

PRIMETIME CRIMES: ARE REALITY TELEVISION PROGRAMS  
“ILLEGAL CONTESTS” IN VIOLATION OF FEDERAL LAW

KIMBERLIANNE PODLAS\*

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INTRODUCTION

In the summer of 2000, *Survivor* burst onto the television screen with a format that changed the nature of television programming. Combining elements of game shows and *The Real*

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\* Assistant Professor of Media Law, University of North Carolina—Greensboro; former Associate Appellate Counsel, Criminal Appeals Bureau (NY); JD, cum laude, University of Buffalo School of Law. An earlier abridged version of this paper received the Broadcast Education Association’s 2007 Best Paper Award. The author would like to thank the very patient and accommodating *AELJ* editorial staff. ©2007 Kimberlianne Podlas.

*World, Survivor* introduced nouveau reality television.<sup>1</sup> Although reality television had existed before, it had never looked like this.<sup>2</sup> Not only did the novel format draw large, demographically-cherished audiences, but also it was relatively inexpensive to produce. Thus, in a programming environment where networks were eager to cut costs and increasingly reluctant to pour dollars into developing new shows, reality television seemed a godsend.

Like most things that seem too good to be true, however, reality television may not be what it initially appeared to be. Taking a cue from the quiz show scandals, reality television contestants are beginning to complain that these “real” shows are tainted by producer deception. Insiders allege that producers are altering outcomes, secretly assisting demographically-favored contestants, and manipulating the reality presented. Indeed, recent legal actions assert that, because many of these programs are contests, producer interference runs afoul of the “quiz show statute,” codified at 47 U.S.C. § 509.<sup>3</sup>

Despite the salience of the quiz show statute to contemporary reality television, neither courts nor scholars have subjected the statute to any in-depth legal analysis. Nonetheless, since reality television has evolved from a broadcasting fad to a staple of prime-time television, and since legal complaints regarding the genre are becoming increasingly common, an understanding of this statute is crucial. Consequently, this article considers whether reality television programs come within the purview of section 509, and, if so, whether their alleged deceptions are illegal “prohibited practices” that can subject broadcasters to criminal liability.

This article begins by outlining the contours of today’s reality television and highlighting the economic aspects that make the genre so attractive to networks and programmers; particularly, this article focuses on reality television’s low production cost to high audience ratio, ease of off-season programming, and draw of demographically desired audiences. It then traces both the genealogy and regulation of reality television contest programs to the quiz show scandals of the late 1950s and introduces 47 U.S.C.

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<sup>1</sup> RICHARD M. HUFF, REALITY TELEVISION ix-x, 11 (2006) (asserting that *Survivor* launched reality revolution).

<sup>2</sup> Matthew J. Smith & Andrew F. Wood, *Introduction: Culture, Communication, and Community Revealed in and Through Reality Television*, in SURVIVOR LESSONS: ESSAYS ON COMMUNICATION AND REALITY TELEVISION 2 (Matthew J. Smith & Andrew F. Wood eds., 2003) [hereinafter SURVIVOR LESSONS] (asserting that *Survivor* did not initiate reality television, but rather introduced wholly new elements to reality television); Kelley Tiffany, *Reality Show Participants: Employees or Independent Contractors?*, 32 EMP. REL. L.J. 15 (2006) (stating that the concept of reality television had previously existed, but that *Survivor* took it to a new level).

<sup>3</sup> 47 U.S.C. § 509 (2006). See *infra* Part III.A.2-3.

§ 509 of the Communications Act, the quiz show statute. This article then goes on to define the scope of the statute. It pays particular attention to section 509's language, specifically, the meaning of "intent to deceive" and "games of intellectual skill," and draws on case law in contexts analogous to the statute.

From this base, the article considers whether reality television shows are contests within the meaning of the statute, and describes the continuum of deceptions involved in reality television, moving from permissible, to illegal, to clearly criminal. This article then applies this analysis to both specific reality television programs and to noted alleged deceptions within those shows. Ultimately, it concludes that, while reality television often deceives the audience, many of its deceptions do not meet the statutory requirement of a criminal intent to deceive. Furthermore, some potentially criminal deceptions occur on programs not covered by the statute.

### I. THE POPULARITY OF REALITY TELEVISION

Since *Survivor's* Season I finale, reality programming has flooded the airwaves.<sup>4</sup> Presently, more than two dozen reality television shows populate the television schedule,<sup>5</sup> and have spilled over to cable.<sup>6</sup> Reality television even draws "B-list" talent to compete on shows such as *Dancing with the Stars* and *Celebrity Duets*.<sup>7</sup> Although television ratings suggest that reality television has lost some of its luster, shows such as *The Amazing Race*, *Project Runway*, and *American Idol* continue to thrive.<sup>8</sup> In fact, while feature filmmaking in Los Angeles has declined, reality television production has increased, and now accounts for forty-one percent of all production activity in Los Angeles.<sup>9</sup>

As a further testament to the resilience of this programming

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<sup>4</sup> See Smith & Wood, *SURVIVOR LESSONS*, *supra* note 2, at 5-6 (networks responded to *Survivor* phenomenon by developing their own reality television programs).

<sup>5</sup> Reality shows broadcast in the last year include: *Project Runway*, *The Bachelor*, *So You Think You Can Dance*, *America's Got Talent*, *Dancing with the Stars*, *Skating with Celebrities*, *Survivor*, *American Idol*, *Amazing Race*, *The Apprentice*, *Big Brother*, *The Biggest Loser*, *Rock Star Supernova*, *America's Next Top Model*, *Last Comic Standing*, *The Simple Life*, *Next Action Star*, *TopChef*, *Cops*, and *Flavor of Love*. For a more complete listing of current reality television shows, see TV.com, Reality Listings (2007), <http://www.tv.com/reality/genre/9/summary.html?tag=subnav;reality>.

<sup>6</sup> See Anne Becker, *Betting on Reality*, BROADCASTING & CABLE, Aug. 8, 2005, at 19; HUFF, *supra* note 1, at x.

<sup>7</sup> Wayne Karrfalt, *Reality's Celebrity Invasion*, MULTICHANNEL NEWS, Aug. 8, 2005, at 23-25.

<sup>8</sup> Cf. Bill Carter & Jim Rutenberg, *Networks Try Reality Cure for Summer Rerun Blues*, N.Y. TIMES, June 9, 2003, at C1; Bill Carter, *Even as Executives Scorn the Genre, TV Networks Still Rely on Reality*, N.Y. TIMES, May 19, 2003, at C1.

<sup>9</sup> Dave McNary, *Reality Boom Boosts TV Prod'n*, DAILY VARIETY, Oct. 16, 2006, at 5, <http://www.variety.com/article/VR1117951957.html?categoryid=1071&cs=1>.

format, the Academy of Television Arts & Sciences now includes two major reality series Emmy Awards: “Outstanding Reality-Competition” and “Outstanding Reality Program.”<sup>10</sup> The medium has also crossed-over into popular culture where “infotainment” programs and gossip magazines track the lives of reality’s pseudo-stars.<sup>11</sup> Clearly, reality television can no longer be dismissed as a mere broadcasting fad, but is here to stay.

#### A. *Contemporary Reality Television*

Today’s reality television is not a wholly new creation, but a hybrid of MTV’s *The Real World*<sup>12</sup> and the quiz shows of the 1950s.<sup>13</sup> Indeed, “reality television” defies true genre categorization<sup>14</sup> and is defined in many different ways.<sup>15</sup>

Some individuals define reality television broadly, encompassing any television program involving real people.<sup>16</sup> This definition includes television shows that run the gamut from quiz shows, stunt and talent shows (such as *You Asked for It*),<sup>17</sup> hidden camera shows (like *Candid Camera* or *Punk’d*), and producer-created situations. Another definition of reality television examines the shows in terms of their quiz show genealogy,<sup>18</sup> highlighting the participatory relationship with the audience.<sup>19</sup> Thus, according to these definitions, reality television encompasses programs in which a real person competes in a

<sup>10</sup> Betty Goodwin, *Eye on the Emmys: Reality Awards’ Growing Pains*, TELEVISION WK., Aug. 15, 2005, at 41.

<sup>11</sup> Olivia Toth, *Reality TV’s Appeal Bites on*, MEDIA, Aug. 12, 2005, at Special Sec. 4-5.

<sup>12</sup> In 1992, *The Real World* “pioneered an entirely new concept known as reality TV . . .” Neil Wilkes, *MTV’s ‘Real World’ Renewed Through 2008*, DIGITAL SPY, Jan. 5, 2005, <http://www.digitalspy.co.uk/article/ds18110.html> (quoting Brian Graden, President of Entertainment, MTV Networks Music Group).

<sup>13</sup> Publisher Robert Harrison’s *Confidential Magazine* has been credited with blazing the trail of reality television’s cameras entering the homes of celebrities. MARTIN J. SMITH & PATRICK J. KIGER, *POPULARICA: A POPULAR HISTORY OF THE FADS, MAVERICKS, INVENTIONS, AND LORE THAT SHAPED MODERN AMERICA 90-91, 102-03* (2005). Additionally, some authors attribute a portion of today’s reality heritage to live television documentaries such as *American Family*. See, e.g., Smith & Wood, *supra* note 2, at 2.

<sup>14</sup> OLAF HOERSCHELMANN, *RULES OF THE GAME: QUIZ SHOWS AND AMERICAN CULTURE* 12, 17 (2006) (stating that it is difficult to define the genre of reality television); April L. Roth, *Contrived Television Reality: Survivor as a Pseudo-Event*, in *SURVIVOR LESSONS*, *supra* note 2, at 27 (stating that *Survivor* is a “coadunation of the . . . game show, soap opera,” and other shows); Tiffany, *supra* note 2, at 17 (“The genre of reality television encompasses a variety of subcategories . . .”).

<sup>15</sup> Cf. HOERSCHELMANN, *supra* note 14, at 7-12 (reporting various attempts to define the genre of quiz shows and programs involving real people).

<sup>16</sup> See Sean Baker, *From Dragnet to Survivor: Historical and Cultural Perspectives on Reality Television*, in *SURVIVOR LESSONS*, *supra* note 2, at 58-59.

<sup>17</sup> At the time of their airings, *The Gong Show*, *The Dating Game*, *Truth or Consequence* and similar programs, were not known as reality programs, but as “stunt shows” or “audience participation shows.” HOERSCHELMANN, *supra* note 14, at 149-50.

<sup>18</sup> Cf. *id.* at 150 (stating that whereas individuals retroactively define reality to encompass quiz shows, quiz shows were not previously deemed reality programs).

<sup>19</sup> See *id.* at 51-52.

contest or that involve substantial audience participation, such as audience members who vote.<sup>20</sup> Still other definitions focus on the real world setting as the defining characteristic of reality television. Under this definition, reality television refers to programs that film real life, capturing the real reactions of real people in real situations.<sup>21</sup> These programs include video verite ride alongs (such as *Cops*),<sup>22</sup> voyeur verite programs that place cameras in one's home (like *The Osbournes*), and filmed contests (such as *America's Next Top Model*).

