

# ESTABLISHING RESPECT FOR MUSIC VIDEO DANCERS: FLASH MOBS, LITIGATION, AND COLLECTIVE BARGAINING

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## I. INTRODUCTION

Sony Music executives looked out of their office windows in Beverly Hills to find a sea of activists dressed in red.<sup>1</sup> Professional dancers and their supporters formed a flash mob and danced to *Respect* by Aretha Franklin.<sup>2</sup> The rally of more than 150 people was designed to help music video dancers obtain a union contract because the American Federation of Television and Radio Artists (AFTRA) and major record labels were meeting to discuss the issue.<sup>3</sup> The rally also included speeches by AFTRA representatives Jason George and Gabrielle Carteris; dancers Dana Wilson, Teresa Espinosa, and Sabrina Bryan; and the secretary-treasurer of the Los Angeles County Federation of Labor, Maria Elena Durazo.<sup>4</sup>

The dancers' rallies concerned AFTRA's Sound Recording Code,

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<sup>1</sup> See Pacific Rim Video Press, *Dancers Alliance 'It's About Time' Flash Mob in Front of Sony Music BH – Respect* (Jan. 6, 2012), <http://www.youtube.com/watch?v=CQl-RZg6FaM>; Dave McNary, *AFTRA Dancers Rally for Contract Deal*, VARIETY (Jan. 6, 2012, 3:55 PM), <http://www.variety.com/article/VR1118048242?refcatid=16>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

which is an employment agreement for sound recording workers.<sup>5</sup> Although the Code regulates more than 14,000 performers who collectively earn more than \$140,000,000 annually, it does not apply to music video workers.<sup>6</sup> In 2010, AFTRA agreed not to organize a strike if the record labels negotiated a music video contract.<sup>7</sup> Finally, on June 21, 2011 AFTRA began to negotiate with record labels for a music video contract that included safe work conditions, fair pay, residuals, health benefits, and retirement plans.<sup>8</sup> Due to these efforts, SAG-AFTRA, a new union composed of AFTRA and the Screen Actors Guild, successfully negotiated a music video contract.<sup>9</sup>

This Note evaluates the different legal strategies available to music video dancers and argues that collective bargaining is the best way to achieve fair compensation. However, this Note only pertains to professionally-trained music video dancers who are hired for their talent to perform complex choreography in music videos, and does not include video models or actors. Obtaining fair compensation for music video dancers has social justice implications because a large disparity exists between profits reaped from music videos and the low wages earned by music video dancers.<sup>10</sup> Additionally, music video dancers largely consist of young women of color—a historically unrepresented group.<sup>11</sup> The issue of fair compensation for music video dancers is timely because music videos have grown in popularity in recent years through video-sharing websites such as YouTube and Vevo,<sup>12</sup> and the first-ever music video

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<sup>5</sup> Jonathan Handel, *AFTRA 'Very Frustrated' With Record Labels as Union Inches Toward Strike Vote*, HOLLYWOOD REPORTER (Oct. 2, 2011, 6:24 PM), <http://www.hollywoodreporter.com/news/aftra-very-frustrated-record-labels-contract--negotiations-242970>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

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

<sup>9</sup> Richard Verrier, *SAG-AFTRA Board Approves Contract for Music Video Performers*, LATIMES.COM (July 21, 2012, 8:25 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-sag-board-20120721,0,4074712.story>; see also Jonathan Handel, *SAG-AFTRA Reaches Industrywide Music Video Deal*, HOLLYWOOD REPORTER.COM (June 1, 2012), <http://www.hollywoodreporter.com/news/sag-aftra-music-video-deal-332238> (discussing final contract provisions for the SAG-AFTRA agreement).

<sup>10</sup> See Mark Sweney, *Rio Caraeff: Vevo Revolutionary*, THE GUARDIAN (Sept. 11, 2011, 3:00 PM), <http://www.guardian.co.uk/media/2011/sep/11/rio-caraeff-vevo> (describing the potential for high profits from music videos).

<sup>11</sup> See Bureau of Labor Statistics, *Union Members Summary* (Jan. 27, 2012), <http://www.bls.gov/news.release/union2.nr0.htm> (finding union membership rates higher among men than women).

<sup>12</sup> See Sweney, *supra* note 10.

contract for performers was established last summer, in June 2012.<sup>13</sup> Part II of this Note provides general information about music videos and music video dancers. Part III illuminates the multiple challenges music video dancers face and analyzes the underlying reasons for those challenges. Part IV assesses whether suing under the Fair Labor Standards Act (FLSA) is a viable option for dancers. It argues that the FLSA does not protect dancers and that, even if it did, it provides minimal rights so dancers would still be unable to achieve their goals. Part V examines whether the National Labor Relations Act (NLRA) protects dancers. Part VI discusses the inadequacy of organizing outside of the NLRA. Part VII concludes that organizing under the NLRA is the best option for dancers and recommends that music video dancers be “statutory employees” for the purposes of federal labor law so their collective bargaining efforts are protected by the NLRA. Finally, Part VIII examines lessons music video dancers can learn from actors and their ability to unionize under the Screen Actors Guild (SAG).

## II. OVERVIEW: MUSIC VIDEOS AND DANCERS

### A. MUSIC VIDEOS

Music videos are videotape clips of audio performances that are three to fifteen minutes paired with a visual performance of a song.<sup>14</sup> Although music videos began as promotional devices to enhance record sales, they have become profitable in their own right and have expanded into new commercial markets.<sup>15</sup> Because of their popularity, record companies seek the rights to the videos and invest significant amounts of money in them.<sup>16</sup> To obtain exclusive ownership and exploitation rights, record companies finance the production.<sup>17</sup> Major record companies’ production budgets can range from \$20,000 to \$200,000.<sup>18</sup>

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<sup>13</sup> Handel, *supra* note 9.

<sup>14</sup> ALEXANDER LINDEY AND MICHAEL LANDAU, 5 LINDEY ON ENT., PUBL. & THE ARTS § 10:28 (3d ed.) [hereinafter LINDEY ON ENT.].

<sup>15</sup> *See id.* § 10:2.

<sup>16</sup> *See id.* § 10:14.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* § 10:28.

## 1. History of Music Videos

Record companies first produced music video clips in 1979 as marketing tools; the clips were played in record stores to increase record sales.<sup>19</sup> Throughout the 1980s, music videos continued to grow in popularity.<sup>20</sup> In 1981, Warner-Amex Satellite Entertainment Company introduced “MTV: Music Television,” the first television channel to showcase music videos all day.<sup>21</sup> Shortly thereafter, MTV established VH1, a channel geared toward a more mature audience than MTV’s teenage viewers.<sup>22</sup> Later, more networks were created. Each network specialized in a different type of music, such as country western, urban, and R&B.<sup>23</sup>

Toward the end of 1983, music videos became more detailed and elaborate.<sup>24</sup> Michael Jackson’s music video *Thriller* was “almost a motion picture ‘short’; it featured large-scale synchronized choreography.”<sup>25</sup> By early 1986, the majority of record companies that previously distributed music videos for free began to charge for them and began to reserve all commercial and exploitation rights to their music videos.<sup>26</sup>

## 2. Music Videos Today

Music videos continue to be an essential part of marketing music and an important source of revenue because they are increasingly available on new media.<sup>27</sup> Being able to download music online through websites such as iTunes, YouTube, and Vevo has enhanced their popularity.<sup>28</sup> Vevo, which launched in 2009 with the support of Sony Music Entertainment, Universal Music, and Electric and Musical Industries (EMI), is a particularly promising avenue for additional revenue.<sup>29</sup> It gives consumers the ability to view free, official versions of music videos exclusively on its

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<sup>19</sup> *Id.* § 10:1.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* § 10:2.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* § 10:1.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* §§ 10:1–2.

<sup>27</sup> *See Sweney, supra* note 10.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.* (Vevo is a new, lucrative source of income for content owners).

website.<sup>30</sup> Advertising-based funding makes free viewing possible and has been a profitable business model for Vevo, which has made “hundreds of millions of dollars” in revenue.<sup>31</sup> Content owners—the label, artist, or licensor—share in Vevo’s financial success by receiving over half of Vevo’s gross revenue, with the remainder distributed to Vevo and its partners, including YouTube.<sup>32</sup> So far, Vevo has paid approximately \$100,000,000 in royalties to the music industry in the few years it has existed,<sup>33</sup> which is considered “a tremendous figure more than MTV has ever paid out.”<sup>34</sup>

In addition, dance has contributed to music videos’ success and has become embedded in all aspects of the entertainment industry.<sup>35</sup> Dance influences the way television, film, music, and advertising are experienced.<sup>36</sup> On television, *Dancing with the Stars*, *America’s Best Dance Crew*, and *So You Think You Can Dance* all have dedicated viewers who vote for their favorite dancers every episode.<sup>37</sup> In film, a movie titled *Step Up* focused on dance choreography, and because of the market demand for dance-featured entertainment, there were three sequels.<sup>38</sup> More recently, *Black Swan* grossed \$305,000,000 globally,<sup>39</sup> and Natalie Portman, who depicted a murderous ballerina, won the Oscar for “Best Actress” in 2011.<sup>40</sup> In pop concerts and music videos, dance routines are essential and celebrity artists like Madonna, Lady Gaga, and Beyoncé

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Vevo aligns the interests of YouTube, a historic copyright infringer, and content owners. This is important because convincing music labels that profitability and reliability are greater than the cost of infringement is a major obstacle. *See id.* (quoting Rio Caraeff, “It is important to let artists, song writers, record companies and anyone else in the business of music know that there are new, viable revenue streams growing rapidly.”).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (quoting Rio Caraeff (emphasis added)).

<sup>35</sup> *See infra* notes 36–40 and accompanying text.

<sup>36</sup> *See* Jewel Delegall, *Dance and Choreography: Making an Impact*, CAMPUS CIRCLE (May 25, 2011), <http://www.campuscircle.com/review.cfm?r=13257>.

<sup>37</sup> *Id.*

<sup>38</sup> *See* Peter Bradshaw, *Step Up 4: Miami Heat Review*, THE GUARDIAN (Aug. 9, 2012, 5:15 PM), <http://www.guardian.co.uk/film/2012/aug/09/step-up-4-miami-heat-review>.

