/pbcs.dll/article?AID=/20030908/COLUMNIST50/309080341> (last visited Feb. 7, 2005) (explaining how the Prometheus Radio Project petitioned the United States Court of Appeals for the Third Circuit for a "stay" (maintenance of the status quo) which was granted to prevent the new FCC rules from going into effect until further investigation into their potential impact). Here, a handful of people advocated for the "Free Radio Movement," more regulation for media ownership, and "democratization of the airwaves" through networking with other consumer-rights, media-justice and public-access groups. *Id.*

<sup>46</sup> Editorial, *FCC Rules: Court, Congress Act to Correct Commission's Mistake*, *supra* note 41 (showing how Senator John McCain (R-AZ) released the "hold" on the FCC bill contested in *Prometheus Radio Project* which overrode an executive branch decision).

<sup>47</sup> See Meg James, *TV Networks Find Way to Stretch Educational Rules*, L.A. TIMES, Feb. 23, 2002, at A1. Cable channels do not use the public airwaves to transmit their signals and as a result are exempt from FCC regulation.



this, it is necessary to turn to the events that led to the creation of this statute: the quiz show scandals of the 1950s. By examining these quiz shows, the striking similarities between these and today's reality TV shows will become apparent. In addition, the comparison will illustrate how the FCC can effectively regulate reality TV shows.

### III. THE QUIZ SHOW SCANDALS

#### A. Background

From 1955 to 1958, no programming format mesmerized television viewers "with more hypnotic intensity than the 'big money' quiz show, one of the most popular and ill-fated genres in U.S. television history."<sup>48</sup> "Broadcast live during and in prime time, the big money quiz show presented itself as a high pressure test of knowledge under the heat of klieg lights and the scrutiny of fifty-five million participant-observers."<sup>49</sup> The premiere of CBS's *The \$64,000 Challenge* on June 7, 1955, the first big-money television show, spawned many competitors.<sup>50</sup> The popularity of quiz game shows was staggering.<sup>51</sup> At their peak, "[t]hese quiz shows were so popular that twenty-two of them were concurrently on the air."<sup>52</sup> From children to octogenarians, people from all walks of life, some with apparent "genius" levels of knowledge, became quiz show contestants and subsequently national heroes. They essentially became living embodiments of the American dream.<sup>53</sup>

No quiz show attracted as much attention as *Twenty-One*.<sup>54</sup> The

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<sup>48</sup> Thomas Doherty, *Quiz Show Scandals*, available at <http://www.museum.tv/archives/etv/Q/htmlQ/quizshowsca/quizshowsca.htm> (last visited Nov. 1, 2004).

<sup>49</sup> *Id.* "Contestants were put in glass isolation booths, with the air conditioning turned off to make them sweat [while] tight close-ups framed faces against darkened backgrounds and spotlights illuminated contestants in a ghostly aura." *Id.*

<sup>50</sup> *See id.* Shows like *The Big Surprise*, *Dotto*, *Tic Tac Dough*, and *Twenty-One* all followed.

<sup>51</sup> "In August of 1955 approximately 32 million television sets and 47,560,000 viewers, almost one-third of the nation, tuned in to see *The \$64,000 Question*." Katie Venanzi, *An Examination of Television Quiz Show Scandals of the 1950s* (1997), available at <http://www.honors.umd.edu/HONR269J/projects/venanzi.html> (last visited Jan. 19, 2005).

<sup>52</sup> *Id.*

<sup>53</sup> JOSEPH STONE & TIM YOHN, *PRIME TIME AND MISDEMEANORS 3* (Rutgers University Press 1992). Tens of millions of viewers awaited the reappearance of the contestants and agonized as they sweated in "isolation booths," and then rejoiced in victory or sympathized when their heroes were defeated or took their winnings and retired. *See id.*

<sup>54</sup> *Twenty-One* was modeled on blackjack where Jack Barry, the master of the ceremonies, announced subjects and the contestants gambled on their knowledge by selecting a number of points from one to eleven. The idea was to amass twenty-one points in two or more rounds. A winner could retire with the winnings or remain as champion to face a new challenger. The prize money on *Twenty-One* made it unique since winners of the game had the option of taking their prize money and retiring from the competition or reappearing on the show again until they were defeated as there was no limit to the amount of cash they could win. *See id.*

questions asked to the contestants were those that interested viewers as well.<sup>55</sup> However, when the show's debut failed to attract much audience attention, the show's sponsor, Geritol, made an ultimatum to the producers of *Twenty-One*.<sup>56</sup> The producers found the solution to their problem with a common, average Joe-type man named Herb Stempel,<sup>57</sup> to whom they could supply answers and create a figure who would be popular among viewers.<sup>58</sup> People identified with Herb Stempel as the "man next door" and subsequently rooted for this underdog as he returned weekly and ended up becoming a champion. In the process, viewers were able to grow more attached to him by continuing to watch his progress.<sup>59</sup> The rise in Geritol's pharmaceutical sales during its time as *Twenty-One*'s sponsor is one example of the success of *Twenty-One* that Stempel helped spark.<sup>60</sup> Stempel had been the show's champion from October 17 to December 5, 1956 and took home \$49,500 in winnings.<sup>61</sup>

The producers of *Twenty-One* worked hard to perpetuate Herb Stempel's image as an average man.<sup>62</sup> The producers made Stempel a star by prepping him with the questions that would appear when the show aired.<sup>63</sup> The rigging of the outcome by the *Twenty-One* producers led to the death of this quiz show. It is possible this

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<sup>55</sup> See Venanzi, *supra* note 51.

<sup>56</sup> *Id.* Geritol stated "the show's producers had the license to take any measures to make it a success." See also STONE & YOHAN, *supra* note 53, at 31, where Stempel recounts producer Enright telling him that Geritol, as *Twenty-One*'s sponsor, budgeted \$10,000 a broadcast for prize money.

<sup>57</sup> See Venanzi, *supra* note 51.

<sup>58</sup> Herb Stempel was an ideal candidate, as a working class American with whom most Americans watching could identify. See *id.*

<sup>59</sup> See *id.*; but see STONE & YOHAN, *supra* note 53, at 28, where in actuality, however, Stempel had a super-genius IQ of 170.

<sup>60</sup> STONE & YOHAN, *supra* note 53, at 181. In 1956, when Geritol sponsored *Twenty-One* for three months, the company sold \$10,782,000 worth of its product. By 1957 when the company sponsored *Twenty-One* for an entire year, sales of Geritol totaled some \$13,975,000 when the popularity of *Twenty One* was at its peak. It is interesting to note that in 1958, when the quiz scandal hit and *Twenty-One* disappeared, Geritol sales slipped. *Id.*

<sup>61</sup> *Id.* at 26.

<sup>62</sup> *Id.* "They told him how to have his hair cut, what types of clothes to wear, how to address the emcee, and how to act on the show when answering questions by making certain gestures to add dramatic effect such as dabbing his sweaty brow with a handkerchief." Venanzi, *supra* note 51. Stempel claimed producer Dan Enright told him "you'll be given the category, then take five seconds, pause, stutter, then say nine points." Enright also instructed Stempel how to stutter, bite his lip, and pretend to be concentrating really hard to get the right answer. Enright also took out a handkerchief and showed Stempel how he should mop his brow, "not smear it, but pat it," to create a more tense atmosphere. Stempel was also told how to sigh and breath heavily into the isolation booth microphone. *Id.* at 29-30.

