The Vulnerability of Academic Freedom – A Look at the Swedish Teacher Exception

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The daily endeavor of researchers, such as those at the Stockholm Commercial Law Centre, would not be possible if not for academic freedom, and this article addresses the vulnerability of academic freedom in light of the Swedish Teacher exception. Who owns the rights to teaching materials?[1] And in light of academic freedom, who should own the rights to teaching materials? At first blush, this issue may seem somewhat marginal. However, recent debates as to this issue challenge the very core of the Swedish labour law model. This article first sets out the legal framework for this type of intellectual property, then goes over to the labour and employment law regulations generally and as to this issue, and finally explores the ongoing debate in Sweden and potential outcomes as to the legal resolution of this issue in light of the concerns raised by the need for academic freedom.

A shift in approach by the newer Swedish universities with respect to this issue of who owns the rights to teaching materials has been underway during the past decade. One explanation for this can be seen to be the digitalization of learning, and more specifically, teaching materials. When teaching materials comprised writing on blackboards and hand-copied lecture notes, the issue of ownership was almost irrelevant, as writing on a blackboard cannot be easily mass-reproduced. Even with technological advancements such as mimeograph and Xerox machines, the limits of these technologies made the question of ownership still rather uninteresting, as individual copies still needed to be produced in time-consuming manners. However, as teaching materials become more and more digitally packageable and reproducible, to

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the extent of even having virtual classrooms, the issue of ownership takes on different legal as well as financial values.[2]

As seen, the issue of the ownership of teaching materials touches upon several different areas of law. The focus here first is on the intellectual property at issue, then over to the regulations found in employment and labour law creating the framework in which this issue is to be resolved. Finally, against the backdrop of these two broad legal approaches, the debate will be assessed against the background of academic freedom as well as potential outcomes to the question, who owns the rights to teaching materials?

1. Swedish Intellectual Property Law

The right of authors to copyrights is protected in Article 16 of the Instrument of Government (1974:152):[3] "Authors, artists and photographers shall own the rights to their works in accordance with rules laid down in law." The statutory framework for copyrights can be found in the Copyright Act (1960:729).[4] Copyright protection is granted for a literary or artistic work regardless of whether in writing or other media. The work needs to have a threshold of originality (*verkshöjd*) to be eligible for copyright protection. Built into this requirement of threshold of originality are two sub-requirements: uniqueness (*särprägel*) and originality. If the work meets this threshold of originality, the author has under the Copyright Act the exclusive right to publish the work. The original owner of a copyright must be a physical person(s) according to its Section 1. The Berne Convention, which Sweden signed already in 1904,[5] grants authors moral rights constituting rights of control of use, misuse, attribution and patrimony in a work despite any assignment of ownership. Moral rights are defined Article 6bis of the Berne Convention as: "Independent of the author's economic rights, and even after

[2] For a more detailed account of the different problems arising with respect to the virtual classroom, see Laura Carlson and Sanna Wolk, *Virtual teachers – a copyright paradox?* In Jan Rosén, ed., Individualism and Collectiveness in Intellectual Property Law (Edward Elgar, Cheltenham, England 2012), pp. 321–329.

[3] *Kungörelse* (1974:152) *om beslutad ny regeringsform*. The Instrument of Government is one of the four Swedish constitutional acts which comprise the Swedish Constitution. An English translation of the Instrument of Government, as well as the three other constitutional acts, is available at the website of the Swedish Parliament, www.riksdagen.se/en under the heading, Documents and laws.

[4] *Lag* (1960:729) *om upphovsrätt till litterära och konstnärliga verk.*

[5] *Internationell upphovsrättsförordning* (1994:193).

the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation." Consequently, a copyright under Swedish law is seen to comprise both moral (*ideella*) and economic rights. The moral rights can never be assigned away by the copyright holder,[6] while the economic rights can.

The transfer of the economic rights in a copyright is to be explicit according to Section 28 of the Copyright Act. The transfer can occur either through an assignment, after which the new owner of the copyright becomes the exclusive holder of the economic rights, or a license, in which the original copyright holder licenses the use of the copyrighted work usually in exchange for some type of monetary compensation. The licensor has only a right of use, not ownership rights in the copyright. In the absence of any specific statutory regulation as to an issue, the law with respect to assignments and licenses of intellectual property rights tends to be general contract law. The parties are to come to an agreement as to the assignment or license, and the terms and conditions for such. Given the rules as to a natural person having the copyright, legal persons such as universities can only have derivative rights with respect to the economic rights in a copyright as arising out of contract where there is no explicit law granting such.

