Who Owns that sermon?

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November 2004

With today's pervasive media, pastors have more opportunities to share their messages with more people in more places. Churches broadcast their services on radio, television and the Internet. To do so, they record the services on tape or computers. Churches make these tapes available to members and shut-ins. Sometimes, the church will assemble several services together from a sermon series for sale to members, listeners and viewers. They also create transcripts for the hearing-impaired. From the transcripts, the pastor writes a book and finds a publisher and/or distributor. Through all these efforts, the world may get to hear a sermon from a local pastor.

Since some of these activities create revenue such as tapes and books, the question arises- who owns the original sermon and all its ancillary products? The answer is important. Sometimes, the desired answer can be accomplished, but only after the church adopts the appropriate policies and procedures. This article describes the policies and procedures in the context of a recent case, Martha Graham School and Dance Foundation vs. Martha Graham Center of Contemporary Dance.

You may recognize the name Martha Graham. She is considered the mother of modern dance, choreographing dozens of famous dances. After she passed away, she bequeathed her residual estate to an individual who founded the Martha Graham School and Dance Foundation (Foundation). The individual donated all Graham's interest in her dances to the Foundation. The Foundation then sought to license her choreographed dances to dance companies. Graham founded the Martha Graham Center of Contemporary Dance (Center), a charitable organization, in 1948. It contested the Foundation's claim to her dances and asserted that it owned the choreographed dances. The Fourth Circuit Court of Appeals determined who owned the dances.

Choreographed dances are intellectual property and are subject to copyright laws. Sermons are intellectual property and are subject to copyright laws. Under copyright law, dances and sermons are treated the same. Both are created by creative individuals and presented to audiences. By using the same analysis as the court used in the Graham case, the church can properly determine the rights and privileges related to the sermons preached by its pastors. By substituting your minister in the place of the Foundation and your church in the place of the Center, you can easily apply this discussion to your situation.

The federal copyright act vests ownership with the employer for works created within the scope of an employee's duties, absent a written contract to the contrary. Stated another way, a work is made at the hiring party's instance and expense when the employer induces the creation of the work and has the right to direct and supervise the manner in which the work is carried out. The right to direct and supervise the manner in which work is created need never be exercised. The issue is whether the dances (or sermons) were created as works for hire, vesting ownership with the employer.

Martha Graham created some dances long before she founded the Center in 1948. If the Foundation could establish that the dance was created before 1948, then the Foundation owned that dance. From 1948 until 1956, the Center solely existed to perform Graham's dances. Since Graham's job description did not include creating dances, the Foundation would also succeed to her interest in dances created between 1948 and 1956. The ownership of the dances created after 1956 is not as straightforward. In 1956, the Center created a dance school. From 1956 to 1965, Graham worked as program director for the Center. She was required to give one-third of her professional time to the Center. Although the Center was charged with creating new dances, Graham's written employment contract required her only to teach and supervise the Center's educational program. Since creating choreographed dances was omitted from her duties under her written employment contract, the dances created by Graham from 1956 to 1965 were outside the work for hire doctrine. The Foundation then owned all dances created during this period.

However, the real issue under the 1909 copyright act is whether the dances created during this period were at the "instance and expense" of the Center. The Foundation argued that a recent case involving a monk's religious writings supports their position that the work for hire doctrine does not apply to a nonprofit employer. The monk founded a church, took a vow of poverty and lived in church-provided quarters. He received a very small monthly stipend, having renounced in writing any claim for compensation. Under the 1909 copyright act, the Ninth Circuit Court of Appeals held that the monk's writings were not created at the instance and expense of the church. The court found that the writings arose from the monk's desire for self-expression or religious instruction and not because the church required him to do so.

The Foundation argued that the dances were not created at the "instance" of the Center because it did not direct her to create any specific dances. Similar to the monk, the Center did not direct her to create any specific dance. The dances arose from her desire for self-expression through dance. This argument was tripped up because her new employment agreement required her to create new dance works. The Center paid her salary and otherwise supported her creative process. As a result, the dances created from 1966 to 1977 are works for hire owned by the Center.

From 1978 to 1991, the dances created by Graham were subject to the requirements of the 1976 copyright act (the current statute). In 1991 Graham passed away. During these years, she was paid a salary and provided benefits by the Center. She worked at the Center's premises and with the Center's resources. Her choreography was a regular activity of the Center. All these factors favor her employment and the application of the works for hire doctrine.

The Foundation argued that it did not control Graham's creative activities. She was free to create dances. The court found the absence of control irrelevant. The court found it normal that the Center would decline to exercise control over the extremely talented Graham.

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The scenario painted above has replayed itself several times in the church world. Though your pastor does not currently contest the ownership of sermons, his or her heirs may not share that point of view. My firm has been involved in several controversies between churches and the estates of former pastors over the ownership of sermons. It is much easier to solve those problems when the pastor is still alive and available. I suggest that your church be proactive in solving this problem by adopting policies and agreements that reflect the parties' understanding.

If the church does nothing, the pastor who creates sermons that are an integral part of the church's activities is likely an employee of the church and the works for hire doctrine will apply to the sermons. As a result, the church will own all rights to the sermons.

If the church and pastor execute a written contract that vests sermon ownership with the pastor, then tax laws will dictate the terms of that agreement. Under federal tax laws, the pastor may not use any church resources or facilities in creating his sermons or he must compensate the church for the use of the church's resources in creating those sermons. Further, he cannot create the sermons as the church's employee; he must create them on his off time.

Audio tapes, videotapes, television broadcasts, Internet broadcasts and books are all derivative works from the sermons. That is, the owner of the sermon has rights and responsibilities regarding the derivative works. If the church is the owner of the sermon, it has the right to license the sermon to allow for recording in audio and video form, to allow for broadcasting and to allow books to be published. The compensation from derivative works belongs to the church.

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