<sup>63</sup> See *id.* According to Stempel, Enright asked him how he would like to make a lot of money. He proceeded to tell Stempel to "play ball with me, kid, and you'll win \$24,000 just like that." To make sure Stempel knew his lessons, there was a run-through in the dressing room before each broadcast. *Id.*

scandal would never have erupted if the producers had kept Stempel on the show.<sup>64</sup> Instead, the producers decided they needed a more personable, attractive contestant, which led them to Charles Van Doren.<sup>65</sup> From his first face-off against Stempel,<sup>66</sup> Van Doren was deemed a “telegenic natural,”<sup>67</sup> who easily gained audience appeal. He duped viewers into believing that he racked his brain to come up with the right answers.<sup>68</sup> By pre-game arrangement, the first Van Doren-Stempel face-off ended with three ties.<sup>69</sup> It was not until Wednesday, December 5, 1956, at 10:30 P.M., when an estimated fifty million Americans tuned in to *Twenty-One* for what host and co-producer Jack Berry called “the biggest game ever played in the program,”<sup>70</sup> that the ties finally ended. By the end of the evening, Van Doren became the new *Twenty-One* champion.<sup>71</sup> The producers believed their decision to replace Stempel with Van Doren would increase ratings to make the show an even greater success.<sup>72</sup> They made a deathly error in paying too little attention to the resentment held by Herb Stempel, their disgruntled former contestant. Upon being betrayed by the show,<sup>73</sup> Stempel exposed the producers’ manipulations.<sup>74</sup>

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<sup>64</sup> See *id.* at 32. Revealing what Enright said to Stempel:

‘[W]e find we’re sort of at a plateau, and we feel it is time for a change. We need another winner to take over from you, a new champion. So tomorrow night’s the night you have to go.’ It was nothing personal, Enright explained, but he could not argue with the ratings; they needed ‘a new face.’

*Id.* at 32.

<sup>65</sup> Doherty, *supra* note 48. Charles Van Doren was an attractive, charismatic college professor of English at Columbia University, who earned \$129,000 in prize money and instant celebrity with a cover on *Time* magazine and a permanent spot on NBC’s *Today*. *Id.*

<sup>66</sup> *Id.* On November 28, 1956, Van Doren faced the cerebral Stempel for the first face-off.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* “Apparently muttering unself-consciously to himself, he let viewers see him think: eyes alert, hand on chin, then a sudden bolt (‘Oh I know!’), after which he delivered himself the answer.”

<sup>69</sup> See STONE & YOHAN, *supra* note 53, at 194. Prosecutor Joseph Stone recounts how the staff producer for *Twenty-One*, Albert Freeman, called Van Doren to his office and confided how they wanted Van Doren to help in removing Stempel; if Van Doren would accept assistance, he could win. Freedman persuaded Van Doren that if he agreed, then Van Doren “could take the spotlight off crime and violence on television and would show people that teachers were ‘regular guys’ and would be entertaining the public while helping himself and his profession.”

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* After many ties and extra rounds, Van Doren finally edges Stempel out, who “[s]eemingly gracious in defeat, in reality steaming with resentment . . . stated truthfully, ‘This all came so suddenly . . . Thanks for your kindness and courtesy.’”

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* Stempel came public with the admission that he was forced to take a dive during the Van Doren face-off.

<sup>74</sup> See *id.* at 4 (explaining that Edward Hilgemeier’s complaint to the District Attorney of New York regarding fixing on the quiz show *Dotto* encouraged Stempel to come forward). Stempel claimed he was given the questions and answers in advance for all the

*Twenty-One* proved not to be the only quiz show guilty of rigging.<sup>75</sup> The reverberations from this scandal reached far and wide and ultimately are credited with our current game show laws.<sup>76</sup> Perhaps no people were more shocked and disappointed than the viewing audience, who invited these shows into their homes for many years and formed private bonds and identifications with many of the returning contestants.

### B. Reaction to the "Quiz Show" Scandals

The public's reaction to the behind-the-scenes rigging was utter disbelief. They could not comprehend how the "purportedly 'official' nature of these quiz shows – had turned out to be contrived for the purpose of dramatic effect."<sup>77</sup> The viewing audience felt betrayed by putting its faith in believing that these quiz shows were "real."<sup>78</sup> Opinion polls published in magazines revealed the depth of the public's discontent.<sup>79</sup> The anger engendered by these scandals went far beyond publicized surveys. Church officials spoke out against the quiz shows for their negative effects on the national morale while many citizens expressed their feelings through letters, editorials, and cartoons sent to journals and newspapers that criticized these scandals.<sup>80</sup> The victims of the quiz show scandals were the television audience, tricked into accepting certain contestants' appearances as genuine. Though the public was angry and upset about the scandals, no one ever filed a complaint or tried to recover the money spent on the products of rigged quiz show sponsors.<sup>81</sup>

Shortly after the exposure of these scandals, a New York grand

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games he had played on the air by Enright, the chief producer, including those during which he gave the wrong answers that led to his defeat by Van Doren. *Id.* at 27.

<sup>75</sup> See STONE & JOHN, *supra* note 53, at 14. In May 1958, a standby contestant from *Dotto* produced hard evidence of cheating with a page from a winner's crib sheet. Former *Dotto* contestant Edward Hilgemeier claimed to have received answers in advance to questions used on-air. He complained to producers, who then paid him \$1500 in return for his signature on documents that waived any further claim against them. *Dotto* was based on the children's game of connecting the dots to make a picture, which pitted two contestants in a race to connect enough dots to recognize the picture first. *Id.* at 14-19.

<sup>76</sup> *Id.* at 307.

<sup>77</sup> They realized that everything had turned out to be fake including the contestants, who had been told to "grimace, to look sweaty, to wring their clammy hands, and to pat their brows." Venanzi, *supra* note 51.

<sup>78</sup> *Id.* It is believed that many tuned into quiz shows for the fact that "unlike a movie or a dramatic show, they supposedly represented real life." *Id.*

<sup>79</sup> *Id.* In *Time* and *Life* magazine survey polls, results showed that 42.8% favored investigation into the quiz shows while 30.6% did not. An astounding 65% of the public believed that the "practices [of the quiz shows] were very wrong and should be stopped immediately." *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> See STONE & JOHN, *supra* note 53, at 320.

jury convened to investigate the charges.<sup>82</sup> There appeared to be no grounds for prosecuting anyone involved in television quiz shows under the laws of New York.<sup>83</sup> As a result, networks, producers, and big-money winners like Van Doren maintained their innocence.<sup>84</sup> In fact, producers and contestants went so far as to perjure themselves when they testified before the New York grand jury.<sup>85</sup> As the prosecutor Joseph Stone lamented, “nothing in my experience prepared me for the mass perjury<sup>86</sup> that took place on the part of scores of well-educated people who had no trouble understanding what was at stake.”<sup>87</sup> He had never heard of any investigation in which so many people who were not actually targeted as criminals had lied before a grand jury.<sup>88</sup>

When the judge presiding over the New York investigations ordered the grand jury report sealed, the House Subcommittee on Legislative Oversight took center stage and conducted hearings into the quiz show scandals.<sup>89</sup> It was not until November 2, 1959, with pressure mounting, that Van Doren confessed to the Harris Committee: “I was involved, deeply involved, in a deception. The fact that I too was very much deceived cannot keep me from being the principal victim of that deception, because I was its principal

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<sup>82</sup> *Id.* at 320-21.

<sup>83</sup> *Id.* at 104-05. The examination of the contracts between producers and sponsors showed that the programs had not been represented as bona fide contests; therefore, larceny by false pretenses had not been committed. As prosecutor Stone stated, “even if we didn’t uncover an actual crime in the operation of the quizzes, the grand jury was exercising a legitimate function by investigating a matter of considerable public concern.” *Id.* at 105.

<sup>84</sup> *Id.* at 105. See Doherty, *supra* note 48. Parties deeply entrenched in the quiz show scandals “feared the loss of professional standing and the loyalty of friends and family as much as the retribution of the district attorney’s office.” *Id.*

<sup>85</sup> Doherty, *supra* note 48. (Though there was no criminal statute against rigging a quiz show at the time this grand jury convened, nearly 100 people committed perjury rather than admitting their individual deceptions.). See also STONE & YOHAN, *supra* note 53, at 8 (illustrating that on a show like *Twenty-One*, which required the contestants’ conscious participation in the rigging, the producers had to resort to considerable pressure to secure the cooperation of contestants. Producers did this by forging deep friendships with the contestants that resulted in varying degrees of emotional dependence, on creating an extended family between the producers and contestants of certain game shows, “linked by the power of a secret guilt.”).

