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Keeping it Real: How the FCC Fights Fake Reality Shows with 47 U.S.C. 509

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I. INTRODUCTION

The early 2000s was an exciting time for primetime entertainment. A new breed of television program was sweeping the nation's airwaves that would forever change the American zeitgeist—reality television.¹

Survivor (2000) is widely credited as the series that popularized and defined the modern concept of reality television.² Commentators almost universally regard Mark Burnett's pioneering program as the first commercially successful reality game show, and the numbers back up their assertion. During the summer of 2000, an average of 28.3 million viewers tuned into CBS Wednesday nights to see which “survivor” would be the next to be “voted off” the island.³ The show's finale attracted an unprecedented 51.1 million viewers,⁴ greatly surpassing anyone's wildest expectations, beating out the World Series, NBA finals, NCAA men's basketball finals, and the Grammy Awards of that year.⁵ To put *Survivor*'s first season viewership in perspective, *Game of Thrones*, the most watched show during the summer of 2017, only attracted an average of 13.1 million viewers (less than

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¹ Note, “television” and “TV” are used interchangeably throughout this Article.

² See RICHARD M. HUFF, REALITY TELEVISION 11 (2006).

³ See Russ Britt, *CBS announces ‘Survivor’ sequels*, MARKET WATCH (Jan. 9, 2001, 1:47 PM), <https://www.marketwatch.com/story/cbs-sets-plans-for-survivor-sequels> [<http://perma.cc/M57N-VY8G>].

⁴ *Id.*

⁵ See, e.g., Bill Carter, *CBS Is Surprise Winner in Ratings Contest*, N.Y. TIMES (Aug. 24, 2000), <https://www.nytimes.com/2000/08/24/us/cbs-is-surprise-winner-in-ratings-contest.html> [<http://perma.cc/Q4TR-VSPG>].

half of *Survivor*'s average in 2000).⁶ In 2009, a likewise comparatively small 37.8 million viewers tuned into the inauguration of America's first black President (13 million fewer viewers than *Survivor*'s season one finale).⁷ *Survivor*'s astronomically high ratings resulted in a wave of advertising revenue that far exceeded CBS's wildest expectations, and the icing on the cake was that *Survivor* was actually significantly cheaper to create than CBS's traditional scripted shows, which required union writers, expensive sets, and highly-paid actors for each episode.⁸

Survivor's unexpected massive commercial success in the summer of 2000 spurred a race between the networks to capitalize on the emerging reality television market, and to create their own popular reality game shows. During the immediate months and years that followed, dozens of iconic shows that have since become a part of the American zeitgeist were born, including *Big Brother* (2000), *The Amazing Race* (2001), *American Idol* (2002), *The Bachelorette* (2003), and *The Apprentice* (2004).⁹

But an inevitable cynicism soon followed the birth of the genre that self-describes itself as "real." Allegations that reality shows are secretly "scripted," "staged," "rigged," or "creatively edited" are as old as the medium itself. Case in point, shortly after *Survivor*'s season one finale, Stacy Stillman, a contestant on the show, filed a lawsuit against CBS, and *Survivor*'s production company, alleging that the show's creator and executive producer, Mark Burnett, materially altered the outcome of the game by approaching two contestants and convincing them to vote her off the island instead of another contestant, who Burnett thought would be better for the show's ratings.¹⁰

According to Stillman's complaint, Burnett discovered, through the taped private interviews producers routinely had

⁶ See, e.g., Michael Schneider, *The 50 Most-Watched TV Shows of Summer 2017: Winners and Losers*, INDIEWIRE (Sept. 1, 2017, 6:01 PM), <http://www.indiewire.com/2017/09/most-watched-tv-show-summer-2017-game-of-thrones-americas-got-talent-1201872421/> [<http://perma.cc/FY4R-KX9W>].

⁷ See, e.g., *Nearly 37.8 Million Watch President Obama's Oath And Speech On TV*, NIELSON (Jan. 21, 2009), <http://www.nielsen.com/us/en/insights/news/2009/nearly-378-million-watch-president-obamas-oath-and-speech.html> [<http://perma.cc/ZXX2-4XCQ>].

⁸ See, e.g., Brian Stelter, *On Reality TV, Even 'Survivor' Looks Mortal*, N.Y. TIMES (Oct. 17, 2008), <https://www.nytimes.com/2008/10/19/business/media/19reality.html> [<http://perma.cc/5KR9-V9RL>].

⁹ See, e.g., Oliva Singh, *The 33 longest-running reality TV shows of all time*, INSIDER (July 17, 2018, 12:47 PM), <https://www.thisinsider.com/longest-running-reality-tv-shows-of-all-time-ranked-2017-12> [<http://perma.cc/G3AQ-CPMA>]; *The Apprentice*, IMDB, <https://www.imdb.com/title/tt0364782/> [<http://perma.cc/KDB4-96NB>].

¹⁰ See Compl. ¶¶ 29–35, *Stillman v. CBS Corp.*, No. 318613 (Cal. Super. Ct. 2001), 2001 WL 36013844 *consolidated with* *SEG, Inc. v. Stillman*, No. BC245328 (Cal. Super. Ct. 2001), 2001 WL 36012815.

with the contestants, that a majority of the players on her tribe were intending to vote out Rudy Boesch, the elderly, gruff, politically incorrect, and quippish former Navy SEAL who, hands-down, proved to be the audience favorite of the season.¹¹ Stillman alleged that Burnett foresaw that Rudy would be a popular player, and that it would benefit the show's ratings to keep him in the game longer. Rudy, who was holding his own at an impressive seventy-two-years-old, was the only remaining contestant over the age of forty,¹² and he, quite hilariously, butted heads with the younger, more carefree and liberal contestants. Much like a drill sergeant, Rudy was quick and savage with his politically incorrect quips, and gave the best sound bites of the season. But, while his rogue and abrasive behavior made for great television, *Survivor* is a social game and, not surprisingly, a majority of the tribe that he routinely offended wanted him eliminated by just the third episode.¹³

Stillman alleged that Burnett personally approached two contestants who were intending to vote Rudy out of the game, and told them that it would benefit their tribe to vote Stillman out instead of Rudy.¹⁴ Both contestants allegedly listened to Burnett's advice and cast their outcome-determinative votes for Stillman instead of Rudy.¹⁵ Stillman was eliminated, and Rudy went on to place third in the game, winning \$85,000 after he was eliminated during the season finale.¹⁶ Burnett's alleged instincts were also proven true, and Rudy became the audience favorite of the season.¹⁷ In fact, he was quite possibly the reason why so many people tuned in to watch.¹⁸

Stillman, an attorney by day, sued CBS and *Survivor*'s production company for fraud and unfair competition under California Business and Professions Code 17200.¹⁹ In her complaint, she also interestingly resurrected an archaic criminal statute, alleging that Burnett violated 47 U.S.C. 509,²⁰ a law that

¹¹ According to polls, about sixty-nine percent of viewers wanted to see the seventy-two year-old former Navy SEAL win the game. See Mike Holtzclaw, *Rudy Mania Not Just a Hampton Roads Thing*, DAILY PRESS (Aug. 23, 2000), <https://www.dailypress.com/news/dp-xpm-20000823-2000-08-23-0008230051-story.html> [<http://perma.cc/4K7V-2WNW>] ("On the show's official Web site, [sixty-nine] percent of the fans pick Rudy to win.").

¹² See Compl., *supra* note 10, ¶ 32.

¹³ See *id.* ¶ 31.

¹⁴ *Id.* ¶¶ 30–31.

¹⁵ *Id.* ¶ 33.

¹⁶ *Celebrity Welcome For 'Survivor' Rudy*, CBS NEWS (Aug. 27, 2000, 1:47 PM), <https://www.cbsnews.com/news/celebrity-welcome-for-survivor-rudy/> [<http://perma.cc/684T-SKBV>].

¹⁷ See, e.g., Holtzclaw, *supra* note 11.

¹⁸ See *id.*

¹⁹ Compl., *supra* note 10, ¶¶ 52–56.

²⁰ *Id.* ¶ 51.

makes it a *federal crime punishable by imprisonment*, to alter the outcome of a broadcast contest of intellectual knowledge, intellectual skill, or chance with the intent to deceive the viewing public.²¹ CBS responded to Stillman's complaint by countersuing her for five million dollars in liquidated damages for breaching her confidentiality agreement and for defamation.²² Their case settled out of court, and will be discussed in greater detail *infra*.²³

Stillman's *Survivor* controversy blew up during the first season of the very first modern American reality show ever, but as the reality television boom began to dominate network programming, more and more of these incidents soon surfaced. In the coming months and years, incidents surfaced far more egregious than Stillman's *Survivor* scandal, suggesting that "reality television" might not be as real as the self-describing name leads viewers to believe.

For example, only six months after Stillman filed her lawsuit against CBS, a former producer of UPN's *Manhunt*, a reality game show similar to *Survivor* that marooned contestants on a supposedly deserted island, blew the whistle on his former show.²⁴ The producer admitted his show actually shot several scenes in a park in Los Angeles, instead of on a deserted island, and scripted key moments of the series that were presented to viewers as spontaneous.²⁵ Then, just two months after that, *Talk or Walk* participant David Lerman filed a complaint with the Federal Communications Commission (FCC), alleging that producers talked his girlfriend into dumping him on the show to make his episode more "entertaining," allegedly causing him to attempt suicide shortly thereafter.²⁶

Stories of purportedly "real" reality shows being "scripted" or "rigged" seemed to surface almost as frequently as the new shows aired. Surprisingly, in 2003, NBC themselves even tried capitalizing on the scandals by creating a five-part documentary series on their Bravo network, *The Reality of Reality*, which

²¹ See 47 U.S.C. § 509 (2017).

²² See *SEG, Inc. v. Stillman*, No. B151712, 2003 WL 21197133, at *1 (Cal. Ct. App. 2003).

²³ See *infra* Part II.B.

²⁴ See, e.g., Mark Armstrong, *Ex-"Manhunt" Producer: It Was Rigged*, E! NEWS (Aug. 15, 2001, 6:00 PM), <http://www.eonline.com/news/42022/ex-manhunt-producer-it-was-rigged> [<http://perma.cc/4FFL-LUM2>].

²⁵ See *id.*

²⁶ See, e.g., Michael Starr, *This show's a killer . . . and it nearly killed me, says 'Walk or Talk' dating game player*, N.Y. POST (Oct. 18, 2001, 4:00 AM), <https://nypost.com/2001/10/18/this-shows-a-killer-and-it-nearly-killed-me-says-walk-or-talk-dating-game-player/> [<http://perma.cc/YQ6T-G6S2>].

exposed some of the behind-the-scenes deceptions.²⁷ The documentary confirmed much of what viewers had suspected: The “reality” in “reality TV” is often very loosely defined.

Commentators suggested that the FCC could try cracking down on fake reality shows using 47 U.S.C. 509, the archaic statute mentioned in Stillman’s *Survivor* complaint that makes it a federal crime—punishable by fine and imprisonment—to engage in any scheme to prearrange or predetermine “the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance . . . with the intent to deceive the listening or viewing public.”²⁸ Even though this federal law was originally intended to apply to traditional trivia “quiz shows” of the 1950s,²⁹ and had largely gone unenforced for decades, a plain reading of the statute suggested it likely could be applied to modern reality game shows.

In 2005, a law review article appeared in the *Cardozo Arts & Entertainment Law Journal*, providing the first academic analysis of the application of 47 U.S.C. 509 to modern reality shows.³⁰ That article provided an overview of the *Survivor* incident, a history of the statute, and then advocated for tougher FCC enforcement of reality television productions through the statute.

In 2007, another law review article appeared in the *Cardozo Arts & Entertainment Law Journal*, authored by Cardozo Entertainment Law faculty member Kimberlianne Podlas, giving a more in-depth analysis of the statute’s applicability to reality shows.³¹ The article analyzed the statute by identifying what specific production interference the author thought would likely be illegal under the law, compared to the type of production interference that would be permissible creative discretion.³² Professor Podlas also explained that not all reality shows are likely to be covered by the statute, since many would probably not fit under the deceptively narrowly-tailored language.³³ Professor Podlas based her opinions on a plain text reading of the statute since case law was completely non-existent at that time.