As evidenced by *Survivor* and *Project Runway*, today's reality programs often blend into their programming the above elements.<sup>23</sup> Thus, in contemporary terms, reality television encompasses programs in which real people are thrust into situations or given tasks and compete for a prize.<sup>24</sup> These are exemplified by real people living or competing in producer-constructed situations, such as a group house or a modeling contest. Most of these programs are competitions with weekly eliminations and economically valuable prizes,<sup>25</sup> such as \$100,000 to start a fashion line, a Cover Girl modeling contract, or \$1,000,000. Others are structured as competitions (such as *The Bachelor*), where the prevailing participant does not win a monetary prize, but rather the prospect of a long term romance. Still other programs are challenge-driven, where the participant has no direct competitors, but instead must complete a task.<sup>26</sup>

### B. *The Economics of Reality Television*

From a business standpoint, reality television holds obvious allure. Over the last decade, and aided by the proliferation of

<sup>20</sup> *Id.* at 7-8, 51; Baker, *supra* note 16, at 67.

<sup>21</sup> HUFF, *supra* note 1, at xi; Baker, *supra* note 16, at 58-59, 64-65. Huff claims that reality television's emphasis shifted from the people on the show to the reality of the situations. HUFF, *supra* note 1, at xi.

<sup>22</sup> Thanks to *Cops*, crime-based reality television became a staple of the 1990s. See Theodore Prosise & Ann Johnson, *Law Enforcement and Crime on Cops and World's Wildest Police Videos: Anecdotal Form and the Justification of Racial Profiling*, 68 W. J. COMM. 72 (2004).

<sup>23</sup> David Marc & Robert J. Thompson, *Boring! How Reality Programs Prospered, Proliferated and Are Now Turning off Many Viewers*, TELEVISION Q. 36, 42 (2005) ("The most successful reality series . . . usually synthesize elements of cinema verite . . . with familiar elements of dramatic genres.").

<sup>24</sup> Steven Reiss & James Wiltz, *Why America Loves Reality TV*, PSYCHOL. TODAY, Sept./Oct. 2006, <http://www.psychologytoday.com/articles/index.php?term=pto-20010901-000029&page=1> (common denominator is competitors vying for a cash prize); Smith & Wood, *supra* note 2, at 2 (competition); HOERSCHELMANN, *supra* note 14, at 8 (competition is defining feature).

<sup>25</sup> Prize winners on television shows must pay taxes on their winnings: "gross income includes amounts received as prizes and awards." I.R.C. § 74(a) (2006).

<sup>26</sup> See WALTER CUMMINS & GEORGE GORDON, PROGRAMMING OUR LIVES: TELEVISION AND THE AMERICAN IDENTITY 38 (2006).

cable television, broadcast television viewership has declined.<sup>27</sup> Presently, no single network attracts more than twenty percent of the prime-time audience.<sup>28</sup> As a result, the competition for viewers is intense.<sup>29</sup>

This competitive climate has changed the way that television shows are made. Networks are employing cost-cutting measures such as laying-off employees<sup>30</sup> and reducing development costs as well as production costs.<sup>31</sup> To reduce development costs, fewer pilots are ordered. If a pilot is picked up by a network, fewer than the standard thirteen episodes may be ordered. If a show is lucky enough to air, it will be given less time to succeed than it would have been given in the past.<sup>32</sup> Producers have further attempted to economize by reducing the money spent on talent and writers.<sup>33</sup> This may mean paying lower salaries, avoiding the requirements of collective bargaining agreements, or reducing the number of employees involved in the production of the show.<sup>34</sup> Meanwhile, to retain viewers and gain new ones, programs are launched year round and run for truncated seasons.

The shifting business model of television programming favors reality television. Reality shows are relatively easy to produce, and, best of all, are cheaper than scripted shows.<sup>35</sup> Whereas a half-hour sitcom costs almost \$1.5 million to make<sup>36</sup> and a one hour drama \$2.6 million,<sup>37</sup> a one hour reality program costs only between \$750,000-800,000.<sup>38</sup> A low-end cable reality program costs even less.<sup>39</sup> In fact, in the fall of 2006, NBC announced that it was

<sup>27</sup> Jody Simon & Arnold Peter, *Entertainment Law Issue: Facing Reality*, 28 L.A. LAW. 44, 46 (2005).

<sup>28</sup> During the November 2004 ratings sweeps, total cable viewing exceeded broadcast network viewing. Denise Martin, *Cable's Neat Sweep Claims First Primetime Win over Broadcasters*, DAILY VARIETY, Dec. 9, 2004, at 6.

<sup>29</sup> Simon & Peter, *supra* note 27, at 46.

<sup>30</sup> See Lynette Rice, *The Incredible Shrinking Network*, ENT. WKLY, Nov. 3, 2006, at 9. NBC, for instance, recently cut "about 700 jobs and \$750 million in expenses." *Id.*

<sup>31</sup> Networks are also amortizing costs by demanding the rights to "a greater number of network[s] . . . [and] repurposed cable exhibition[s] [of a program] without payment of . . . additional license fee[s]." Simon & Peter, *supra* note 27, at 46.

<sup>32</sup> See Brian Lowry, *Changing Channels: Iger Symbolizes Networks' Domino Theory at Work*, DAILY VARIETY, Nov. 25, 1992; see also USA TODAY, Oct. 5, 2005, at D1 (stating that a new program may survive only two or three airings before being cancelled).

<sup>33</sup> *100 Get in on the Act*, TELEVISUAL, Sept. 6, 2004, at 41.

<sup>34</sup> For example, to reduce talent and writing costs, *Saturday Night Live* dropped several cast members for its 2006-07 season. Jennifer Armstrong, *The Evolution of "SNL,"* ENT. WKLY, Sept. 29, 2006, at 11; see also Rice, *supra* note 30, at 9 (discussing employee firings).

<sup>35</sup> Simon & Peter, *supra* note 27, at 46.

<sup>36</sup> John M. Higgins & Jim Benson, *Reality Check: The Revolution in "Unscripted" Fare Has Hollywood Asking Just What Exactly Is a Writer?*, BROADCASTING & CABLE, July 18, 2005, at 1 (noting that a half-hour sitcom costs \$1.3 million); Rice, *supra*, note 30, at 9-10 (noting that *30 Rock* costs \$1.6 million).

<sup>37</sup> Rice, *supra* note 30, at 9-10 (*Friday Night Lights* costs \$2.6 million).

<sup>38</sup> Higgins & Benson, *supra* note 36.

<sup>39</sup> *Id.* These programs can be sold to a network for approximately \$2 million. *Id.*

considering replacing scripted shows with less expensive reality shows in order to save money.<sup>40</sup>

Reality television's cost savings is due in part to its lower talent costs. An unknown actor on a sitcom will earn \$25,000 or more per episode and be covered by a Screen Actors Guild (SAG) contract. In contrast, reality contestants, neither subject to SAG provisions nor possessing the leverage of celebrity, earn virtually nothing for their participation.<sup>41</sup> Instead, they perform in hopes of winning the coveted prize, and parlaying that success into future fame.<sup>42</sup> Even celebrities who appear on reality shows receive only \$10,000 appearance fees "at the high end."<sup>43</sup>

Reality shows also do not need the cadre of writers demanded by scripted television shows, thus reducing staffing costs for reality television. Furthermore, the few "writers" or story shapers<sup>44</sup> employed by reality shows earn far less than writers on scripted shows. Moreover, because of their novelty, low cost, and speed with which they can be brought to air, reality programs are ideal for off-season programming. They can substitute for summer reruns, staving audience slippage.<sup>45</sup> Additionally, reality shows possess an inherent fail safe: with the lower cost and shorter season,<sup>46</sup> should a reality show fail, the financial damage will not be great.<sup>47</sup>

Finally, reality television boasts significant audience appeal. A large portion of its viewership constitutes the eighteen-to-forty-nine year old demographic coveted by advertisers.<sup>48</sup> Indeed, during May 2006, *American Idol* helped the FOX network win its first sweeps in that demographic.<sup>49</sup> Consequently, since these shows draw a desired audience, their advertising spots demand top dollar<sup>50</sup> and can lure advertisers away from scripted television.<sup>51</sup>

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<sup>40</sup> Rice, *supra* note 30 (citing Jeff Zucker, CEO of NBC Universal Television Group).

<sup>41</sup> See Baker, *supra* note 16, at 65-66.

<sup>42</sup> CUMMINS & GORDON, *supra* note 26, at 39-42; HUFF, *supra* note 1, at 150-64 (detailing the ways that reality contestants parlay their participation in a reality television show into quasi-celebrity); Tiffany, *supra* note 2, at 15 (stating that reality television provides stardom seekers with an outlet).

<sup>43</sup> Karrfalt, *supra* note 7, at 24.

<sup>44</sup> See generally James Poniewozik & Jeanne McDowell, *How Reality TV Fakes It*, TIME, Feb. 6, 2006, at 60.

<sup>45</sup> CUMMINS & GORDON, *supra* note 26, at 39.

<sup>46</sup> The "low production costs and unscripted formats of reality television" make them relatively easy to put on the air quickly. Daniel A. Fiore & Samuel E. Rogoway, *Reality Check: A Recent Court Decision Indicates That Traditional Copyright Analysis May Be Used to Protect Reality TV Shows from Infringement*, 28 L.A. LAW. 34, 36 (2005).

<sup>47</sup> Karrfalt, *supra* note 7, at 23.

<sup>48</sup> See CUMMINS & GORDON, *supra* note 26, at 37, 39; HUFF, *supra* note 1, at ix.

<sup>49</sup> Allison Romano, *Fox's Greatest Hit*, BROADCASTING & CABLE, May 30, 2005, at 10.

<sup>50</sup> Programs can also increase revenue by integrating corporate advertisers into their plots, thereby taking product placement to a whole new level. See, e.g., CUMMINS & GORDON, *supra* note 26, at 63 (noting the product placement of Doritos and Mountain

This unique combination of low production cost to high audience ratio, ease of off-season programming, and draw of demographically sought after audiences, has made reality television more than just an inexpensive solution to fill programming holes.<sup>52</sup> It has made it lucrative for networks.<sup>53</sup>

### C. *Emerging Problems and Hidden Costs*

Despite reality television's attractiveness due to its seemingly minimal bottom line—reality television is not a programming panacea. In fact, it seems that as reality television shows have proliferated, so have complaints about these shows. While these could potentially translate into criminal and civil liability, they also increase the cost of doing business. Consequently, networks investing time and money into the development of a reality-based program should be fully cognizant of legal concerns, as they present a number of hidden costs.<sup>54</sup> These concerns come in the form of actions for breach of contract and fraud,<sup>55</sup> privacy lawsuits by people unwillingly to participate in hidden-camera shows,<sup>56</sup> complaints filed with the FCC,<sup>57</sup> accusations of intellectual property theft,<sup>58</sup> claims that people were cheated out of prizes,<sup>59</sup>

Dew as rewards in *Survivor*); MARIE-LAURE RYAN, AVATARS OF STORY 72 (2006) (noting the blatant capitalism on *Survivor* where “contestants . . . feast on the products of . . . sponsors” such as Budweiser).

<sup>51</sup> Rice, *supra* note 30, at 9. During the 2005-06 season, NBC attributed its loss of more than \$800 million in advertising sales to the number of scripted dramas (and lack of reality programs) on its schedule. *Id.*

<sup>52</sup> HUFF, *supra* note 1, at 21 (noting that reality television is perceived as quick fix to fill programming holes).

<sup>53</sup> Joel Michael Ugolini, *So You Want to Create the Next Survivor: What Legal Issues Networks Should Consider Before Producing a Reality Television Program*, 4 VA. SPORTS & ENT. L.J. 68, 84 n.84 (2004) (citing Darby Green, *Almost Famous: Reality Television Participants as Limited-Purpose Public Figures*, 6 VAND. J. ENT. L. & PRAC. 94, 94-95 (2003)).

<sup>54</sup> *Id.* at 70.