<sup>86</sup> See STONE & YOHAN, *supra* note 53, at 321. Though the operation of rigged quiz shows broke no laws, mass perjury occurred, resulting in the conviction of twenty former contestants, a majority of them only small winners. *Id.*

<sup>87</sup> See generally *id.*

<sup>88</sup> See generally *id.*

<sup>89</sup> Politicians, led by the chair Oren Harris (D-AR), believed this sealed report was a cover up so they seized the opportunity to conduct their own investigation in October and November 1959. Oren Harris declared that the “American public had been ‘defrauded on a large scale’” and called it a “national” problem. “The purpose of the investigation would be to ensure that ‘effective enforcement measures’ were taken by government regulatory agencies subject to his committee’s jurisdiction and to assess ‘adequacy of existing laws.’ If these were found to be lacking, new legislation would be recommended.” *Id.* at 210.

symbol."<sup>90</sup>

Though the acts of rigging and manipulation were certainly immoral, they were not yet illegal.<sup>91</sup> Before the quiz show scandals of the 1950s, there were no real laws specific to the regulation of television quiz shows.<sup>92</sup> It was hard to prove fraud in the quiz show scandals because most statutory frauds required a victim to be injured financially.<sup>93</sup> As a result of the quiz show scandals of the late 1950s, President Eisenhower signed a bill<sup>94</sup> that allowed the FCC to declare any contest or game with intent to deceive the audience illegal.<sup>95</sup> This statute is known as 47 U.S.C. § 509.<sup>96</sup> Unfortunately,

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<sup>90</sup> See *id.* at 247 (claiming that at the hearing Van Doren also emphasized that he believed by appearing on a nationally televised program he would be doing a great service to intellectual life, to teachers, and to education in general by increasing public respect for the work of the mind).

<sup>91</sup> *Id.* at 233. The FCC had no real power in these circumstances because the Communications Act of 1934 provided that, in return for their licenses which were granted without fees, broadcasters were required to serve the public interest, but it was up to the licensees to determine that their programming met the criteria. However,

preventing the deception of the public had nothing to do with censorship, citing the U.S. Code of Criminal Procedure, which set criminal penalties for devising 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises' and for transmitting 'by means of wire, radio, or television communication in interstate or foreign commerce, any writing, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice.'

*Id.*

<sup>92</sup> The only federal laws remotely applicable at the time of the quiz show scandals were the Federal Communications Act of 1934 (dealing with advertising, fair competition, and labeling of broadcast stations) and Title 18 U.S. Code "Crime and Criminal Procedure" (applying to television fraud generally).

<sup>93</sup> See STONE & JOHN, *supra* note 53, at 233.

<sup>94</sup> See *id.* at 303. This bill originated at the end of 1959 when Robert Kintner, the president of NBC, proposed the wording for such a law.

<sup>95</sup> See *id.* at 244. Regarding the quiz show scandal, President Eisenhower expressed that "fixing TV shows was a terrible thing to do to the public." *Id.*

<sup>96</sup> 47 U.S.C. § 509 (2000) states:

Prohibited practices in contests of knowledge, skill, or chance

(a) Influencing, prearranging, or predetermining outcome

It shall be unlawful for any person, with intent to deceive the listening or viewing public —

(1) To supply to any contestant in a purportedly bona fide contest of intellectual skill any special and secret assistance whereby the outcome of such contest will be in whole or in part prearranged or predetermined.

(2) By means of persuasion, bribery, intimidation, or otherwise, to induce or cause any contestant in a purportedly bona fide contest of intellectual knowledge or intellectual skill to refrain in any manner from using or displaying his knowledge or skill in such contest, whereby the outcome thereof will be in whole or in part prearranged or predetermined.

(3) To engage in any artifice or scheme for the purpose of prearranging or predetermining in whole or in part the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance.

(4) To produce or participate in the production for broadcasting of, to broadcast or participate in the broadcasting of, to offer to a licensee for broadcasting, or to sponsor, any radio program, knowing or having reasonable ground for believing that, in connection with a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance constituting any part of such pro-

this statute, as passed, was a watered-down version of its original form.<sup>97</sup>

### C. FCC Title 47 U.S.C. § 509

When the Special House Subcommittee on Legislative Oversight held hearings<sup>98</sup> they revealed a “complex pattern of calculated deception of the listening and viewing audience.”<sup>99</sup> People believed they were watching honest competitions of intellectual skill rather than frauds. The legislators “recommended that the Communications Act of 1934 be amended to make it a criminal offense for any person to intend to deceive viewers or listeners.”<sup>100</sup> Though ultimately 47 U.S.C. § 509 was passed to deal with the quiz show abuses, the question of why these scandals occurred perplexed many and left them with a feeling of dissatisfaction and increasing cynicism.<sup>101</sup>

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gram, any person has done or is going to do any act or thing referred to in paragraph (1), (2), or (3) of this subsection.

(4) To conspire with any other person or persons to do any act or thing prohibited by paragraph (1), (2), (3), or (4) of this subsection, if one or more of such persons do any act to effect the object of such conspiracy.

(c) Penalties—Whoever violates subsection (a) of this section shall be fined not more than \$10,000 or imprisoned not more than one year, or both.

<sup>97</sup> See STONE & JOHN, *supra* note 53, at 307. The Harris bill became weaker as it passed through the Senate because of networks and big broadcasters represented by lobbying groups. Although the provisions made quiz show rigging illegal, the FCC would now be *permitted*, not *required*, to hold public hearings concerning license applications, and the provision to license networks was dropped. The Senate version did not contain provisions for the temporary suspension of licenses or heavy fines for violators of FCC regulations.

<sup>98</sup> See H.R. REP. NO. 86-1800, at 16 (1960) *reprinted in* 1960 U.S.C.C.A.N. 3516, 3533 Amendments.

The hearings of the House Subcommittee on Legislative Oversight were held for 11 days on October 6-10 and 12 and also on November 2-6. The Subcommittee heard a total of 51 witnesses, network executives, producers, sponsors, advertising agency representatives, quiz show contestants, and the chairmen of the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC).

*Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* The House Subcommittee believed that the Communications Act of 1934 was inadequate in placing responsibility solely on licensees since all the popular big-money programs were nationally broadcast and individual licensees had no real control over the shows' production. Thus, it amended the Act to make it a criminal offense for any person, with intent to deceive viewers or listeners to “(1) broadcast or participate in the broadcasting or to produce or participate in the production for broadcasting, of any such program, or (2) conspire with others to do any act so prohibited.” *Id.* The House report clarified that the amended section would only prohibit the rigging of contests of intellectual knowledge or intellectual skill and would not be applicable to contests involving physical skill.

*Id.*

<sup>101</sup> See Venanzi, *supra* note 51. By 1958, no one was laughing anymore. Grabbing the attention of the public even more than the shows themselves were the scandals that emerged around them. The public's naive trust had evolved into suspicious cynicism because it had learned that many of the shows were rigged. As can be imagined, this caused great disgust among viewers. *Id.*

#### D. *What Caused the "Quiz Show" Scandals?*

As is typically the case when a scandal is involved, the motive behind it is money.<sup>102</sup> Whether in the reality TV world of today or the quiz shows of the late 1950s, the business of television is still about increasing ratings and maximizing profits. Networks need advertisers to pay for the production costs of a program and its airtime.<sup>103</sup> It is common sense that larger audiences indicate successful shows, which in turn generate greater viewer exposure to advertisements and their products.<sup>104</sup> Another factor that contributed to the quiz show scandals was the voluntary involvement by contestants.<sup>105</sup> They most likely enjoyed the money and new celebrity-like status. As previously mentioned, there were no specific laws at the time that prohibited rigging of shows.<sup>106</sup> Many attribute this to the technology of television itself.<sup>107</sup>

Those quiz show contestants were much like today's reality TV show contestants, who also are motivated to participate for the financial gains and fame. However, today's participants on reality TV are *not* volunteers in the scandal.<sup>108</sup> Despite this, there are an abundance of common elements featured in the quiz shows of the 1950s and today's reality TV shows.

