

Legal Issues Involving Ownership of Pastors' Sermons, Books, etc.

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The advancement and growing prevalence of digital technology continues to present churches and ministries with exciting opportunities as well as substantial new challenges. In order to successfully and securely utilize such technology, it is becoming increasingly important for organizations to familiarize themselves with pertinent intellectual property (“IP”) law issues.

A common issue that a church may be faced with is the question of ownership of intellectual property that was created by the church’s pastor. Pastors are now able to record, edit and distribute their songs, books, podcasts, and sermons through various digital media platforms to anyone with an internet connection. However, complications often arise when ascertaining which party holds the copyright to such creations, who can profit from them, who is allowed to control the distribution of the IP, and other related questions.

The answers to most of these questions can be found through an analysis of relevant Federal statutes, case law, and guidance by the United States Copyright Office.

Work Made for Hire

Under the federal Copyright Act of 1976 (the “Act”), the creator of an original work is generally considered to be its author and copyright holder. The copyright holder ordinarily has the exclusive rights to copy, prepare new versions of, distribute, perform publicly (including digitally), and display the work, as well as the ability to assign these rights.

In case of a “work made for hire” however, the employer or commissioning party is automatically considered the author by the Act, even if an employee actually created the work. In other words, the firm, organization, individual or church that the work was made for will hold the copyright, not the originator of the work.

The Act defines “work made for hire” in two parts:

1. a work prepared by an employee within the scope of their employment
or
2. a work specially ordered or commissioned for use (I.e., independent contractor situations)
 - a) as a contribution to a collective work,
 - b) as a part of a motion picture or other audiovisual work,
 - c) as a translation,
 - d) as a supplementary work,
 - e) as a compilation,
 - f) as an instructional text,
 - g) as a test,
 - h) as answer material for a test, or
 - i) as an atlas,

if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

Additionally, the U.S. Supreme Court has examined and clarified some of the more ambiguous language of the Act and created a roadmap for organizations to follow when making their “work for hire” determinations. The Court held that in order to establish a claim of “work for hire,” an organization must first ascertain whether a work was prepared by its employee or an independent contractor.

Steps for Establishing a Claim of Work for Hire: Employees

1. In most cases, a pastor participating in a regular salaried employment relationship with a church will be considered an employee. The courts have bolstered this argument by consistently ruling that regular pastors are to be considered employees of their church.
2. Next, the church must look at whether the pastor created the sermon, book, other work within the scope of their employment. Here the court will look at the following three factors:
 - a. Is the work of the type for which the employee was hired to perform?
 - b. Did the creation of the work occur "substantially within the authorized time and space limits" of the employment?
 - c. Is it wholly or partially motivated to benefit the employer?
3. When it comes to the first factor, it is well established that one of the primary duties of a pastor is to generate and deliver sermons, songs, etc. to individuals attending the church. Furthermore, due to the importance of creating sermons as part of the pastor's employment, the mere fact that preparations were done outside of a church building or normal working hours would very likely not remove them from the scope of employment. Lastly, the church would likely benefit from the creation of the sermons, books, etc. as they would in theory draw new attendees to the church and/or increase attendee involvement. Legal scholar and author of the *Essential Guide to Copyright Law for Churches*, Richard Hammar, argues that if writing sermons is part of a pastor's job description, and they write the sermons while at the church office, the Act would very likely apply.
4. Although less likely to succeed in court, arguments have been made that the Act does not apply in these situations and that pastors should therefore own the copyright to the sermons, books, etc. that they create. This argument usually asserts that pastors are hired to teach and give spiritual guidance to their churches, not to write sermon manuscripts or books. The possibility of such complications highlights the importance of unambiguously stating the pastor's job duties, in writing (often as a part of a church's policy), at the beginning of their employment (discussed further in the Solutions paragraph below).