With respect to the economic rights of intellectual property created in the academic environment, there is both an explicit statutory teacher exception (*lärarundantag*)[7] with respect to patents, and an implicit teacher exception with respect to copyrights.

1.1 The Explicit Patent Teachers Exception based on Statute

Though the focus of this article is on the copyright to teaching materials, the treatment of employee rights with respect to patents needs to be addressed as these rules are a basis for certain employer interpretations of the copyright to teaching materials. Patents are generally regulated by the

[6] It can, however, vest in the estate of the copyright holder upon the latter's death.

[7] *Lärarundantag* has been translated to "professor privilege" in certain Swedish reports, see for example, Åse Karlén and Jonas Gustafsson (eds.), Det innovativa Sverige – Sverige som kunskapsnation in en internationell kontext (Vinnova Stockholm 2013) p. 49 and "teachers' exemption" in others, see for example, SULF, *Yttrande över SOU 2005:95 Nyttiggörande av högskoleuppfinningar* (dated 24 March 2006).

Patent Act (1967:837),[8] with the rights to a patent accruing to the individual inventor when the invention meets the requirements of: industrial use, novelty and a degree of invention (*uppfinningshöjd*) without being in violation of public order or good practices. There is no duality in the nature of a patent in that *droit moral* is not an aspect of the grant of a patent.

The Act on the Right to Employee Inventions (1949:345)[9] addresses the issue of which party, as between the employer and the employee, ultimately owns patent rights in inventions created under employment. The main rule is that the employee, the individual, owns the patent rights. However, the statute carves out several exceptions with respect to creating an assignment of the patent right to the employer. These exceptions can be founded in the statute itself, or through an explicit agreement between the employer and employee, or where such can be seen from the employment relationship, or otherwise existing circumstances. In essence, these exceptions have gutted the main rule of the employee having the patent rights, particularly as many employment agreements transfer any patent rights to the employer even prior to any invention.

The teacher exception under this act is found in its § 1(2) in that teachers at universities, university colleges or other institutions belonging to higher education are not to be viewed as employees under the act. Consequently, the Patent Act does not regulate patent rights within this university employment context. One of the reasons for this exception for university teachers, giving rise to the designation of "teacher exception", has been the need for academic freedom.

A government inquiry was made into a proposed abolition of the statutory patent teacher exception in 2005.[10] Looking at the exception's statutory codification in 1949, the 2005 Inquiry found that the 1949 act was simply a codification of custom, and that the exemption for university teachers was based on the unique employment relationship between teachers and institutions of higher education. This uniqueness is based particularly on academic freedom as espoused in § 1(6) of the Act on Higher Education (1992:1434):[11] "With respect to research, the following general prin-

8 *Patentlag* (1967:837).

9 *Lag* (1949:345) *om rätten till arbetstagares uppfinningar.*

10 See SOU 2005:95, *Nyttiggörande av högskoleuppfinningar.* This is just one government inquiry on this topic of many, beginning with the original one in 1944 upon which the present act emanated, SOU 1944:27 *Rätten till vissa uppfinningar m.m.*

11 *Högskolelag* (1992:1434).

ciples shall govern: (1) Research problems are to be freely chosen, (2) research methods are to be freely developed, and (3) research results are to be freely published."

1.2 The Implicit Copyright Teachers Exception based on Custom

Though patents by university teachers are not regulated by the above-mentioned act except by way of exception, there is a least statutory mention of teachers with respect to patents. When it comes to teachers and teaching materials in the context of copyrights, the teachers' exception is based on custom (*sedvana*) and not any mention in any statute. The main reason for this exception has been the need for academic freedom, mirroring the same needs with respect to patent ownership. University teaching in Sweden in general has been characterized by a broad freedom with respect to the teacher deciding how materials are to be taught. One of the basic principles at Swedish universities is that all teaching is to be based on scientific grounds, consequently the tight ties between research and teaching as supported by academic freedom.