<sup>39</sup> Pamela McClintock, ‘Black Swan’s’ Japan Opening Pushes Worldwide Cume Past \$300 Mil, HOLLYWOOD REPORTER (March 15, 2011, 9:35 AM), <http://www.hollywoodreporter.com/news/black-swans-japan-opening-pushes-188510>.

<sup>40</sup> *Awards for Black Swan*, IMDB.COM, <http://www.imdb.com/title/tt0947798/awards> (last visited Jan. 31, 2012).

“aren’t complete without their dancers.”<sup>41</sup> Dancers are also prevalent in marketing and advertising. For example, a “Nike Women ad campaign features a music video from Rihanna with a breakdown of the moves by choreographer Jamie King,” and “Pepsi promoted its tropical Pepsi Samba drink with a dance competition where people uploaded videos and voted for the best and worst dancers.”<sup>42</sup>

Although dance is essential to the entertainment industry and key to the success of music videos, music videos have been among the worst jobs for dancers. Dancer Sarah Christine Smith cautions new dancers:

If you have to choose between a music video and a SAG job, take the SAG job. I know it’s cool to dance in a video on MTV, but a union job will continue to pay you in residuals. If you make enough money through SAG, you get health insurance.<sup>43</sup>

## B. MUSIC VIDEO DANCERS

Dancers compose a significant portion of the artistic community and consist largely of young females of color who are more likely to lack advanced education, to be self-employed, and to earn lower wages than other artists.<sup>44</sup> Of the 2.1 million artists working in the United States, 23,713 are dancers and choreographers, composing 1.3% of the artist workforce.<sup>45</sup> Dancers have the youngest median age among artists: twenty-five years old.<sup>46</sup> New dancers, who are thrilled to have a job at all, tend to be more willing than experienced dancers to work for lower wages and under poor conditions.<sup>47</sup> Additionally, dancers are the most ethnically

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<sup>41</sup> Delell, *supra* note 36.

<sup>42</sup> *Made for Each Other*, DANCE MAGAZINE, Oct. 2006, at 16 (describing dancers being used in ad campaigns by GAP, Hanes, Nike and Pepsi).

<sup>43</sup> Sarah Christine Smith, *Off the Record: Dancer to Dancer: Living La Vida L.A.*, DANCE SPIRIT, Nov. 2008, at 50, available at <http://www.danceu101.com/articles/2008-11-01/record-livin-la-vida-la>.

<sup>44</sup> See *infra* notes 45–58 and accompanying text.

<sup>45</sup> NAT’L ENDOWMENT FOR THE ARTS, NEA RESEARCH NOTE NO. 105, ARTISTS AND ART WORKERS IN THE UNITED STATES 6 (2011), available at <http://www.nea.gov/research/Notes/105.pdf>.

<sup>46</sup> *Id.* at 11; see also Tamara Johnson, *Crossover Kid: Hip-Hop Dancemaker John Byrne Moved from Taylor 2 to MTV*, DANCE MAGAZINE, June 2004, at 62 (“[C]ommercial dance is dominated by young talent.”).

<sup>47</sup> See Smith, *supra* note 43; see also Ava J. Bernstein, *Dancers’ Alliance: The Voice Behind the Movement*, DANCEPLUG.COM, Mar. 5, 2011 (“It is understood that many new dancers are eager to get noticed and often at any cost (or no cost, rather), but it is this mentality that will keep dancers at the bottom of the totem pole.”).

diverse artist group: 41% of all dancers and choreographers are non-white or Hispanic, which is “nine points higher than the corresponding share of the U.S. workforce.”<sup>48</sup> Historically, non-white and Hispanic workers earn lower wages on average than their white counterparts.<sup>49</sup> Dancers also have the highest percentage of women: 78% of all dancers and choreographers are women.<sup>50</sup> “Meanwhile, of the two best-paying artist occupations—architects and producers/directors—men compose seventy-five percent and sixty-three percent, respectively.”<sup>51</sup> As with race, it has long been established that women generally earn lower wages than men, and female-dominated professions pay lower wages than male-dominated ones.<sup>52</sup> Further, dancers have the lowest rates of college education. Only 25.9% of dancers and choreographers have a college degree compared to 59% percent of all artists and 32.3% of the total labor force.<sup>53</sup> Not having a college education limits dancers’ career options, making them more willing to accept jobs for lower rates.<sup>54</sup> Additionally, dancers are more likely to be self-employed: 26% of dancers and choreographers are self-employed compared to 9.8% of the total workforce.<sup>55</sup> Being self-employed hinders dancers’ ability to organize because they do not share a common

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<sup>48</sup> NAT’L ENDOWMENT FOR THE ARTS *supra* note 45, at 7.

<sup>49</sup> Gregory Acs and Pamela J. Lopreste, *Working for Cents on the Dollar: Race and Ethnic Wage Gaps in the Noncollege Labor Market*, URBAN INSTITUTE (Mar. 23, 2009), at 1, 7, available at <http://www.urban.org/url.cfm?ID=411856> (finding that although wages earned by white and nonwhite people in the United States have become closer over the past quarter-century, a gap persists even after controlling for worker, job, and employer characteristics).

<sup>50</sup> NAT’L ENDOWMENT FOR THE ARTS, *supra* note 45, at 10.

<sup>51</sup> *Id.*

<sup>52</sup> Jill Krasny, *Women Still Earn Less Than Men at Every Education Level*, YAHOO FINANCE (Mar. 1, 2012, 10:47 AM), <http://finance.yahoo.com/news/women-still-earn-less-men-154700013.html> (finding women “earned less per month at every degree level”); see also Jennifer Ludden, *Despite New Law, Gender Salary Gap Still Persists*, NPR.ORG (Apr. 19, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=125998232> (“[w]omen, on average, earn only 77 cents to a man's dollar.”); see also Mario Giaccone, *Gender Discrimination in Female Dominated Jobs*, EUROPEAN WORKING CONDITIONS OBSERVATORY (July 12, 2009), available at <http://www.eurofound.europa.eu/ewco/2009/04/IT09040491.htm> (finding that a gender gap for wages exists in Italy).

<sup>53</sup> NAT’L ENDOWMENT FOR THE ARTS, *supra* note 45, at 9.

<sup>54</sup> See Abby Rogers, *Charts: It's Nearly Impossible to Make a Living Wage Without a College Education*, BUSINESS INSIDER (Nov. 19, 2011, 12:11 PM), <http://www.businessinsider.com/college-degrees-jobs-2011-11>; see also Zoe Chace, *Without a College Degree, Hard Pressed for Jobs*, NPR.ORG (May 6, 2011, 12:01 AM), <http://www.npr.org/2011/05/06/136023482/without-a-college-degree-hard-pressed-for-jobs> (describing the plight of two siblings that do not have college educations struggling to find jobs).

<sup>55</sup> NAT’L ENDOWMENT FOR THE ARTS, *supra* note 45, at 10.

job site or principal.<sup>56</sup> All of these characteristics lead to dancers' having the third lowest median annual earnings for all artists of \$27,392.<sup>57</sup> In turn, these low earnings make litigating labor claims difficult, especially if dancers must finance the litigation themselves without union support.<sup>58</sup>

### 1. History of Music Video Dancers' Organizing Efforts

Music video dancers and their organizing efforts have adapted to the changes in the music video industry.<sup>59</sup> In the early 1980s, when music videos were a new industry, dancers only made fifty dollars per day.<sup>60</sup> Once music videos became more established, dancers required professional representation.<sup>61</sup> Working dancers in Los Angeles finally had access to legitimate representation in 1985 when Julie McDonald opened a dance department at Joseph, Helfond & Rix Agency (JHR) and became Los Angeles' first dance agent.<sup>62</sup> In the early 1990s, Dancers' Alliance was founded to standardize non-union work, including music video work.<sup>63</sup> In the mid-1990s, music videos began fading in popularity and the union representing dancers, Screen Extras Guild (SEG), dissolved—leaving dancers without union representation.<sup>64</sup> At this time, Dancers' Alliance became an active participant in unionizing dancers' film and television work, which included working with SAG to recognize dancers in all contracts as principal performers instead of extras.<sup>65</sup>

<sup>56</sup> See Oliver J. McKinstry, Note, *We'd Better Treat Them Right: A Proposal for Occupational Cooperative Bargaining Associations of Sex Workers*, 9 U. PA. J. LAB. & EMP. L. 679, 693–94 (2007) (identifying the challenges of organizing workers not employed at the same jobsite).

<sup>57</sup> NAT'L ENDOWMENT FOR THE ARTS, *supra* note 45, at 10.

<sup>58</sup> See Sarah Cuhn, Note, *An Uncommon Alliance*, 10 HASTINGS WOMEN'S L.J. 231, 234 (1999).

<sup>59</sup> See Lisa Jo Sagolla, *A Pioneer in Representing Dancers*, BACKSTAGE.COM (Sept. 30, 2009, 1:35 PM), <http://www.backstage.com/bso/advice-dance-movement/a-pioneer-in-representing-dancers-1004015801.story>.

<sup>60</sup> *Id.*

<sup>61</sup> See *id.*

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

<sup>63</sup> *About Dancer's Alliance*, DANCERS' ALLIANCE.COM, [www.dancersalliance.org/dancersalliance/About.html](http://www.dancersalliance.org/dancersalliance/About.html) (last visited Feb. 16, 2013).

<sup>64</sup> Screen Extras Guild was formed in 1945 to represent television and movie extras. It dissolved on June 1, 1992 and transferred jurisdiction to the Screen Actors Guild. SAG-AFTRA, *SAG Timeline*, SAG-AFTRA ONE UNION <http://www.sagaftra.org/sag-timeline> (last visited Feb. 16, 2013).