<sup>55</sup> See *The Reality-TV Business: Litigious Reality*, ECONOMIST, Sept. 25, 2004 (stating that “lawsuits are . . . [a] cost of doing business in . . . reality-TV,” and noting that Simon Fuller, the producer of *American Idol*, had brought a breach of contract suit against Simon Cowell, a star of that show).

<sup>56</sup> Hidden camera shows have been sued for violating state privacy provisions and anti-fraud laws. See, e.g., Debbi Mack, *Reality Show Producers Face Class Action*, CORP. LEGAL TIMES, Sept. 2005, at 78; Charles Toutant, *Emergency-Room Patients Filmed for Reality TV Certified As Plaintiff Class*, N.J.L.J., June 13, 2005, at 5; Michael Freeman & Chris Pursell, *Hotel Guests Sue MTV for ‘Harassment’*, 21 ELECTRONIC MEDIA 20, Apr. 29, 2002; Linda Moss, *Facing Legal Realities*, BROADCASTING & CABLE, Oct. 8, 2001, at 23.

<sup>57</sup> Tara Brenner, Note, *A “Quizzical” Look into the Need for Reality Television Show Regulation*, 22 CARDOZO ARTS & ENT. L.J. 873, 874 (2005) (noting that complaints have been filed with the FCC based on allegations that producers and networks defrauded contestants and audiences).

<sup>58</sup> See Andrew M. White & Lee S. Brenner, *Reality TV Shows Difficult Concepts to Protect*, 20 ENT. L. & FIN., Nov. 2004, at 3. *But see* Fiore & Rogoway, *supra* note 46, at 35-38 (describing intellectual property lawsuits against reality television shows).

<sup>59</sup> Millie Ruperto and Raul Arrieta, the winners of Telemundo's *Protagonistas de Novela* are suing Telemundo for reneging on their prize. *Protagonistas de Novela*—the first Hispanic reality show in the United States—was an *American Idol*-style show in which

and allegations that programs were rigged.

Consequently, this article focuses on an issue inherent in many of the complaints about reality television: the ways in which it can deceive audiences. More specifically, this article considers whether reality television programs premised on competition, prize money, and intellectual skill are subject to the proscriptions of 47 U.S.C. § 509.<sup>60</sup>

## II. QUIZ SHOWS AND THE DEVELOPMENT OF SECTION 509

The genealogy of both 47 U.S.C. § 509 and today's reality television programs can be traced to the television quiz shows of the 1950s. From 1955 to 1958, the quiz-show genre—exemplified by CBS' *The \$64,000 Challenge*—dominated American television.<sup>61</sup> The scandal attendant to this programming serves as the backdrop for understanding the regulation of televised contests and today's reality programming.

At the height of the quiz show phenomenon, twenty-two quiz shows crowded the airwaves.<sup>62</sup> This duplicative programming made the competition for viewers fierce, and many shows found themselves without an audience. One such program was *Twenty-One*.<sup>63</sup> Because *Twenty-One*'s debut did not attract an audience large enough to satisfy its sponsor,<sup>64</sup> its producers decided to manipulate the program for dramatic effect and position competitors as characters that viewers would tune in to watch and cheer on.

The first character came in the form of Herb Stempel.<sup>65</sup> First, the producers underscored Stempel's image as a working class

would-be actors competed for a lead role in a Telemundo telenovela. The lawsuit alleges that the network refused to provide the promised prize, breaching the contract and defrauding both the contestants and viewers. Press Release, Hispanic PR Wire—Business Wire, Infante & Zumpano, P.A. Announces Reality Show Winners File Lawsuit Against Telemundo Network for Reneging on Acting Contract (Apr. 29, 2005), *available at* <http://www.hispanicprwire.com/generarnews.php?l=in&id=4109&cha=7>.

Federal Communications Commission (FCC) Regulations (“Licensee-conducted contests”) “require . . . licensees to conduct the contest substantially as announced or advertised.” 47 C.F.R. § 73.1216 (2006). This has been interpreted to mean that they award the prizes announced. 50 Fed. Reg. 19,229, ¶¶ 50-51 (May 7, 1985) (FCC Memorandum Opinion and Order).

<sup>60</sup> See Brenner, *supra* note 57, at 890.

<sup>61</sup> Thomas Doherty, Quiz Show Scandals, The Museum of Broadcast Communications, <http://www.museum.tv/archives/etv/Q/htmlQ/quizshowsca/quizshowsca.htm> (last visited Mar. 25, 2007).

<sup>62</sup> *Id.*

<sup>63</sup> JOSEPH STONE & TIM YOHN, PRIME TIME AND MISDEMEANORS 3 (1992). *Twenty-One* was modeled after blackjack (or *Twenty-One*), where contestants attempted to amass *Twenty-One* points in two or more rounds. *Id.* at 26.

<sup>64</sup> Geritol was the sponsor of *Twenty-One*. THOMAS A. DELONG, QUIZ CRAZE: AMERICA'S INFATUATION WITH GAME SHOWS 213 (1991).

<sup>65</sup> See STONE & YOHN, *supra* note 63, at 4.

underdog, to help viewers identify with him. Next, producers directed Stempel's body movements, vocal pauses, and other flourishes to heighten the drama of each showdown. Finally, producers prepped Stempel with the questions and answers.<sup>66</sup> With this assistance, Stempel reigned as the *Twenty-One* champion from October 17, to December 5, 1956, until producers replaced him with the more telegenic, personable Charles Van Doren.<sup>67</sup> Consistent with their plan to script drama in the pursuit of viewers, the producers arranged the first Van Doren-Stempel face-off to end in three ties.<sup>68</sup> This strategy paid off as millions of viewers tuned in the next evening to watch Van Doren unseat Stempel.<sup>69</sup>

Although the manipulation of the contestants on *Twenty-One* helped the producers maintain viewer interest and ratings, the producers had not anticipated the extent of Stempel's resentment at being required to take a dive—particularly on a question to which he knew the answer.<sup>70</sup> Two years later, Edward Hilgemeier complained to a New York District Attorney that the quiz show *Dotto*, a speed duel where contestants connected dots to identify a caricature,<sup>71</sup> was fixed. Hilgemeier, who had been a standby contestant for *Dotto*,<sup>72</sup> produced a page from a crib sheet showing that winners received the answers in advance.<sup>73</sup> Inspired by this public scrutiny of quiz shows, Stempel exposed the producer manipulations at *Twenty-One*.<sup>74</sup> This and the resulting fallout proved the death knell for quiz shows.<sup>75</sup>

#### A. *Prelude to Regulation*

The public reacted to the discovery of these manipulations with “utter disbelief.”<sup>76</sup> The audience, still naive to the medium of

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<sup>66</sup> *See id.* at 26, 30.

<sup>67</sup> *Id.* at 193-94.

<sup>68</sup> *See id.* at 194.

<sup>69</sup> *Id.* At their peak, quiz shows including *Twenty-One* attracted upwards of fifty million viewers. *Id.* at 3.

<sup>70</sup> *See id.* at 4.

<sup>71</sup> KENT ANDERSON, TELEVISION FRAUD: THE HISTORY AND IMPLICATIONS OF THE QUIZ SHOW SCANDALS 108 (1978).

<sup>72</sup> *Id.* at 111-12.

<sup>73</sup> *See* STONE & YOHAN, *supra* note 63, at 14-19. For a copy of the crib sheet see *id.* at 163. When he complained to producers, Hilgenmeier was paid \$1500 in exchange for waiving any further claims against the show. *Id.* at 13-14.

<sup>74</sup> *Id.* at 4 (noting that Hilgenmeier's complaint encouraged Stempel to come forward).

<sup>75</sup> Although the quiz show genre was discredited, it retained the economic benefit of having low production costs. HOERSCHELMANN, *supra* note 14, at 88. Quiz shows would later reinvent themselves as “game shows” in part to escape negative connotation. *Id.* at 12-14. *See also* Peter W. Kaplan, *Network Documentaries an Endangered Species*, N.Y. TIMES, Dec. 5, 1985, at C30 (stating that networks responded to quiz show scandals by airing more documentaries to convince the FCC that television had social merit).

<sup>76</sup> Brenner, *supra* note 57, at 884; *see also* HOERSCHELMANN, *supra* note 14, at 87 (noting audience resentment).

television, had relied on the “official” nature of these shows<sup>77</sup> to conclude that both the shows and their contestants were genuine.<sup>78</sup>

In response to public outcry, a New York grand jury investigated the riggings, but no state statutes existed that addressed fixing a broadcast quiz show.<sup>79</sup> The federal system fared no better. Neither the federal regulatory system<sup>80</sup> nor federal laws offered any recourse.<sup>81</sup> The 1934 Communications Act required broadcasters to serve the public interest (in return for their licenses),<sup>82</sup> but it was up to the licensees to determine whether their programming lived up to that promise.<sup>83</sup> Provisions of Title 18 of the United States Code addressing television fraud generally<sup>84</sup> were also inapt, leaving the FCC powerless.<sup>85</sup> In fact, the 1954 Supreme Court case of *Federal Communications Commission v. American Broadcasting Co.*,<sup>86</sup> held that unless a broadcast “scheme” was illegal under some other statute,<sup>87</sup> the FCC had no authority to punish or even regulate the activity.<sup>88</sup>

As a result, The House Subcommittee on Legislative Oversight conducted hearings into deception on these shows.<sup>89</sup>

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<sup>77</sup> See STONE & YOHN, *supra* note 63, at 307.

<sup>78</sup> Brenner, *supra* note 57, at 884.

<sup>79</sup> The district attorney indicted eighteen people, seventeen of whom were contestants. See ANDERSON, *supra* note 71, at 168-69.

<sup>80</sup> This article is not concerned with the FCC’s regulatory authority, an issue well-detailed in multiple other sources. See, e.g., Laurence H. Winer, *The Signal Cable Sends, Part II—Interference from the Indecency Cases?*, 55 FORDHAM L. REV. 459 (1987); SYDNEY W. HEAD & CHRISTOPHER H. STERLING, BROADCASTING IN AMERICA 145 (Houghton Mifflin Co. 1982) (1956). Rather, this article analyzes the applicability of the quiz show statute to contemporary reality television.

<sup>81</sup> The Attorney General of the United States also investigated broadcast riggings. *Report to the President by the Attorney General on Deceptive Practices in Broadcasting Media*, H.R. REP. NO. 86-1258, at 61 app. E (1960).

<sup>82</sup> The FCC interpreted this to mean that whatever profited the broadcast industry benefited the public. See J. FRED MACDONALD, ONE NATION UNDER TELEVISION 23 (1994).

<sup>83</sup> *Id.* at 23, 233.

<sup>84</sup> See 18 U.S.C. § 1343 (2006).

<sup>85</sup> See MACDONALD, *supra* note 82, at 23, 233.

<sup>86</sup> Fed. Comm’ns Comm’n v. Am. Broad. Co., 347 U.S. 284, 290 (1954).

<sup>87</sup> The issue in *FCC v. ABC* was whether the program in question constituted a “‘lottery, gift enterprise, or similar scheme’ proscribed by § 1304.” *Id.* (quoting 18 U.S.C. § 1304).