Teachers are not only to freely conduct research, but also to freely form their teaching and teaching materials. The teacher exception was found by the 2005 Inquiry as understood by many as a guarantee against being forced to commercialize their research results as well as teaching and research materials. The 2005 Inquiry found that regardless of the type of work it was a question of, the main rule was that the individual who created the academic result, lecture, teaching material, etc. had the claim as to the copyright. According to the findings of the 2005 Inquiry, the right of teachers to teaching materials is based on custom that can be traced back one hundred years this year.[12]

2. The Swedish Labour Law Model

It appears fairly obvious from the Swedish constitution and the Copyright Act that the copyright right to teaching materials should accrue to teachers (at least at the university level). However, arguing that custom is the basis for

[12] Ibid. at p. 239 citing a report by the Justice Department with respect to a legislative bill proposing a copyright law in 1914, *Förslag till lag om rätt till litterära och musikaliska verk, lag om rätt till verk av bildande konst samt lag om rätt till fotografiska bilder, avgivna den 28 juli 1914 av därtill inom kungl. Justitiedepartementet förordnade sakkunniga*, p. 67.

this right muddies these legal waters particularly in the employment/labour law context.

To fully examine the complexity of this issue, an understanding of the Swedish labor and employment law model is necessary. One of the distinctive and main features of this model is self-regulation, with both employers and employees often organized on several levels. There are 4.2 million employees in Sweden, which has a population of almost 9.7 million in 2014.[13] Approximately one-third of all employees work in the public sector, while two-thirds work in the private sector. In the field of higher education, the vast majority of employees at all Swedish universities and university colleges are public employees as there are almost no private universities in Sweden. For the average lecturer at a Swedish institution of higher learning, the terms and conditions of employment (other than wages) are set out in the collective agreements, not in an individual employment agreement.

2.1 Self-regulation as the Swedish Labour Law Paradigm

This approach of self-regulation instead of state legislation in the Swedish system has strong historic roots. The development of labor law in Sweden can be seen as comprising four stages, the first beginning with Sweden's late industrialization at the end of the 19th century. The second phase begins at the turn of the twentieth century putting the Swedish model into place with the December Compromise (*decemberkompromissen*) of 1906 between the Swedish Employers' Confederation (now the Confederation of Swedish Enterprise) and the umbrella blue-collar worker union, LO. With this compromise in the form of an agreement between the social partners, the procedure of resolving labour market problems internally within the labor market was affixed, and the social partners kept the state and legislation at bay. The system created was bi-partite, not tri-partite as found in other countries, with legislation seen as an encroachment of the power of the social partners, the employer and employee organizations. The Act on the Right to Employee Inventions (1949:345) was passed during this second phase in 1949, a marked exception to the neutrality policy of the state with respect to legislation governing the labour market. The third phase came with the codification of labour and employment law in the 1970's, with the fourth phase characterized by Sweden's EU membership beginning in 1995.

[13] These statistics are taken from Statistics Sweden, available at www.scb.se.

The first phase was marked by a lawlessness that was a natural consequence of a very rapid industrialization process. The second phase can be seen as characterized by the absence of individual employment agreements, with collective agreements being the rule. The third phase saw an increase in use of individual employment agreements, which cannot still, however, conflict with the rights granted in the applicable collective agreements. The fourth phase can be seen as characterized by a greater emphasis on individual employee rights than that which had occurred historically, this new approach a result in part of the requirements of EU law. However, despite this expansion on the side of employment law, the collective agreements in Sweden continue to regulate the details of the terms and conditions of employment. As members of a labour union, employees are bound to the terms the local or central labour unions have entered into with the employer or the employer organization. These agreements are also typically applied to unorganized workers at a workplace.

As one of the most salient features of the Swedish model is the underlying premise that the state should be neutral with respect to the social partners, the perception being that legislation is an unwanted intrusion in the labor market, the legislation historically was (and still often is) quasi-mandatory. This can be seen with the Act on the Right to Employee Inventions described above, giving the parties (most often only the social partners) the opportunity to opt out of statutory requirements through agreements, usually collective agreements at the central levels.

2.2 The System of Joint Regulation in the Swedish Labour Law Model

The system of joint regulation, also referred to as co-determination, as set out in the Swedish Labour Law model rests on several premises, the two of which most important in this context are the duty to negotiate and the right to interpret a collective agreement. As to the latter, the right of interpretation lies with the union with respect to certain issues under a collective agreement, such as the employee's duty to perform work. In the event the employer disagrees with the union's interpretation, the employer is first to request negotiations with the union with respect to the issue and then ultimately if still unresolved, take the issue to the Swedish Labour Court.