Overall, a work prepared by an employee (within the scope of his or her employment) is a "work made for hire" under the Act, even in the absence of an express agreement to that effect. However, since there is no precise legal standard for determining an "employee within the scope of his or her employment," please consult your local attorney if there are any circumstances or ambiguities that complicate your determination. Furthermore, as discussed in the Solutions paragraph below, the most effective course of action would be for the pastor and church to contractually agree on the pastor's job duties and/or copyright ownership matters before the employment relationship begins.

Steps for Establishing a Claim of Work for Hire: Independent Contractors

1. If an organization specially orders or commissions a non-employee to create a work, that non-employee would be deemed an independent contractor.
2. A work created by an independent contractor would be considered a "work made for hire" only if it is listed under one of the Act's nine categories (*see* subsection b on page 1 of this document) and if there is a written agreement between parties specifying that the work is a "work made for hire." This "work for hire" language would have to be inserted into the contract between the commissioning entity and the independent contractor.
3. As an example, a church that contracts with a non-employee (and includes "this is a work for hire" language in the contract) to compose a song that is to be played during the church's worship service would be considered a "work made for hire."

Work For Hire: Conclusion

Overall, the law is fairly clear on this topic. If a pastor's work falls under the Act's "work for hire" standards, the copyright to the material created by the pastor would belong to the church. Consequently, the rights that accompany a copyright would exclusively belong to the church as well. For example, if a pastor wrote a book or an internet blog as an extension of their ministry while using a work computer, the employer church would exclusively own the copyright and have the exclusive ability to profit from the sales of the book, share the book with other organizations, create derivative works based on the book, etc.

Solutions

There are several solutions available to the parties that will set forth and clarify the ownership of any works created by the pastor and help avoid any future disputes:

1. *Church Allows Pastor to Retain Some (or All) of the Rights to the Works.* The primary exception to the work made for hire doctrine can be found within the Act, which states that under the correct circumstances the "work made for hire" doctrine will automatically apply, "unless the parties have expressly agreed otherwise in a written instrument signed by them." What this means is that churches and pastors can expressly agree, in a written instrument, for the pastor to retain some or all rights to the work they created. There are many possibilities when it comes to these agreements, the parties will have to work together to come up with the arrangement that best suits their needs.
 - a. For example, the parties can come to an agreement in which the pastor retains the copyright to the work they created, while the pastor simultaneously grants the church a perpetual license to use the work without paying the pastor any royalties.
2. *Pastor Assigns All Copyrights to the Church.* This can be done through a clause inserted into an independent contractor contract or an employment contract with the pastor.
 - a. The church could also develop an intellectual property policy that covers the sermons, poems, books, or other materials developed by church staff while on the job. The policy can make it clear that those materials are "works for hire" and belong to the church.
 - b. When creating a list of the pastor's job duties (often given to the pastor pre-employment), the church should clarify that the creation of sermons, poems, etc. is an essential part of the pastor's job duties.
3. *Have Pastors Create Their Separate Works at Home.* Under this approach, the parties can agree that pastors can retain the copyright to their works as long as they are clearly created on their personal computer, at a personal place (not their office), using their own software, and in their spare time. If no church resources are used, it is more likely that the copyright would belong to the pastor. The best approach would be for the pastor and church to agree to this method before the pastor starts developing the work.

Ultimately, in order to avoid problems, disputes, and potential future litigation, the parties should create an agreement or policy at the beginning of the pastor's employment that addresses any copyright ownership related issues.

Term of Copyright and Other Issues

It is also important to note that unlike other copyright protections, the term of copyright protection of a "work made for hire" is 95 years from the date of publication or 120 years from the date of creation, whichever expires first. Ordinarily, a work not made for hire is protected by copyright for the life of the author plus 70 years.

For a more information on copyright, trademark and other intellectual property issues a church may encounter, please consult the Legal Resources Manual on the following website:

www.pcusa.org/site_media/static/assets/Section%204%20-%20%20Copyright%20and%20Trademark.pdf