<sup>88</sup> The Supreme Court held that “[u]nless the ‘give-away’ programs involved . . . [were] illegal under § 1304, the Commission cannot employ the statute to make them so by agency action.” *Id.*

<sup>89</sup> See *Investigation of Television Quiz Shows: Hearings Before a Subcomm. of the Comm. on Interstate and Foreign Commerce*, 86th Cong. (1960); *Responsibilities of Broadcasting Licensees and Station Personnel: Hearings Before a Subcomm. of the Comm. on Interstate and Foreign Commerce H.R. on Payola and Other Deceptive Practices in the Broadcasting Field*, 86th Cong. (1960); *Communications Act Amendments: Hearings Before a Subcomm. of the Comm. on Interstate and Foreign Commerce H.R. on Conditional Grants, Pregrant Procedure, Local Notice, Local Hearings, Payoffs, Suspension of Licenses, and Deceptive Practices in Broadcasting*, 86th Cong. (1960); INVESTIGATION OF REGULATORY COMMISSIONS AND AGENCIES, INTERIM REPORT OF THE COMM. ON INTERSTATE AND FOREIGN COMMERCE, SUBCOMM. ON LEGISLATIVE

Testimony ranged from neutral admissions that the broadcasts had been manipulated, to contrite apologies, to claims of ignorance.<sup>90</sup> Although the hearings enabled Congress to uncover a “complex pattern of calculated deception of the listening and viewing audience,”<sup>91</sup> neither the producers nor the participants involved had violated any laws. This led to the creation of 47 U.S.C. § 509.<sup>92</sup>

### B. *Legal Regulation: 47 U.S.C. § 509*

The quiz show scandal underscored not only the power that television had over viewers but also the power that advertisers had over the medium itself.<sup>93</sup> Then, as today, television was first and foremost a business. Like any other business, television seeks to maximize profits.<sup>94</sup> The larger a show’s audience (or share of the desired audience), the higher its ratings; the higher the ratings, the higher dollar amount at which advertising rates can be set; the higher the advertising rates, the more a show can generate in revenue. This desire for ratings and consequent profit can lure television producers to manipulate contests. Greed can also entice contestants to participate in and cover up these deceptions in order to win. After all, the type of individual willing to subject herself to the scrutiny of a publicly-broadcast game is likely a highly competitive one.<sup>95</sup>

After passing the Communications Act in 1934, Congress devoted little attention to further television regulation until the quiz show and payola scandals surfaced.<sup>96</sup> Then, to address the

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OVERSIGHT, H.R. REP. NO. 86-1258 (1960).

<sup>90</sup> See HOERSCHELMANN, *supra* note 14, at 87-89 (outlining testimony). It was during these hearings that Charles Van Doren confessed his involvement in these deceptions. Brenner, *supra* note 57, at 883 n.73; see also eHistory.com, A Moment in Time Archives: TV Quiz Show Scandal, Nov. 21, 2001, [http://ehistory.osu.edu/world/amit/display.cfm?amit\\_id=1874](http://ehistory.osu.edu/world/amit/display.cfm?amit_id=1874).

<sup>91</sup> See H.R. REP. NO. 86-1800, at 16 (1960), *reprinted in* 1960 U.S.C.C.A.N. 3516, 3533.

<sup>92</sup> See *id.* at 1960 U.S.C.C.A.N. 3533-34.

<sup>93</sup> In fact, quiz shows were born of commerciality in broadcasting. “[Q]uiz shows on radio in the 1930s coincide[d] with the . . . solidification of commercial broadcasting,” and the desires of sponsors and networks influenced the quiz shows’ development. HOERSCHELMANN, *supra* note 14, at 40.

<sup>94</sup> Denise D. Bielby et al., *Whose Stories Are They? Fans’ Engagement with Soap Opera Narratives in Three Sites of Fan Activity*, 43 J. BROADCASTING & ELECTRONIC MEDIA 35 (1999) (stating that television’s content is mediated by concerns of business and “[c]ommercial success [remains] the bottom line.”). Indeed, “[t]he primary purpose of [a] television program[] is to persuade” people to watch it. L. J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewers’ Perceptions of Reality: A Psychological Process Perspective*, 22 LEGAL STUD. F. 257, 258 (1998).

<sup>95</sup> See Brenner, *supra* note 57, at 888.

<sup>96</sup> Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 331 (2004).

The widespread nature of payola—where record companies secretly paid disc

lack of legal regulation and protect viewers from these deceptive broadcast practices, Congress passed 47 U.S.C. § 509, which “[p]rohibited practices in contests of knowledge, skill, or chance.”<sup>97</sup> This statute, virtually unchanged since its enactment, makes it illegal to influence, prearrange, or pre-determine the outcome of certain types of televised games or contests, or to conspire with others to do so.<sup>98</sup> Violators of this statute can be fined up to \$10,000, imprisoned for up to one year, or both.<sup>99</sup>

Section 509 applies to any contest “of knowledge, skill, or chance” broadcast on television.<sup>100</sup> It makes it 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 knowledge or 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

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jockeys to play particular records—was exposed as a result of the legislative investigation into quiz shows. *See id.* at 347 (“The two scandals . . . merged in the public’s mind to form one image of commercialism’s corrupting influence on broadcasting.”). Nonetheless, quiz shows deceived audiences about the nature of the contest, whereas with covert sponsorship of music, audiences were deceived with regard to a sponsor’s influence over programming content. *See id.*

<sup>97</sup> This amendment was passed as part of the 1960 Communications Act. *See* Communications Act Amendments of 1960, Pub. L. No. 86-752, § 9, 74 Stat. 889, 897 (codified as amended at 47 U.S.C. § 509 (2006)). Since that time, the FCC has also issued regulations pertaining to broadcast contests. For instance, in 1974, the Commission issued a Public Notice cautioning licensees against conducting fraudulent contests or promotions and enumerating practices that would trigger inquiry. *In re* Failure of Broadcast Licensees to Conduct Contests Fairly, 45 F.C.C.2d 1056 (1974) (public notice). In 1975, the Commission initiated a proceeding to consider the feasibility of adopting rules in this area. *See In re* Amendment of Part 73 of the Commission’s Rules Relating to Licensee-Conducted Contests, 40 Fed. Reg. 26,692 (June 25, 1975). In 1976, the Commission issued regulation 47 C.F.R. § 73.1216 (2006) (“Licensee-conducted contests”).

<sup>98</sup> 47 U.S.C. § 509(a)(5) makes it unlawful “[t]o 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.”

<sup>99</sup> Section 509(c) provides: “Penalties. Whoever violates subsection (a) shall be fined not more than \$10,000 or imprisoned not more than one year, or both.” *Id.* § 509(c).

<sup>100</sup> *Id.* § 509. Section 509 also applies to any such contest broadcast by radio. *Id.* § 509(a)(4).

knowledge, intellectual skill, or chance.<sup>101</sup>

These proscriptions cast a wide net, applying to television producers, contestants, and sponsors alike. Indeed, to ensure that individuals cannot shield themselves through their position in the production and to ensure that others have an incentive to report violations, section 509 applies to anyone involved in the production, broadcast, or offering of the program to licensees, as well as sponsors who knew or should have known that someone violated or plans to violate the statute.<sup>102</sup>

Despite the statute's seemingly straightforward text, it requires a particularized criminal intent, covers only specified contests, and prohibits only certain activities directed at outcomes. These provisions and their application are detailed below.<sup>103</sup>

### 1. Intent to Deceive

Section 509 is a criminal statute<sup>104</sup> requiring scienter, to wit: that one act with the "intent to deceive the listening or viewing public."<sup>105</sup> Interpreting identical language in another fraud statute,<sup>106</sup> the Supreme Court has held that "intent to deceive" requires that a person act with a particular mental state to deceive, as opposed to acting negligently or merely deceptively.<sup>107</sup> The Court explained that the plain meaning of the term "deceive," whether read as a term of art or in its common sense, clearly proscribed only "knowing or intentional misconduct."<sup>108</sup>

Applying these principles, section 509's plain language and historical context demonstrate that it does not prohibit every fictionalization or falsity within a televised contest, but proscribes

<sup>101</sup> *Id.* § 509(a)(1)-(3)

<sup>102</sup> *Id.* § 509(4).

Though the FCC previously asserted little authority regarding the public interest, once section 509 was passed, it embraced a philosophy "that, in fulfilling its obligation to operate in the public interest," broadcasters have an obligation to protect the public from rigged quiz shows. *Commission Policy on Programming*, 20 PIKE & FISCHER RADIO REG. 1901, 1904 (1960). Indeed, the quiz show scandals prompted the FCC to create the Complaints and Compliance Division. *See generally* WILLIAM B. RAY, FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION (1990).

<sup>103</sup> The FCC's regulations now include 47 C.F.R. § 73.1216 (1986), which pertains to fairness in and disclosure of material terms of broadcast contests and games.

<sup>104</sup> After section 509's enactment, the Model Penal Code, somewhat embarrassingly, added provisions prohibiting rigging publicly exhibited contests. *See* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES: CRIMINAL PRACTICE SERIES 2 (1984); MODEL PENAL CODE AND COMMENTARIES § 224.9, at 337-38 (Official Draft and Revised Comments 1980).

<sup>105</sup> 47 U.S.C. § 509(a).

<sup>106</sup> *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 191-93 (1976) (defining scienter as "intent to deceive, manipulate, or defraud"); *see also* *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983) (embracing *Hochfelder's* scienter requirement of intent to deceive, manipulate, or defraud).

<sup>107</sup> *Ernst & Ernst*, 425 U.S. at 197-99 (holding that simple negligence cannot sustain civil action for damages under section 10(b) and Rule 10b-5).

<sup>108</sup> *See id.* at 199, 201.

only knowing, intentional deceptions. Simply, “[n]ot all conduct that strikes a court as . . . unethical . . . is a ‘scheme or artifice to defraud’” within the meaning of the statute.<sup>109</sup>

That a depiction was untrue or did deceive is not equivalent to the deception having been undertaken with the criminal intent to deceive. Rather, if footage or a setting is manufactured or altered, but the audience would reasonably understand it as artificial<sup>110</sup> or incidental,<sup>111</sup> it will not meet the required intent to deceive. For instance, shielding outdoor singers from rain and adding heaters and bright lights could falsely suggest that the weather is good; hair extensions and silicone cutlets could falsely present a starlet as prettier than she truly is; and excluding a competitor’s profanity-laced tantrum might falsely imply that he is civil or affable when he is not. While these employ some degree of deception, they do not seem intended to perpetrate a fraud on the audience. Indeed, these television conceits are commonly acknowledged by the public. Hence, none would meet the statute’s “intent to deceive.” Where, however, a producer uses a plant or ringer as a contestant, gives a competitor the answers to Jeopardy-style questions, or alters scores or vote totals, there seems to be an intent to deceive.

Furthermore, the construction of the statute suggests that “intent to deceive” is to be read in conjunction with subdivisions (1) through (3), i.e., that a deception be connected to the outcome of the contest. Artifice or secret assistance that does not affect the outcome might be unethical, but might not be illegal. As courts have noted in the context of other contests, “illegitimate conduct, however, is not the same thing as unlawful conduct.”<sup>112</sup> Accordingly, alterations of the story, presentation of individuals through editing, through insertion of voiceover, sponsorship information,<sup>113</sup> prizes awarded, and creation of settings claiming to

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<sup>109</sup> United States v. Pearl, 376 F.3d 1303, 1314 (11th Cir. 2004) (quoting United States v. Holzer, 816 F.2d 304, 309 (7th Cir. 1987)); see also Policy Regarding Character Qualifications in Broadcast Licensing, Conclusions Regarding Deceptive or Fraudulent Programming, 51 Fed. Reg. 3049, § III.B.4.c.iii (1986) (noting that not all deceptive or fraudulent broadcasting is treated the same).