As soon as a collective agreement is reached, the right of the parties to take industrial action in principle ceases according to Sections 41–42 of the Joint

Regulation Act (1976:580).[14] Industrial action may not be taken in order to bring about changes in a collective agreement. Such a conflict with respect to amending a collective agreement is termed a "rights dispute" and must first be negotiated and failing a resolution by the parties, ultimately taken to the Labor Court instead. Settlements in such cases are quite common, as the social partners prefer to resolve their disputes internally rather than judicially.

Before an employer decides on any significant changes to its activities, e.g. curtailment of its operations, or the introduction of new production technology, the employer must initiate negotiations with the local trade union with which it is bound by collective agreement, referred to as the primary right to negotiation as found in Section 11 of the Joint Regulation Act. The aim of the rules on the primary right to negotiation is to force employers to listen to and take into consideration the wishes of the employees. These rules apply as well where the employer wishes to make significant changes in the terms of employment or conditions of work in relation to an employee who belongs to the union, e.g. by assigning the employee significantly altered work tasks. The employer may not implement the intended measure before discharging the obligation to negotiate. The employer is obliged under Section 12 of the Act to negotiate even if a decision concerns matters not involving significant changes, if the request to negotiate comes from the trade union that is a party to the collective agreement. In certain cases, a trade union not bound by a collective agreement has a right to negotiate under Section 13, namely where a matter specifically concerns the work or employment conditions of an employee belonging to that union. The employer must also negotiate in these matters upon request with a central organization of employees, i.e. with representatives of the national trade union to which the local union belongs in accordance with Section 14 of the Act. As can be seen, the duty to negotiate by the employer is extensive, and the Labour Court in its case law has defined the duty broadly.[15]

[14] *Lag* (1976:580) *om medbestämmande i arbetslivet*. Also translated to English as "Employment (Co-Determination in the Workplace) Act)", see the website of the Government Offices of Sweden, www.government.se for an English translation of this act under the heading, Swedish Statutes in Translation.

[15] See for example, AD 2012 no. 57.

2.3 The Swedish Labour Law Hierarchy of Legal Sources

When determining the "law" applicable in an employment situation, the hierarchy of legal sources, based on this self-regulation by the social partners, becomes: constitutional acts, mandatory legislation, central collective agreements, gap-filling legislation in the absence of a central collective agreement governing the issue, legislative preparatory works, precedent as created by case law, custom, unwritten general legal principles and then employer practices. From this hierarchy it becomes easily apparent why a reliance simply on custom for a principle becomes rather slippery. Given the importance of self-regulation in the Swedish labour and employment law model, basing any interpretation of the teacher exception with respect to copyright on custom is tenuous as the ideal in a system of self-regulation is that the social partners have come to an agreement that has become usage. As seen below, there is a wide disparity in the interpretation of this right by the employer and employee sides.

3. The Current Debate as to the Teacher Exception

The current debate in Sweden has been focused on the teacher exception with respect to patents as an impediment to technological innovation. The argument made is that as teachers do not have the same resources as legal persons to commercialize their patents, Sweden as a nation is losing with respect to productivity and commercializing technological innovations. In the extreme, the argument has been that the teacher exception not only slows, but actually impedes progress in Sweden.[16] The 2005 government inquiry into a proposed abolition of the statutory patent teacher exception offered the alternatives of either requiring teachers to report intellectual property assets to their institutions of higher education, or allowing the ownership of certain such assets to be assumed and then commercialized by the institutions. The Inquiry states:

> The Inquiry has been premised on the implicit condition that the fundamental tasks of higher education – to conduct research and education – must not be disrupted by any changes in legislation. Conducting free, independent and scientif-

[16] For a rebuttal of this argument as being too simplified, see Erika Färnstrand and Marie C. Thursby, *University entrepreneurship and professor privilege*, Industrial and Corporate Change, Vol. 22, No. 1, pp. 183–218 (Oxford University Press 2013).

> ically based research and education is, and will remain, the central task of HEIs [Higher Education Institutions]. Academic freedom must not be compromised. This basic principle has led, for example, to proposed solutions where the researcher must always be free to choose between publishing and commercializing.[17]

Teachers are not only to freely conduct research, but also to freely form their teaching and teaching materials. The committee found that regardless of the type of work it was a question of, the main rule was that the individual who created the academic result, lecture, teaching material had the claim as to the copyright.[18] However, the committee also found that the higher education institutions could enter into an agreement stating otherwise with the employee and that many had adopted guidelines for the treatment of teaching materials.