²⁷ See *Bravo Gets Real When the Cable Network Examines the Reality Television Genre in Its Five Part Documentary Series ‘The Reality of Reality’*, BRAVO http://www.bravotv.com/The_Reality_Of_Reality/about/ [<http://perma.cc/X794-36EE>] [hereinafter *Bravo Gets Real*].

²⁸ See 47 U.S.C. § 509 (2017).

²⁹ For a full discussion of the history of this statute, see *infra* Part II.

³⁰ See Tara Brenner, *A Quizzical Look into the Need for Reality Television Show Regulation*, 22 CARDOZO ARTS & ENT. L.J. 873, 874–76 (2005).

³¹ See Kimberlianne Podlas, *Primetime Crimes: Are Reality Television Programs “Illegal Contests” in Violation of Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 141, 141–42 (2007).

³² See *id.* at 141–43.

³³ See *id.* at 143.

Professor Podlas ultimately concluded that only reality shows that challenge contestants using *intellectual* skills, *intellectual* knowledge, or *chance* are covered.³⁴ She elaborated that a predominance test would likely be used to determine whether a complex reality show, where contestants compete using a variety of different skills (social, intellectual, and physical), would be predominately “intellectual” enough to qualify.³⁵ Professor Podlas gave the opinion that a game like *American Idol* is a contest of a predominately non-intellectual skill (singing) and therefore probably would not be covered by 47 U.S.C. 509.³⁶ However, she concluded a game like *Survivor*, which she believes is a game of predominately intellectual skills, might qualify.³⁷ Admittedly though, determining which modern reality contests are “intellectual” enough to subject networks to enforcement under the statute is not an easy task, and certainly reasonable minds can differ on what the word “intellectual” even means. Years after Professor Podlas’s article was published, a class action complaint against *American Idol* actually quoted her article and then proceeded to plead, contrary to what she actually argued, that singing was indeed an “intellectual skill” that qualified under the statute.³⁸ Unfortunately for our analysis, that lawsuit was dismissed on other grounds, saving the question of whether singing is intellectual enough for another day.³⁹

Since the publishing of Professor Podlas’s article in 2007, academic discussion on the application of 47 U.S.C. 509 to reality shows has been silent. Meanwhile, stories in the media relating to reality show deceptions have not shown any signs of abating. This leads us to the topic of this Article: All these years later, how did the FCC decide to interpret 47 U.S.C. 509?

While there has been some academic discussion on whether 47 U.S.C. 509 can be applied to reality shows, and some speculation on what shows and what conduct might be covered, there has been no academic discussion on the FCC’s actual enforcement of the statute. Make no mistake, while there is still a distinct lack of appellate-level case law on the subject, the FCC has indeed commenced many different 47 U.S.C. 509 investigations into broadcasters, and has even levied enforcement action against a few

³⁴ *Id.* at 156.

³⁵ *Id.* at 158–59, 170.

³⁶ *Id.* at 170.

³⁷ *Id.*

³⁸ See Compl. ¶ 1924, ¶ 1935 n.67, *Andrews v. Freemantle Media, Inc.*, No. 13 CIV 5174, (S.D.N.Y. 2013), 2013 WL 3819593.

³⁹ See *infra* Part IV.

of them.⁴⁰ Private lawsuits have also been attempted using the statute.⁴¹ So, just how accurate were the predictions made by Professor Podlas in her law review article regarding what shows and conduct would qualify under 47 U.S.C. 509?

To find out, this author filed a Freedom of Information Act request with the FCC and received back hundreds of internal documents from every 47 U.S.C. 509 investigation that has been conducted into allegedly rigged contests from year 2000 to December 2017—when the request was filed. The answers to the above questions were found within those documents.

This Article analyzes seventeen years of FCC investigations into broadcasters alleged to have rigged games and cheated their contestants out of prizes. It examines, in detail, some of these investigations in order to shed some light on how the FCC actually interprets and enforces 47 U.S.C. 509. The examined incidents range from a 2010 Fox game show that was pulled prior to airing after it was revealed producers might have given contestants questions and answers in advance, to an incident where a radio station employee and fifteen of her co-conspirators were arrested on felony charges after an on-air radio contest was rigged to allow the employee's friends to win cash prizes.⁴² This Article also looks at some private causes of action that aggrieved contestants have attempted after they were allegedly cheated out of prizes.

This Article concludes that the FCC predominately enforces 47 U.S.C. 509 against rigged radio contests, although the Commission sometimes investigates television shows for possible violations of the statute. Further, the FCC appears to narrowly interpret the “intellectual skill” element of the statute, as evidenced by the summarily dismissal of a complaint into an allegedly rigged comedy contest, on the basis that stand-up comedy is an “intellectual skill” for the purposes 47 U.S.C. 509. Lastly, this Article wraps up with an analysis of some of the private lawsuits that have been attempted by contestants, and concludes that 47 U.S.C. 509 does not create a private cause of action, and reality show contestants face uphill battles winning lawsuits on the claim that producers rigged the series and cheated them out of prize money.

⁴⁰ See *infra* Part III.

⁴¹ See *infra* Part IV.

⁴² See *infra* Part III.

II. HOW WE GOT HERE

A. The Quiz Show Scandals of the 1950s

The birth of 47 U.S.C. 509 can be traced to the quiz-show mania of the 1950s. CBS's *The \$64,000 Question* (1955) was the innovative show responsible for launching America's obsession with trivia game shows.⁴³ The format of *The \$64,000 Question* will appear familiar to modern audiences, and probably very unspectacular: A contestant on the show would choose a trivia category, be asked a question by the host, and money would be awarded for each correct answer.⁴⁴ While this game appears vanilla now, the format was pioneering entertainment then and audiences loved it. *The \$64,000 Question* beat every other Tuesday night program in the ratings for the 1955 to 1956 season, including *I Love Lucy*.⁴⁵

Envious of CBS's commercial success with *The \$64,000 Question*, other networks scrambled to develop their own trivia quiz shows. NBC's answer was *Twenty One*⁴⁶ (1956), hosted by the late Jack Berry.⁴⁷ *Twenty One* featured two contestants competing against one another by answering trivia questions.⁴⁸ For each round, the contestants would be told the category ahead of time and they would select a point-value, ranging from one to eleven, based on their knowledge of the subject matter.⁴⁹ If the contestant answered correctly, they would see the chosen point-value added to their score, but if they answered incorrectly, they would have the points subtracted.⁵⁰ The first contestant to reach twenty-one points won a cash prize, and also won the opportunity to compete against the next contestant.⁵¹ The loser received nothing, and was eliminated from further participation in the game.⁵² Thus, the same contestant could remain on the show knocking out challengers multiple episodes in a row.

⁴³ E.g., Thomas Doherty, *Quiz Show Scandals*, MUSEUM BROADCAST COMM., <http://www.museum.tv/eotv/quizshowsca.htm> [<http://perma.cc/VG7B-KDVK>].

⁴⁴ TIM BROOKS & EARLE MARSH, *THE COMPLETE DIRECTORY TO PRIME TIME NETWORK AND CABLE TV SHOWS 1946–PRESENT* 1251 (9th ed. 2007).

⁴⁵ See *id.* at 1681.

⁴⁶ Note, this Article uses “*Twenty One*,” consistent with episodes from the game show, but, sources diverge on whether it is “*Twenty-One*” or “*Twenty One*.”

⁴⁷ See Bridget Byrne, *NBC Revives Scandal-Plagued “Twenty-One,”* E! NEWS (Sept. 27, 1999), <https://www.eonline.com/news/38766/nbc-revives-scandal-plagued-twenty-one> [<http://perma.cc/5FRW-586U>].

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

Unfortunately for NBC, *Twenty One* entered the quiz-show game late and had to compete against close to twenty other game shows that crowded the airwaves competing for attention, and the first episodes of *Twenty One* proved to be quite dull. The show's questions turned out to be way too difficult for the contestants to answer correctly, resulting in contestants maintaining zero to zero tied scores for entire episodes, which made for lousy television.⁵³ After its anti-climactic premiere, *Twenty One's* sponsor, Geritol, told the producers that the program needed to improve or they would pull their support.⁵⁴

From that moment on, *Twenty One's* producers decided to take complete control over the program and manipulate it to achieve better ratings.⁵⁵ They first decided to approach the game like they were creating a traditional scripted program, casting archetypical contestants whose characters could be easily identified by audiences, selecting their wardrobe and hairstyle, and even coaching them on how to behave.⁵⁶ Dan Enright, the show's creator, recalls micromanaging contestants to the point of even telling them to "pat" the sweat off their eyebrow, instead of wiping it.⁵⁷

One of *Twenty One's* coached contestants was Herb Stempel. In real life, Herb was a married man who was doing quite well financially and had a high IQ. However, the show wanted to portray him as an underdog—a penniless G.I. who was working his way through college. Dan Enright personally selected a cheap oversized double-breasted suit for Herb, a blue shirt with a frayed collar, and a cheap watch that ticked so loudly that the studio's microphones could pick it up in order to build suspense.⁵⁸ He was given a "square" haircut, glasses, and the direction from Enright to act meek and timid while taping, and to always politely call the host "Mr. Berry" instead of "Jack" like the other contestants.⁵⁹

⁵³ E.g., Walter Karp, *The Quiz-Show Scandal*, AM. HERITAGE (May 1989), <https://www.americanheritage.com/content/quiz-show-scandal> [http://perma.cc/Z28Y-R8LF].

⁵⁴ See, e.g., Katie Venanzi, *An Examination of Television Quiz Show Scandals of the 1950s*, THE BEAT BEGINS: AMERICA IN THE 1950S (1997), <http://www.plosin.com/beatbegins/projects/venanzi.html> [http://perma.cc/H7YQ-KAG2].

⁵⁵ See, e.g., Myrna Oliver, *Dan Enright, Key Figure in '50s Game Show Scandals, Dies at 74*, L.A. TIMES (May 24, 1992), http://articles.latimes.com/1992-05-24/news/mn-385_1_game-show [http://perma.cc/EJ8W-VY6S].

⁵⁶ See, e.g., *id.* (documenting how the producers of *Twenty One* "worked to make [Herb Stempel] fit into their idealized image").

⁵⁷ See *id.*

⁵⁸ See, e.g., KENT ANDERSON, TELEVISION FRAUD: THE HISTORY AND IMPLICATIONS OF THE QUIZ SHOW SCANDALS 49 (1978).

⁵⁹ See Karp, *supra* note 53.

The producers also gave Herb the questions and answers in advance.⁶⁰ They completely choreographed his appearances, telling him when to sigh, stutter, or pause before answering to create maximum tension.⁶¹ They set him up to win week after week, and this metaphorical David's prize money eventually swelled to over \$50,000 as he easily beat his Goliath opponents.⁶²

The plan worked—America fell in love with Herb. The underdog resonated with middle America, and audiences saw him as a relatable hometown boy who was finally getting his big break. Each week, the country would tune in to the show to witness Herb knock out another elite competitor. Audiences loved watching a meek, average Joe like Herb beat snooty competitors at their own intellectual game, and ratings for the show soared.⁶³

Unfortunately for Herb, the producers could not just let him keep winning forever. Eventually, the show decided that another contestant had to beat him, and *Twenty One's* producers set up a new contestant, described as a “telegenic natural,” with the answers in advance and told Herb it was time to gracefully lose, take his winnings, and run.⁶⁴ However, nobody at *Twenty One* counted on just how bitter Herb would be about the game being thrown in the opposite direction. Even after the network allowed him to cheat for weeks, handing him an inordinate amount of prize money and fame in the process, Herb ended up blowing the whistle.⁶⁵

When the news broke, not only were NBC's viewers outraged, the conscious of a much more innocent and honest country was shocked.⁶⁶ The 1950s were apparently a time of much stronger morals, and folks could not understand how a show that presented itself in such an “official” manner could be rigged, and the country demanded accountability.⁶⁷ A New York Grand Jury convened and investigated the show but ended up concluding that the producers had not broken any laws.⁶⁸ It turned out, while *Twenty One's* tactics of completely choreographing a supposedly bona fide game show might have been dishonest, there was simply nothing on the books that made the conduct illegal. This inflamed the country even more, and Congress held hearings on the matter, subpoenaing a total of fifty-one witnesses; including

⁶⁰ See *id.*

⁶¹ See Oliver, *supra* note 55.