#### IV. COMPARISON OF REGULATION UNDER 47 U.S.C. § 509 OF QUIZ SHOWS VERSUS REALITY TV SHOWS

Unlike the era of the 1950s, where the medium of television was a new innovation, today's society does not have an excuse.<sup>109</sup> Despite the national scale of fraud and the amount of money generated from the quiz show scandals, there were no victims in a legal sense.<sup>110</sup> Many realities of the television marketplace today are the

<sup>102</sup> *Id.* (explaining that "[t]he first motive responsible for fueling the scandals was the drive for money and financial gain.").

<sup>103</sup> *See id.*

<sup>104</sup> Revlon is an example of a sponsor of *The \$64,000 Question* whose chief executive officers told a Congressional Committee that they had to rig the show in order to sustain high ratings by keeping attractive contestants that the viewers wanted to watch. *See* Charles Revson, *The Quiz Show Scandal, People and Events*, at <http://www.pbs.org/wgbh/amex/quiz-show/peopleevents/pande03.html> (last visited Nov. 1, 2004).

<sup>105</sup> *See* Venanzi, *supra* note 51.

<sup>106</sup> *Id.*

<sup>107</sup> The rapid growth of the television medium was so new that "no one knew either the limits of its dangers nor its potentials for manipulation." *Id.*

<sup>108</sup> *See infra* Parts V-A, B, and C.

<sup>109</sup> Philo Farnsworth did not begin inventing the television set until the year 1927, and it was not until the following decades that its use became widespread among American families. *See Television*, at <http://www.ideafinder.com/history/inventions/story085.htm> (last visited Jan. 19, 2005).

<sup>110</sup> *See* STONE & JOHN, *supra* note 53, at 320. "Those who were 'deceived' by the packagers into sponsoring and broadcasting the fixed quizzes suffered increased sales and profits



same as those of the 1950s. Though cable channels have proliferated in the past decade, there is still tremendous pressure for high ratings from producers.<sup>111</sup> The allegations made against today's reality TV shows as potential violators of FCC game show laws could create a *déjà vu* of the quiz show scandals of the 1950s with widespread public cynicism.

#### A. *Common Characteristics*

Are there really distinguishing elements between game shows and reality TV shows that prevent the latter from being regulated under 47 U.S.C. § 509? Those against regulation of reality TV shows point to the language of the above statute<sup>112</sup> to argue against federal regulation.<sup>113</sup> On the other end of the spectrum are those who vehemently support reality show regulation to prevent the continuing betrayal of the American public.<sup>114</sup>

Reality TV shows and game shows often share dual underlying premises — competition and prize money. Reality TV shows also incorporate elements of intellectual skill, such as memory quizzes and map navigation that should fall under 47 U.S.C. § 509.<sup>115</sup> This statute's creation occurred in the aftermath of the quiz show scandals to quell the widespread climate of distrust among the American viewing public.<sup>116</sup> There is further evidence that reality TV shows fall under the game show regulations of 47 U.S.C. § 509 since participants on reality TV shows often refer to their roles as

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[and] the patsy contestants, who played in good faith against the rigged contestants were rewarded . . . as noted by Edward Jurist of 'Dotto' . . . ." *Id.*

<sup>111</sup> Steve McClellan, *Networks Face Double-Digit Loss*, BROADCASTING & CABLE, available at <http://www.broadcastingcable.com/article/CA382857?verticalid=311&industry=TV+Buyer&industryid=21326> (last visited Nov. 1, 2004).

<sup>112</sup> Opponents focus upon words "intellectual knowledge" or "intellectual skill" to argue that reality TV lacks these components and consequently, should not be regulated by the statute.

<sup>113</sup> Glenn Garvin, *Reality TV: What's Truth Got to Do With It?* (Sept. 8, 2003), available at [http://www.miami.com/mld/miamiherald/entertainment/columnists/glenn\\_garvin/6716974.htm](http://www.miami.com/mld/miamiherald/entertainment/columnists/glenn_garvin/6716974.htm) (last visited Jan. 19, 2005). When *Manhunt* contestants and crew members charged that the show was fixed, "CBS (which controls its corporate cousin UPN) defended itself by arguing that FCC regulations prohibit rigging only 'contests of intellectual skill' and there was nothing intellectual about wrestlers blasting people with paintguns." *Id.*

<sup>114</sup> See Bob Thompson, *Survivor Lawsuit*, ON THE MEDIA (June 23, 2001), available at [http://www.onthemedias.org/transcripts/transcripts\\_062301\\_survivor.html](http://www.onthemedias.org/transcripts/transcripts_062301_survivor.html) (last visited Jan. 19, 2005). Bob Thompson, media critic, believes that reality TV shows should be regulated because they present themselves as games where contestants win money, which is exactly what the quiz shows were. And if in fact it turns out that they were manipulated, which is not different from what happened in the Quiz Show Scandal, that is very much within the purview of regulatory commissions. *Id.*

<sup>115</sup> See generally discussion *infra* Part V.

<sup>116</sup> See Venanzi, *supra* note 51.

part of “the game.”<sup>117</sup>

In both the big-money quiz shows and reality TV shows today, contestants vie for substantial prize money by engaging in various competitions. Throughout the reality TV shows, contestants refer to themselves as such in “the game.”<sup>118</sup> Furthermore, intellectual skill is part and parcel of reality TV shows.<sup>119</sup> The FCC did not tailor the term “intellectual skill” to apply only to a quiz show context.<sup>120</sup> Intellectual skill must be broadly construed to encompass the rigging of contests that have elements of both physical and intellectual challenges.<sup>121</sup> The term “intellectual skill” applies to all reality TV shows today, not just the ones that give quizzes,<sup>122</sup> but all those that involve mind games of strategy and outwitting opponents.<sup>123</sup> In fact, the entire reality game is an intellectual pursuit because it is a constant mind game of strategy to out-manipulate an opponent.

Arguably, sizing up people to judge their character is another form of intellectual skill. By specifically looking at some of the recent reality TV show scandals, the need for FCC regulation will become increasingly clear as it was in the aftermath of the quiz shows.

## V. REALITY TV SCANDALS

### A. *The Survivor Lawsuit*

Stacey Stillman, the third contestant kicked off the original CBS *Survivor*,<sup>124</sup> brought an action against CBS, Survivor Entertain-

<sup>117</sup> Telephone Interview with Steve Beverly, *supra* note 6 (arguing that *Survivor* provides increasing evidence of the need for reality TV shows to be regulated in the same fashion as game shows under 47 U.S.C. § 509).

<sup>118</sup> *Id.* Steve Beverly explained how during one episode of *Survivor* contestants made forty-seven references to their role in playing “the game.”

<sup>119</sup> *Id.* On shows like *Survivor*, memory quizzes are provided to give teams benefits, while on *Manhunt*, reading maps and clues demonstrates elements of intellectual skill.

<sup>120</sup> Looking at the provisions of 47 U.S.C. § 509, nothing implies that it would not cover the reality TV show context because of reality TV’s similar elements.

<sup>121</sup> Both *Survivor* and *Manhunt* fit this category of containing athleticism and stamina elements combined with contestants using their minds.

<sup>122</sup> On *Survivor*, the contestants participate in memory quizzes based on previous occurrences on the island. See Telephone Interview with Steve Beverly, *supra* note 6.