<sup>110</sup> See Buckley v. McGraw-Hill, Inc., 782 F. Supp. 1042, 1049 (W.D. Pa. 1991) (holding that defamation is determined by considering “the understanding of the average reader”); Fram v. Yellow Cab Co., 380 F. Supp. 1314, 1329 (W.D. Pa. 1974) (assessing understanding in terms of the average viewer of the program for defamation purposes); *In re* RKO Gen. Inc. et al., 48 Fed. Reg. 30443 (1983) (interpreting “deceive” to require the broadcaster to intentionally act to knowingly deceive).

<sup>111</sup> Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (stating that in statute with criminal scienter, misrepresentation must be material).

<sup>112</sup> United States v. Chandler, 376 F.3d 1303, 1314 (11th Cir. 2004) (citing *Holzer*, 816 F.2d at 309).

<sup>113</sup> The Communications Act, 47 U.S.C. § 317(a)(1) (2006), provides the following with regard to broadcast sponsorship information:

be real, might be done with the intent to mislead viewers, but because they would not alter a portion of the outcome, they would likely fall outside the purview of section 509. This reading is consistent with the plain language of the statute and effectuates congressional intent as manifested by the history surrounding the enactment of 47 U.S.C. § 509.

## 2. Contests and Games

Section 509 applies to broadcast contests and games, but does not cover *every* contest broadcast. Rather, by its language, section 509 is limited in its applicability to contests of knowledge, skill, or chance. These categories are clarified by the rest of the statute, and only include skills that are of a primarily intellectual nature. It does not include other skills or talents, hence it does not cover athletic events, talent contests, or beauty pageants.

### a. Contests of Skill

Section 509's truncated introductory paragraph references "contests of knowledge, skill, or chance." Although this could imply that the statute covers contests of any type of skill, be they athletic, intellectual, or of some other sort,<sup>114</sup> reading the statute in its entirety demonstrates that this is not the case.

The statute's subsequent, more detailed sections uniformly refer to *only* "contests of intellectual skill," but never to unadorned "contests of skill" or contests of some other type of skill. For instance, subsection one refers to a "bona fide contest of intellectual skill"; subsection two to a "bona fide contest of intellectual knowledge or intellectual skill"; and subsection three to a "purportedly bona fide contest of intellectual knowledge, intellectual skill." Thus, section 509 covers contests of intellectual skill (or knowledge), but not contests of other types of skill, such as billiards or dancing. Indeed, even if "skill" were interpreted to encompass any skill, the enumerated prohibitions of the statute would still pertain to only contests of "intellectual skill." Thus, throwing, rigging, or predetermining the outcome of a contest of another (non-intellectual) type of skill is not forbidden under section 509.

The exclusion of non-intellectual skill contests is further supported by the historical context in which the statute was

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All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished . . .

<sup>114</sup> The comma separating "knowledge" and "skill" could distinguish contests of skill from contests of knowledge.

written. Indeed, a basic premise of statutory construction is that the language of a remedial statute is to be interpreted with regard to “the mischief to be remedied.”<sup>115</sup> For example, antifraud provisions of securities legislation are to be construed “to effectuate [their] remedial purposes.”<sup>116</sup> The incidents prompting legal regulation involved contests where contestants answered questions, solved puzzles, or used mental faculties in some way. In justifying the need for regulation, Congress concluded that “[c]ontests of skill and knowledge . . . were revealed as crass frauds.”<sup>117</sup> Notably, while point shaving and rigging scandals existed in basketball and professional wrestling, making them ripe for anti-fraud legislation, the statute did not include in this category contests involving non-intellectual or physical skills.

#### b. Designation of Contests

Although the statute designates which three types of contests it covers, it does not define them. That is, section 509 does not describe what constitutes a contest of chance or a contest of intellectual knowledge or intellectual skill. Although no court has had occasion to interpret section 509’s contest provision,<sup>118</sup> case law from analogous contexts defining and distinguishing contests and games is instructive.<sup>119</sup> This classification of intellectual contests is based on the classification of contests generally.

Case law in the sport and gaming contexts provides that contests are designated according to their dominant character. The law divides prize gaming—activities where a participant attempts to win a prize—into “gambling, sweepstakes, and contests.”<sup>120</sup> Gambling<sup>121</sup> is a game of chance (where winning is based on chance and) where an individual pays consideration to

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<sup>115</sup> *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 545 (1978) (quoting *Duparquet Co. v. Evans*, 297 U.S. 216, 221 (1936)).

<sup>116</sup> *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972) (citing *SEC v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943)). See also *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 849-51 (1975).

<sup>117</sup> Communications Act Amendments, H.R. REP. NO. 86-1800 (1960), as reprinted in 1960 U.S.C.C.A.N. 3516, 3533.

<sup>118</sup> To date, no district court, circuit court, or Supreme Court decision has addressed this statute.

<sup>119</sup> Both televised sports competitions and reality television programs involve individual competition, and are broadcasted via the same medium. Sports competitions, however, generally unfold in real-time.

<sup>120</sup> Anthony N. Cabot & Louis V. Csoka, Symposium, *Cross-Border Issues in Gaming, the Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197, 199 (2003).

<sup>121</sup> Historically, in defining areas of prohibited activity, legislatures have distinguished games of chance from games of skill. See R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 MISS. L.J. 565, 644-46, 679 (2002).

participate.<sup>122</sup> On the one hand, a sweepstakes, like gambling, is a game of chance. The participant, however, does *not* pay consideration to enter.<sup>123</sup> Hence, a sweepstakes is often called a “give-away.”<sup>124</sup> On the other hand, a contest, unlike gambling and sweepstakes, is a competitive activity where the winner is determined primarily by skill, rather than by chance.<sup>125</sup>

Of course, most games and contests include multiple elements ranging from chance to training to talent to intellect.<sup>126</sup> To categorize these various contests, courts employ a “predominance” or “dominant factor” test.<sup>127</sup> Under this test, if chance primarily determines the outcome or winner, the activity is deemed a game of chance; if skill primarily determines the outcome or winner, the activity is deemed a contest of skill,<sup>128</sup> if beauty primarily determines the winner, the activity is a contest of beauty. The designation of a contest by a certain factor does not exclude the influence of some other factors, but rather speaks to the game’s dominant character. Therefore, designating a contest as one of physical skill does not mean that intellectual ability plays no part in the outcome, but only that intellect is not the dominant

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<sup>122</sup> See *id.* at 644-46; Fed. Commc’n Comm’n v. Am. Broad. Co., 347 U.S. 284, 290 (1954); see, e.g., N.Y. PENAL LAW § 225.00(2) (2006) (defining gambling as “stak[ing] or risk[ing] of something of value upon the outcome of a contest of chance”); N.J. STAT. ANN. § 2C:37-1(b) (2006) (defining gambling as “staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor’s control or influence”); LA. REV. STAT. ANN. § 14:90(A)(1)(a) (2006) (“Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value.”).

<sup>123</sup> See, e.g., Pepsi Cola Bottling Co. v. Coca-Cola Bottling Co., 534 So. 2d 295, 296-97 (Ala. 1988); see also The Procter & Gamble Co., 49 Fed. Reg. 6366 (1984) (discussing FCC rules regarding sweepstakes and give-aways involving chance).

Incidental costs, such as the gas consumed to drive to the mail box or the price of a stamp to enter, are not deemed consideration. See *Cudd v. Aschenbrenner*, 377 P.2d 150 (Or. 1962).

<sup>124</sup> Cabot & Csoka, *supra* note 120, at 199, 202; see, e.g., GA. CODE ANN. § 16-12-20(4) (2006) (defining “lottery” as “any scheme or procedure whereby one or more prizes are distributed by chance among persons who have paid or promised consideration”).

Subject to multiple exceptions, the FCC can regulate and prohibit the broadcasting of lotteries “or similar scheme[s], offering prizes dependent in whole or in part upon lot or chance.” 18 U.S.C. § 1304 (2006).

<sup>125</sup> Cabot & Csoka, *supra* note 120, at 199; see generally *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961).

<sup>126</sup> Cabot & Csoka, *supra* note 120, at 202, 223.

<sup>127</sup> Whereas the continental or “English Rule” referenced games of “pure chance,” the “American Rule” spoke of games in which chance was a “dominant element.” Bridwell & Quinn, *supra* note 121, at 646-49 & nn. 285 & 290.

<sup>128</sup> Cabot & Csoka, *supra* note 120, at 222-23.

“L” games and “W” games anchor the ends of the chance/skill continuum. ARTHUR S. REBER, *THE NEW GAMBLER’S BIBLE* 6 (1996). In “L” games, winning is controlled entirely by chance (these are games of chance). Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 378-80 (2006). In “W” games, winning is impacted by knowledge and skill. REBER, *supra*, at 6. For a detailing of the continuum of gambling games of pure chance to skill and chance, see Hurt, *supra*, at 378 fig.1.

factor in the outcome.<sup>129</sup> For example, billiards contains some chance and knowledge of geometry, but is predominantly a game of skill. Consequently it is labeled a contest of skill,<sup>130</sup> rather than a game of chance or math.<sup>131</sup> Similarly, contests of primarily physical beauty (such as beauty pageants) that include intellectual or talent elements, such as interviewing skills or playing the violin, would not be deemed contests of skill or intellect as neither rises to the dominant factor in the outcome.<sup>132</sup>

### c. Prohibited Actions

Subdivisions one, two, and three of section 509 proscribe particular actions in particular contests. For the most part, the proscriptions recognize the nature of the contests involved and their unique potential for dishonesty. For instance, subdivision one bans programs from supplying to contestants secret assistance in order to influence the outcome. The type of aid that cannot be supplied to contestants, however, is not defined. Moreover, the aid need not result in the assisted contestant winning, but need only impact a portion of the outcome. Thus, a program could advance the assisted contestant, but not lead her to win, or it could impact the other contestants, causing someone to advance, and this aid would still not be permitted. Subdivision two prohibits an individual from causing a contestant to refrain “from using or displaying his knowledge or skill,” hence, from taking a dive or purposely losing. Although this bans an individual from using influence, threats, or bribery to *cause a contestant* to throw some portion of the contest, it does not forbid the contestant from actually doing so. Hence, the one who exerts the influence is covered by section 509 but the one who complies is not. Subdivision three is a catchall provision, prohibiting any artifice or

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<sup>129</sup> See Cabot & Csoka, *supra* note 120, at 202; see also N.Y. PENAL LAW § 225.00(1) (2006) (defining “contest of chance” as a “game . . . in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein”).

<sup>130</sup> Legislation and case law is sometimes intellectually incongruous with regard to certain games that include elements of both chance and skill. This is apparent in gambling. Hence, courts have split in their classification of poker and backgammon and the Nebraska Supreme Court has ruled that chess and checkers are games of chance. *Indoor Recreation Enters., Inc. v. Douglas*, 235 N.W.2d 398, 400-01 (Neb. 1975) (holding that checkers and chess are games of chance by implication). Legislatures deem some skill-based contests, such as poker, to be “gambling,” in order to eradicate them. Cabot & Csoka, *supra* note 120, at 201-02; see *Charnes v. Cent. City Opera House Ass’n*, 773 P.2d 546, 551 (Colo. 1989) (holding that poker is an illegal game of chance).

<sup>131</sup> *State v. Stroupe*, 76 S.E.2d 313, 316 (N.C. 1953). This court suggested the dominance of skill in billiards could be proven by sending an individual who has never played to a pool hall. *Id.* (citation omitted).

<sup>132</sup> See IND. CODE § 35-45-5-1(1) (2006) (expressly excluding from the definition of gambling any “bona fide contests of skill, speed, strength or endurance”); cf. TENN. CODE ANN. § 39-6-601 (repealed) (same).

schemes directed at prearranging or predetermining some part of the outcome.