⁶² See ANDERSON, *supra* note 58, at 50.

⁶³ See Brenner, *supra* note 30, at 882.

⁶⁴ See *id.* at 883.

⁶⁵ See *id.*

⁶⁶ See *id.* at 884.

⁶⁷ See *id.*

⁶⁸ See *id.* at 884–85.

network executives, producers, sponsors, and former quiz-show contestants from a variety of programs.⁶⁹ During the hearings, it came to light that production interference in these quiz-shows was actually fairly common in the industry, and the scandals were not just limited to *Twenty One*.⁷⁰ For the first time, America had the revelation that a lot of what was being presented as “real” on television was actually tweaked by producers to achieve better ratings.

The congressional subcommittee charged with investigating these scandals found a “complex pattern of calculated deception of the listening and viewing audience. Contests of skill and knowledge whose widespread audience appeal rested on the carefully nurtured illusion that they were honestly conducted were revealed as crass frauds.”⁷¹

Congress responded to these “crass frauds” by passing 47 U.S.C. 509, a statute that makes it a federal crime for broadcast shows falling under FCC jurisdiction to “engage in any artifice or scheme for the purpose of prearranging or predetermining . . . the outcome of a purportedly bona fide contest of intellectual knowledge, intellectual skill, or chance . . . with [the] intent to deceive the listening or viewing public.”⁷² Anyone found to violate the law may be subjected to criminal prosecution in their individual capacity and may be “fined not more than \$10,000 or imprisoned not more than one year, or both.”⁷³

Immediately after the law passed, there was little occasion for the FCC to actually enforce it. The fallout from the quiz-show scandals was enough to cause the networks to self-regulate.⁷⁴ They were not going to make the mistake that inflamed the country and led to Congressional hearings more than once—at least not until memories faded, America’s conscious scarred over, and reality television came along, over four and a half decades later.

B. Reality TV’s Birth and Subsequent Scandals of the 2000s

Fast forward to 2000. If you were old enough to be alive during the 1950s quiz-show scandals, the reality television boom

⁶⁹ See H.R. REP. NO. 86-1800, at 3533 (1960).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 47 U.S.C. § 509(a) (2017); see also Brenner, *supra* note 30, at 887.

⁷³ 47 U.S.C. § 509(c) (2017).

⁷⁴ The Standards and Practices Department at each network is responsible for self-regulating network shows, ensuring that gameshows follow FCC regulations. See generally *Standards and Practices*, MUSEUM BROADCAST COMM., <https://museum.tv/eotv/standardsand.htm> [<http://perma.cc/ATC9-AVQQ>]. For a discussion on how 47 U.S.C. 509 has influenced contestant agreements see *infra* Part IV.

of the early 2000s and their subsequent scandals might have seemed like déjà vu. Yes, America's favorite *Survivor*, Rudy Boesch, was very much like *Twenty One's* Herb Stempel. Both men were former servicemen and underdogs who captured the nation's attention out-playing much stronger contestants at their own games.⁷⁵ Herb was the meek small-town boy, penniless and humble, working his way through college and beating elite university professors at intellectual trivia games. Rudy was a seventy-two-year-old former Navy SEAL stranded on a deserted island, surrounded by a liberal group of college kids in their physical prime.⁷⁶ Audiences loved tuning in and watching this stoic representative of "The Greatest Generation" out-perform contestants young enough to be his grandchildren, while making Clint Eastwood worthy quips along the way.

To fully understand the scandal that occurred during the first season of *Survivor*, some background about the game might be helpful. The series maroons a group of strangers together on a deserted island with minimal supplies. The contestants are divided into "tribes," which compete against each other in "immunity challenges." The tribe that loses an immunity challenge is then forced to go to "tribal counsel," where the members of the tribe must vote to eliminate one of their own teammates. Around midway through the game, the tribes merge together into a single tribe, where the contestants then compete against each other in "individual immunity challenges." When only two contestants remain, a "jury" of former contestants convenes to vote for the "sole survivor," who wins a million-dollar cash prize. The motto of *Survivor* is "Outwit, Outlast, Outplay," a testament to a long and very complex game where contestants compete against each other physically, mentally, and socially.⁷⁷

Survivor proved to be a very successful series for CBS. Nineteen years after the first season premiere, the game is still going strong, and CBS has just aired *Survivor's* thirty-eighth season.⁷⁸ According to lifelong host Jeff Probst, production of the

⁷⁵ See *supra* note 11 and accompanying text. See also *supra* notes 56–58 and accompanying text.

⁷⁶ See Lauren Hunter, *Sole 'Survivor': Richard masterminds \$1 million win*, CNN (Aug. 24, 2000), <http://www.cnn.com/2000/fyi/news/08/24/new.survivor/index.html> [<http://perma.cc/T8YV-SQBK>].

⁷⁷ For a full explanation of the rules of the game, see generally, Andy Dehnart, *Survivor rules: the contract that details pay, tie-breakers, prohibited behavior and more*, REALITY BLURRED (May 31, 2010, 8:00 PM), <https://www.realityblurred.com/realitytv/2010/05/survivor-rule-book/> [<http://perma.cc/ULT6-BHPM>].

⁷⁸ Two seasons are aired a year. See Stelter, *supra* note 8.

series now runs like a well-oiled machine.⁷⁹ Being one of the highest rated shows on CBS, the series now receives a generous budget from the network.⁸⁰ The production also now has the luxury of a full-time crew consisting of over 400 employees that are present at any given time on location during taping.⁸¹ *Survivor* also now efficiently films two seasons back-to-back using the same crew and island (as soon as one group of contestants leaves, another group is flown in, thereby reducing costs).⁸² There is now even an entire team of crewmembers, called the “Dream Team,” whose sole job it is to stand-in as the contestants to “test” the challenges.⁸³ The crew is very experienced, with staff frequently returning for multiple contracts. Just about every problem that could be experienced by the series has been experienced, and the game is now as close to running itself as any game could possibly be.

However, production on the very first season of the show did not run nearly as smoothly. Mark Burnett and his skeletal team of TV pioneers were blazing new trails when they began filming sixteen contestants on a deserted island in the middle of nowhere, and they faced a lot of uncertainty. Their budget was much smaller than it is now, allowing only for a bare bones crew. Lifelong host Jeff Probst admits, “There was an ‘amateurish’ feeling to our early seasons, especially season one . . . we had cameras in the shots, we didn’t always have great audio—but it was really compelling because it was so raw. Our show is now much more polished”⁸⁴ During the first season, producers crudely created very simple challenges without much support (one challenge was literally just seeing which contestant could hold onto a totem pole in the ground the longest; another was seeing who could eat the most disgusting bugs found on the island), as opposed to the complex obstacle courses and puzzles featured in current seasons, designed by a fully-staffed “Challenge Department,” and constructed

⁷⁹ See Andy Dehnart, *How Survivor is produced: Jeff Probst reveals many behind-the-scenes details*, REALITY BLURRED (Sept. 22, 2018, 11:40 AM), <https://www.realityblurred.com/realitytv/2018/09/jeff-probst-survivor-producers-guide-interview/> [http://perma.cc/3L6Q-EVS4].

⁸⁰ See Stelter, *supra* note 8.

⁸¹ See Lash Augsburger, *Working Crew on Survivor TV Show: pt 2- Life on Crew*, LASH WORLD TOUR (Oct. 3, 2012), <http://www.lashworldtour.com/2012/10/crew-survivor-tv-show-pt-2-life-crew.html> [http://perma.cc/9SQH-R3VM].

⁸² See Dalton Ross, *Jeff Probst wants ‘Survivor’ to stay in Fiji permanently*, ENT. WKLY. (Sept. 12, 2017), <https://ew.com/tv/2017/09/12/survivor-jeff-probst-fiji/> [http://perma.cc/4CWD-4D75].

⁸³ See Dalton Ross, *Survivor: How a teen came up with the first challenge twist of season 35*, ENT. WKLY. (Sept. 21, 2017, 10:00 AM), <http://ew.com/tv/2017/09/21/survivor-heroes-healers-hustlers-challenge/> [http://perma.cc/9VPD-UFWN].

⁸⁴ See Andy Dehnart, *What we learned from Jeff Probst’s AMA*, REALITY BLURRED (May 20, 2014, 2:27 PM), <https://www.realityblurred.com/realitytv/2014/05/survivor-cagayan-probst-ama/> [http://perma.cc/WE85-TPWM].

by an experienced Art Department.⁸⁵ When problems and issues arose during the first season, the production did not have any experience or much support to fall back on. They just had to wing decisions and hope the show turned out okay.

In a declaration in Stillman's lawsuit, Mark Burnett described his first season experience as "sailing in 'uncharted waters.'"⁸⁶ Back then, Burnett, the self-made businessman (who not long before was making a living selling t-shirts at a space he rented in Venice Beach) was not the established game show titan that he is today, and CBS green-lighting *Survivor* was his shot at creating something new and big.⁸⁷ Needless to say, he and his producers were a little on edge about how this new format of a show would be received.

The first season cast a variety of personalities and demographics in an attempt to appeal to wide audiences, including three senior citizens: Sonja Christopher (sixty-three-years-old), B.B. Anderson (sixty-four-years-old), and former Navy SEAL Rudy Boesch (seventy-two-years-old).⁸⁸ One of the now self-evident *Survivor* truths learned that season is that (for reasons beyond the scope of this Article) the older contestants often get voted out first by the predominately younger players. That season, Sonja went first, followed by B.B. the next episode.⁸⁹ According to Stillman's lawsuit, the quippish seventy-two-year-old war-hero Rudy was about to be sent home next before Mark Burnett stepped in and saved the last remaining contestant over thirty-eight.⁹⁰

In her complaint, Stillman speculated on information and belief about Burnett's motivation to save Rudy. She alleged that Burnett was afraid that losing Rudy would cause a "critical demographic" of older viewers to tune out.⁹¹ Stillman also speculated that Burnett had the instincts to know that Rudy would be a popular contestant who had the potential for anchoring the show, explaining that he was the type of contestant

⁸⁵ See *Production*, SURVIVOR WIKI (last updated Dec. 2018), <https://survivor.fandom.com/wiki/Production> [http://perma.cc/BF9M-N56B].

⁸⁶ Decl. of Mark Burnett in Opp'n to Def.'s Special Mot. to Strike Compl. ¶ 2, SEG Inc. v. Stillman, No. BC 245328 (Cal. Ct. App. 2003), 2001 WL 36016692.

⁸⁷ See Carmine Gallo, *From T-Shirt Salesman To Mega Producer: Mark Burnett Shares Five Keys For Personal Transformation*, FORBES (Feb. 27, 2014), <https://www.forbes.com/sites/carminegallo/2014/02/27/from-t-shirt-salesman-to-mega-producer-mark-burnett-shares-five-keys-for-personal-transformation-2/#155abb5a2b85> [http://perma.cc/64BL-8F49].

⁸⁸ See Compl., *supra* note 10, ¶ 32.

⁸⁹ See *id.*

⁹⁰ *Id.* ¶ 31.