<sup>123</sup> See *infra* Part V. Planning alliances, navigating through maps, and manipulating peoples’ emotions are all examples of the use of intellectual capacities. See also Telephone Interview with Steve Beverly, *supra* note 6 (pointing out that *The Dating Game* was not a quiz show, but was subject to the same guidelines as all other television game shows to avoid outright fraud in the selection of dates). This is further evidence of why today’s reality TV shows, having many aspects of intellectual skills, should fall under FCC regulation.

<sup>124</sup> See *SEG, Inc. v. Stillman*, No. B151712, 2003 WL 21197133 (Cal. Ct. App. 2d Dist. May 22, 2003). *Survivor* was the name of the new show that was being produced for CBS by SEG that involved sixteen contestants shipped to an island in the South China Sea. Contestants were divided into two “tribes” and required to engage in multiple contests between the tribes. Contestants on a regular basis were asked to vote on which member to evict from the tribe. A majority vote of the existing members of the tribe that had lost the most

ment Group (“SEG”), and its producer Mark Burnett alleging that the producers intervened in the show and, as a result, violated federal game show laws by altering the outcome of *Survivor*.<sup>125</sup> Stillman argued that producer Burnett fixed the game by pressuring others to vote her off the island.<sup>126</sup> If true, this claim seems to violate 47 U.S.C. § 509, which prohibits rigging of game show contests. CBS denies these allegations.<sup>127</sup> Another contestant from the original *Survivor*, Dirk Been, “wrote a letter to Burnett, expressing his dissatisfaction with Burnett’s conduct during the filming.”<sup>128</sup> In his deposition, Been admits that Burnett improperly attempted to influence his vote, but he stops short of saying that he was actually coerced into voting Ms. Stillman off of the island.<sup>129</sup> It is telling of the manipulations on reality TV by the very fact that Mark Burnett himself does not call *Survivor* reality TV. Instead he calls it a “reality drama.”<sup>130</sup> Furthermore, the Applicant Agreement that CBS and SEG required the sixteen *Survivor* “castaways” to sign provides damning evidence of the companies’ acknowledgment that this reality show fell under the FCC’s game show jurisdiction.<sup>131</sup> Only after Stillman<sup>132</sup> sued CBS and Mark Burnett<sup>133</sup> did

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recent contest would then evict a member of that tribe, until there was only one surviving contestant who would win one million dollars. *Id.* at \*2.

<sup>125</sup> Peter Lance, *The Colbster Gets Another Pass*, at <http://thestingray.net/pass.htm> (last visited Nov. 1, 2004). “Burnett’s interference with the voting,” alleged Stacey, “undermined a fundamental premise of the Survivor contest, namely the ability of contestants to freely compete for survival.” *Id.*

<sup>126</sup> See Emily Farache, *Survivor Stacey: Show was Rigged*, at <http://www.eonline.com/News/Items/Pf/0,1527,7772,00.html> (last visited Nov. 1, 2004). In Stillman’s fourteen-page complaint, she alleged that Burnett persuaded her fellow Tagi tribesmen Sean Kenniff and Dirk Been to vote her off, instead of the seventy-two year old Rudy Boesch.

<sup>127</sup> See *id.* In a statement, CBS said: “[w]e heard about Stacey Stillman’s allegations several months ago. They had no merit then; they have no merit now that she has packaged them into a frivolous and groundless lawsuit.” *Id.*; see also Brief of Amici Curiae The Reporters Committee for Freedom of the Press and the California First Amendment Coalition in support of Peter A. Lance’s Motion to Unseal Portions of the Trial Court Record Pursuant to Cal. Rule Ct. 243 2(h), *SEG, Inc. v. Stillman* (Cal. Super. Ct., L.A. May 17, 2001) (No. BC245328) (where SEG counterclaimed that Stillman violated her confidentiality agreement with SEG and libeled the producers), available at <http://www.rcfp.org/news/documents/survivoren.html>.

<sup>128</sup> See Claire White, *Interview with Peter Lance*, at <http://www.writenews.com/features/lancewn.htm> (last visited Nov. 1, 2004). Dirk Been’s “testimony lends support to Stillman’s lawsuit, which raises some very serious issues about how much control Burnett exerted over the outcome of the popular reality show.” *Id.*

<sup>129</sup> Mark Armstrong, *Survivor Dirk: I was Influenced*, at <http://www.eonline.com/News/Items/0,1,8330,00.html> (Nov. 1, 2004).

<sup>130</sup> See *id.*

<sup>131</sup> The Applicant Agreement for *Survivor* states that it is “a federal offense, punishable by fines and/or imprisonment for anyone to do anything which would rig or in any way influence the outcome of the Series with intent to deceive the viewing public . . . .” As of January 19, 2005, portions of the Applicant Agreement for *Survivor* were available at <http://www.thestingray.net/agree5.htm>.

<sup>132</sup> See *SEG, Inc. v. Stillman*, No. B151712, 2003 WL 21197133 (Cal. Ct. App. 2d Dist. May 22, 2003). In December, 1999, Stillman applied to be a contestant on *Survivor*. On

Burnett back away from that admission to argue that *Survivor* was not a traditional FCC regulated show.<sup>134</sup>

### 1. Stillman's Likelihood of Success

Legally, “[a] contestant on a rigged television game show may have a cause of action against the broadcaster, the producer, and the sponsor of the program for libel on the basis that they falsely depicted the contestant on television as a participant in a dishonest production.”<sup>135</sup> To be successful, Stillman must be able to prove special damages.<sup>136</sup> Legal actions brought by losing game show contestants on the theory of prima facie tort have generally been unsuccessful.<sup>137</sup> Also, it is impossible for anyone to know whether or not Stillman would have been the sole survivor and won the prize money. Stillman may not recover any damages speculated on the possibility of her winning the *Survivor* competition.

As seen in the quiz show scandals, the motive for deception is ratings.<sup>138</sup> Burnett's motive during *Survivor* was apparently no different.<sup>139</sup> Stillman's lawsuit against *Survivor* is perhaps the most publicized given the show's name recognition and popularity, but

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this show, two tribes competed in immunity challenges to test each individual's mental and physical stamina to determine which tribe would be forced to evict one of its members. On the ninth day of shooting out of a thirty-nine day period, Stillman's Tagi tribe lost a contest where it voted Stillman off the island by a 5-2 margin. Tagi tribe members Dirk Been and Sean Kenniff informed Stillman that Mark Burnett (an officer of SEG) had told them to vote to evict Stillman. Stillman contends that, if true, this constitutes a violation of federal law prohibiting the “rigging” of game shows. *Id.* at \*2. Thereafter, Stillman filed a complaint on February 5, 2001, asserting damages under the Business and Professions Code section 17200 and requested restitution for lost prize money and \$75,000. CBS, SEG and Burnett filed counter-claims of five million dollars on February 20, 2001, where they claimed five causes of action including: (1) breach of written contract, (2) breach of implied covenant of good faith and fair dealing, (3) defamation, (4) product disparagement and (5) injunctive relief. *Id.* at \*3. The trial court handed down its decision in June 26, 2001, which granted Stillman's motion to strike the first two counts of SEG's complaint, but denied its motion as to the defamation claim. Both parties appealed this decision. *Id.* at \*10. The appellate court sustained the trial court's findings. *Id.* at 4.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* Burnett had already gone on videotape (on DVD highlights of season one of the hit series) admitting that the elimination-style show with the million-dollar prize fell under FCC control.

<sup>135</sup> 103 N.Y. JUR. 2D *Telecommunications* § 152 (2002).

<sup>136</sup> See *Davidson v. Nat'l Broad. Co.*, 204 N.Y.S.2d 532 (N.Y. Sup. Ct. 1960) (stating the principle that to find defendants who are accused of falsely depicting the plaintiff on television as a participant in a dishonest production guilty, plaintiff must prove that the defendants knew the purpose and intent of the program as it was managed, which resulted in great financial gain and benefit to the defendants who were unjustly enriched at the plaintiff's expense).