<sup>65</sup> Host Jason J. Carter, Video Editor Glyn Gray, *Dancers Alliance SAG / AFTRA Merger – Bobbie Bates*, DANCEPLUG.COM (Feb. 26, 2012), <http://www.danceplug.com/insidertips>



## 2. Music Video Dancers' Organizing Efforts Today

Music video dancers' organizing efforts have enabled them to secure a music video contract with major record labels.<sup>66</sup> The contract recognizes music videos as union work and allows music video dancers to earn better pay and receive greater health benefits.<sup>67</sup> It also has built momentum for other types of non-union work, such as concert tours, to become unionized.<sup>68</sup> The music video contract is pivotal, and the rights it has secured should be protected and expanded.

Union representation for music video dancers is important because advances in technology and the pervasiveness of the Internet have elevated music videos to a mainstream art form that is unlikely to disappear in the near future.<sup>69</sup> Union pressure is necessary for a dancer's compensation to accurately reflect music videos' popular status and profitability.<sup>70</sup> In Michael Jackson's music video *Hold My Hand*, the producers made it clear from their casting notice that they would refuse to hire anyone from Dancers' Alliance.<sup>71</sup> Such situations are less common now that Dancers' Alliance and SAG-AFTRA have unionized music videos, and require producers to comply with standardized compensation rates and working conditions when they produce music videos for covered record companies.<sup>72</sup>

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/interviews/dancers-alliance-sag-aftra-merger-bobbie-bates.

<sup>66</sup> Verrier, *supra* note 9.

<sup>67</sup> *Music Video Contract*, DANCERS' ALLIANCE.COM, [http://www.dancersalliance.org/dancersalliance/MV\\_Contract.html](http://www.dancersalliance.org/dancersalliance/MV_Contract.html) (last visited Feb. 16, 2013) [hereinafter DANCERS' ALLIANCE, *Music Video Contract*] (Covered music videos are defined as "an audiovisual product that contains as its underlying audio track, a sound recording produced under the AFTRA Sound Recordings Code and a visual element of the type of genre traditionally produced for exhibition on cable television or made available for digital distribution via Internet streaming and/or download.").

<sup>68</sup> See *Working Conditions and Rates*, DANCERSALLIANCE.COM, <http://www.dancersalliance.org/dancersalliance/Working.html> (last visited Feb. 16, 2013) [hereinafter DANCERS' ALLIANCE, *Working Conditions*] (providing rates for non-union jobs, including concert tours).

<sup>69</sup> See Sweney, *supra* note 10.

<sup>70</sup> McNary, *supra* note 1.

<sup>71</sup> See TMZ Staff, *Dancers Allege Discrimination in MJ Video Shoot*, TMZ.COM (Nov. 19, 2010, 5:05 AM), <http://www.tz.com/2010/11/18/michael-jackson-hold-my-hand-music-video-dancers-alliance-discrimination-casting-call/#.TziTFyPcbeY>.

<sup>72</sup> Verrier, *supra* note 9.

## III. NEED FOR LEGAL ACTION

## A. PROBLEMS MUSIC VIDEO DANCERS FACE

While the dance industry seems glamorous, dancers face the same labor and employment issues as the rest of the workforce.<sup>73</sup> Music videos are made in uncomfortable working conditions.<sup>74</sup> “Videos are usually quick, seat-of-the-pants projects, very much like the early days of television where there were no rules and anything could happen.”<sup>75</sup> According to SAG-AFTRA Co-President Roberta Reardon, music video dancers are often young and “face difficult working conditions, including exposure to the elements and worksites with no break areas, drinking water or even bathrooms.”<sup>76</sup>

Until the music video contract, the long hours, unsuitable working conditions, and risks of physical injury that music video dancers endure were never considered.<sup>77</sup> The very nature of their work subjects them to potential injuries. Dancers are prone to joint and tendon injuries, which occur when the floor they dance on does not absorb enough impact.<sup>78</sup> They can also experience “acute trauma from a single injury,” such as a collision, or an injury from repetitive motions.<sup>79</sup> Because of the physical injuries described above, music video dancers should have pensions, health insurance, and collect hazard pay when appropriate.<sup>80</sup>

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<sup>73</sup> Erin E. Bahn, Note, *To Labor in the Dancing World: Human Rights at Work*, 7 BUFF. HUM. RTS. L. REV. 105, 105 (2001) (describing ballerinas’ work and collective bargaining challenges, while arguing that “[d]ance is a form of labor not unlike other kinds of labor.”).

<sup>74</sup> DJ Fatboy Slim’s video, *Wonderful Night*, featured professional musical theater dancers barrel turning and pirouetting next to him, doing their best to avoid rubble and potholes and working three all-nighters to finish the shoot. Sara Jarrett, *Howling to the Beat*, DANCE SPIRIT, Feb. 2005, at 136.

<sup>75</sup> Sagolla, *supra* note 59 (quoting Julie McDonald).

<sup>76</sup> See Barb Kucera, *Co-President of Newly Merged Entertainment Union Brings Message of Unity*, WORKDAYMINNESOTA.ORG (Sept. 17, 2012), [www.workdayminnesota.org/index.php?news\\_6\\_5338](http://www.workdayminnesota.org/index.php?news_6_5338).

<sup>77</sup> See Verrier, *supra* note 9.

<sup>78</sup> Bahn, *supra* note 73, at 108.

<sup>79</sup> Michael McCann, *Occupational Hazards in the Arts*, CALIFORNIA STATE MONTEREY BAY, FACILITIES AND PLANNING, <http://fmp.csumb.edu/hazards-arts> (last updated Nov. 3, 2010).

<sup>80</sup> See McNary, *supra* note 1.

## B. WHY DANCERS FACE PROBLEMS

Dancers have struggled to obtain fair pay in part because of their demographics and the temporary nature of music video work.<sup>81</sup> Many music video dancers are at the beginning of their careers<sup>82</sup> and are thus more willing to work for a lower rate to get noticed.<sup>83</sup> Additionally, music video work only lasts a few days.<sup>84</sup> Consequently, some dancers are not motivated to fight for change because most of their jobs are temporary.<sup>85</sup>

## C. WHAT DANCERS WANT: FAIR COMPENSATION

Throughout the music video contract negotiations, Dancers' Alliance members advocated for minimum rates; residuals and buyouts; and pay for overtime, costume fittings, and hazardous activities.<sup>86</sup> Although many of these protections were granted in the music video contract, music video dancers must remain vigilant to ensure these protections are maintained. The music video contract does not provide principal dancers, who have highly prominent roles in music videos, with residuals.<sup>87</sup> This is a right that music video dancers should advocate for because music video stars contribute as much to music videos as choreographers who receive residuals do.<sup>88</sup> A residual is a payment for each time a music video is shown,<sup>89</sup> whereas a buyout is a one-time fee calculated on the video's total budget for the use of a dancer's likeness in the future, such as when the dancer is featured on MTV multiple times per day for months.<sup>90</sup> Hazard

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<sup>81</sup> See *supra* Part III.B.

<sup>82</sup> See Smith, *supra* note 43 (discussing the difficulty of rejecting a music video job because of the desire to work with pop stars).

<sup>83</sup> See *id.*; see also Bernstein, *supra* note 47 (discussing how dancers were reluctant to turn down work at "half of the DA music video rate").

<sup>84</sup> See Q & A: Rosero and Jamal, DANCE MAGAZINE, Oct. 2006, at 16.

<sup>85</sup> See Cuhn, *supra* note 58, at 233.

<sup>86</sup> See BWV News Desk, *SAG-AFTRA Reaches Deal with Record Labels on Music Video Performers*, BROADWAYWORLD.COM (June 1, 2012, 6:06 PM), <http://losangeles.broadwayworld.com/article/SAG-AFTRA-Reaches-Deal-with-Record-Labels-on-Music-Video-Performers-20120601>; see also DANCERS' ALLIANCE, *Music Video Contract*, *supra* note 67 (discussing the terms of the music video contract).

<sup>87</sup> See DANCERS' ALLIANCE, *Music Video Contract*, *supra* note 67 (not including a provision for residuals in the contract).

<sup>88</sup> See LINDEY ON ENT., *supra* note 14, § 10:37 ("Choreographer to receive flat fee plus percentage of net profits derived from exploitation of the Video.").

<sup>89</sup> See MERRIAM WEBSTER DICTIONARY, *Definition of Residual*, <http://www.merriam-webster.com/dictionary/residual> (last visited Feb. 16, 2013).

<sup>90</sup> Kristin Lewis, *How Much Do Dancers Really Make?*, DANCE SPIRIT, Feb. 2008, at 74.

pay is a minimum fee a producer must pay if he or she “engages a performer in legitimate hazardous activity.”<sup>91</sup> Examples of hazardous activities include dancing on improper floors, in inclement weather, or with unsecure props.<sup>92</sup> Choreography such as lifts, throws, catches, and falls, as well as knee work without pads are also considered hazardous.<sup>93</sup> The following sections will discuss methods of obtaining fair compensation for dancers and assess whether unionization is the best option.

#### IV. LITIGATION AND THE FAIR LABOR STANDARDS ACT

##### A. PURPOSE OF THE FLSA

The Fair Labor Standards Act (FLSA) establishes the national minimum wage and overtime pay for employees engaged in commerce or in production for commerce.<sup>94</sup> It strives to correct labor conditions “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>95</sup> By prohibiting substandard labor conditions, the FLSA protects “the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others.”<sup>96</sup>

The FLSA, like all federal and state labor law, only protects “employees.”<sup>97</sup> This limitation has two consequences: it gives employers an incentive to classify employees as independent contractors to circumvent providing employee benefits,<sup>98</sup> and it makes it difficult to

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<sup>91</sup> DANCERS’ ALLIANCE, *Working Conditions*, *supra* note 68.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> 29 U.S.C. §§ 206–07 (2006).

<sup>95</sup> *Id.* § 202(a)–(b).

<sup>96</sup> *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 592 (1944), *superseded on other grounds by statute*, 29 U.S.C. § 254.

<sup>97</sup> *See* 29 U.S.C. §§ 206–07 (limiting the FLSA to only apply to employees); *see also* *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (explaining that the FLSA applies only if an employer-employee relationship exists).