⁹¹ *Id.* ¶ 32.

who gave sound-bites that “played well to a television audience.”⁹² Burnett knew ahead of time how all the contestants would likely vote at tribal council, since he had access to all of their privately recorded interviews where they revealed their thoughts about the game and who they wanted to vote out.⁹³ Contestant Dirk Been recalled that the producers “knew everything that was going on. [Burnett] basically knew what as individuals each one of us was thinking.”⁹⁴

Stillman explained that after her tribe lost the immunity challenge in the third episode, Burnett and a co-producer pulled contestant Dirk Been aside to have a private chat with him.⁹⁵ Dirk would later reveal in a deposition that, prior to this conversation, he was leaning toward voting Rudy off the island, and not Stillman.⁹⁶ Dirk explained, however, that Burnett talked strategy with him, and told him his best tactic was “to form an alliance against [Stillman] and vote [Stillman] off because Rudy . . . is the guy that you will need in the future.”⁹⁷ Dirk explained in his deposition that he took Burnett’s advice very seriously because Burnett was the executive producer of the show and had access to far more information than he did.⁹⁸

Stillman alleged that after his conversation with Dirk, Burnett immediately approached another contestant, Sean Kenniff.⁹⁹ Stillman alleged that prior to talking to Burnett, Sean was also planning to cast his vote for Rudy and not her.¹⁰⁰ Stillman alleged that Burnett likewise suggested to Sean that he should vote her off the island instead of Rudy.¹⁰¹

In his deposition, Dirk recalled speaking to Sean shortly after they had their conversations with Burnett. He testified that Sean confirmed to him that Burnett told him he should keep Rudy in the game and vote out Stillman instead.¹⁰² Dirk testified, “At that point me and Sean had pretty much decided that we were going to vote for [Stillman] based off the knowledge that—what we believed [Burnett] had told us.”¹⁰³

⁹² *Id.*

⁹³ *See id.* ¶ 28.

⁹⁴ Dep. of Dirk Henry Been at 41:20–42:6, SEG, Inc. v. Stillman, No. BC 245328 (Cal. Ct. App. 2003).

⁹⁵ *See* Compl., *supra* note 10, ¶¶ 29–30.

⁹⁶ *See* Dep. of Dirk Henry Been, *supra* note 94, at 44:5–11.

⁹⁷ *See id.* at 32:23–33:9.

⁹⁸ *Id.* at 42:7–18.

⁹⁹ *See* Compl., *supra* note 10, ¶ 30.

¹⁰⁰ *See id.* ¶ 31.

¹⁰¹ *See id.*

¹⁰² Dep. of Dirk Henry Been, *supra* note 94, at 39:23–40:7.

¹⁰³ *Id.* at 41:9–13.

That night, Sean and Dirk both cast their outcome-determinative votes for Stillman instead of Rudy.¹⁰⁴ Stillman went home, and Rudy remained on the island, eventually placing third, winning \$85,000 after being eliminated in the finale.¹⁰⁵

As luck would have it, Dirk was voted off the island just a few days later, and sent to the same hotel as Stillman and the other contestants who had been voted out. The ousted contestants got together one night to go out for dinner.¹⁰⁶ It was then that Dirk decided to tell Stillman about Burnett's conversation with him and Sean on the beach.¹⁰⁷ Dirk later wrote an angry letter to Burnett where he decried that he felt "cheap and used."¹⁰⁸

During the subsequent lawsuit, Dirk would prove to be Stillman's star witness, giving a seemingly candid deposition that remained remarkably consistent during cross-examination by CBS's lawyers, and confirmed just about all of Stillman's allegations.¹⁰⁹ Kenniff, conversely, would become CBS's star witness, when he, along with Burnett, denied Stillman and Dirk's version of events in signed declarations filed with the court.¹¹⁰ The matter quickly turned into a he-said/she-said situation.

The case's discovery period concluded with Stillman and Dirk alleging one version of events, and Burnett and Sean alleging another. Each side actually agreed on most of the facts, but what they disagreed about was what Burnett's intent was when he met with the two contestants on the beach.¹¹¹ Burnett and Sean both conceded that the conversations on the beach took place, but maintained that the conversations were routine, and Burnett was not specifically trying to "save" Rudy or "target" Stillman.¹¹² Burnett and Sean both explained that the producers routinely spoke to the contestants on the beach and raised hypothetical voting scenarios with them in order to get them to consider alternative strategies to keep the game more alive, and

¹⁰⁴ See Compl., *supra* note 10, ¶ 33.

¹⁰⁵ See *Big Paychecks for 'Survivor' Cast Members*, ABC NEWS (Aug. 25, 2000), <https://abcnews.go.com/Entertainment/story?id=116137&page=1> [<http://perma.cc/DP2K-EVET>].

¹⁰⁶ Dep. of Dirk Henry Been, *supra* note 94, at 28:22–29:3.

¹⁰⁷ *Id.* at 29:19–30:13.

¹⁰⁸ *Id.* at 57:3–18.

¹⁰⁹ *Id.* at 44:5–25.

¹¹⁰ See Decl. of Mark Burnett in Opp'n to Def. Stacey E. Stillman's Special Mot. to Strike Compl., *supra* note 86, ¶¶ 10–13; Decl. of Sean Kenniff ¶¶ 13–17, *SEG, Inc. v. Stillman*, No. BC 245328 (Cal. Ct. App. 2003), 2001 WL 36016693.

¹¹¹ Nobody denies that Burnett approached the two contestants on the beach and discussed strategy with them. See Dec. of Mark Burnett in Opp'n to Def. Stacey E. Stillman's Special Mot. to Strike Compl., *supra* note 86, ¶ 12; Dec. of Sean Kenniff, *supra* note 110, ¶ 14.

¹¹² See Dec. of Mark Burnett in Opp'n to Def. Stacy E. Stillman's Special Mot. to Strike Compl., *supra* note 86; see also Dec. of Sean Kenniff, *supra* note 110, ¶ 12.

to also get the contestants to open up more for their on-camera interviews.¹¹³ Sean pointed out that Burnett always made it a habit to conclude conversations where he discussed voting strategy with contestants by saying “vote your conscious,” which signaled to him that Burnett wanted to make it clear that the decision of who to vote for was ultimately his alone.¹¹⁴ Burnett defended these strategy talks with his contestants by pointing out that all the contestants signed a contract that granted the production virtually unlimited discretion on how the game would be ran.¹¹⁵ He also explained that in his business judgment these talks were necessary to get contestants to open up and talk candidly about their planned strategies to facilitate better production of the series.¹¹⁶

Stillman’s fraud case soon came down to the factual question of whether Burnett had deceptive intent when he spoke with the two contestants on the beach. It will forever be a mystery which side a jury would have taken, since the parties entered into a confidential settlement agreement prior to trial.¹¹⁷ The FCC also never investigated the show for possible 47 U.S.C. 509 violations.

After this in-depth discussion of the first season of *Survivor*, it is only fair to point out that, quite impressively, no other allegations of deception regarding the series have ever come out in thirty-eight seasons. To the contrary, contestants and series insiders alike frequently comment that the series now takes production interference and the show’s integrity very seriously.¹¹⁸ Stillman’s early incident quite possibly shaped *Survivor* into one of the most real reality shows presently on air, and the scandals that soon began to surface throughout the reality television world made her complaint seem very tame in comparison.

¹¹³ See Dec. of Mark Burnett in Opp’n to Def. Stacy E. Stillman’s Special Mot. to Strike Compl., *supra* note 86, ¶ 9.

¹¹⁴ See Dec. of Sean Kenniff, *supra* note 110, ¶ 6.

¹¹⁵ See Dec. of Mark Burnett in Opp’n to Def. Stacy E. Stillman’s Special Mot. to Strike Compl., *supra* note 86, ¶ 4.

¹¹⁶ *Id.* ¶ 9.

¹¹⁷ Ianic Roy Richard, *The Stacey Stillman Case: A Deep Dive*, MEDIUM (Aug. 18, 2017), <https://medium.com/a-tribe-of-one/the-stacey-stillman-case-a-deep-dive-caa7816a27a1> [<http://perma.cc/A664-G9RK>].

¹¹⁸ Candid Reddit AMAs (“ask me anything”) with former contestants and crewmembers can be enlightening. See Rob Cesternino (u/RobCesternino), REDDIT (Sept. 5, 2012), https://www.reddit.com/r/IAmA/comments/zenas/i_was_a_two_time_contestant_on_survivor_ama/ [<http://perma.cc/ANH3-QVEH>] (“I don’t think that production tried to manipulate our games on Survivor”); Anonymous Survivor Cameraman (u/survivorguy), REDDIT (Nov. 15, 2011), https://www.reddit.com/r/IAmA/comments/mdd5l/have_worked_on_the_camera_crew_on_many_seasons_of/ [<http://perma.cc/V7PV-5A6G>] (responding to whether a contestant has ever asked for his secret assistance he replied, “[N]ope. [W]ould tell them no anyhow. [That’s] a firing!!”).

In August of 2001, just six months after Stillman's complaint, news broke that a producer on UPN's *Manhunt*, another reality game show that marooned contestants on a supposedly deserted island, had quit the series in protest after Paramount TV asked him to rig challenges and to re-shoot several scenes in a Los Angeles park.¹¹⁹ A judge on the series substantiated the producer's claims, adding that he was told by a different producer to give an immunity card to a player to keep him in the game longer.¹²⁰ Contestants also blew whistles regarding some questionable tactics the production employed creating the series, including producers physically preventing contestants from aiding injured players.¹²¹

Then, just two months after UPN pulled *Manhunt*, a participant on *Talk or Walk*, a relationship show, filed a complaint with the FCC regarding his experience on the program.¹²² According to news sources, the contestant alleged that producers secretly told his girlfriend to break up with him on-air because they thought it would make for entertaining television.¹²³ The contestant's girlfriend did not want to do this at first, but they ultimately convinced her to "walk" off the show and out of his life forever. This was in 2001, prior to the age of cell phones, social media, and instant communication, so he actually left the taping thinking she really broke up with him. According to news reports, the publicly embarrassed contestant allegedly attempted suicide before his girlfriend could tell him what happened.¹²⁴

Shortly after that, a judge on MTV's *Surf Girls* complained to the media about producers vetoing his decision regarding who to vote off the show.¹²⁵ Prior to the series airing, Quicksilver pro and *Surf Girls* judge Jon Rose told *Transworld Surf* magazine that he wanted to vote "some annoying girl' off the program," but the producers wanted to keep her in the show because she was

¹¹⁹ See Armstrong, *supra* note 24.

¹²⁰ See Melinda Smith, *Coming Up to Date on the Manhunt Scandal*, REALITY NEWS ONLINE (July 10, 2002), <http://archive.li/2hBQe#selection-485.0-489.8> [<http://perma.cc/FAV3-92MH>].

¹²¹ See *id.*

¹²² See Starr, *supra* note 26.

¹²³ See *id.*

¹²⁴ See *id.* While this news report talks about an FCC complaint the contestant filed regarding this incident, the FCC had no such complaint on file when the author of this Article contacted them with a FOIA request. The FCC explained over the phone that old documents are sometimes purged for storage reasons, and sometimes news agencies report FCC matters inaccurately. It is difficult to say which was the case here.

¹²⁵ See Steve Rogers, *'Surf Girls' Fixed? Judge Reportedly Claims His Decision Was Overruled by Show Producers*, REALITY TV WORLD (May 12, 2003), <http://www.realitytvworld.com/news/surf-girls-fixed-judge-reportedly-claims-his-decision-was-overruled-by-show-producers-1173.php> [<http://perma.cc/X4MP-VBKN>].

the one responsible for causing all the drama.¹²⁶ When he said he was going to vote her off, the producers simply vetoed his decision and told him to pick someone else instead. That article was published the same day the first episode of the series was scheduled to air, and MTV chose not to respond to it.¹²⁷ MTV aired the whole season just like nothing happened, and nobody seemed to mind at all. The controversy just went away all by itself, possibly signaling to reality television producers that audiences simply do not really care much about these allegations.

Unlike the quiz-show controversies of the 1950s, which ended in congressional investigations and a new criminal law prohibiting on-air deception, America's conscience was not nearly as shocked by the reality show controversies of the early 2000s. The viewing public did not seem to care very much, and audiences continued to prove that they would keep watching the allegedly staged shows despite the controversies.