<sup>137</sup> See *Holt v. Columbia Broad. Sys., Inc.*, 253 N.Y.S.2d 1020 (N.Y. Sup. Ct. 1964) (claiming that an essential ingredient in an action to prove a prima facie tort is that defendant's actions were malicious and unjustifiable attempts to injure plaintiff). In Stillman's case, this seems like a high burden of proof for her to overcome.

<sup>138</sup> See *supra* Part III-D.

<sup>139</sup> According to the suit, Burnett feared the show would lose older viewers – one of

it is by no means alone in the concept of producer manipulation and rigging.<sup>140</sup> Both *Talk or Walk* and *Manhunt* provide more evidence of this trend of deception in the name of high ratings.

### B. *The Talk or Walk Scandal*

When David Lerman<sup>141</sup> went on the syndicated daytime relationship show *Talk or Walk*,<sup>142</sup> he ended up filing a complaint with the FCC.<sup>143</sup> He went on the show to get help from the host, purported relationship specialist Michael Baisden,<sup>144</sup> for a minor issue with his girlfriend. Lerman claimed that the producers defrauded him and his girlfriend, Carlisa Hamagaki.<sup>145</sup> Allegedly, the executive producer did not feel the honest resolution of their trouble was dramatic enough, so he created a fictional ending that almost cost Lerman his relationship and life.<sup>146</sup> Lerman, not realizing Hamagaki had been ordered<sup>147</sup> by the producer to end their relationship, attempted suicide.<sup>148</sup> If true, this is yet another example of a producer manipulating the outcome, but this time with severe

CBS' key demographics – if the seventy-two year old Rudy Boesch was voted off, as the first two contestants voted off the island were senior citizens.

<sup>140</sup> See *infra* Part V-B, C.

<sup>141</sup> Peter Lance, *Talk Show Guest Attempts Suicide*, at <http://www.thestingray.net/talkorwalk/index.htm> (last visited Nov. 1, 2004). Lerman, a thirty-four year old former information supervisor for the Los Angeles Philharmonic, wrote to the FCC that he became “shocked and traumatized” after guesting on *Talk or Walk* and tried to kill himself. *Id.*

<sup>142</sup> See *Man Files FCC Complaint Against Relationship Show*, at [http://tv.zap2it.com/tveditorial/tve\\_main/1,1002,271—71305—1—,00.html](http://tv.zap2it.com/tveditorial/tve_main/1,1002,271—71305—1—,00.html) (last visited Nov. 1, 2004) (explaining how the show, hosted by author Michael Baisden, brings couples before an audience to discuss issues in their relationship, after which the audience votes to have the couples “talk” out their problems or “walk” away. Tribute Entertainment syndicated this show).

<sup>143</sup> *Id.*

<sup>144</sup> See Lance, *supra* note 141. Baisden is the author of *Never Satisfied: How and Why Men Cheat*. In 1977 he conducted a series of self-help seminars with the title “The Love And Lust Tour.”

<sup>145</sup> See *id.* Lerman says the audience voted for him to end his relationship with Hamagaki, but he went against their recommendation and asked her to work things out, which she agreed to and the audience applauded. However, at that point, executive producer Scott Sternberg stopped the taping and pulled Hamagaki aside and told her to go back on stage and tell Lerman she was ending their relationship. *Id.*

<sup>146</sup> See *id.*

<sup>147</sup> *Id.* Hamagaki said that on the day of the taping she was sequestered for five hours and coerced by executive producer Sternberg into telling Lerman she would leave him. He allegedly said “It looks really bad and I need you to go back out there and walk.” She insists that she only agreed to Sternberg’s alleged demands so that she could end the taping and go home. *Id.*

<sup>148</sup> *Id.* Lerman stated, “I felt betrayed by Carlisa. I felt used. I had no idea that she had only said she’d walk, just to get out of there.” Lerman drank a bottle of vodka that night with the intent to end his life. Additionally, he had a breakdown and lost his job as a result of the depression and public humiliation caused by his *Talk or Walk* appearance. Hamagaki apparently tried getting in touch with Lerman that night to tell him it was an act, but his phone was off the hook. *Id.*

consequences.<sup>149</sup> The motive behind this producer interference was to increase ratings by selling Hamagaki's rejection of Lerman as a way of rehabilitating her image after being portrayed as a "gold digger."<sup>150</sup> However, if Lerman attempts to file suit on the theory of prima facie tort, he will have a great deal of difficulty, since he would have to prove special damages.<sup>151</sup> *Talk or Walk* and *Survivor* are not alone in the instance of producer interference in these supposedly unscripted reality TV shows. *Manhunt* is yet another example of such manipulation.

### C. *The Manhunt Scandal*

Allegations of rigging on the UPN "reality" series *Manhunt*<sup>152</sup> abounded shortly after its debut on August 3, 2001.<sup>153</sup> Thirteen contestants went on a six-day journey through Kauai while being chased by hunters carrying paintball guns. Co-executive producer Bob Jaffe quit the show after he claimed that Paramount TV executives allegedly asked him to rig challenges and reshoot scenes with scripts in a Los Angeles park.<sup>154</sup> Bob Jaffe explained that the exec-

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<sup>149</sup> See Lance, *supra* note 141. Unlike Stillman's allegation in *Survivor*, *supra* Part V-A, and J.K.'s in *Manhunt*, *infra* Part V-C, Lerman's complaint focuses upon a life-threatening harm (as opposed to merely economic harm).

<sup>150</sup> See *id.*

<sup>151</sup> See *Friedlander v. Nat'l Broad. Co.*, 241 N.Y.S.2d 477 (N.Y. Sup. Ct. 1963) (stating that mere allegation that plaintiff was subjected to ridicule and impairment of reputation and was damaged, was insufficient as an allegation of special damages necessary to permit a cause of action on prima facie tort).

<sup>152</sup> *Manhunt*, billed as a "winner take all" contest, had three hunters, played by actors, chase the contestants with paintball rifles as they made their way along a twenty-five mile course on the jungle island to compete for a \$250,000 prize. See Mark Armstrong, *Ex-"Manhunt" Producer: It Was Rigged* (Aug. 15, 2001), available at <http://www.eonline.com/News/Items/Pf/0,1527,8678,00.html> (last visited Feb. 14, 2005).

<sup>153</sup> See *id.*; see also Interview with Peter Lance, *Manhunt Judge Says Game was Fixed*, available at <http://www.thestingray.net/manhunt.judge/index2.htm> (last visited Feb. 7, 2005). Peter Lance's interview with Judge Hash Shalaan excerpts:

Peter Lance (PL): Do you have any doubt in your mind as the Judge of *Manhunt*, that intervention by the producers or network executives affected the final outcome of the game?

Hash Shalaan (HS): There's no doubt in my mind. That's why I'm speaking with you right now. The game was fixed. Network executives, certain producers shaped and corrupted the integrity of the game; shaped the outcome of the game, the winner of the show. There's no doubt in my mind.

PL: You're saying that *Manhunt* was fixed?

HS: Yes. I'm saying *Manhunt* was fixed.