<sup>98</sup> Thomas Murray, Note, *Independent Contractor or Employee? Misplaced Reliance on Actual Control Has Disenfranchised Artistic Workers Under the National Labor Relations Act*, 16 *Cardozo Arts & Ent. L.J.* 303, 304 (1998); *see also* David P. Cudnowski, *Actors and Entertainers: Employees, Independent Contractors, or Statutory Employees? A Matter of Form over Substance*, 11 *U. MIAMI ENT. SPORTS L. REV.* 143, 143 (“[A]ctors and entertainers are hybrids of a sort, difficult to categorize and possessing traits common to both employees and independent contractors.”).

know whether the FLSA protects performers since they often possess qualities indicative of both employee and independent contractor status.<sup>99</sup>

## B. ECONOMIC REALITIES TEST

Under the FLSA, an “employee” is “any individual employed by an employer.”<sup>100</sup> An “employer” is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>101</sup> The term “employ” is defined as “to suffer or permit to work.”<sup>102</sup> An “economic realities test” is used to interpret the phrase “to suffer or permit to work.”<sup>103</sup> Under the test, “[e]mployees are those who, as a matter of economic reality, are dependent upon the business to which they render service.”<sup>104</sup> The test’s ultimate concern is whether workers are in business for themselves.<sup>105</sup> While neither exhaustive nor determinative, six factors are used to analyze whether a worker is an employee:

- 1) [T]he degree of the alleged employer's right to control the manner in which the work is to be performed;
- 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill;
- 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers;
- 4) whether the service rendered requires a special skill;
- 5) the degree of permanence of the working relationship; and
- 6) whether the service rendered is an integral part of the alleged employer's business.<sup>106</sup>

These factors must be weighed together and not in isolation.<sup>107</sup> The

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<sup>99</sup> See Cuhn, *supra* note 58, at 235 (“[I]ndependent contractor status becomes a disadvantage to employees when employers improperly classify them as independent contractors to avoid providing benefits . . .”).

<sup>100</sup> 29 U.S.C. § 203(e)(1).

<sup>101</sup> *Id.* § 203(d).

<sup>102</sup> *Id.* § 203(g); see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (discussing the definition of “employ”).

<sup>103</sup> *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 724 (1947); see also *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (“[T]he test of employment under the Act is one of ‘economic reality.’”).

<sup>104</sup> *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

<sup>105</sup> *Donovan v. Tehco, Inc.* 642 F.2d 141, 143 (5th Cir. 1981).

<sup>106</sup> *Real v. Driscoll Strawberry Assoc., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979).

<sup>107</sup> *Rutherford Food Corp.*, 331 U.S. at 730.

weight of each factor depends on “whether the putative employee is economically dependent upon the alleged employer.”<sup>108</sup>

Exotic dancers have successfully argued that they are employees under the economic realities test by demonstrating that they depend on their employers for their livelihoods.<sup>109</sup> In most FLSA cases that involve exotic dancers, each of the economic reality factors, except for the working relationships’ permanence, weigh in favor of the dancers being considered employees.<sup>110</sup> First, with respect to control, exotic dance clubs generally control the dancers because they establish set fees or minimum charges for table and other dances,<sup>111</sup> require dancers to perform on the center stage during “stage rotations,”<sup>112</sup> and force dancers to follow written rules and regulations or pay a fine.<sup>113</sup> Furthermore, they mandate that dancers leave immediately after their shifts and perform for all the customers, not just a select few.<sup>114</sup> Second, dancers’ opportunities for profit or loss often depend upon their ability to “hustle,”<sup>115</sup> which is not the type of “initiative” contemplated by the FLSA.<sup>116</sup> Third, dancers’ invest much less in the business than club owners do.<sup>117</sup> Specifically, club owners’ expenses for advertising, facilities, and maintenance outweigh dancers’ expenses for costumes, hairstylings, and shoes.<sup>118</sup> Fourth, exotic dancing does not require any specialized skills.<sup>119</sup> Although dancers audition, they do not have to follow any criteria and those who fail are

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<sup>108</sup> *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994).

<sup>109</sup> Exotic dancer plaintiffs persuasively argued they were independent contractors under the FLSA in the following cases: *Reich v. Circle C. Inv., Inc.*, 998 F.2d 324, 328–29 (5th Cir. 1993); *Harrell v. Diamond A Entm’t, Inc.*, 992 F. Supp. 1343, 1353–54 (M.D. Fla. 1997); *Reich v. Priba Corp.*, 890 F. Supp. 586, 592 (N.D. Tex. 1995).

<sup>110</sup> See *Circle C Invest., Inc.*, 998 at 328–29; see also *Harrell*, 992 F. Supp. at 1352–54; see also *Priba Corp.*, 890 F. Supp. at 592–94.

<sup>111</sup> E.g., *Circle C Invest., Inc.*, 998 F.2d at 327.

<sup>112</sup> *Harrell*, 992 F. Supp. at 1349–50.

<sup>113</sup> E.g., *Circle C Invest., Inc.*, 998 F.2d at 327.

<sup>114</sup> *Harrell*, 992 F. Supp. at 1350.

<sup>115</sup> “Hustling” is a term used in the exotic dance industry to describe the “rounds” dancers make to earn tips and solicit table dances. *Id.*

<sup>116</sup> *Id.* (“The ability to converse with club clientele in an effort to generate a larger tip is not the type of initiative contemplated [by this factor]. Customer rapport much more closely parallels efficiency than initiative [which this factor requires].” (internal quotation marks omitted)).

<sup>117</sup> E.g., *Circle C Invest. Inc.*, 998 F.2d at 327–28.

<sup>118</sup> *Id.*

<sup>119</sup> E.g., *Circle C Invest. Inc.*, 998 F.2d at 328.

“few and far between.”<sup>120</sup> Many exotic dancers have no prior dance experience; they have to “keep moving,” but do not need to follow certain dance steps or choreography.<sup>121</sup> Fifth, dancers are integral to their club’s continued success, which depends upon stage and table dances.<sup>122</sup> “Unlike shoe shine boys at an airport, topless dancers are the ‘main attraction’ at a topless nightclub and ‘obviously very important’ to the business of the nightclub.”<sup>123</sup> Finally, although the temporary nature of the work weighs in favor of the dancers’ independent contractor status, this solitary factor does not outweigh the five remaining factors and courts in exotic dancer cases afford it little weight.<sup>124</sup>

In contrast, truck drivers are independent contractors under the FLSA.<sup>125</sup> The first two factors weigh in favor of the drivers being independent contractors and the remaining factors cut in favor of employee status.<sup>126</sup> In *Herman v. Express Sixty-Minute Service, Inc.*,<sup>127</sup> the drivers exercised control over their jobs because they were not required to accept all deliveries, to wear a uniform, or to work exclusively for one courier delivery business.<sup>128</sup> Additionally, the drivers’ opportunity for profit or loss depended on their own initiative.<sup>129</sup> The drivers exercised initiative by choosing to undertake only the most profitable jobs.<sup>130</sup> Moreover, the drivers only worked for their alleged employer for a short period of time.<sup>131</sup> However, the drivers’ relative investment and skill favor employee status; the drivers’ invested less than the alleged employers’ and did not need any special skills to drive the trucks.<sup>132</sup>

### C. ARE MUSIC VIDEO DANCERS EMPLOYEES UNDER THE FLSA?

Music video dancers have characteristics of both independent contractors and employees, making it challenging to categorize them. The

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<sup>120</sup> *Harrell*, 992 F. Supp. at 1351.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1352.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> See *Herman v. Express Sixty-Minute Delivery Serv., Inc.*, 161 F.3d 299, 306 (1998).

<sup>126</sup> *Id.* at 303–06.

<sup>127</sup> *Id.* at 306.

<sup>128</sup> *Id.* at 303.

<sup>129</sup> See *id.* at 304.

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

<sup>131</sup> *Id.* at 305.

<sup>132</sup> *Id.* at 305.

factors fall across the board. Music video dancers' relative investments clearly indicate employee status. On the other hand, the permanency of the working relationship and skill required undoubtedly favor independent contractor status. Finally, the remaining factors weigh slightly in favor of independent contractor status. Ultimately, in light of the economic reality test, music video dancers are more likely to be classified as independent contractors because they are not economically dependent on music videos for their livelihood any more than independent contractor truck drivers are dependent on a courier service for their livelihood. Furthermore, music video dancers also resemble the independent contractor professional ballerinas discussed in the following National Labor Relations Act section.

### 1. Relative Investment Suggests Employee Status

It is expensive to produce music videos; one music video can cost up to \$200,000.<sup>133</sup> Thus, the amount of money music video dancers spend on clothing and training is much less, indicating employee status.<sup>134</sup> In fact, the music video dancers' investments are comparable to exotic dancers' investments in costumes, hairstylings, and shoes. Therefore, this factor weighs in favor of music video dancers being employees.

### 2. Temporary Nature of the Working Relationship and Skill Required Indicates Independent Contractor Status

On the other hand, the temporary nature of the working relationship and the skill required of music video dancers strongly favors independent contractor status. Music video projects typically take no more than one week,<sup>135</sup> and dancers do not expect to be hired again.<sup>136</sup> Moreover, unlike exotic dancers who are not valued for their artistic talent, only the most talented music video dancers are chosen; top choreographers view music videos as a medium to showcase their art and reach millions of viewers.<sup>137</sup>

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<sup>133</sup> LINDEY ON ENT., *supra* note 14, § 10:28.

<sup>134</sup> This only accounts for dancers' current investments, not the money dancers spend from a younger age to build their careers.

<sup>135</sup> See *Q & A: Rosero and Jamal*, *supra* note 84 at 16 (describing music video rehearsals as only lasting a couple of days compared to movies, which can last months).

<sup>136</sup> See Lewis, *supra* note 90, at 74 (dancers are only paid for hours relating to a specific music video project).

<sup>137</sup> See Johnson, *supra* note 46, at 62–63 (John Bryne, music video choreographer for Christina Aguilera, Gwen Stefani, and Blink-182, comments that creating music videos is “very powerful” because they enable him to reach a larger audience.).



Additionally, music video dancers need formal dance training because music videos often contain complicated choreography.<sup>138</sup> By contrast, exotic dancers are just expected to “keep moving”; no choreography is required.<sup>139</sup> Further, flocks of dancers audition to be in music videos but only a few are chosen,<sup>140</sup> unlike exotic dancers who rarely fail an audition.<sup>141</sup> In sum, the temporary nature of the working relationship and the high skill required favors music video dancers being independent contractors.