### III. REALITY TELEVISION PROGRAMS AS CONTESTS

The prohibitions of section 509 presumptively apply to a number of reality programs. First, the statute covers televised contests, and a majority of reality television shows structure and bill themselves as contests. The shows have rules, winners, contestants, elimination methods, standards of judging, and prizes.<sup>133</sup> Even the contestants themselves deem the programs in which they participate to be games, and speak of winning. For example, *Survivor's* rules describe it as “a contest of elimination, with the decision of the elimination determined by the vote of the contestants.”<sup>134</sup> *Survivor's* castaways compete in “challenges,” vote to expel each other,<sup>135</sup> and, throughout the competition, repeatedly refer to “playing the game.” *The Amazing Race*, as its name designates, is a race; the prototypical contest. Teams must comply with rules to avoid disqualification and be the first to cross the finish line. On *American Idol* and *Dancing with the Stars*, contestants perform to garner votes from the viewing public or points from judges. *Project Runway* has extensive rules regarding what materials, tools, and books contestants can possess, and has weekly challenges and winners. Accordingly, many reality television contest programs are “contests” within the meaning of section 509.

Second, the contests encompassed by section 509 must be characterized by either a predominance of chance or a predominance of intellectual skill or knowledge. Although no reality television program is based predominantly on chance, most incorporate some measure of intellectual skill or knowledge. For instance, *America's Next Top Model* contestants must memorize advertising scripts, sometimes in a foreign language, and apply the basics of photographic lighting to their posing; *American Idol* singers must learn new songs. Nonetheless, though talents, such as dancing or singing, can be enhanced by intelligence or

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<sup>133</sup> See Terri Toles Patkin, *Individual and Cultural Identity of the World of Reality Television*, in *SURVIVOR LESSONS*, *supra* note 2, at 22 (stating that reality contests are “characterized by organized play, competition . . . [and] criteria for determining the winner”).

<sup>134</sup> Complaint at 5, *Seg, Inc. v. Stillman*, No. B151712, 2003 Cal. App. Unpub. LEXIS 5067 (Cal. Ct. App. May 22, 2003) [hereinafter *Complaint*], available at <http://www.sfgate.com/cgi-bin/document.cgi?file=/gate/archive/2001/02/06/stillmansuit.DTL>.

<sup>135</sup> Brief of Amici Curiae the Reporters Committee for Freedom of the Press and the California First Amendment Coalition at 11, *Seg, Inc. v. Stillman*, No. B151712, 2003 Cal. App. Unpub. LEXIS 5067 (Cal. Ct. App. May 22, 2003), available at <http://www.rcfp.org/news/documents/survivoren.html>.

impeded by the lack thereof (such as the dancer who cannot remember her choreography), neither these talents nor programs that highlight them are of a predominantly intellectual character.

A few programs, however, do rely primarily on intellectual ability or intellectual skill to determine the winner. As evidenced by its first few winners, *Survivor*, while including difficult physical challenges, is a show predominating in strategy and cleverness.<sup>136</sup> Competitors attempt to “outwit” their opponents, and use their knowledge of survivalism (such as making fire, shelter, and food out of what is found on the land), group relations, and memory.<sup>137</sup> *Amazing Race* contestants rely on ingenuity, strategy, language and map reading aptitudes, and some ability to decipher clues. Again, the sharper contestant often has an edge over the more physically fit one. *Project Runway* revolves around an understanding of clothing design principles, comprehension of fit and form, appreciation of fabric and consequent garment construction, expertise in pattern making, and knowledge of fashion trends.<sup>138</sup> Further underscoring this contest’s intellectual base knowledge is the program’s home at an academic institution, New York’s Parsons The New School for Design of The New School University. Consequently, the character of the contests on at least a few reality television programs falls within the purview of section 509. The chart on the following page lists the predominant characteristics of several popular reality television shows.

#### A. Reality Television’s Audience Deception

Section 509 criminalizes the intentional deception of the audience. Recently, both a *Time Magazine* story<sup>139</sup> and a Bravo<sup>140</sup> documentary, *The Reality of Reality*, revealed that reality television engages in a pattern of audience deception in the pursuit of ratings.<sup>141</sup> Although deception comes in a variety of forms, only some run afoul of section 509. Specifically, the deception must be executed with the intent to deceive the audience and be directed at the outcome.

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<sup>136</sup> Cf. HOERSCHELMANN, *supra* note 14, at 151 (“*Survivor* reproduces . . . many [elements of] quiz shows . . .”).

<sup>137</sup> In its advertising, *Survivor Australian Outback* used the tagline, “Surviving social politics, it’s what the game is about.” RYAN, *supra* note 50, at 76. Indeed, Richard Hatch, the inaugural winner, devised the first alliance and relied on strategy to win. *Id.* at 75.

<sup>138</sup> In fact, a person found with pattern books was disqualified. *Project Runway: Reap What You Sew* (Bravo television broadcast, Aug. 2, 2006).

This season, the first contestant “auf’d” had no academic training in fashion or design and immediately found herself out of her depth. *Project Runway: Wall to Wall Fashion* (Bravo television broadcast, July 12, 2006).

<sup>139</sup> Poniewozik & McDowell, *supra* note 44.

<sup>140</sup> Bravo, ironically, is the home of reality darling *Project Runway*.

<sup>141</sup> Bravotv.com, *The Reality of Reality* (Bravo television broadcast, Sept. 8-12, 2003).

### Characteristics of Contests: Intellectual Skill or Knowledge

	Contest indicia	Intellectual skill or knowledge	Other skills, attributes in contest	Elements of chance	Dominant character of contest
<i>SURVIVOR</i>	Prize money	Memory, building, survivalism, social understandings	Strength, fitness, fishing, building, swimming	Other players, conditions and challenges	Intellectual
<i>AMAZING RACE</i>	Race; prize money	Memory, language, deciphering clues, strategy	Fitness, speed, strength	Other players, conditions	Intellectual
<i>PROJECT RUNWAY</i>	Prize money, challenge winners	Pattern-making, knowledge of design trends, understanding garment construction	Sewing skills	Other designers, challenges	Intellectual
<i>TOP MODEL</i>	Prize of employment contract	Knowledge of lighting, script memory	Speaking, walking, posing, beauty	Other players, challenges	Beauty, posing
<i>AMERICAN IDOL</i>	Prize of recording contract	Memorizing lyrics, reading music	Perfect pitch, phrasing, voice	Other singers, song genres	Singing talent
<i>THE BACHELOR</i>	Eliminations	n/a	Subjectively determined by bachelor	Bachelor's taste, other women	n/a

#### 1. Editing

The most common complaint is that some footage is deceptive, because it is either wholly manufactured or selectively edited to misrepresent what actually occurred during the filming of a program. Segment producers or “story shapers” draft pre-production episode outlines<sup>142</sup> and design multi-act ‘storyboards’ before taping.<sup>143</sup> They then sort “through hundreds of hours of footage”<sup>144</sup> to stitch together scenes.<sup>145</sup> Consequently, “[q]uotes are manufactured, crushes and feuds constructed out of whole cloth . . . .”<sup>146</sup>

For example, Peter Lance details a number of instances where *Survivor*'s shots were shown out of order or discarded for dramatic effect.<sup>147</sup> *The Amazing Race* is “known to leave out vital

<sup>142</sup> James Hibberd, *WGA Tells Studios to Get Real*, TELEVISION WK., June 12, 2006, at 1.

<sup>143</sup> Poniewozik & McDowell, *supra* note 44, at 61.

<sup>144</sup> Hibberd, *supra* note 142.

<sup>145</sup> Poniewozik & McDowell, *supra* note 44, at 61.

<sup>146</sup> *Id.*

<sup>147</sup> PETER LANCE, *THE STINGRAY: THE LETHAL TACTICS OF THE SOLE SURVIVOR* 69, 81-82 (2000).

information,<sup>148</sup> and use false synchronization<sup>149</sup> and frankenbiting—a technique where dialogue from different conversations (or in response to different questions) is woven together.<sup>150</sup> Similarly, Sarah Kozer, the “runner-up” girlfriend on *Joe Millionaire*, claimed that producers added “sexual noises” and a woman’s voice to footage that suggested she fellated Joe in a field off-camera.<sup>151</sup> *Survivor*’s production team has even admitted that it reenacts scenes to make them “appear more ‘authentic,’”<sup>152</sup> uses stand-ins and stunt doubles,<sup>153</sup> re-enacts swimming races to pick up better overhead shots,<sup>154</sup> creates scenery, has put fish into empty traps set by hungry contestants, and selectively enforced challenges.<sup>155</sup>

Additionally, editing can unfairly portray contestants,<sup>156</sup> sometimes bordering on defamation.<sup>157</sup> For example, Ron Copsy, a contestant on the BBC’s *Castaway*, successfully sued its production company for libel.<sup>158</sup> Copsy showed that the production company edited scenes to make him appear “aggressive and temperamental”<sup>159</sup> in order to paint him “as a villain to boost ratings.”<sup>160</sup> Since that victory, several other cast members have claimed that they “were ‘damaged’ by ‘selective editing.’”<sup>161</sup>

As noted, only broadcast deceptions perpetrated with the criminal intent to deceive the audience violate section 509. Today’s viewers are more sophisticated than those of the quiz

<sup>148</sup> ADAM-TROY CASTRO, “MY OX IS BROKEN!”: ROADBLOCK, DETOURS, FAST FORWARDS, AND OTHER GREAT MOMENTS FROM TV’S *THE AMAZING RACE* 31 (2006).

<sup>149</sup> *Id.* at 32.

<sup>150</sup> *Id.* at 30. Poniewozik & McDowell, *supra* note 44, at 61.

<sup>151</sup> *Id.*; CASTRO, *supra* note 148, at 28.

<sup>152</sup> Patkin, *supra* note 133; HUFF, *supra* note 1, at 168.

<sup>153</sup> Tom Shales, *Reality Faked Out*, ELECTRONIC MEDIA, June 4, 2001, at 5.

<sup>154</sup> The premiere of the now-cancelled game show, *Weakest Link*, included a segment that was re-enacted by the contestants due to a technical problem in taping. This was noted during the closing credits. *Id.*

<sup>155</sup> See Patkin, *supra* note 133, at 20-21; HUFF, *supra* note 1, at 168.

<sup>156</sup> LANCE, *supra* note 147, at 18, 40-41, 182. For examples of personalities that the editing of *Survivor* has created or misrepresented, see Patkin, *supra* note 133, at 20.

<sup>157</sup> Defamation is a false remark, exposing one to public shame, hatred, or disgrace, communicated to others, that injures one’s reputation. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>158</sup> James Morrison, ‘Scarred’ Reality Show Survivors Queue to Sue TV Companies, INDEP., Aug. 18, 2002, at 9.

Copsy sued under Britain’s libel law, which places the burden on the defendant-speaker to prove that the statement was true, rather than placing the burden on the plaintiff to prove that the statement was false. *Id.*

<sup>159</sup> David Roy, *Bored of the Flies*, IRISH NEWS LTD., July 7, 2001, at 42.

<sup>160</sup> Morrison, *supra* note 158.

<sup>161</sup> *Id.*; see also Darby Green, *Almost Famous: Reality Television Participants as Limited-Purpose Public Figures*, 6 VAND. J. ENT. L. & PRAC. 94 (2003).