MTV's lack of response to their judge on *Surf Girls* openly admitting to the media that producers completely rigged the show might have been telling, but even more telling was NBC's idea to capitalize on the controversies by creating a five-part series about them.

The Reality of Reality (2003) was, quite oddly, created by a network that makes a good chunk of their money broadcasting reality shows.¹²⁸ The documentary explains, through interviews with actual reality show producers and crewmembers, the different ways that America's favorite reality shows are manipulated to increase entertainment value. Clearly, NBC's network executives did not think airing the whistle-blowing show would be harmful to their existing cash-cow reality shows, including their then-upcoming premier of what would prove to be yet another long-living Mark Burnett hit, *The Apprentice* (2004).¹²⁹

C. Academia's Response to the Reality Television Scandals

Academics and entertainment commentators alike began suggesting that 47 U.S.C. 509 might apply to certain broadcast reality game shows. In 2005, the Cardozo Arts and Entertainment Law Journal published the first scholarly article on the topic of possible FCC enforcement of the archaic quiz-show statute against modern reality shows.¹³⁰ The article concluded

¹²⁶ *Id.*

¹²⁷ Both the episode and the article appeared May 12, 2003. *See id.*

¹²⁸ *Bravo Gets Real*, *supra* note 27.

¹²⁹ *See The Apprentice*, *supra* note 9.

¹³⁰ *See Brenner*, *supra* note 30, at 874.

that the statute likely applies to modern reality game shows and advocated for FCC enforcement.¹³¹

In 2007, Kimberlianne Podlas penned another law review article on the applicability of 47 U.S.C. 509 to modern reality shows.¹³² In her article, Podlas went into greater detail analyzing the statute, and specifically addressed which reality shows are likely covered under the law, and which types of manipulations would be unlawful. Since published case law was completely non-existent at the time, Professor Podlas had to engage in a plain-text analysis of the statute. She made several points:

First, she states the statute requires the specific intent “to deceive the listening or viewing public.”¹³³ She notes that the U.S. Supreme Court has generally held that criminal statutes requiring this type of intent “requires that a person act with a particular mental state to deceive, as opposed to acting negligently or merely deceptively.”¹³⁴ This intent element would undoubtedly be hard to prove, because the fact finder would be forced to get into the producer’s head and assume the worst. The producer in most cases will likely be able to present an alternative, non-deceptive, and innocent explanation regarding the alleged manipulative conduct. It is probably no coincidence that the ultimate factual issue in Stillman’s fraud lawsuit in *Survivor* centered on what Mark Burnett’s intent was when he suggested to two contestants that it might benefit them to vote Stillman out of the game instead of another player. Stillman said Burnett’s intent was deceptive, while Burnett said his intent was just a routine and legitimate facilitation of the game that all the contestants had agreed to prior to coming on the show when they signed their contracts.¹³⁵

Second, Podlas points out that the construction of the statute suggests that its intent must be read in conjunction with its requirement that the deception be actually connected to the outcome of the contest.¹³⁶ Simply put, a causal connection between the deception and outcome is needed. She concludes that “artifice or secret assistance that does not affect the outcome might be unethical, but might not be illegal.”¹³⁷ Thus, unless the

¹³¹ See *id.* at 900.

¹³² Podlas, *supra* note 31, at 142.

¹³³ *Id.* at 154–55.

¹³⁴ *Id.* at 154 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197–99 (1976)).

¹³⁵ See Dec. of Mark Burnett in Opp’n to Def. Stacey E. Stillman’s Special Mot. to Strike Compl., *supra* note 86, ¶ 12.

¹³⁶ Podlas, *supra* note 31, at 155.

¹³⁷ *Id.*

deception can be proven to have actually affected the outcome of the game, it might not be covered.

Finally, and perhaps most restrictively, Professor Podlas cautiously noted that only certain reality shows are even covered by the statute.¹³⁸ The statute actually specifically enumerates that the interference must occur in a contest of (1) “intellectual knowledge,” (2) “intellectual skill,” or (3) “chance.”¹³⁹ Whenever “skill” is mentioned in the statute, “intellectual” precedes it.¹⁴⁰ Thus, unless the reality competition is *intellectual* in nature, or a game of chance, a plain reading of the statute suggests the game is probably not covered. Professor Podlas concludes, because of the intellectual or chance element, reality game shows like *American Idol*, *So You Think You Can Dance?*, and other contests featuring predominately non-intellectual skills (like singing, dancing, modeling, or dating) are probably not covered.¹⁴¹ However, she believes that shows like *Survivor* probably do meet the element, since the social politics needed to win make the game one of “strategy and cleverness,” which therefore makes the game predominately intellectual in nature.¹⁴²

Professor Podlas’s opinion that social politicking is an intellectual skill, while singing is not, is interesting. The “intellectual” element is responsible for much of the ambiguity of this statute. What exactly does the word “intellectual” even mean? Colorful arguments can be made that any skill that requires some sort of brainpower could be classified as “intellectual.” Any lines that get drawn here are bound to be arbitrary and subject to differing opinions. For example, as will be discussed *infra*, the FCC has specifically held that comedy is not an intellectual enough skill for the purposes of the Commission’s enforcement of this statute.¹⁴³ Compare that interpretation to the group of singers on *American Idol* who filed a class action complaint pleading that singing is an intellectual skill that qualifies under 47 U.S.C. 509 (while simultaneously quoting Professor Podlas’s law review article for support for other matters).¹⁴⁴

I suppose there are two dueling schools of thoughts regarding the intellectual element: Either it can be read narrowly, or

¹³⁸ *Id.* at 156.

¹³⁹ See 47 U.S.C. § 509 (2017).

¹⁴⁰ Podlas, *supra* note 31, at 156.

¹⁴¹ *Id.* at 160–61.

¹⁴² *Id.* at 161.

¹⁴³ See Letter to Compl. from FCC Re: Case EB-09-IH-1750, *infra* note 146, at 1 n.3 (“Because the [Comedy] Contest was not one of intellectual knowledge, intellectual skill, or chance, the federal statute that regulates contests does not apply to this case.”).

¹⁴⁴ See *infra* Part IV.

expansively. On one hand, it was the quiz-show controversies that gave birth to this law in the first place, so it makes sense that the law would be narrowly interpreted to require that the contest be at least as intellectual as the quiz shows that were responsible for the statute's creation. It was trivia "quiz shows" that Congress was targeting after all. However, the counterargument to that is Congress did not stop at enumerating "intellectual" games; they also added "games of chance" to the contests to be covered. Why would Congress deliberately add games of chance to the statute if their sole intention was to cover trivia quiz shows? The answer might have to do with history.

Back when this statute was enacted, the only two types of game shows in existence were games of intellectual skill and games of chance. American television had yet to experiment with broadcast contests of non-intellectual skills, like singing, dancing, comedy, modeling, or dating.¹⁴⁵ Congress could not outlaw what it did not yet know about. The fact that Congress chose to include games of chance into the law, even though it was only intellectual quiz shows that were marred in the controversy, demonstrates that the legislature intended to be all encompassing with the statute. Congress simply did not want *any* game show to be deceptively rigged by producers. The source of the controversy had nothing to do with the nature of the rigged contests being "intellectual;" it was the deception that America was upset about. There is nothing in the legislative history to suggest Congress was intentionally trying to exempt non-intellectual game shows that would later be invented. A good case can be made that Congress actually intended to cover all broadcast games with 47 U.S.C. 509, especially when it is considered how ambiguous the qualifier "intellectual" actually is.

It has been over a decade since Professor Podlas published her article analyzing the applicability of 47 U.S.C. 509 to modern reality shows. How correct was she regarding how the courts would interpret the statute? Although searches on Westlaw and LexisNexis reveal that there still have been no appellate level court cases discussing the statute in great detail, the FCC has had the opportunity to interpret the statute when conducting investigations and levying administrative enforcement action against broadcasters.

To understand how the FCC interprets the statute, the author of this Article filed a Freedom of Information Act request with the agency, seeking its raw reports from every 47 U.S.C. 509

¹⁴⁵ The Dating Game (1965) was the earliest game show this author could identify that competed contestants using a non-intellectual skill. Production on that series did not begin until after 47 U.S.C. 509 was enacted.

investigation that it conducted from year 2000 to 2017.¹⁴⁶ The FCC was responsive to the request, and turned over a mountain of redacted documents, never before publicly released, providing a window into their investigations into broadcast television and radio programs that have been alleged to have violated 47 U.S.C. 509 by airing rigged contests.

Analyzing these documents, it becomes clear that the FCC has actually been pretty active since the *Survivor* incident investigating broadcasters for possible violations of this law. For example, in 2010, a Fox game show was pulled prior to the first episode airing, likely due to an FCC investigation into the show's producers' allegedly giving contestants the questions and answers before taping.¹⁴⁷ There was even a case where an employee of a broadcaster was arrested for rigging a radio contest. That employee was convicted of a state felony, and the station fined by the FCC, after an investigation found that the employee had rigged an on-air contest so her friends would win, and then split cash prizes with them.¹⁴⁸

These investigations provide insight into how the FCC is choosing to enforce 47 U.S.C. 509, and patterns quickly become discernible.

III. HOW THE FCC IS PRESENTLY ENFORCING 47 U.S.C. 509

A. Introduction to The FOIA Request

To understand how the FCC internally investigates 47 U.S.C. 509 complaints, the author of this Article filed a Freedom of Information Act request with the agency. The request sought all documents connected to FCC investigations into broadcasters under FCC jurisdiction alleged to have violated 47 U.S.C. 509.¹⁴⁹ This request sought responsive documents from the year 2000 to December 17, 2017, when the request was filed.¹⁵⁰

The FCC responded to the request with the suggestion that it be amended to exclude documents that were (1) internal FCC correspondences and (2) "materials subject to pending requests

¹⁴⁶ See Letter from the FCC to George Brietigam Re: FOIA Control No. 2018-000243 (Feb. 20, 2018) (on file with author).

¹⁴⁷ See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident (Dec. 17, 2009) (on file with author).

¹⁴⁸ See Seattle Police Department Incident Report (Jan. 29, 2010) (on file with author); see also Fisher Broadcasting - Seattle Radio, L.L.C., 27 FCC Rcd. 5690, 5697 ¶ 14 (2012).

¹⁴⁹ See Letter from the FCC to George Brietigam Re: FOIA Control No. 2018-000243, *supra* note 146.

¹⁵⁰ See *id.*

for confidentiality.”¹⁵¹ The FCC explained that excluding these documents would expedite the fulfillment of the request by many months, since internal agency communications are protected by the deliberative process privilege, and broadcasters would have to be given an opportunity to respond to any request for records that contained confidential proprietary information. The request for documents was thus narrowed accordingly. The author of this Article and the FCC also agreed upon the methodology that the agency would use to locate responsive documents. The FCC would: (1) poll the individual Enforcement Bureau managers responsible for overseeing enforcement of 47 U.S.C. 509 and have them identify cases; and (2) query their case management databases using permutations of the term “contest rigging” and “47 U.S.C. 509.”¹⁵²

Two months later, the FCC released 479 pages of responsive documents connected to nine different investigations into programs suspected of violating 47 U.S.C. 509 from the year 2000 to December 2017.¹⁵³

Additionally, it was discovered from those documents that in 2008 the Seattle Police Department investigated a local radio station employee, and recommended felony criminal charges against her and fourteen co-conspirators, for rigging an on-air radio contest.¹⁵⁴ A Washington State Public Records Request was accordingly filed with the Seattle Police Department, requesting access to that investigation. The Seattle Police Department released seventy-five pages of records relating to its criminal investigation of that radio station employee, who was eventually convicted of felony grand theft.¹⁵⁵

B. Answers Emerge

The investigations were scrutinized, and patterns began to emerge.