### 3. Control Exercised by the Dancers Supports Independent Contractor Status

The record labels and producers contractually retain the right to approve creative aspects of the music videos they fund.<sup>142</sup> However, dancers perform the choreography in their own style and provide input.<sup>143</sup> Moreover, music video dancers are not required to work solely for one label or producer.<sup>144</sup> In fact, dancers typically work on several projects simultaneously.<sup>145</sup> Like the truck drivers in *Herman* who were not required to accept all deliveries from the courier service, music video dancers also are not required to do all stunts or to accept all music video jobs from a specific producer or label.<sup>146</sup> Additionally, unlike exotic dancers who must comply with written regulations such as fines for unexcused absences and for staying after their shift, the general release form music video dancers

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<sup>138</sup> Sara Wolf, *Landing a Gig in LA*, DANCE MAGAZINE, Feb. 1, 2005, at 84 (advising dancers to bring a resume listing their professional experience and background training to auditions).

<sup>139</sup> *Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343, 1351 (M.D. Fla. 1997).

<sup>140</sup> Wolf, *supra* note 138, at 82 (explaining that “many young dancers migrate to southern California to fulfill their dream of dancing onstage next to their favorite pop star”).

<sup>141</sup> *Harrell*, 992 F. Supp. at 1351.

<sup>142</sup> LINDEY ON ENT., *supra* note 14, at § 10:14 (Record companies try to contract for approval over the major creative elements involved in the production of a music video such as selecting a producer or director of the music video, the storyboard, and the production budget.).

<sup>143</sup> See Wolf, *supra* note 138, at 85 (“Accuracy is important but choreographers also want to see what ‘flavor’ you bring to the movement.”); see also *Q & A: Rosero and Jamal*, *supra* note 84, at 16 (explaining that dancers have an opportunity to give their input on the choreography and their suggestions can be incorporated into the video).

<sup>144</sup> Wolf, *supra* note 138, at 82–83 (“You can be a backup dancer in a music video one day and in a TV commercial the next.”).

<sup>145</sup> See *id.*

<sup>146</sup> See Dancers’ Alliance, *Working Conditions*, *supra* note 68 (advising dancers of the right to refuse performing hazardous activities).

sign contains no such provisions.<sup>147</sup>

#### 4. Initiative Favors Independent Contractor Status

Further, music video dancers take initiative in order to earn a profit, which indicates independence.<sup>148</sup> Music video dancers exert initiative in the operation of their businesses by controlling which talent agents to use, which jobs to audition for (e.g., music videos, television shows, commercials), and which specialized skills to showcase (e.g., dancing, acting, singing, modeling).<sup>149</sup> Like the truck drivers in *Herman*, dancers are independent entrepreneurs and must balance the profitability of different jobs to determine which ones to accept.<sup>150</sup> The majority of dancers live job-to-job, without a steady paycheck, so choosing jobs wisely is essential to their financial success.<sup>151</sup>

Furthermore, business aspects that producers control, like advertising and distribution, affect a song's and artist's success, but not a dancer's profits.<sup>152</sup> Unlike an exotic dancer whose profits are directly determined by a club's ability to increase customer volume,<sup>153</sup> a music video dancer's opportunity for profit does not depend on a record label's decisions about marketing and promotion of music videos; instead, a music video dancer is paid a flat fee based on the length of the rehearsal and shoot. Therefore, a music video's popularity has little bearing on a dancer's profits.<sup>154</sup>

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<sup>147</sup> See *LINDEY ON ENT.*, *supra* note 14, § 10:37 Ex. B.

<sup>148</sup> Lewis, *supra* note 90, at 74–75.

<sup>149</sup> See Wolf, *supra* note 138, at 85 (describing dancers doing a variety of dance jobs); see also Lewis, *supra* note 90, at 74–75 (discussing the profitability of different dance jobs).

<sup>150</sup> See Lewis, *supra* note 90, at 74 (explaining that dancers are only paid for hours relating to a specific music video project).

<sup>151</sup> See Wolf, *supra* note 138, at 83 (explaining that Los Angeles dancers are always auditioning for the next job).

<sup>152</sup> See Lewis, *supra* note 90, at 74 (Music video dancers may expect to be paid for rehearsal time and for the shoot and, under certain circumstances, may receive a one-time fee for the use of their likeness in the future.).

<sup>153</sup> *Reich v. Circle C. Inv., Inc.*, 998 F.2d 324, 327–28 (5th Cir. 1993).

<sup>154</sup> See *id.* (“Almost every successful song has a corresponding music video to promote it.”).

5.    Integral Part of the Business Factor Indicates Independent Contractor Status

Moreover, music video dancers are not an integral part of the record labels' business operations because music video dancers do not perform the primary work of recording labels.<sup>155</sup> Typically, dance is only a component of music videos, and music video production is a single aspect of recording labels' complex business operations.<sup>156</sup> Additionally, although record labels would experience a financial loss if music video production ceased, the music business would nonetheless survive.<sup>157</sup> Hence, just as advertising is important for attracting nightclub patrons, but is not an integral part of operating a nightclub, music videos are important for obtaining new fans and consumers, but are not an integral part of a record label's business.<sup>158</sup> With respect to the nightclub analogy, music video dancers are comparable to workers dancing outside a nightclub to entice passersby to come inside: music video dancers promote the central product, which is the music.<sup>159</sup>

In conclusion, because music video dancers are economically independent, they are probably independent contractors under the FLSA. Specifically, the relative investment factor is the only factor favoring employee status; the temporary nature of the work, special skill required, control exercised, opportunity for profit, and secondary role of dance for record labels all indicate that music video dancers are independent contractors, unprotected by the FLSA.

D.    PROFESSIONAL EXEMPTION

Even if music video dancers were employees under the FLSA, they probably would not receive the Act's protection. Specifically, the FLSA's minimum wage and overtime provisions do not apply to "any employees employed in bona fide executive, administrative, or professional

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<sup>155</sup> Karl Hagstrom Miller, *Music Industry*, 5 *DICTIONARY OF AMERICAN HISTORY* 502, 503 (Stanley I. Kutler ed., 3d ed. 2003) (explaining that major labels use promotional strategies that combine well-advertised albums, large-scale tours, and airplay on radio stations; music videos were added to this list in the early 1980s), available at <http://www.encyclopedia.com/doc/1G2-3401802800.html>.

<sup>156</sup> *Id.*

<sup>157</sup> See Sweney, *supra* note 10 (stating that music videos generate "hundreds of millions of dollars" in revenue).

<sup>158</sup> See *id.*

<sup>159</sup> See *id.*

capacity.”<sup>160</sup> Individuals are deemed bona fide professional employees if: (1) they receive at least \$455 per week “on a salary or fee basis,” and (2) primarily perform “work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.”<sup>161</sup> A salary basis exists if each pay period employees receive a predetermined amount that is not reduced based on the quality or quantity of work performed.<sup>162</sup> By contrast, a “fee basis” exists if an employee “is paid an agreed sum for a single-job regardless of the time required for its completion.”<sup>163</sup> The requirement of “invention, imagination, originality or talent” is met by “actors, musicians, composers, conductors, and soloists” as well as “cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept.”<sup>164</sup> Furthermore, “a recognized field of artistic or creative endeavor” includes music, writing, acting, and graphic arts.<sup>165</sup> The creative professionals exemption is “narrowly construed” and “limited to those establishments plainly and unmistakably within their terms and spirit.”<sup>166</sup>

The requirement of “invention, imagination, originality, or talent” is not met by exotic dancers.<sup>167</sup> In *Harrell*, the exotic dancing at issue did not require the “invention, imagination, and talent” contemplated by the exemption.<sup>168</sup> Crucially, when the club owner made hiring decisions, he focused more on a dancer’s ability to entice customers than the artistic qualities of dancing.<sup>169</sup> Further, the dancers only had to keep moving and were not required to learn or perform specific steps or choreography.<sup>170</sup>

Here, music video dancers earn enough to qualify under the exemption; they receive more than \$455 per week for one day of a

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<sup>160</sup> See 29 U.S.C. § 213(a).

<sup>161</sup> 29 C.F.R. § 541.300.

<sup>162</sup> *Id.* § 541.602(a).

<sup>163</sup> *Id.* § 541.605(a); see also *Elwell v. Univ. Hosp. Home Care Serv.*, 276 F.3d 832, 838 (6th Cir. 2002) (A “compensation plan will not be considered a fee basis arrangement if it contains any component that ties compensation to the number of hours worked.”).

<sup>164</sup> 29 C.F.R. § 541.302(c).

<sup>165</sup> *Id.* § 541.302(b).

<sup>166</sup> *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); but see *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2172 n.21 (2012) (stating that narrow construction is not necessary when “interpreting a general definition that applies throughout the FLSA” and not just an exemption).

<sup>167</sup> *Harrell v. Diamond A Entm’t, Inc.*, 992 F. Supp. 1343, 1343 (M.D. Fla. 1997).

<sup>168</sup> *Id.* at 1357.

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

<sup>170</sup> *Id.* at 1351, 1357.

shoot.<sup>171</sup> In addition, they are paid on a salary basis because they receive a predetermined amount that does not change based on the quality or quantity of work performed.<sup>172</sup>

In addition, a dancer's primary duty is to perform work that requires "invention, imagination, originality, or talent."<sup>173</sup> Like actors who are generally covered by the exemption, dancers also are trained, possess specialized skills, and undergo competitive auditions for jobs.<sup>174</sup> These aspects set music video dancers apart from exotic dancers who are valued not for their talent but rather for their attractiveness.<sup>175</sup> Dancers also can be analogized to cartoonists because they rely on "their own creative ability to express the concept"<sup>176</sup> that choreographers strive to convey.<sup>177</sup>

Furthermore, music video dancing is likely a recognized field of artistic or creative endeavor because music is recognized as such,<sup>178</sup> and music videos are essentially music paired with rapidly moving pictures.<sup>179</sup> Furthermore, dance can be analogized to acting, another recognized field of artistic endeavor.<sup>180</sup> Like actors, dancers must train, develop their talent, and audition to obtain creative work.<sup>181</sup>

In sum, dancers likely fall within the professional exemption because they meet the minimum payment requirement and the artistic merit of dance is at least equivalent to that of acting and music.<sup>182</sup>

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<sup>171</sup> 29 C.F.R. § 541.300.