Most reality participants, however, who believe that “editing is deceptive have little recourse due to stack of waivers they sign in order to compete.” Hibberd, *supra* note 142.

show era and understand some of the artificiality and contrivance inherent in reality programs.<sup>162</sup> Presumably, viewers are aware that the aesthetics of television involve editing and reordering non-scripted footage.<sup>163</sup> Consequently, such editing would not be intended to perpetrate fraud on the audience, and, therefore, would not be deceptive within the meaning of section 509. Similarly, falsities, such as staged shots, re-enactments with stand-ins, and altering camera angles, would neither significantly misrepresent the events that occurred nor, more importantly, predetermine the outcome.<sup>164</sup> As a result, these falsities would also likely escape the reach of section 509.

Selective edits, however, might be problematic in programs where elimination is based on audience vote. Significant, inequitable deceptions in contestant presentation could impact the portrayal and resulting audience opinion of contestants. This could possibly impact votes, and, thus, some portion of a show's outcome. Almost no reality contest show that is predominantly one of intellectual skill or knowledge uses audience voting, and the programs that do base eliminations on audience votes are *not* contests of intellectual skill or knowledge.

A show such as *Last Comic Standing*, however, could properly be deemed a contest of intellectual knowledge or skill. While comedic talent is an obvious element, much of that talent is derived from quick wit, imagination, intelligently structuring jokes and routines, and learning comedic timing. Indeed, *Last Comic Standing* enforces several rules regarding assistance with joke writing, further suggesting its intellectual underpinning. Once the semi-finalists are announced, the program chooses its winner based solely on audience vote. Consequently, if editing were purposely deceptive so as to both mislead the audience and impact the outcome, it could be found impermissible under the statute.

## 2. Artifice or Scheme

The highest profile complaint about reality television's deception involves the highest profile reality program, *Survivor*. In 2003, Stacey Stillman, a contestant on the first installment of

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<sup>162</sup> See RYAN, *supra* note 50, at 72-73.

<sup>163</sup> One empirical study has suggested that audiences view reality television as moderately real. See generally Robin L. Nabi et al., *Reality-Based Television Programming and the Psychology of Its Appeal*, 5 MEDIA PSYCHOL. 303 (2003).

<sup>164</sup> Burnett has stated that reshoots "didn't change the outcome of the race." HUFF, *supra* note 1, at 168. CBS has added this "doesn't involve the contestants and doesn't in any way influence the outcome of any challenge, tribal council, or change the view of reality as it occurred." *Id.* at 169.

*Survivor*, sued CBS, Survivor Entertainment Group, and producer Mark Burnett<sup>165</sup> alleging that the show was rigged.<sup>166</sup> Stillman claimed that when Burnett learned that Rudy Boesch, another contestant, was going to be voted off, Burnett intervened and persuaded contestants to expel Stillman instead.<sup>167</sup> Allegedly, Burnett did so to retain the more demographic-friendly Boesch, the only remaining contestant over forty.<sup>168</sup> Additionally, Boesch had participated in Burnett's *Eco Challenge*, and Burnett believed that Boesch provided great sound bites.<sup>169</sup> According to Stillman's complaint, Burnett's "scheme resulted in the premature expulsion of the plaintiff-contestant, defrauding her and the viewing public, and altered the ultimate outcome of *Survivor*."<sup>170</sup> Indeed, while the winner receives \$1 million, the four runners-up receive \$4,500 each.<sup>171</sup>

Supposedly, before day nine's immunity challenge, Tagi tribe members were interviewed on camera regarding their forthcoming expulsion votes.<sup>172</sup> Four members—a majority—stated that they planned to vote off Boesch,<sup>173</sup> thus alerting producers that Boesch was in jeopardy.<sup>174</sup> When the Tagi tribe lost the challenge, thus necessitating that they vote a tribe member off the island, Burnett spoke privately with contestants Dirk Been and Sean Kenniff,<sup>175</sup> urging them to change their votes to Stillman and spare Boesch.<sup>176</sup> Burnett allegedly told Kenniff and Been that upcoming challenges would play toward Boesch's strengths, allowing him to contribute more, and that it would be in the best interest of the tribe to eliminate Stillman.<sup>177</sup> The next day, Kenniff and Been voted against Stillman. Kenniff and Been's on-camera justifications for voting off Stillman parroted those provided by

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<sup>165</sup> Burnett's production company immediately countersued Stillman for violating the confidentiality agreement that she signed in order to compete on the show. Shales, *supra* note 153, at 4; Dan Bischof, *Reporter Gets Caught up in 'Survivor' Litigation with CBS*, NEWS MEDIA & THE L., Summer 2001, at 23.

<sup>166</sup> *Seg, Inc. v. Stillman*, No. B151712, 2003 Cal. App. Unpub. LEXIS 5067 (Cal. Ct. App. May 22, 2003). The complaint alleges fraud, breach of contract and unlawful business practices, under California's Unfair Competition Law, and Business and Professional Code. Complaint, *supra* note 134, at 2, 12-13.

<sup>167</sup> *Suit Against CBS: "It's the Reality, Stupid,"* ELECTRONIC MEDIA, Feb. 12, 2001, at 8; Bischof, *supra* note 165, at 23.

<sup>168</sup> Peter Hartlaub, *One Angry 'Survivor,'; S.F. Attorney Sues Reality Show over Alleged Fraud*, S.F. CHRON., Feb 6, 2001, at A1; Complaint, *supra* note 134, at 9, 32.

<sup>169</sup> Complaint, *supra* note 134, at 9.

<sup>170</sup> *Id.* at 14. Stillman seeks to enjoin CBS from promoting *Survivor* as a bona fide contest. *Id.*

<sup>171</sup> Hartlaub, *supra* note 168, at A1.

<sup>172</sup> Complaint, *supra* note 134, at 8.

<sup>173</sup> *Id.* at 8-9.

<sup>174</sup> *Id.* at 8.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 8-9.

<sup>177</sup> *Id.* at 9.

Burnett: that “it was just for the team,”<sup>178</sup> and that they needed as much “athleticism and brute strength” as possible.<sup>179</sup>

Been later admitted to Stillman, as well as in a deposition,<sup>180</sup> that Burnett had persuaded him to vote off Stillman.<sup>181</sup> Been repeated this in a post-competition letter to Burnett<sup>182</sup> in which he complained of Burnett’s control over the contestants and outcome of a show purporting to be real.<sup>183</sup> Kenniff, too, disclosed that he changed his vote to Stillman due to Burnett’s urging.<sup>184</sup>

Other shows have also been accused of intervening in order to keep telegenic contestants on air. Bob Jaffe, former co-executive producer of UPN’s *Manhunt*, claimed that Paramount TV asked him to rig challenges and re-shoot scenes. In response, Jaffe quit.<sup>185</sup> Substantiating this claim, a judge on *Manhunt* disclosed that Paramount asked him to give an immunity card to a player.<sup>186</sup> A contestant also complained to the FCC that producers intervened in the game by physically preventing her from helping an injured team member and misrepresented her to her teammates as a “deserter.”<sup>187</sup> A judge on MTV’s *Surf Girls* accused producers of manipulating which contestants remained on the show.<sup>188</sup> *The Surf Girls* judge told *Transworld Surf* magazine that producers overruled his decision to vote “some annoying girl off” the program.<sup>189</sup> Considering that a Quicksilver representative had stated that “the real juice from the show won’t come from the action in the water, but from the interactions and conflict amongst

<sup>178</sup> *Id.* at 10.

<sup>179</sup> *Id.* (citing Kenniff). Burnett also persuaded Boesch to join the Tagi alliance. *Id.*

<sup>180</sup> Shales, *supra* note 153, at 5; Claire E. White, *Interview with Peter Lance*, WRITE NEWS, May 29, 2001, <http://www.writenews.com/features/lancewn.htm> (“The testimony lends support to Spillman’s [sic] lawsuit, which raises some very serious issues about how much control Burnett exerted over the outcome . . . .”). CBS sought to seal that deposition. *Seg, Inc. v. Stillman*, No. B151712 (Cal. App. Dep’t Super. Ct. May 17, 2001), *available at* <http://news.lp.findlaw.com/hdocs/docs/survivor/segstillman51701ord.pdf> (ruling that the deposition and accompanying exhibits (the letter) had not been properly sealed).

<sup>181</sup> Shales, *supra* note 153, at 10-11. Been stated that the production staff and producers “were involved in the game in such a manner that to me it seemed that maybe there was manipulation or . . . influence . . . . [T]hey were trying to program things in a certain way—and they had an idea of how the game should go, instead of just actually what happened.” *Id.* at 5.

<sup>182</sup> White, *supra* note 180; *Dirk Been Denies Manipulation of ‘Survivor’ Voting*, PRNEWSWIRE, May 25, 2001.

<sup>183</sup> Complaint, *supra* note 134, at 11.

<sup>184</sup> *Id.*

<sup>185</sup> Brenner, *supra* note 57, at 894-95.

<sup>186</sup> *Id.* at 897; *see also* Kate Fitzgerald, *So Many Realities, So Few Slots*, ADVER. AGE, May 12, 2003, at S6.

<sup>187</sup> Brenner, *supra* note 57, at 895-96.

<sup>188</sup> Steve Rogers, *‘Surf Girls’ Fixed? Judge Reportedly Claims His Decision Was Overruled by Show Producers*, REALITYTVWORLD.COM, May, 12, 2003, <http://www.realitytvworld.com/news/surf-girls-fixed-judge-reportedly-claims-his-decision-was-overruled-by-show-producers-1173.php>.

<sup>189</sup> *Id.*

the cast,” the judge presumed that producers wanted to keep the contestant in hopes of creating drama.

In a similar vein, conspiracy theorists contend that *Project Runway* contestant Wendy Pepper was a plant,<sup>190</sup> or at least was spared from eliminations so that she could continue her role as foil. A few television critics insist that *Project Runway* keeps contestants who “make [] for good TV,”<sup>191</sup> such as Pepper and *Project Runway* Season Two’s Santino, a “smack-talker and rabble-rouser (not to mention Tim Gunn impersonator).”<sup>192</sup> Having developed this on-camera persona, “there was no way the producers were going to behead their golden goose.”<sup>193</sup> Further, the *Project Runway* closing disclaimer that “[t]he judges considered both their scores and input from the producers and Bravo in reaching their elimination decisions”<sup>194</sup> evidences that producers, rather than judges, are clearly calling the shots and will “keep who’s gonna keep people watching.”<sup>195</sup>

When producers intervene to keep certain contestants on air, fail to enforce challenges for or against contestants, and decline to disqualify rule violators, it inures to the benefit of the protected contestant (and to the detriment of the player expelled prematurely). Additionally, since it alters which competitors advance, it impacts a portion of the contest’s outcome. Thus, it violates subdivision three as a scheme directed at predetermining some portion of the outcome. Consequently, if the allegations regarding *Survivor*, *Manhunt*, and *Project Runway*’s rescuing designated contestants from elimination are true, these constitute impermissible schemes directed at the outcome. Moreover, a split-second disclaimer that “producers were consulted” does not remedy this. First, the statute does not allow programs to exempt themselves from its coverage. Second, the content of the disclaimer does not note the nature of the producer consultation, and does not make clear that a show purporting to be real is indeed not, and that the eliminations purporting to be based on judging or votes are a function of casting. Therefore, even if it were possible to remove a program from the reach of the statute

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<sup>190</sup> TARA ARIANO, TELEVISION WITHOUT PITY: 752 THINGS WE LOVE TO HATE (AND HATE TO LOVE) ABOUT TV 207 (2006); Clarissa Cruz, *EW Truth Police: Project Runway*, ENT. WKLY, Feb. 17, 2006, at 67 (asserting that the designers who make good television are kept on show); see also Dalton Ross, *Something’s Auf*, ENTMT WKLY.COM, Aug. 8, 2006, <http://www.ew.com/ew/article/0,,1224423,00.html> (“[Wendy Pepper] was bitchy. She was cutthroat. And producers loved her for it.”).