First, more than half of the FCC’s investigations into broadcasters suspected of violating 47 U.S.C. 509 (a statute originally intended to apply to televised quiz shows) are actually

¹⁵¹ *See id.*

¹⁵² Telephone call with William Knowles-Kellett, Attorney, Enforcement Bureau, Investigations and Hearings Division, Federal Communications Commission (Jan. 12, 2018).

¹⁵³ *See* Letter from the FCC to George Brietigam Re: FOIA Control No. 2018-000243, *supra* note 146.

¹⁵⁴ *See* Letter from Fisher Broadcasting - Seattle Radio, L.L.C. to the FCC (Apr. 18, 2008) (on file with author).

¹⁵⁵ *See* Seattle Police Department Incident Report, *supra* note 148.

related to complaints of rigged radio contests.¹⁵⁶ Indeed, while it is clear that the FCC does actively enforce 47 U.S.C. 509, the bulk of those investigations relate to the “caller 49 will receive \$1000” type of contests that are frequently heard on the radio. In those cases, 47 U.S.C. 509 is usually a secondary violation that is only briefly addressed by the Commission, with 47 C.F.R. 73.1216 being the charge that takes center stage—a far more frequently enforced regulation that requires broadcast contests be run “substantially as announced.”¹⁵⁷ In those rigged radio contest cases, with only one major exception to be discussed in detail *infra*, the broadcaster violating the rule generally receives a modest penalty, and is ordered to enact a remedial plan, but the individual violator generally does not see the criminal liability contemplated by 47 U.S.C. 509.

Second, the FCC appears to agree with Professor Podlas’s interpretation of the “intellectual” element, and narrowly defines the skills that are sufficiently “intellectual” enough to qualify a contest for enforcement. Contests that exploit non-intellectual skills, like singing, dancing, or even comedy, receive no protection under the statute, with the Commission summarily dismissing such complaints without any investigation.¹⁵⁸

For example, in 2009 a losing contestant on the “Classic Comedy Contest”, broadcast by WNCX FM, Cleveland, filed a complaint with the FCC alleging that the contest was rigged.¹⁵⁹ The contest aired stand-up comedy acts of amateur comedians, and invited the public to vote for their favorite act on the station’s website.¹⁶⁰ The top online vote-getter received ten points, the second-highest received nine points, and so on, “with the tenth-most popular entrant receiving [only] one point.”¹⁶¹ In addition to the points awarded based off of the online votes, a panel of station judges also awarded points to their favorite contestants.¹⁶² The top three contestants with the highest

¹⁵⁶ See Table of 47 U.S.C. 509 Investigations Year 2000 to 2017 from George Brietigam (compiling information from all of the documents released by the FCC) (on file with author).

¹⁵⁷ See Letter to Complainant from FCC Re: Case EB-09-IH-1750 (Jan. 14, 2010) (addressing 73.1216 violation in detail, dismissing 47 U.S.C. 509 violation) (on file with author); New Northwest Broadcasters, L.L.C., 19 FCC Rcd. 9352 (2004) (addressing the 73.1216 violation in more detail, with the 47 USC 509 violation only briefly mentioned).

¹⁵⁸ See Letter to Complainant from FCC Re: Case EB-09-IH-1750, *supra* note 157, at 1 n.3 (informing Complainant that his 47 USC 509 claim will not be investigated because comedy is not an intellectual skill qualifying under 47 USC 509).

¹⁵⁹ See *id.* at 1.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 2.

number of combined online and judge votes won the opportunity to perform at a comedy club.¹⁶³

A losing contestant alleged that the station judges were given such a disproportionate amount of points to award contestants that it allowed the station to essentially just select the winners with the impact of the online votes being deceptively small.¹⁶⁴ The FCC dismissed the claim without an investigation, declaring that comedy is not an “intellectual skill” for the purposes 47 U.S.C. 509.¹⁶⁵ The FCC reasoned in a letter to the complainant, “because the contest was not one of intellectual knowledge, intellectual skill, or chance, the federal statute that regulates contests does not apply to this case.”¹⁶⁶ The FCC also dismissed the complainant’s allegation that the contest was not run “substantially as announced” under 47 C.F.R. 73.1216.¹⁶⁷ The FCC reasoned that the contest was indeed run according to its published rules; those rules specified how many points the judges would be allowed to award, and how many points the collective online community could award.¹⁶⁸ The complainant’s frustration that the published rules were unfair did not amount to a violation under 47 C.F.R. 73.1216.¹⁶⁹

Based on the FCC’s narrow interpretation of what qualifies as an “intellectual skill,” Professor Podlas was probably correct in her assertion that a lot of reality shows probably do not come under 47 U.S.C. 509’s jurisdiction. Based on the summary dismissal of the above complaint, a show like *Last Comic Standing* would almost certainly not be covered. It is also doubtful that other reality talent shows, like *American Idol*, *So You Think You Can Dance?*, *The X Factor*, *America’s Got Talent*, or *The Voice* would come under the jurisdiction of 47 U.S.C. 509. If comedy is not “intellectual” enough, then neither is singing, dancing, or magic.

But what about the more complicated reality game shows where contestants compete using a variety of skills? For example, in *Survivor* contestants are plopped into a stressful social setting where they must use tribal politics to avoid being voted out by their fellow contestants. In addition, they also compete in challenges for immunity that vary greatly in the type of skills

¹⁶³ *Id.* at 1–2.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1 n.3

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See id.* at 2–3.

¹⁶⁹ *Id.*

that are used, with some being entirely physical (like obstacle courses), others entirely mental (like puzzles), and some mixed. What determines if a game is intellectual enough to fall within the purview of 47 U.S.C. 509? Unfortunately, after the FOIA request, we are nowhere near closer to the answer. Complex shows like *Survivor* may, or may not, fall under the jurisdiction of 47 U.S.C. 509. As will be discussed *infra*, attorneys for these shows generally proceed on the assumption that they do fall within the scope of 47 U.S.C. 509.¹⁷⁰

The fact that two decades have passed by with no FCC enforcement of 47 U.S.C. 509 against a complex reality game show might be telling. Of all the investigations into broadcast television shows suspected of violating 47 U.S.C. 509, half were investigations into game shows that use the simple quiz-show format similar to the ones seen during the quiz-show controversies of the 1950s.¹⁷¹

For example, in December of 2009, the FCC received a complaint regarding the planned Fox game show, *Our Little Genius*.¹⁷² The father of a contestant alleged that a member of the production gave him several questions and answers prior to his son's taping.¹⁷³ He also alleged that his son was inexplicably canceled from the program after he asked too many questions about the integrity of the questions.¹⁷⁴

Our Little Genius was a planned Fox game show that was going to feature child prodigies, aged six to twelve, who would compete for money answering advanced level questions in their "area of expertise" (such as calculus, music theory, astronomy, and physics).¹⁷⁵ The parents of the prodigies would control how far their child would get in the game, based on how much confidence they had that their little genius would correctly answer the question.¹⁷⁶ If the parents thought a topic was too tough for their child to answer, they could lock in their winnings and take the money before the child had the opportunity to answer.¹⁷⁷

In a letter to the FCC, the father of the canceled contestant reveals facts that suggest that the creators of *Our Little Genius*

¹⁷⁰ See *infra* Part IV.

¹⁷¹ See Table of 47 U.S.C. 509 Investigations year 2000 to 2017, *supra* note 156.

¹⁷² See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident, *supra* note 147.

¹⁷³ See *id.*

¹⁷⁴ *Id.*

¹⁷⁵ See *Our Little Genius* Series Rules, reprinted as *Exhibit A* in *Appendix 3* in FCC Compl. EB-10-IH-0412 (on file with author).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

might have greatly overestimated the ability of six-year-old children to correctly answer doctorate level questions about complex topics, like physics and music theory, without some assistance. He reveals that after the first contestants had been taped, but prior to his child's scheduled taping, he was sent an addendum to his contract altering the rules to the game in his favor.¹⁷⁸ The addendum read, "In connection with Game Play, in the event that the Little Genius answers Question 1, 2, 3, or 4 incorrectly, the Contestants will be entitled to the one (1) time opportunity, but not the obligation, to restart game play with a new Question Set. . . ."¹⁷⁹ One likely explanation for this change of rules was that the children who had already completed taping had difficulty correctly answering enough questions to make the show engaging. The whole excitement of the show centered on little children being able to answer extremely advanced questions correctly. If the children were immediately confused at question number one, the entire premise of the series would obviously be ruined.

The father then reveals that a few days prior to the taping, somebody from the production contacted him to get "feedback about whether or not the topics were familiar [to his child] . . ."¹⁸⁰ This person explained that the purpose of getting feedback on possible topics was to "make sure [the child] d[id] well on the show."¹⁸¹ But, the father claims this person not only disclosed the topics, he also dropped some pretty big hints about what the actual questions and answers would be.

The father explained that the caller oddly began stressing *very specific* things that his child needed to know. "He told us that it was very important to know that the hemidemisemiquaver is the British name for the sixty-fourth note."¹⁸² He also "placed specific emphasis on knowing the time signature of the polka."¹⁸³ He "emphasized that it was important to be able to list [four] types of modulation techniques" and that the child "needed to know the Italian names for the three piano pedals. Then he proceeded to list them as the sostenuto, forte, and una corda pedals."¹⁸⁴ The father

¹⁷⁸ See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident, *supra* note 147.

¹⁷⁹ See Addendum to the Series Rules – "Our Little Genius," *reprinted in Appendix 4 in* FCC Compl. EB-10-IH-0412 (on file with author).

¹⁸⁰ See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident, *supra* note 147.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

concluded that it was “very likely that he was giving us the answers to at least four questions”¹⁸⁵

A few days later, the father and his child arrived at the studio for the taping of his episode.¹⁸⁶ Prior to the taping, the father along with three other families, attended a meeting with the production company’s attorney.¹⁸⁷ The purpose of the meeting was for the attorney to explain in detail the game show’s rules. In the meeting the father expressed concern “about the quality of the game show questions and how they were prepared.”¹⁸⁸ He then recalls that, “[s]hortly after that meeting we were informed that our game show taping was being postponed, and later in the day we were informed that our participation in the game show was cancelled.”¹⁸⁹

In his letter to the FCC, the contestant’s father attached his contract with the game show, which provides a lot of insight into the production’s knowledge of the implications of 47 U.S.C. 509. Paragraph twenty-two of that agreement reads:

I am aware that it is a federal offense, punishable by fine and/or imprisonment for anyone to do anything which would rig or in any way influence the outcome of the Series with the intent to deceive the viewing public . . . [i]f anyone tries to induce me to do any such act, I must **immediately** notify the Producer as provided in Paragraph [forty-five].¹⁹⁰

The FCC launched an investigation into the matter. After interrogatories and subpoenas were sent to the production company, Fox, and several contestants, it was announced that the series was voluntarily being pulled and would never air.¹⁹¹ In an act of goodwill, the production company and Fox told the contestants who had already competed and won money that they would still be given their prize money, even though their contracts explicitly stated that winnings were only due upon the their episode actually airing.¹⁹² The FCC abandoned their investigation shortly thereafter with no enforcement action.¹⁹³

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ See Our Little Genius Contestant Release Agreement ¶ 22, *reprinted in Appendix 2 in* FCC Compl. EB-10-IH-0412 (emphasis added) (on file with author).

¹⁹¹ See Michael Schneider, *Fox pulls ‘Our Little Genius,’* VARIETY (Jan. 7, 2010), <http://variety.com/2010/scene/markets-festivals/fox-pulls-our-little-genius-1118013460/> [<http://perma.cc/K395-S66P>].

¹⁹² See Brian Lowry, *Quiz Show Scandal? Fox Yanks ‘Our Little Genius,’* VARIETY (Jan. 7, 2010), <http://variety.com/2010/voices/opinion/quiz-show-scandal-fox-yanks-our-little-genius-4874/> [<http://perma.cc/Q2YD-3TNW>]; see Our Little Genius Contestant Release

In his letter to the FCC, the father of the contestant confusingly ponders, “It is reasonable to ask why would [the production company] want to reveal questions and answers and apparently help contestants win more prize money?”¹⁹⁴ The answer is likely the same reason why the producers of *Twenty One* counter-intuitively wanted to help Herb Stempel win more money. The whole appeal of a show like *My Little Genius* is to wow audiences with children who possess Ph.D. level understandings of complex topics. It is hardly the basis of an interesting show if these children perform exactly how viewers would expect them to by not knowing any of the questions correctly. These games actually benefit from contestants shockingly performing well and winning a lot of money through increased ratings and higher advertising bids. It is the advertising dollars that the shows are after; the prize money is chump change.