<sup>172</sup> *Id.* § 541.602(a).

<sup>173</sup> 29 C.F.R. § 541.300.

<sup>174</sup> Laurence Shatkin & Michael Farr, TOP 100 CAREERS WITHOUT A FOUR-YEAR DEGREE 278 (10th ed. 2011) ("Formal training through a university or acting conservatory is typical; however, many actors, producers, and directors find work on the basis of their experience and talent alone.").

<sup>175</sup> See *Harrell*, 992 F. Supp. at 1357 ("[T]he work product being purchased (as it were) by the employer is not [the exotic dancers'] dancing skill at all. It is the ability of the dancers to titillate male customers. If a fully clothed modern dancer auditioned to modern, atonal music, she might be a former member of the Martha Graham or Twyla Tharp dance groups, but she would not stand a chance of being hired at Babe's or Foxy Lady [exotic dance clubs] . . . they are not looking for dance talent, they are looking for attractive young women.").

<sup>176</sup> 29 C.F.R. § 541.302(c).

<sup>177</sup> See Wolf, *supra* note 138, at 85 ("Accuracy is important but choreographers also want to see what 'flavor' [an auditioning dancer] brings to the movement.").

<sup>178</sup> 29 C.F.R. § 541.302.

<sup>179</sup> LINDEY ON ENT., *supra* note 14, § 10:28.

<sup>180</sup> *Harrell*, 992 F. Supp. at 1354 n.14 (finding the analogy between dancing and acting persuasive for purposes of a professional exemption).

<sup>181</sup> See Wolf, *supra* note 138, at 82–84.

<sup>182</sup> See 29 C.F.R. § 541.302.

### E. FLSA CONCLUSION

To obtain overtime and minimum wage payments under the FLSA, workers must litigate their claims.<sup>183</sup> However, litigation is an expensive and time consuming dispute resolution procedure that often results in a zero-sum solution.<sup>184</sup> Furthermore, it can be particularly unattractive for female dancers, who are more likely to be daunted by the prospect of waiting several years for the legal remedy, risking their career, and paying expensive legal fees.<sup>185</sup>

Additionally, dancers are unlikely to prevail once they bring their claims because they are probably independent contractors. Even if they were employees, they would likely fall within the professional exemption, which exempts them from FLSA protections. Finally, if they were protected by the FLSA, the protections would not achieve the “fair compensation” dancers seek when they negotiate a salary floor above the national minimum wage and overtime rates. Therefore, dancers should look to another means to improve their rights.

## V. PRIVATE COLLECTIVE BARGAINING AND THE NATIONAL LABOR RELATIONS ACT

### A. IMPORTANCE OF LABOR UNIONS

A labor union is a “combination of workers organized for the purpose of securing through united action the most favorable conditions as regards wages or rates of pay, hours, and conditions of employment.”<sup>186</sup> A union’s purpose is to protect employees against exploitive employers and improper working conditions.<sup>187</sup> Unions are effective because “[t]he voice of a single employee does not have as great of an impact” as that of thousands of unionized employees.<sup>188</sup> Unions accomplish their goals through collective bargaining, which is the “settlement of disputes by

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<sup>183</sup> See 29 U.S.C. § 216(b)–(c) (stating that an aggrieved employee may file a lawsuit to recover for minimum wage and overtime pay, and that the Labor Department may file a civil action on the employee’s behalf).

<sup>184</sup> See Cuhn, *supra* note 58, at 234.

<sup>185</sup> See *id.*

<sup>186</sup> *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 177 (Cal. 1981) (per curiam).

<sup>187</sup> Monique A. Anawis, Note, *The Ethics of Physician Unionization: What Will Happen if Your Doctor Becomes a Teamster?*, 6 DEPAUL J. HEALTH CARE L. 83, 84 (2002).

<sup>188</sup> *Id.*

negotiation between an employer and an employee representative.”<sup>189</sup> The resulting agreement creates the terms and conditions of employment for the union members.<sup>190</sup>

Union representation is critical for dancers.<sup>191</sup> Even though only twelve percent of the total national workforce is unionized, almost all performers in the entertainment industry are represented by a union.<sup>192</sup> Unions are a crucial counter-force to the four major labels that control more than seventy-five percent of the recorded music market: Universal Music Group, Sony Music Entertainment, Warner Music Group, and EMI Group.<sup>193</sup>

AFTRA and SAG were the two major unions that represented dancers until March 30, 2012 when they merged and became SAG-AFTRA.<sup>194</sup> SAG-AFTRA currently represents over 160,000 entertainers and negotiates contracts with major media corporations on members’ behalf.<sup>195</sup> A benefit that SAG-AFTRA offers its members through a collective bargaining agreement is the payment of a professional wage and overtime.<sup>196</sup>

Union support has been critical to music video dancers’ recent success in obtaining a music video contract.<sup>197</sup> Because of AFTRA’s support and music video dancers’ efforts, SAG-AFTRA’s National Board approved a music video contract on July 21, 2012.<sup>198</sup> The music video contract requires major labels, including Universal Music Group, Sony Music Entertainment, Warner Music Group, EMI Music, and The Walt Disney Co. to contribute to music video dancers’ retirement plans, provide minimum daily rates, and maintain safe working conditions for qualifying

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<sup>189</sup> Cal. Civ. Prac. Employment Litigation § 8:20 (2012).

<sup>190</sup> *Id.*

<sup>191</sup> See Sharlene A. McEvoy and William Windom, *SAG and AFTRA: The Case for Merger of the Entertainment Unions*, 12 U. MIAMI BUS. L. REV. 59, 59 (2004).

<sup>192</sup> *Id.*

<sup>193</sup> ROBERT LIND ET AL., ENTERTAINMENT LAW, 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES §§ 1:38, 21:17 (3d ed. 2012).

<sup>194</sup> See Verrier, *supra* note 9; see also Kucera *supra* note 76 (discussing the SAG-AFTRA merger).

<sup>195</sup> Kucera, *supra* note 76.

<sup>196</sup> *AFTRA and SAG Unions*, STAGESOURCE.COM, [www.stagesource.com/site\\_media/uploads/documents/8\\_advice\\_article\\_for\\_aftra\\_sag.pdf](http://www.stagesource.com/site_media/uploads/documents/8_advice_article_for_aftra_sag.pdf) (last visited Feb. 16, 2013).

<sup>197</sup> SAG-AFTRA, *What the Music Video Contract Means for You*, SAG-AFTRA.COM, <http://www.sagaftra.org/files/sag/documents/whatthemusicvideoagreementmeansforyou.pdf> (last visited Feb. 16, 2013).

<sup>198</sup> See *id.*

music video jobs.<sup>199</sup> Minimum daily rates only apply when a music video is produced under the AFTRA Sounds Recordings Code and has a budget greater than \$200,000.<sup>200</sup> Minimum daily rates for all other music videos must be negotiated on an individual basis.<sup>201</sup>

The music video contract is a tremendous achievement for music video dancers, and could not have been accomplished without union support.<sup>202</sup> Certain groups, such as exotic dancers, that have had difficulty “finding outside support or unions that will allow them to join” have failed to improve their wages and working conditions.<sup>203</sup> To succeed, music video dancers should continue to take advantage of SAG-AFTRA’s support as much as possible.<sup>204</sup> As stated by Sarah Cuhn in *An Uncommon Alliance*:

The labor movement has done more for the economic well-being of women and poor people than any other social institution. Women who belong to unions earn higher wages as a result of collective bargaining than women who are not members. Additionally, unions proportionally provide more advantages for women and persons of color than for white men.<sup>205</sup>

Although SAG-AFTRA now covers music video dancers and the music video contract is in force, determining whether music video dancers qualify as protected employees under the NLRA is still relevant for litigation purposes.<sup>206</sup> If the labels challenge music video dancers’ representation by SAG-AFTRA or the music video contract’s enforceability, a music video dancer’s employment status is critical.<sup>207</sup> If music video dancers are independent contractors, this may undermine their recent achievements of gaining union representation and a collective bargaining agreement.<sup>208</sup> This would be a disappointing result, particularly

<sup>199</sup> *Id.*

<sup>200</sup> *See id.*

<sup>201</sup> *Id.*

<sup>202</sup> *See* SAG-AFTRA, *SAG-AFTRA Reaches Historic Deal with Record Labels: Landmark Deal is the First Industrywide Agreement Covering Music Video Performers*, SAG-AFTRA.ORG (June 1, 2012), available at [www.sagaftra.org/music-videos/news](http://www.sagaftra.org/music-videos/news) (describing AFTRA’s role in negotiating the music video contract).

<sup>203</sup> Margot Rutman, Note, *Symposium: Exotic Dancers’ Employment Law Regulations*, 8 TEMP. POL. & CIV. RTS. L. REV. 515, 553 (1999).

<sup>204</sup> *See id.*

<sup>205</sup> Cuhn, *supra* note 58, at 250.

<sup>206</sup> The NLRA only protects employees. *See* 29 U.S.C. § 151.

<sup>207</sup> *See id.* § 152.