<sup>191</sup> Cruz, *supra* note 190, at 67; Ross, *supra* note 190.

<sup>192</sup> Ross, *supra* note 190.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* A similar disclaimer referencing judging and elimination decisions runs at the conclusion of Bravo’s *Top Chef* (Bravo television broadcast 2006).

<sup>195</sup> Ross, *supra* note 190.

by making clear that it is not a bona fide contest, the disclaimers presently used do not do so.

Additionally, providing contestants with inside information, such as the nature of upcoming challenges, revelations of voting blocks, or other information that could give contestants an inside edge could be deemed part of an impermissible “scheme.”

### 3. Secret Assistance

Section 509 also prohibits programs of intellectual skill from providing secret assistance to contestants. Recently, an *American Idol* judge was accused of providing one contestant with such special assistance.

Corey Clark was a 2003 *American Idol* finalist who was disqualified<sup>196</sup> when the producers learned that he had misrepresented his criminal history for “failing to inform the show that he had been arrested after a domestic dispute with his sister.”<sup>197</sup> Clark emerged two years later to accuse Paula Abdul of providing him with off-camera tips and assistance<sup>198</sup> while he was a contestant.<sup>199</sup> According to Clark, Abdul helped him select songs, guided his look, chose a hair stylist, and even gave him her prescription cough syrup for his sore throat.<sup>200</sup>

A three and a half month internal investigation conducted by dual outside counsel<sup>201</sup> concluded that while Abdul had communicated with Clark, there was no evidence that Abdul had assisted (or been involved sexually with) Clark: “We have determined . . . that there is insufficient evidence that the communications between Corey Clark and Ms. Abdul in any way aided his performance. Further, we are confident that none of these communications had any impact on [the outcome of] the competition.”<sup>202</sup>

<sup>196</sup> HUFF, *supra* note 1, at 129.

<sup>197</sup> *An Illicit Affair on ‘American Idol’? Ex-Contestant Says He Got Coaching from, Had Relationship with, Judge Paula Abdul*, ABCNEWS.COM, May 3, 2005, <http://abcnews.go.com/Primetime/Entertainment/story?id=701186&page=1>.

<sup>198</sup> These allegations bore some resemblance to those underlying *Melody Music, Inc. v. Fed. Comm’n’s Comm’n*, 345 F.2d 730 (D.C. Cir. 1965). In *Melody Music*, the FCC refused to renew the license of a radio station operator who had secretly given assistance to contestants in answering questions on a number of television quiz shows that the licensee had produced. *Id.* at 731. Because the FCC had not denied licenses to other NBC licensees who had engaged in similar or worse conduct, the FCC’s license denial was held to be an illegal abuse of discretion. *Id.* at 732-33.

<sup>199</sup> HUFF, *supra* note 1, at 129-30.

<sup>200</sup> *An Illicit Affair on ‘American Idol’?*, *supra* note 197. Clark also produced a voicemail message, in which Abdul begged “him not to talk about her or publish his memoirs.” *Id.*

<sup>201</sup> The investigation required approximately six hundred hours of legal work and involved forty-three witnesses. HUFF, *supra* note 1, at 143.

<sup>202</sup> Press Release, FremantleMedia, N.A., Inc., Fox Broadcasting Company & 19 Entertainment Regarding Paula Abdul and Corey Clark (Aug. 2005), *available at* <http://www.etonline.com/celebrities/35764/index.html>.

Although *American Idol* does not fall within the statute because it is not a contest of intellectual skill or knowledge, the Clark incident underscores a critical aspect of the statutory prohibition: that assistance be of the type that influences the outcome.

As noted, providing a contestant with information such as the nature of upcoming challenges, planned votes, and the location of food, bestows on her a benefit unavailable to others. Where this information provides a palpable benefit, it can impact a portion of the contest's outcome. Thus, the *Survivor* situation could be construed as secret assistance in that Burnett disclosed to Been and Keniff the nature of future challenges. This knowledge may have aided either the Tagi tribe (as Burnett promised it would) or just Boesch. If Burnett, using inside information of contestant voting patterns, convinced Boesch to join an alliance, the information directly aided Boesch. In any event, the information gave some contestants an edge over others. Although the statute does not criminalize the behavior of a contestant by virtue of accepting aid, it places liability on anyone who knew of a statutory violation. Hence, the recipient of aid, if he understands it to be impermissible, will be liable if he does not report it.

#### 4. Causing Contestants to Refrain

Section 509 prohibits individuals from bribing, persuading, or otherwise forcing contestants to refrain "from using or displaying [their] knowledge or skill" in order to impact the outcome. In a few instances, reality contestants have promised gifts or a portion of their winnings to another contestant. For example, the winner of the fall 2006 installment of *Big Brother* discussed sharing his winnings with an unsuccessful contestant and *Survivor II*'s Tina and Colby had promised each other gifts should the other win.

Although a cash-equivalent might resemble a bribe, there is no evidence that any competitor refrained from using intellectual skills or purposely threw a contest as part of some cabal. Although viewers have opined that *Amazing Race* competitor Tara threw the race to get back at her partner and/or to assist the other team,<sup>203</sup> her doing so was not prohibited by section 509; rather, *causing* someone to throw the contest is prohibited. Indeed, in contests that do not involve objective correct answers, it is virtually impossible to determine that a knowledgeable competitor held back or simply lost. Further, most poor choices could be

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<sup>203</sup> See CASTRO, *supra* note 148, at 141-43.

defended as strategy, and it is unlikely that one contestant would sacrifice himself in hopes that another contestant, who also lacks control over the situation, wins.

B. *Applying 47 U.S.C. § 509 to Reality Television*

Some reality programs do not fall within section 509 because they are not contests with economically valuable prizes. Of programs that are contests,<sup>204</sup> several do not fall within section 509 because they do not rely predominantly on intellectual skill or knowledge as opposed to some other type of talent, skill, or attribute. The former excludes programs such as *The Bachelor* and *The Real World*. The latter excludes talent shows such as *American's Next Top Model*, *America's Got Talent*, *Dancing with the Stars*, and *American Idol*. It is not that these programs are devoid of intellect, but that intellectual skill or knowledge is not the primary factor in winning a number of these reality contest programs. Although many contests involve skills, those skills typically are not intellectual or knowledge-based. Rather, they emphasize predominantly athleticism and physical skill, or some other attribute such as walking, beauty, or singing. The more knowledgeable person will usually lose to the prettier, more aesthetically pleasing model or to the dimwitted singer unable to read music but with perfect pitch and an angelic voice. Because these programs do not fall within the purview of section 509, deceptions on these programs are permissible. This is true whether the deception is directed at predetermining the outcome or is incidental to it. Simply put, although these deceptions may be unethical, they are not illegal.

By contrast, shows such as *Survivor*, *Amazing Race*, and *Project Runway* exemplify contest programs in which intellectual skill or knowledge predominates and are encompassed by section 509. Therefore, certain artifice intended to deceive the audience is criminal. Nevertheless, not all deceptions are equal in the eyes of the statute. Instead, the deception must be analyzed in terms of whether it was intended to deceive and whether it was directed at the outcome.<sup>205</sup>

For the most part, editing and production issues (including re-stagings) are not intended to perpetrate fraud on the audience, and, therefore, do not meet section 509's requirement of a criminal intent to deceive. Producers<sup>206</sup> of reality contests of

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<sup>204</sup> No programs structured as contests are based primarily on chance.

<sup>205</sup> *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976) (Scienter refers to "a mental state embracing intent to deceive, manipulate, or defraud").

<sup>206</sup> As used here, "producer" includes networks and other entities connected with the

intellectual skill should be aware, however, that significantly misleading edits *could* impact the outcome where eliminations or scores are based on audience vote. Under such circumstances, misleading editing would be forbidden by the statute.

Certain untruths, however, would not be intended to perpetrate fraud on the audience. For instance, viewers understand that the aesthetics of television involve editing and reordering non-scripted footage. Consequently, such editing and reordering would not be deceptive within the meaning of section 509. Other falsities, such as staging shots to enhance visuals or re-enacting completed events with stand-ins would not substantially misrepresent the events. More importantly, these machinations would not impact or predetermine the outcome.<sup>207</sup> As a result, these would escape the reach of section 509.

Nonetheless, as previously noted, certain types of selective edits could implicate statutory proscriptions in programs where elimination is based on audience vote. Editing that leads to severe, inequitable deceptions in contestant presentation could impact the portrayal and resulting audience opinion of contestants. This could then impact votes, and, thus, affect some portion of a show's outcome. Nonetheless, presently, no reality contest show that is predominantly one of intellectual skill or knowledge uses audience voting; the only programs that base eliminations on audience votes are *not* contests of intellectual skill or knowledge. As a result, the former shows are immune from the statute, because they do not use audience voting; the latter are immune, because they do not involve predominantly intellectual skill.

Instances where producers intervene in judging decisions or influence voting to keep popular contestants on the program (or delay their departure) almost certainly violate the statute. Section 509 does not require that a scheme (or assistance) designate the winner or *final* outcome; the statute only requires it to impact an aspect of the outcome. Altering an elimination (thus altering the fates of two individuals) or immunizing a competitor until the finals, changes an aspect of the outcome. Producers chasing ratings might not appreciate this as an impermissible scheme, but may believe it merely gives the audience what it wants. Nonetheless, such actions, as with quiz shows of yesteryear, deceive

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broadcast.

<sup>207</sup> Burnett, on a panel at the Museum of Television & Radio, said he was "not embarrassed about" reshoots and asserted that the footage "didn't change the outcome of the race." HUFF, *supra* note 1, at 168. CBS added that "[w]hat Mark is talking about is nothing more than window dressing. It doesn't involve the contestants and doesn't in any way influence the outcome of any challenge, tribal counsel, or change the view of reality as it occurred." *Id.* at 169.

the viewing public. The public is led to believe that, aside from some aesthetic deceits, the events shown are actual events and that the people who win “challenges” have succeeded of their own accord by following the rules and being subjected to the same conditions as everyone else.

Supplying secret information or assistance to competitors could also violate the statutory proscriptions, provided it impacted the outcome. In some circumstances, assistance would be irrelevant to the outcome and, therefore, permissible. In others, however, such as the *Survivor* allegations, it could aid contestants or teams in advancing in the competition. As this assistance would clearly impact the contest’s outcome, it would be illegal.

#### CONCLUSION

Today’s reality contest programs, as exemplified by *Survivor*,<sup>208</sup> are unlike what audiences have seen in the past. These coadunations of contests and video verite are hyped as real yet are edited just as any scripted drama. Although most viewers likely understand that these shows are manipulated to some degree for dramatic effect, it is unlikely that they realize the extent of the producer control. Yet, it is reasonable for the audience to presume that something called “reality television” is in essence real. When reality programs that present themselves as bona fide contests of intellectual skill or knowledge cross the line from the acknowledged conceits of production practice to intervening in ways that impact the outcome of the contest, they cross the line from permissible artifice to illegal audience deception in violation of 47 U.S.C. § 509.

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<sup>208</sup> Interestingly, Mark Burnett avoids the connotations of the reality label, calling *Survivor* unscripted drama. *Id.* at 168.