No enforcement action resulted from the abandoned *My Little Genius* investigation.¹⁹⁵ Even when these FCC investigations do find wrongdoing, FCC enforcement action appears to be quite minimal. Despite 47 U.S.C. 509 being a criminal statute that could potentially subject violators to federal prison, only one investigation over the course of the past two decades has actually resulted in a criminal indictment against a broadcast employee.¹⁹⁶

C. A Rigged Radio Contest Leads to Arrests in Washington

In April of 2008, an attorney for Fisher Communications, licensee of Seattle radio station KVI (AM), self-reported an incident of possible contest rigging to the FCC that was uncovered during a routine internal audit.¹⁹⁷

Fisher informed the FCC that, the year prior, their KVI affiliate ran daily contests where listeners had the opportunity to win \$1000 cash prizes. At set times throughout the day, the station would announce the randomly selected name of a member of the KVI Listener’s Club, and that member would then have

Agreement, *supra* note 190, ¶ 8 (explaining the payment of winnings in the event the episode is not broadcast is in the producer’s sole discretion).

¹⁹³ No documents were received from the FCC explaining a disposition of the case. An FCC enforcement official who wished to be unnamed informed the author that the investigation into *Our Little Genius* was never officially closed, but instead was “abandoned,” citing “enforcement discretion,” after attorneys for the production informed them the series would not air.

¹⁹⁴ See Letter from Parent of Former Contestant to FCC Re: TV Game Show Cheating Incident, *supra* note 147.

¹⁹⁵ See *supra* note 193.

¹⁹⁶ See generally Seattle Police Department Incident Report, *supra* note 148.

¹⁹⁷ See Letter from Fisher Broadcasting - Seattle Radio, L.L.C. to the FCC, *supra* note 154.

only thirty minutes to call in and claim their \$1000 prize.¹⁹⁸ After calling to claim their prize, the winners were supposed to complete a W9 tax form before the station would release their \$1000 winnings.¹⁹⁹

In January of 2008, accountants for Fisher determined that KVI did not receive tax paperwork from several of the \$1000 winners.²⁰⁰ The station initially assumed that it was a mere oversight from their former promotions coordinator, who was in charge of running the contest, and who had quit her job after the contest ended a few months prior. The station contacted the winners, requesting that they complete the tax paperwork. One of the winners did not respond until about four months later—not so coincidentally after he broke up with his girlfriend, who happened to know the station’s former promotion’s coordinator.²⁰¹ That winner left a message at the station requesting somebody contact him. He blew the whistle as soon as his call was returned.

The contest winner told the station that he did not fill out a W9 because he never collected his prize.²⁰² He said that a former employee of KVI rigged the contest, and he did not want to have any part of it.²⁰³ He explained that his ex-girlfriend’s acquaintance knew the former promotions coordinator in charge of running the contest who entered him into the KVI Listener’s Club.²⁰⁴ Then, instead of randomly selecting the winner, the promotions coordinator intentionally selected his name to win the \$1000 prize.²⁰⁵ He went on to explain that the promotions coordinator made agreements with people she knew promising to select them as winners in exchange for one-half of the prize money.²⁰⁶ To prove his inside knowledge of the scheme, he told the station that their records would show that the very next day his ex-girlfriend was the winner of the contest.²⁰⁷ He also told the station that they would likely find his ex-girlfriend’s acquaintance’s name as one of the winners as well.²⁰⁸ He explained that he never picked up his prize, because he felt “bad about the situation.”²⁰⁹

¹⁹⁸ *Id.*

¹⁹⁹ *See* Seattle Police Department Incident Report, *supra* note 148, at 32.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 33.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 34.

²⁰⁷ *Id.* at 32.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 33.

KVI quickly verified the whistle-blower's claims. The station confirmed that his ex-girlfriend did indeed win the contest the day immediately after him.²¹⁰ They also discovered that the ex-girlfriend's acquaintance had won the contest as well. Upon further scrutiny, they also noticed "unusual demographic patterns" of younger listeners winning the contest at an unusual frequency, noting that KVI, a conservative talk radio station, normally had a predominately older demographic.²¹¹ KVI also noted that the younger winners tended to enter the KVI Listener's Club only a day or two prior to winning, which seemed like too big of a coincidence.²¹² The station began to suspect that this alleged fraud ran pretty deep.

KVI contacted the Seattle Police Department, who initiated a criminal investigation into the former promotions coordinator, and several suspicious winners, for embezzlement. Fisher Communications also contacted their attorneys, who advised them to self-report the incident to the FCC, who then subsequently began their own investigation.²¹³

At the conclusion of their investigation, the Seattle Police Department arrested a total of fifteen people.²¹⁴ The promotions coordinator was arrested for felony grand theft,²¹⁵ and fourteen contest winners were arrested as her co-conspirators.²¹⁶ The King's County Prosecutor's Office elected to only indict the promotion's coordinator.²¹⁷ She was ultimately convicted of felony grand theft, received probation and a stayed sentence, and ordered to pay Fisher Communications \$14,000 in restitution.²¹⁸

The FCC and Fisher Communications entered into a consent decree, mandating that KVI adopt policies and controls to prevent similar incidents from occurring in the future, including creating a mandatory training program for employees that addresses 47 U.S.C. 509 and related Commission rules.²¹⁹ The consent decree also mandated Fisher send the FCC periodic compliance reports and pay a \$7000 "voluntary contribution" to

²¹⁰ *Id.* at 34.

²¹¹ *Id.* at 33.

²¹² *Id.*

²¹³ See Letter from Fisher Broadcasting - Seattle Radio, L.L.C. to the FCC, *supra* note 154.

²¹⁴ See Seattle Police Department Incident Report, *supra* note 148, at 3–12.

²¹⁵ *Id.* at 47.

²¹⁶ *Id.* at 47–52.

²¹⁷ See Jennifer Sullivan, *KVI ex-employee sentenced for rigging radio contest*, SEATTLE TIMES (July 30, 2010), <https://www.seattletimes.com/seattle-news/kvi-ex-employee-sentenced-for-rigging-radio-contest/> [http://perma.cc/2EL5-GH5B].

²¹⁸ *Id.*

²¹⁹ Fisher Broadcasting - Seattle Radio, L.L.C., 27 FCC Rcd. 5690, 5695–96 (2012).

the United States Treasury,²²⁰ which seems like a very polite way of telling them to pay a fine.

This is the only case this author identified where an employee of a broadcaster was actually held criminally liable for interfering with the outcome of a broadcast contest. And this was for a state theft charge investigated by local police and prosecuted by local prosecutors, not a federal 47 U.S.C. 509 charge. This likely could have been the pioneering criminal 47 U.S.C. 509 case, but it appears that, for whatever reason, it was decided that a state theft charge was simply the better option. As a result, there still has not been one person charged criminally under 47 U.S.C. 509 since the statute's enactment.

D. Insights Drawn from the Investigations

It is apparent that the FCC actively enforces 47 U.S.C. 509, along with the other Commission rules that regulate broadcast contests. The FCC has yet, however, tried to apply the statute to a complex reality game show. There are several possible explanations for this.

First, reality game shows might simply be too complicated for this narrowly drafted statute. As discussed in detail *supra*, 47 U.S.C. 509 requires the meddled game to be one of “intellectual skill,” “intellectual knowledge,” or chance. As noted in the FCC’s investigation into WNCX FM’s “Classic Comedy Contest,” the Commission does not interpret comedy to be an “intellectual skill” that qualifies the contest for enforcement under the section.²²¹ If comedy contests do not qualify, where wit is a key element, there leaves little room for many other skill-based contests that do. While colorful arguments can be made that skills like comedy, singing, dancing, tattooing, modeling, or even dating can be intellectual in nature, the FCC apparently does not want to expand the definition of “intellectual” so far, and interprets this element as applying predominately to standard run-of-the-mill quiz shows.

Additionally, the production interference has to be done with the specific intent to “deceive” the listening or viewing public.²²² With that specific intent requirement, it becomes really easy for a producer to still be able to influence, and possibly even swing, a complex reality game show in favor of one contestant while staying on the right side of the statute.

²²⁰ *Id.* at 5697.

²²¹ See Letter to Complainant from FCC Re: Case EB-09-IH-1750, *supra* note 157, at 1 n.3.

²²² See 47 U.S.C. § 509 (2017).

For example, assume that the producers on a new complex reality game show want to keep a ratings friendly contestant in the game longer. Assume further that the producers know from their extensive casting process that this contestant is really good at solving complicated sliding puzzles. There would be no 47 U.S.C. 509 violation if the producers decided that the next challenge for some sort immunity would be a sliding puzzle challenge. There would be no “deception” to the viewing public when the contestant wins that challenge, fair-and-square, and becomes immune from the next vote, since the viewing public witnessed the challenge, observed the contestant win it, and the contestant received no special outside aide. Even though the producers had a good idea that the contestant would win—and intentionally chose that challenge for that reason—the “deception” element of this statute is lacking.

This makes sense. It was never the intent of this statute to completely castrate producers from their freedom to run their televised games as they saw fit. Congress just did not want television game shows blatantly lying to viewers; absolute fairness to contestants was never demanded. The statute was aimed to protect the viewer, and not the contestant.

Producers are still free to exercise their creative discretion when creating the rules for their shows and then “shaking up” their games midway through. They can adopt rules that might benefit one contestant over another, and then even do things mid-game like abruptly switch teams to a certain player’s detriment, or even select challenges that they know a favorite contestant has a propensity to win. This unchecked freedom in how producers are allowed to run their games gives them ample opportunity to *lawfully* influence the outcome of the game, in a more transparent way that will simply not be “deceitful” enough to trigger the statute. Therefore, there is little reason for producers to violate 47 U.S.C. 509 considering they have the ability to sway their games while remaining on the right side of the law.

Finally, there may simply be a lack of aggrieved reality show contestants complaining to the FCC about potential violations. If a contestant is bitter enough, they might file a complaint just to spite the production, but an FCC complaint will not get the contestant much in terms of compensation, or even attention. Private lawsuits and press releases tend to be the preferred method of addressing alleged wrongs.

IV. PRIVATE CAUSES OF ACTION

Private lawsuits and press releases have been the route most aggrieved reality show participants have taken after allegedly being cheated out of prizes.

In 2001, attorney turned *Survivor* contestant Stacey Stillman did not choose to take her complaint to the FCC when she alleged the show's executive producer swayed other contestants into voting her out to save another.²²³ Instead, she filed a private lawsuit in a court of law and then took her gripe to the media, to be scrutinized in the court of public opinion.²²⁴ Doing this, she was almost certainly expecting some sort of cash settlement from CBS, or court awarded damages, which she would not receive just by submitting an FCC complaint. Although Stillman suggested in her complaint that the production violated 47 U.S.C. 509, she did not attempt to use that statute as a private cause of action.²²⁵ Instead, she proceeded on fraud and unfair competition theories.²²⁶

However, twelve years later, in 2013, aggrieved contestants did try to use 47 U.S.C. 509 as a private cause of action. In a 260-page class-action complaint, former *American Idol* contestants attempted to rescind their Contestant Agreements using the statute.²²⁷ Several former African-American contestants, who were all disqualified from the program after failing background checks, alleged that the background checks disparately impacted black males and deceived the viewing public into believing that only judge and viewer votes selected the winner.²²⁸ They alleged in their complaint that "utilizing the private background information of Black *American Idol* Contestants as a means to decide which Semi-Finalist or Finalists would advance through the Contest (as opposed to utilizing the purported voting system) violates subdivision three of Section 509 as a scheme directed at predetermining some portion of the outcome."²²⁹

Their lawsuit was dismissed for failure to state a claim.²³⁰ The Second Circuit affirmed the dismissal, and held regarding the 47 U.S.C. 509 claim, "the District Court did not err in holding that neither 47 U.S.C. 509 nor 47 C.F.R. 73.1216 creates a private cause of action allowing [the plaintiff] to rescind his contestant agreement."²³¹

²²³ See generally Compl., *supra* note 10.