<sup>208</sup> *See id.* § 157.



in light of the NLRA's objectives.<sup>209</sup>

One of the NLRA's objectives is to minimize obstructions to commerce by encouraging collective bargaining and protecting a workers' freedom to associate, self-organize, and choose representatives to negotiate the terms and conditions of their employment or "other mutual aid or protection."<sup>210</sup> This objective promotes fair agreements by equalizing the bargaining power between employees and employers.<sup>211</sup> The NLRA protects employees' bargaining power and right to organize in many ways. For example, it requires employers to negotiate at arm's length with employee representatives and guarantees that employers will not interfere with the manner of representation that employees choose.<sup>212</sup>

#### B. EMPLOYEE STATUS AND THE CONTROL TEST

Like the FLSA, the NLRA only protects employees.<sup>213</sup> The NLRA's test to determine employment status is governed by general principles of agency law and contains factors included in the FLSA's economic reality test.<sup>214</sup> Whether an individual is an employee under the NLRA depends on the outcome of the control test: If an employer retains the right to direct the manner in which the work is done, as well as the result to be accomplished, an employer-employee relationship exists.<sup>215</sup> To determine if an alleged employer has control, factors considered include: if the employer controls the "manner and means" by which work is performed; if the "employer provides benefits"; "who provides the tools and other materials to perform the work"; and "who designates where work is done and whether the relationship is temporary."<sup>216</sup>

In *Jonbruni*, exotic dancers were considered employees under the NLRA's control test<sup>217</sup> because of the following: (1) they were warned by

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<sup>209</sup> See *id.* § 151.

<sup>210</sup> See *id.* § 151.

<sup>211</sup> *Id.* § 151 (discussing how the inequality of bargaining power between employees and employers "substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries").

<sup>212</sup> See *id.* § 157.

<sup>213</sup> See Rutman, *supra* note 203, at 528–29.

<sup>214</sup> See *Local 777 v. NLRB*, 603 F. 2d 862, 872–82 (D.C. Cir. 1978).

<sup>215</sup> *Id.* at 872–73.

<sup>216</sup> *NLRB v. O'Hare-Midway Limousine Serv., Inc.*, 924 F.2d 692, 694–95 (1991).

<sup>217</sup> *Jonbruni, Inc.*, Case No. 20-CA-283931999, WL 33454729 (N.L.R.B. Div. of Judges

the club not to under- or overcharge customers for a lap dance, required to dance on stage and provide "2 for 1" lap dance specials; (2) did not pursue a "distinct occupation" and were not hired to accomplish a specific result; (3) were exotic dancers, who are usually employees; (4) did not need any special skills; (5) were not hired to perform a specific, defined project; and (6) were essential to the club's business operations because there would be no business without them.<sup>218</sup> The remaining factors involving ownership of instrumentalities and place of work, method of payment, and belief of the parties were neutral.<sup>219</sup>

Apart from the control test, the National Labor Relations Board (NLRB) has designed eligibility formulas for the entertainment industry that allow short-term employees who have a continuing interest in employment to be included in bargaining units.<sup>220</sup> On-call stage technicians<sup>221</sup> who worked an average of four hours per week were eligible employees.<sup>222</sup> Additionally, those who worked on two film productions for five working days the prior year were eligible employees.<sup>223</sup>

Unlike the entertainment industry workers discussed above who are generally employees, taxi cab drivers and professional ballerinas are generally independent contractors.<sup>224</sup> In *Local 777*, the leading case to determine employment status,<sup>225</sup> several taxi drivers were found to be

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Nov. 2, 1999).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Trump Taj Mahal Assoc.*, 306 N.L.R.B. 294, 292–96 (1992) (concerning on-call stage technicians); *see also* *American Zoetrope Prod.*, 207 N.L.R.B. 621, 622–23 (1973) (discussing collective bargaining power of film editors, sound editors, assistant editors).

<sup>221</sup> On-call stage technicians perform technical functions and perform the same function as regular technical employees when not enough regular employees are available. Stage technician duties include "load-in, load-out, set up and operation of lighting, audio, and stage equipment; operation of dressing rooms; set up of movable staging; convention power distribution; and rigging and hanging of anything suspended from the ceiling." *Trump Taj Mahal Assoc.*, 306 N.L.R.B. at 294–95.

<sup>222</sup> *Id.* at 294.

<sup>223</sup> *American Zoetrope Prod.*, 207 N.L.R.B. at 622–23.

<sup>224</sup> *See Local 777 v. NLRB*, 603 F. 2d 862, 880–81 (D.C. Cir. 1978) (finding lessee cab drivers to be independent contractors); *see also* *Am. Guild of Musical Artists*, 157 N.L.R.B. 735, 741–42 (1966) (finding ballet dancers to be independent contractors); *but see* *Home Box Office, Inc. v. Directors Guild of Am., Inc.*, 531 F. Supp. 578, 581 (S.D.N.Y. 1982) *aff'd*, 708 F.2d 95 (2d Cir. 1983) (holding that freelance entertainers such as directors are independent contractors).

<sup>225</sup> *Murray*, *supra* note 98, at 325–26 (distinguishing *Local 777* as the leading case in this area).

independent contractors for two main reasons.<sup>226</sup> First, the taxicab lessor lacked control over the manner and means by which the drivers undertook their businesses.<sup>227</sup> Second, the rent paid to the lessor was not related to the fares earned by the lessee-driver.<sup>228</sup> These factors demonstrated that each driver was a small business owner whose personal choices determined the amount of profit or loss.<sup>229</sup>

Similarly, in *American Guild of Musical Artists*, the ballerinas in question were deemed independent contractors because they controlled the manner and means in which they danced their roles and numerous other factors suggested they controlled their work.<sup>230</sup> Although the company, Symphony, supplied the dance halls, determined when rehearsals and performances occurred, supplied music for rehearsals and performances, and choreographed a routine, the ballerinas retained and exercised control because: they received one lump sum; worked for Symphony for a short amount of time; exercised a high degree of skill; could also perform for other companies; had personal reputations; supplied their own costumes; were treated as independent contractors for tax purposes; were excluded from the Symphony's Worker's Compensation policy; and could interpret their roles as they saw fit.<sup>231</sup>

### C. ARE MUSIC VIDEO DANCERS EMPLOYEES UNDER THE NLRA?

For purposes of NLRA coverage, music video dancers possess traits of both independent contractors and employees. Even though some factors of the FLSA's economic realities test are repeated in the NLRA's control test, these factors must be re-evaluated in light of NLRA-specific case law.<sup>232</sup> Under the "control test," music video dancers again are likely independent contractors because they retain the right to control the manner and means in which they perform in music videos.

Music video dancers control the manner and means in which they

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<sup>226</sup> *Local 777*, 603 F.2d at 880.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Am. Guild of Musical Artists*, 157 N.L.R.B. 735 at 741. The Strand Art Theatre case involved a comic and an exotic dancer; both were independent contractors for NLRA purposes. *Strand Art Theatre, Inc.*, 184 N.L.R.B. 667 (1970).

<sup>231</sup> *See Am. Guild of Musical Artists*, 157 N.L.R.B. at 738, 741–42.

<sup>232</sup> Factors of the FLSA's economic realities test are seen in the NLRA's control test. *See Halferty v. Plus Drug Co., Inc.*, 821 F.2d 261, 265 (5th Cir. 1987) (enumerating FLSA factors); *see also Am. Guild of Musical Artists*, 157 N.L.R.B. at 741–42 (listing NLRA factors).

perform the choreography and decide whether they will perform stunts, and like the independent contractor ballerinas, music video dancers follow choreography but perform it in their personal style.<sup>233</sup> They also retain and exercise control over whether they will perform stunts or other hazardous activities.<sup>234</sup> Moreover, the labels and producers do not control the manner and means by which the dancers undertake the business of selling their talent to various entertainment industry clients.<sup>235</sup> In this respect, music video dancers are similar to the taxicab drivers in *Local 777*, who rented their cars, but were independent contractors because they chose which clients to transport and, in general, how to run their businesses.<sup>236</sup> Thus, the control factor—the most important factor in the control test<sup>237</sup>—cuts in favor of music video dancers being independent contractors.

Furthermore, music video dancers' working relationship with producers further indicates independent contractor status. Just as the brief working relationship of the ballerinas helped prove independent contractor status, the brief relationship of music video dancers also suggests they are not employees.<sup>238</sup> Moreover, music video dancers are hired to perform a specific, defined project, which further demonstrates independent contractor status.<sup>239</sup>

Additionally, music video dancers are engaged in a distinct occupation and business, which is evidenced through their specialized skill, opportunity for profit or loss based on initiative, and freedom to appear in other performances. They are valued for their dance skills and bring their prior dance training to their jobs.<sup>240</sup> Hence, just as the ballerinas in *Jonbruni* brought artistic skill and "know how" to their roles

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<sup>233</sup> See Wolf, *supra* note 138, at 85 ("Accuracy is important but choreographers also want to see what 'flavor' you bring to the movement."); see also *Q & A: Rosero and Jamal*, *supra* note 84, at 16 (indicating that dancers have an opportunity to give their input on the choreography and that dancers' suggestions can be incorporated into the music video).

<sup>234</sup> Dancers' Alliance, *Working Conditions*, *supra* note 68 (emphasizing that dancers control whether they will perform stunts or other hazardous activities).

<sup>235</sup> See Sagolla, *supra* note 59 (explaining that dancers select talent agents to represent them); see also Lewis, *supra* note 90 (explaining that dancers decide which jobs will be most beneficial and profitable for their careers).

<sup>236</sup> *Local 777 v. NLRB*, 603 F. 2d 862, 880 (D.C. Cir. 1978).

<sup>237</sup> See *Singer v. Moran*, 132 U.S. 518, 523 (1889).

<sup>238</sup> See *Q & A: Rosero and Jamal*, *supra* note 84, at 16 (describing music video rehearsals as only lasting a couple of days compared to movies, which can last months).

<sup>239</sup> See Lewis, *supra* note 90, at 74 (describing the amount dancers make per music video rehearsal or shoot).

<sup>240</sup> See Wolf, *supra* note 138, at 84 (dancers instructed to list their professional experience and training on their resumes).

in *The Nutcracker*,<sup>241</sup> music video dancers contribute artistic skill to their roles in music videos.

In addition, dancers rely on their initiative and must appear in various performances to support themselves, which also indicates independent contractor status.<sup>242</sup> Music video dancers exert initiative in the operation of their business because they can choose their talent agents, which jobs to audition for (e.g., music video, television show, commercial), and which skill set to showcase (e.g., dancing, acting, singing, modeling).<sup>243</sup>

Further, because dancers' primarily serve advertising and promotional interests, they are not "integral" to record label operations.<sup>244</sup> The rationale parallels FLSA cases.<sup>245</sup> Unlike exotic dancers who *are* the business of a nightclub, music video dancers are *not* the business of a music label.<sup>246</sup>

In conclusion, music video dancers are likely independent contractors under the NLRA and thus probably do not qualify for its protection. This is an unsatisfying result, but solutions are proposed in the final section.