*Id.*

<sup>154</sup> Armstrong, *supra* note 152. Bob Jaffe, a twenty-year reality show veteran and former creator of *American Gladiators*, says he quit the show after battling with executive producer Chris Crow, Paramount TV chief Kerry McCluggage, and UPN chief Dean Valentine over concerns that footage he shot in Kauai didn't have enough conflict and needed to be reshot in Los Angeles's Griffith Park. When he refused to fake entire segments of the game, create phony story lines, and misstate the game rules, Paramount hired a new co-executive producer to make the changes. See also Peter Lance, *THE STINGRAY.NET Uncovers Evidence of Rigging on "Manhunt," Another Viacom Reality T.V. Game Show*, available at

utives wanted to make a fictitious representation of what might have occurred.<sup>155</sup> Apparently, Paramount executives were not satisfied with the way the contestants performed the shoot in Kauai.<sup>156</sup> Jaffe, in an August 3, 2001 interview, said that the chief of Paramount TV's production studio went so far as to ask him to fix a gauntlet in favor of a particular female contestant.<sup>157</sup> Jaffe claims that at one point he was taken away by Gary Hart, President of Paramount Network TV, and asked to have the hunters miss Mandy, another contestant. As she ran through the gauntlet, Hart said to Jaffe, "can you imagine what the ratings would be if she survived, even if she doesn't win?"<sup>158</sup> Apparently, Paramount executives were disappointed that the thirteen contestants on *Manhunt* did not act with more conflict and backstabbing for ratings purposes.<sup>159</sup> Paramount denied these rigging allegations,<sup>160</sup> which appear to fall under the FCC game show laws passed in the wake of the "Quiz Show" scandal.<sup>161</sup>

Charges that Paramount TV "fixed" *Manhunt* based on evidence of re-enacting scenes is not the only source of manipulation. Jacqueline Kelley (hereinafter "J.K."), the first contestant to get kicked off *Manhunt*, sent a complaint to the FCC alleging that the

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<http://www.thestingray.net/manhunt.probe/index.htm> (last visited Feb. 7, 2005) [hereinafter "*THE STINGRAY.NET Uncovers Evidence*"].

<sup>155</sup> Armstrong, *supra* note 152. Jaffe alleged that "they brought in palm trees to make [Los Angeles's Griffith Park] look like they were in the jungle" and "it had just reached a point where they wanted me to do a number of things I didn't want to do." Also, the executives dressed the participants in the same outfits as the original Kauai shoot and made those contestants who had shaved their heads when they were eliminated wear bandannas during the reshoots in Griffith Park. *Id.*

<sup>156</sup> "Jaffe claims that president Gary Hart and studio chairman Kerry McCluggage approached him about manipulating the gauntlets . . . they were concerned that these 'capture-the-flag' races were too difficult and were eliminating favored contestants." *Id.* Jaffe charged that Paramount executives wanted him to manipulate the gauntlets to such a degree that the producers could determine the outcome, but he refused to re-arrange the gauntlet to place the hunters in a position where it would be more difficult to hit the person who was running. *Id.*

<sup>157</sup> Mandy Kaplan, a twenty-three year old contestant, is the person in whose favor Paramount allegedly asked Jaffe to fix the gauntlet. *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* Producer Jaffe makes these allegations to provide more evidence that the Paramount executives asked him to change the 'reality' of the series. *Id.*

<sup>160</sup> *THE STINGRAY.NET Uncovers Evidence, supra* note 154. Lawyers for Paramount sent some contestants letters threatening legal action with damages up to one million dollars if they talked to the press. *Id.* Paramount issued the following statement following the rigging charges: "UPN and Paramount have not supported and would not support persons or practices designed to manipulate the outcome of the show." See Peter Lance, *Manhunt Contestant Files FCC Complaint, available at* <http://www.thestingray.net/82001release.htm>. (last visited Feb. 14, 2005).

<sup>161</sup> See Garvin, *supra* note 113 (explaining how CBS, which controls its corporate cousin UPN/Paramount, "defended itself by arguing that FCC regulations prohibit rigging only contests of intellectual skill and there was nothing intellectual about wrestlers blasting people with paint guns.").

show broke federal game show laws because of producer interference.<sup>162</sup> This prevented J.K. from returning to an injured team member, which lead her teammates to believe she abandoned the team, when in fact she had been wrestled to the ground by the executive producer, who demanded she submit to an interview. The Judge of *Manhunt*, Hash Shaalan, claimed that this interference<sup>163</sup> “ear-marked her as a deserter and prevented her from performing.”<sup>164</sup> However, like Stillman’s suit against *Survivor*, it would be hard to prove that J.K. would have been the ultimate winner. In an interview with investigative journalist Peter Lance, Hash Shaalan disclosed many of the deceptions that occurred during *Manhunt*.<sup>165</sup>

### 1. FCC and the *Manhunt* Scandal

Allegations of rigging during the *Manhunt* production and post-production re-cutting to include phony scenes that deceived audiences, and producer interference to rig the outcome raise serious questions concerning the violation of 47 U.S.C. § 509. This law, which forbids game show producers from engaging in “any artifice or scheme for the purpose of prearranging or predetermin-

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<sup>162</sup> Interview with Peter Lance, *supra* note 153 (where Hash Shaalan, the event producer, judge, and trainer of the hunters and contestants, accused producer Christopher Crowe of affecting the outcome of the game by physically restraining J.K. as the clock was running. “He basically put her onto the ground and did this interview and during the time that elapsed, her absence created, I think, an issue with some of the other contestants . . . citing this as a reason they were going to vote her off.”).

<sup>163</sup> *Id.* When asked whether a rule existed concerning producer interference, he stated, “One of the rules that I did impart to the contestants was that there would be no physical contact between them and the hunters and I also said that nobody in the field was going to come into play. The producers; the cameramen . . . they wouldn’t influence them.” *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Some excerpts from the interview by Peter Lance of Hash Shalaan regarding deceptions on *Manhunt*:

Peter Lance (PL): How accurately did the series as aired, reflect the reality of what happened?

Hash Shalaan (HS): It wasn’t accurate at all. It was very deceiving.

PL: What was deceptive about it?

HS: From the first voice you hear, that of the Narrator, you’re told that this was a 50 mile course when, in fact it, was about half that. You’re lied to about a lot of the writing you see on the screen . . . the contestants were even asked to tell you things that weren’t true reading from a script that they did. Those scenes from Griffith Park are clearly an attempt to mislead you . . . so as a viewer, you’re lied to throughout the whole show.

PL: Do you think the intervention by the production people from Paramount affected the outcome of the game?

HS: Absolutely. No doubt about it . . . I can start with J.K. and tell you what happened from there.

PL: If you had known what had happened [with the J.K. producer interference] how would you have acted (as the judge)?

HS: I would have made a ruling. I wouldn’t have let that go . . . I wouldn’t have allowed the game to proceed without there being a direct explanation and possibly some kind of penalty against the producer or favor for the contestant.



ing in whole or in part the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill or chance,"<sup>166</sup> can apply to the *Manhunt* context.<sup>167</sup> While the game is based on paintball and physical skill to avoid the "hunters," it requires intellectual skill to plan a course of action and attempt to find various hidden items. Only after J.K. submitted her complaint to the FCC citing violations of federal law did Paramount insert a disclaimer<sup>168</sup> in the last two episodes. This disclaimer, however, should have been at the beginning of the broadcast and more detailed. As the show's judge, Shalaan, stated, "they put a disclaimer, at the tail end of the show and that equates to putting a triple X rating at the end of a porno movie and at the end, realizing, 'Oh I shouldn't have let my kids watch that.'"<sup>169</sup>

In another example of producer interference to rig the outcome, Shalaan accused Paramount executives of asking him to give a certain person an immunity card to give that individual a competitive advantage.<sup>170</sup> This is similar to the *Twenty-One* scandal and to Stacey Stillman's charge in the *Survivor* lawsuit.<sup>171</sup> When asked by Peter Lance about the problems of manipulating a television game show, Shalaan advanced the argument for FCC regulation.<sup>172</sup>

## VI. WHY FCC REGULATION OF REALITY TV SHOWS IS NEEDED

An FCC probe into the rigging and manipulation charges fac-

<sup>166</sup> See 47 U.S.C. § 509 (2000).

<sup>167</sup> See Interview with Peter Lance, *supra* note 153.

PL: One of the defining questions for the FCC is whether *Manhunt* falls under 47 U.S.C. § 509, which governs game shows of 'intellectual knowledge, skill or change' [sic]. Was *Manhunt* a game of 'intellectual knowledge skill or chance?'