²²⁴ See generally *id.*; see also Newsweek Staff, *Stacey Stillman Speaks*, NEWSWEEK, (Feb. 9, 2001, 7:00 PM), <https://www.newsweek.com/stacey-stillman-speaks-155591> [http://perma.cc/45RK-TDRV].

²²⁵ See Compl., *supra* note 10, ¶ 51.

²²⁶ See *id.* ¶¶ 44, 53.

²²⁷ See Compl., *supra* note 38, ¶ 1903.

²²⁸ *Id.* ¶ 1938.

²²⁹ *Id.*

²³⁰ *Andrews v. Fremantlemedia, N.A., Inc.*, 613 Fed.Appx. 67, 67 (2d Cir. 2015).

²³¹ *Id.* at 69.

Unfortunately for our analysis, the court did not discuss the statute at length, or even clarify the ongoing question of whether a show like *American Idol*, a singing competition, would even be covered by 47 U.S.C. 509 since the statute supposedly only covers contests of intellectual skills or chance. In their complaint, the plaintiffs were careful to plead facts that argued *American Idol* was, in fact, a contest of intellectual skill. They pleaded: “The purported *American Idol* contest rewards Contestants with natural singing ability, trained singing ability, stage presence, an attractive physical appearance (more often than not), and intellectual skill or knowledge required to select songs and strategize one’s position in the Contest relative to other Contestants.”²³² The court did not address this assertion, and only held that 47 U.S.C. 509 does not create a private cause of action.²³³ The question of whether *American Idol*, a singing competition, is intellectual enough to come into the reach of the statute was saved for another day.

Even though Professor Podlas, and apparently even the FCC, subscribe to a narrow definition of the word “intellectual,” it is clear from reality show contestant agreements that productions are erring on the side of caution. For example, in the *American Idol* complaint discussed above, the plaintiff reveals a telling provision from his Contestant Agreement. The agreement warns, “[I]t is a *federal offense* punishable by fine and/or imprisonment for anyone to do anything which would rig or in any way *influence the outcome* of the [*American Idol*] Series *with the intent to deceive the viewing public*.”²³⁴ While the agreement does not specifically mention 47 U.S.C. 509, the word choice of the agreement makes it apparent that it is indeed what the agreement is addressing. Clearly, the producers of *American Idol* suspect the statute might apply to them, whether singing is “intellectual,” or not.

A 2010 leaked *Survivor* contestant agreement likewise suggests that the producers of that show feel that 47 U.S.C. 509 might apply to *Survivor*. It reads:

I will not rig or in any way influence the outcome of the Series with intent to deceive the viewing public (including, without limitation, colluding to share any prize money), and I will not accept any information or special or secret assistance in connection with the Series. I agree that I will not participate in any such act or any other deceptive or dishonest act with respect to the Series. I acknowledge and agree that any agreement between me and any other contestant(s) to share the Prize, if awarded to me or such other

²³² Compl., *supra* note 38, ¶ 1924.

²³³ See *Andrews*, 613 Fed.Appx. at 69.

²³⁴ Compl., *supra* note 38, ¶ 1915 (emphasis in original).

contestant(s), shall constitute a deceptive or dishonest act hereunder. If anyone tries to induce me to do any such act, I shall immediately notify Producer and a representative of CBS.²³⁵

Nineteen years after the original *Survivor* incident, we are no closer to knowing whether or not 47 U.S.C. 509 even applies to the series. There has simply been no court guidance on what “intellectual” means. While the FCC summarily dismissed a complaint relating to a comedy contest on the grounds that comedy is not “intellectual” enough of a skill, there is no saying whether a complex show like *Survivor*, where contestants arguably use hundreds of skills to win the game, qualifies or not. Clearly the attorneys who drafted *Survivor*’s contestant agreement felt there is a possibility the show might be covered by the statute.

These reality show contestant agreements also generally do a really good job at keeping fraud lawsuits from displeased contestants at bay. They put contestants on notice that the producers are essentially granted unfettered discretion in how they run the game, which mitigates potential fraud or breach of contract claims. For example, the leaked *Survivor* contestant agreement informs contestants:

I understand that Producer reserves the right, in its sole discretion, to change, add to, delete from, modify or amend the terms, conditions and rules affecting the conduct of the contestants on the Series, the Series activities, the elimination of contestants from the Series and the granting of prizes . . . I further understand that the Series may entail twists, of which I may or may not be aware, and that such twists may influence the outcome of the Series.²³⁶

This type of language makes it very easy for producers to essentially do whatever they want in terms of creating or even changing rules midway through games, for whatever reason they want to. Contestants are on notice this can happen, and they sign a contract agreeing to it. The production thereby mitigates the risk of possible fraud claims that the contestant lost the game because producers meddled by changing the rules, not honoring the rules, or entering contestants into a “twist” that the contestant did not benefit from. As stated *infra*, such will also not likely run afoul of 47 U.S.C. 509, since the viewing public is not being “deceived” in any way. The result of all this is that producers can freely meddle with the rules of their reality game shows to achieve whatever result they want, so long as they do not do it in a way that deceives the viewing public in violation of 47 U.S.C. 509. Pretty much, as long as whatever interference the

²³⁵ *Survivor* Contestant Agreement, ¶ 19 (on file with the author).

²³⁶ *Id.* ¶¶ 3, 7.

producer decides to throw at the game is shown on television, there is likely no remedy for the contestant in terms of either FCC enforcement or private fraud claims.

Lawsuits are not always attempted on just fraud or contract law theories, however. In 2013, a former participant on A&E's *Storage Wars* filed a wrongful termination lawsuit alleging that he was fired after complaining to producers about the show's practice of "salt[ing]" storage lockers with valuable items and then telling participants how much to bid, therefore predetermining the outcome of the show.²³⁷ That participant believed that the practice violated 47 U.S.C. 509, informed producers, and was subsequently let-go. Although A&E rightfully pointed out that the statute, and the rest of The Communications Act of 1934, as amended, does not apply to *Storage Wars*, since it is a cable program, a Los Angeles judge emphasized that the fired employee "doesn't need to 'prove' an actual violation to prevail on his wrongful termination claim, only that he was fired for reporting his 'reasonably based suspicions.'"²³⁸ The case settled, and the participant even returned to the series afterwards.²³⁹

V. THE FUTURE OF FAKE REALITY SHOWS

Since the FCC has not yet enforced 47 U.S.C. 509 against a complex reality game show, and since private causes of actions are unlikely to succeed, what needs to change? This author believes everything is fine just the way it is.

Times have changed. Long gone are the days where the entire country sat down and watched the same three broadcast networks. Also, long gone are the innocent times of the mid-twentieth century where rigged game shows would reasonably cause Americans to become so outraged that they would call for congressional investigations. When Dan Enright was caught completely choreographing *Twenty One* in the 1950s, he was caught lying to just about everyone who owned a television. Everybody was watching the same shows back then, and there was a (somewhat) reasonable expectation that what was broadcast over the heavily regulated airwaves was the truth. Now, living in the Instagram age, it's no surprise to anybody that what is presented as real in the media

²³⁷ Eriq Gardner, *Fired 'Storage Wars' Star Wins Round in Rigging Lawsuit*, HOLLYWOOD REP. (Sept. 3, 2013), <https://www.hollywoodreporter.com/thr-esq/fired-storage-wars-star-wins-619655> [<http://perma.cc/96JM-57PE>].

²³⁸ *Id.*

²³⁹ Austin Siegemund-Broka, *Hollywood Docket: 'Storage Wars' Rigging; Disney's Legal Bill; 'Ricky Bobby' Saloon*, HOLLYWOOD REP. (Aug. 8, 2014), <https://www.hollywoodreporter.com/thr-esq/hollywood-docket-storage-wars-rigging-724115> [<http://perma.cc/2LTF-FFKG>].

often is not. Expectations have changed greatly since 47 U.S.C. 509 was passed. Anyone living today who is shocked at the idea that producers can (and do) manipulate their shows for entertainment value needs to crawl out from under their rock.

Additionally, a lot of FCC regulations just don't make as much sense today compared to when literally every television channel was broadcast over the airways. The FCC only has the authority to regulate broadcast networks (currently ABC, CBS, NBC, Fox, and The CW). The FCC does not regulate cable networks, like AMC, the Paramount Network, or TruTV, or streaming services, like Amazon Prime and Netflix. The rest of the internet is also not regulated by them either. So, why are we placing such a big burden on just five networks to follow all of Title 47 of the U.S. Code when the vast majority of the modern media does not have to?

The average cable package now comes with over two hundred channels.²⁴⁰ Even cable is becoming an outdated way to consume media. "Cord cutting" is the latest trend where consumers are ditching traditional television altogether and instead subscribing to streaming services, like Amazon Prime, which includes access to tens of thousands of titles, commercial free, that can be consumed at the viewer's convenience.²⁴¹ Amateur viral web videos are also competing for consumer attention (and we all know how real and genuine a lot of those are). With all these alternative forms of media available, it makes little sense to require five television networks—with exponentially diminishing audiences—to abide by an entire volume of laws that nobody else has to abide by. If anything, 47 U.S.C. 509, like the rest of Title 47, should be slowly walked back in the age where unregulated digital media has completely overtaken traditional broadcast media.

VI. CONCLUSION

Nineteen years after *Survivor* made academia, and the tabloids alike, question whether an archaic criminal statute might apply to reality shows, we are not much closer to an answer. This author's FOIA request has revealed that the FCC has been very restrained in applying 47 U.S.C. 509 to modern reality game shows, with the bulk of enforcement instead focused

²⁴⁰ See John Dille, *How Much Should I Be Paying for Cable TV?*, (Sep. 27, 2017), <https://www.cabletv.com/blog/how-much-should-i-pay-for-cable-tv/> [http://perma.cc/CQ5J-DN7L].

²⁴¹ See, e.g., Luke Bouma, *From live TV streaming to big mergers: five cord-cutting trends to watch in 2019*, TING (Jan. 3, 2019), <https://ting.com/blog/five-cord-cutting-trends-2019/> [http://perma.cc/V4JB-52B7].

on radio and traditional quiz-style game shows. A plain reading of the statute, and one case that was summarily dismissed by the FCC, suggests that the statute might only be applicable only to contests of a narrowly defined “intellectual” nature, or contests of pure chance. But, without any appellate level court decisions on the matter, it is still impossible to say with certainty if the statute is really so limited.

Private lawsuits relating to production interference are also unlikely to be very successful. Courts have held that 47 U.S.C. 509 does not create a private cause of action for aggrieved contestants,²⁴² and the airtight contracts that grant producers unfettered discretion regarding how they run their games removes the realistic shot of fraud claims.²⁴³

Contestants are largely left without a remedy when they feel they have been scripted out of their shot at winning a prize. But, at the end of the day, maybe angry contestants should just take a deep breath, enjoy their time on television, and the instant fame that came with it, and contemplate the wise mantra of *Mystery Science Theatre 3000*, “It’s just a show; I should really just relax.”²⁴⁴

²⁴² See *Andrews v. Fremantlemedia, N.A., Inc.*, 613 Fed.Appx. 67, 67, 69 (2d Cir. 2015).

²⁴³ See, e.g., *Survivor* Contestant Agreement, ¶¶ 3, 7, 19 (on file with the author).

²⁴⁴ *MST3k Mantra*, TV Tropes, <https://tvtropes.org/pmwiki/pmwiki.php/Main/MST3KMantra> [http://perma.cc/SJE5-35TW].