## VI. ALTERNATIVES TO ORGANIZING UNDER THE NLRA

Organizing outside the NLRA is ineffective because non-NLRA units do not have the power to implement legally binding bargaining units.<sup>247</sup> However, these units can still increase wages and improve working conditions.<sup>248</sup> One strategy of non-NLRA organizing is "occupational organizing."<sup>249</sup> Occupational organizing occurs when

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<sup>241</sup> *Jonbruni, Inc.*, Case No. 20-CA-283931999, WL 33454729 (N.L.R.B. Div. of Judges Nov. 2, 1999).

<sup>242</sup> See Wolf, *supra* note 138, at 85 (describing dancers doing a variety of dance jobs); see also Lewis, *supra* note 90, at 74–75 (discussing the profitability of different dance jobs).

<sup>243</sup> See Sagolla, *supra* note 59 (dancers pick talent agents to represent them); see also Lewis, *supra* note 90 (dancers decide which jobs will be most beneficial and profitable for their careers).

<sup>244</sup> *LINDEY ON ENT.*, *supra* note 14, § 10:1 (explaining that successful songs have music videos to promote them).

<sup>245</sup> See *id.*; see also *Halferty v. Plus Drug Co., Inc.*, 821 F.2d 261, 265 (5th Cir. 1987) (eliminating FLSA factors).

<sup>246</sup> See *LINDEY ON ENT.*, *supra* note 14, § 10:1.

<sup>247</sup> *McKinstry*, *supra* note 56, at 693.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 696.

workers in the same field informally unite and engage in grassroots techniques like “going door-to-door, combing residential neighborhoods and shopping malls, contacting churches, and waiting at bus stops” to advocate for better work conditions.<sup>250</sup> Occupational organizing was a successful tactic for domestic workers who accomplished their goals of “increasing wages, creating a safer working [environment], and obtaining health care insurance.”<sup>251</sup> Occupational organizing is important for groups that earn low wages, are unfamiliar with unionizing techniques, but are not employed by a common employer at the same jobsite.<sup>252</sup>

Music video dancers already engage in a type of occupational organizing.<sup>253</sup> They created Dancers’ Alliance, a non-union group that hold events, distributes YouTube videos, and posts updates on social media sites like Facebook, Twitter, and MySpace to advocate better working conditions for dancers.<sup>254</sup> Dancers’ Alliance online video campaign *It’s About Time* includes video testimonials by established dancers describing the “30-year history of the modern music video, the recent resurgence in the popularity and profitability of music videos and the need for dancers and other performers to finally be recognized for the talent and professionalism they bring to the music video industry.”<sup>255</sup> Although Dancers’ Alliance has facilitated many improvements, its minimum compensation rates are not binding; therefore, dancers still need union representation and a collective bargaining agreement.<sup>256</sup>

## VII. RECOMMENDATIONS

Although music video dancers are employees for union representation purposes, they are independent contractors under the FLSA and NLRA and thus not protected. This erroneous classification is unacceptable because dancers are an occupational group that lacks the necessary bargaining power to independently negotiate fair terms.

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<sup>250</sup> Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 76–77, 80–81 (2000).

<sup>251</sup> McKinstry, *supra* note 56, at 693–94.

<sup>252</sup> See *id.* at 693.

<sup>253</sup> Sagolla, *supra* note 59.

<sup>254</sup> See generally DANCERS’ ALLIANCE, <http://www.dancersalliance.org/> (last visited Feb. 16, 2013) (website includes videos, announcements, and information).

<sup>255</sup> AFTRA, *AFTRA Dancers Escalate Fight for a Fair Music Video Contract, Launch ‘It’s About Time’ Campaign*, [FAM]ILY [BIZ]NESS, <http://fambizfb.blogspot.com/2011/09/aftra-dancers-escalate-fight-for-fair.html> (last visited Feb. 16, 2013).

<sup>256</sup> See Sagolla, *supra* note 59.

Additionally, their exclusion from the FLSA and NLRA undermines the Acts' purposes. The FLSA's purpose is to ensure workers can achieve a minimum standard of living through their wages.<sup>257</sup> The NLRA's purpose is to equalize the bargaining power between employees and employers so that commerce will continue.<sup>258</sup>

To fulfill these purposes, the legislature should create a new formula to determine the employment status of music video dancers specifically, just as it has for other workers.<sup>259</sup> The formula could model those already used for on-call stage technicians, and it could cover dancers who performed in a set number of music videos the past two years or a specific number in the last year.<sup>260</sup>

Alternatively, music video dancers could be declared "statutory employees," workers who are deemed employees by statute.<sup>261</sup> This would minimize the confusion caused by applying the "economic realities" and "control test," under which dancers and other performers are hybrids because they contain both independent contractor and employee characteristics.<sup>262</sup> It would also give dancers the extra power they need to successfully negotiate with the labels when future labor issues arise.

### VIII. LESSONS LEARNED FROM SCREEN ACTORS AND SAG

It is useful to examine why screen actors are considered employees and how they overcame past bargaining inequalities since their profession is similar to dancers'. Both often have several employers and rely on their artistic talent to obtain jobs.<sup>263</sup> Also, like music video producers, motion picture producers depend on a large labor pool, from which workers are "employed on a short-term basis and shifted from studio to studio as production schedules change."<sup>264</sup> Furthermore, like music video dancers,

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<sup>257</sup> 29 U.S.C. § 202(a)-(b).

<sup>258</sup> 29 U.S.C. § 151.

<sup>259</sup> *Trump Taj Mahal Assoc.*, 306 N.L.R.B. 294, 294-96 (1992) (concerning on-call stage technicians); *American Zoetrope Prod.*, 207 N.L.R.B. 621, 621-23 (1973) (concerning those who work in film productions).

<sup>260</sup> *Trump Taj Mahal Assoc.*, 306 N.L.R.B. 294.

<sup>261</sup> See I.R.C. § 3121(d); see also *Statutory Employees*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Statutory-Employees> (last visited Feb. 16, 2013).

<sup>262</sup> See Murray, *supra* note 98, at 331-37.

<sup>263</sup> Cudnowski, *supra* note 98, at 146-47.

<sup>264</sup> HUGH LOVELL & TASILE CARTER, *COLLECTIVE BARGAINING IN THE MOTION PICTURE INDUSTRY: A STRUGGLE FOR STABILITY* 4 (1955).

an actor's work varies based on the number of films in production.<sup>265</sup> Additionally, dancers, like actors, contribute artistic rather than technical skills to their respective industries and employ professional agents to secure work.<sup>266</sup> The key difference, however, is that actors are assumed to be "almost invariably accustomed to an employer-employee relationship and to working under the supervision of a director."<sup>267</sup> This assumption initially seems counterintuitive because actors are hired just like independent contractors; they may be employed by the day or on a freelance basis.<sup>268</sup> Additionally, they may have multiple contracts simultaneously or one contract that requires exclusivity for a given period.<sup>269</sup> Thus, actors are employees, but have several of the same independent contractor qualities as music video dancers.

Actors increased their bargaining power when they joined SAG, a union established in 1933 that grew to represent actors in film, television, commercials, video games, and new media formats.<sup>270</sup> SAG arrived when "actors were to Hollywood studios what cattle are to ranchers: they were bound to multi-year, exclusive contracts, unable to choose their own films, their own career paths, or, in some cases, their own relationships."<sup>271</sup> A large reason the film and television industries have unions is because SAG deliberately chose to cover them.<sup>272</sup> Although obtaining recognition in the motion picture industry was difficult, producers agreed—four years after SAG was formed—to recognize SAG as the official bargaining agent for actors on May 9, 1937.<sup>273</sup> The first contract was signed on May 15, 1937, providing a template for all future SAG contracts.<sup>274</sup> Once employers recognize a union as the bargaining representative and implicitly acknowledge that its workers are employees, they are hard pressed to later argue that its workers are independent contractors and thus ineligible for

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 32–33.

<sup>267</sup> *Id.* at 33.

<sup>268</sup> *Id.* at 44.

<sup>269</sup> *Id.* at 44–45.

<sup>270</sup> SAG-AFTRA, *SAG History*, SAG-AFTRA.COM, <http://www.sagaftra.org/history/sag> (last visited Feb. 16, 2013); Gilbert Cruz, *A Brief History of the Screen Actors Guild*, TIME (Dec. 18, 2008), <http://www.time.com/time/arts/article/0,8599,1867172,00.html#ixzz1qF2aaopS>.

<sup>271</sup> Cruz, *supra* note 270.

<sup>272</sup> See Am. Broad. Co., Inc. 96 N.L.R.B. 815, 816–19 (1951) (assuming actors are employees without performing analysis).

<sup>273</sup> McEvoy, *supra* note 191, at 63.

<sup>274</sup> *Id.*



coverage under the NLRA.<sup>275</sup> SAG-AFTRA has modeled its fight for change after the successful approach taken by actors in the 1930s since, like actors, music video dancers want to be legally recognized employees.<sup>276</sup> SAG-AFTRA has successfully negotiated with labels to become the bargaining representative for music video dancers and thus can help music video dancers become employees under the NLRA.<sup>277</sup>

## IX. CONCLUSION

After many obstacles and setbacks, AFTRA successfully negotiated a music video contract with the major record labels.<sup>278</sup> While this is a landmark milestone, dancers still lack employee status and are consequently unprotected by the NLRA. To ensure that music video dancers receive the Act's protection, SAG-AFTRA should advocate for "statutory employee" status or a special eligibility formula exception. Without this classification, dancers may be unable to enjoy the same collective bargaining protections as NLRA employees, which may hinder their ability to organize and negotiate. However, the future for music video dancers looks promising. With the SAG-AFTRA merger and the music video contract, dancers are finally beginning to receive, in the words of Aretha Franklin, "a little respect."

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<sup>275</sup> *See id.*

<sup>276</sup> McNary, *supra* note 1.

<sup>277</sup> *See id.*

<sup>278</sup> *Id.*