HS: . . . it required a great deal of intellect to figure out the clues of the game . . . to learn how to navigate in a jungle, on camera, while being shot at. Figuring out clues and decisions and making them in a rapid moment.

*Id.*

<sup>168</sup> *Id.* The only notice given by Paramount was a one-quarter second statement hidden in the closing credits that "This program includes dramatic scenes intended for entertainment purposes only." This made no mention of the newly scripted dialogue, the fictitious scenes, or the interviews shot months after the original scenes. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> See *id.* quoting:

PL: You were the judge of *Manhunt*. Is there any question in your mind that producer intervention affected the ultimate outcome of the show?

HS: Producer outcome shaped the outcome of the show. There's no question about it.

<sup>171</sup> See *id.* Specifically, producers on these shows try to preserve the longevity of certain contestants they think will produce better ratings and audience response.

<sup>172</sup> Shalaan stated, "nothing's wrong with manipulating a T.V. show but if it's a game show where contestants are governed by certain laws and the viewing audience is told that this is reality and it's not, well I think that's a problem." He also suggested that the viewers were being defrauded by not being informed that what they were seeing was fake, since the disclaimer was placed at the end of the show for a fleeting moment. *Id.*

ing *Survivor*, *Talk or Walk*, and *Manhunt* is necessary. 47 U.S.C. § 509 can be clearly applied to these shows as a result of their striking similarities to quiz and game shows. As a result, penalties under the statute would apply, which could fine or imprison networks and their producers, respectively.<sup>173</sup> However, we live in different times than the 1950s. The reality is that today's audiences do not seem shocked or amazed by the revelations of rigging or other manipulations, most likely because viewers have been numbed into a state of complacency due to FCC inaction. As long as the audiences do not turn away, neither will the networks. Today's audience is not naïve, and through many years of experiencing the television medium, it knows that things are often not as they appear. Unlike the *Twenty-One* scandal, where the networks kicked game shows out of prime time slots after fraud was exposed, reality TV shows are performing too well for the networks to give them up.<sup>174</sup> That is why it is of the utmost importance that the FCC investigate these allegations, as it appears that the networks and producers will not self-regulate, but rather will continue to deceive the public. There is nothing wrong with a polished show that encompasses rigging and other scripted elements, but it cannot hold itself out to the public and its participants as reality.

#### CONCLUSION

As of the year 2005, it appears that reality TV shows are here to stay. A reality TV crash may have seemed likely, but with a long list of unscripted shows that made their debuts in recent seasons, it is not only time to recognize reality TV's staying power but also to acknowledge that the genre is enormously varied. More than sixteen new and returning reality TV shows led the January 2004 mid-season charge on broadcast and cable networks.<sup>175</sup> Reality TV has the undeniable capacity to create buzz and generate big ratings, and serves as a welcome change for young viewers who turn away from formulaic sitcoms and dramas. Additionally, this genre offers entertainment at a seemingly unprecedented level since the public at large is led to believe that they are watching unadulterated spectacles. In reality, they are not.

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<sup>173</sup> 47 U.S.C. § 509 (2000).

<sup>174</sup> Elizabeth White, '*Manhunt*' Scandal is a Teapot Tempest, available at [http://www.medialifemagazine.com/news2001/aug01/aug20/3\\_wed/news3wednesday.html](http://www.medialifemagazine.com/news2001/aug01/aug20/3_wed/news3wednesday.html) (last visited Feb. 7, 2005). Also, at the time of the quiz show scandal, the shows had already peaked so it was easy for the networks to take them off of the air, whereas reality TV is still very profitable today. *Id.*

<sup>175</sup> Mike Duffy, *Another Dose of Reality*, at [http://www.freep.com/entertainment/tvandradio/duf4\\_20040104.htm](http://www.freep.com/entertainment/tvandradio/duf4_20040104.htm) (last visited Feb. 7, 2005).

As a society, we have come to appreciate escapes from our mundane lives and the tragedies and terrors of today's world. It is perhaps this harsh reality that has bred this new species of TV.

As a result, it is now more pressing than ever before that the FCC intervene and begin to regulate these so-called reality TV shows. The FCC can easily regulate them under 47 U.S.C. § 509, as these shows surely classify as prize money contests like the quiz shows<sup>176</sup> of the 1950s that encompassed intellectual skills.<sup>177</sup> Alternatively, Congress can pass an amendment to the Communications Act specifically addressing this new genre of reality TV. Today's reality TV shows differ in some fundamental ways from the quiz shows, which makes the need for regulation even more apparent. Not only are the audiences of reality TV shows duped, but so are the participants, who innocently come onto a show to compete in a purportedly bona fide contest.<sup>178</sup> The quiz shows became regulated in spite of their duplicitous contestants, whereas with the reality TV shows their participants, in addition to their audiences, are manipulated.

There is a real danger that could arise as the outer limits of deception continue to be pushed on these reality TV shows. Not only did we see the possibility of death<sup>179</sup> in the *Talk or Walk* scandal, as David Lerman almost committed suicide, but the overall social and economic costs on our society are tremendous. Television is a communicative medium that reaches all segments of our society. It arguably influences how we as a society are taught to think and act. If our youth, especially, grow up in an era where illegality is commonplace, it is likely that the morality of our society will inevitably decline. Rigging reality TV shows sends a message that cheating is acceptable. This can only have the most devastating of consequences for everyone. The lesson that money, through ratings, is of more fundamental importance to the networks than improving the moral consciousness of society is despicable. The networks have an onus to uphold a modicum of values. By misrepresenting a show as "reality," they breach this obligation.

Aside from the social costs that burden society, if these reality shows go unregulated, there is an equally substantial economic cost. Our litigious society will make lawsuits such as Stacey Stillman's the norm if producers and networks continue their decep-

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<sup>176</sup> See *supra* Part III.

<sup>177</sup> See generally discussion *supra* Part V.

<sup>178</sup> Stacey Stillman, David Lerman, and J.K. were all innocent participants in reality TV show deceptions.

<sup>179</sup> See *supra* Part V-B.

tion. In addition, the FCC will be flooded by more complaints regarding these manipulations. The expense, time, and resources that will be expended as a result of this litigation are absolutely unnecessary and highly preventable by FCC regulation. Unlike the quiz shows of the 1950s, which did not have legislation on the books at the time that regulated this programming,<sup>180</sup> today's reality TV shows do not have the same excuse. There is 47 U.S.C. § 509, which has provisions that can easily be tailored to suit shows like *Survivor*, *Talk or Walk*, and *Manhunt*, all competitions for prize money entailing some type of intellectual skill.

However, the FCC has thus far refused to regulate reality TV shows and embrace them as analogous to the quiz show formats falling under 47 U.S.C. § 509. It is incumbent upon the FCC and/or Congress to be proactive rather than reactive with this issue before more devastating consequences occur. Essentially, all a reality TV show must do to avoid any legal responsibility is to place an easy-to-read disclaimer at the beginning of its show which explains to the audience that what they are about to watch is scripted. Furthermore, the networks would also have to represent this to the contestants so that they do not believe they are participating in a good faith competition. Participants must know of the possibilities of tweaking for the sake of ratings. This proposal would be of little cost to the networks while it would simultaneously foster openness in our society. It is unlikely that such disclaimers would affect the popularity of reality TV shows. On the contrary, these disclaimers could make them even more entertaining by giving producers carte blanche to create the most shocking outcomes, which in turn would generate higher ratings. This proposal would certainly eliminate any statutory challenges and complaints to the FCC while perhaps raising the bar for actors to participate in these reality TV shows.

We have experienced throughout history the effects deception has had upon us as a society. From the quiz shows, to Watergate, to Monicagate, and now to the apparent lack of weapons of mass destruction, we, as a people, crave honesty and morality. Regulation of reality TV shows wholly lacking in reality is necessary to preserve our faith in the rule of law.

*Tara Brenner\**

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<sup>180</sup> See *supra* Part III-B.

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