The 2005 Inquiry report is typical of the treatment of teaching materials in this debate. The debate itself has focused on the dissemination of technological advances by universities or the academic patent holder, pros and cons. However, teaching materials have been conflated into this debate concerning technological advancements without any true arguments presented as to why institutions of higher education need to have rights to teaching materials, despite the fact that radically different interests arise in the copyright context.

Another government inquiry was conducted already in 2012.[19] The 2012 Inquiry began with the assumption that "the operations supporting innovation at universities and colleges function surprisingly well against the background of their unsatisfactory premises. The deficiencies in the support system for innovation are extensive but can be repaired."[20] The Inquiry referred to the EU Commission Recommendation dated 10 April 2008 as a starting point for reform within the Swedish system.

When addressing the rights with respect to teaching materials, the 2012 Inquiry states that "as a rule, a procedure is applied whereby the individual presenting [teaching] material has both the moral and economic rights to the material, but that the institution of higher learning as employer has the right

[17] See SOU 2005:95, p. 17.
[18] Ibid. at p. 239.
[19] SOU 2012:41, *Innovationsstödjande verksamheter vid universitet och högskolor: Kartläggning, analys och förslag till förbättringar – slutbetänkande*.
[20] *Ibid.* at p. 10.

to use the material in its operations at no cost."[21] The Inquiry goes on to state that in the absence of any case law on this issue, it is difficult to exactly define the parties' rights, but that this approach functions well today and no initiative by the Swedish Government needs be taken. Again the issues with respect to teaching materials have been subsumed by the discussion as to patents.

3.1 Employer University Interpretations

The first matter that must be clarified here is that there is no unified approach by approximately seventeen Swedish institutions of higher education with respect to this issue. One can see a divide with respect to the older and newer universities. Uppsala University (1477) states simply on its website that "[a]s an employee at Uppsala University you fall within the teacher exception. This briefly means that you own the result of your research."[22] Lund University (1666) also states clearly "[a]s an employee at a Swedish University, the teacher exception is application, which means that it is you as a researcher, and not the university, that owns the rights to your research results."[23] These older universities can be seen to be preserving teachers' rights to a greater degree, probably strongly based on concerns of academic freedom. The newer universities, for example Stockholm University (1878)[24] and Malmö Högskola (1998),[25] are more engaged in claiming rights for the institutions, relying heavily on the "rule of thumb" and custom as discussed below. When Stockholm University issued its policy with respect to teaching materials in the fall of 2013, the unions protested as the negotiations required under the Joint Regulation Act as described above had not been invoked. Stockholm University withdrew the guidelines, negotiations were conducted with the union, and the guidelines in basically an unchanged format were reissued a few weeks later. Umeå University (1965) has taken a

[21] *Ibid.*

[22] See the website of Uppsala University, employee portal and checklist for research agreements, available at mp.uu.se/web/info/forska/forskningsavtal/checklista.

[23] See the website of Lund University, LU Innovation System – lärarundantaget, available at www5.lu.se/anstaelld/forska/lunds-universitets-innovationssystem-luis-.

[24] See the website of Stockholm University, employee portal, copyright, at www.su.se/medarbetare/service/juridik-upphandling/juridik/upphovsr%C3%A4tt.

[25] See the website of Malmö University College, Copyright and copying, available at www.mah.se/upphovsratt.

mid-way approach, together with the labour unions drafting a contract to be entered into with the owner of the copyright which then explicitly grants Umeå University a license.

3.1.1 The Rule of Thumb

Several employers, such as Umeå University, argue that they have a license to use teaching materials under the rule of thumb (*tumregeln*). The rule of thumb is not based on statute, but rather was first articulated in the legal scholarship, stating that an employer, within its area of operations and for its normal operations may use such works that are generated as a result of services to the employer.[26] This license is seen to arise according to this general principle when the work comes into existence. According to this rule, the university has the license to use teaching materials, but in the case of significant economic investments, the rights and obligations of the parties out to be clarified.[27]

3.1.2 Custom

Certain other institutions of higher education argue that teachers as copyright holders with respect to teaching materials are subject to a license by the educational institution as a matter of custom. The reality here is that the institution in actuality is most likely relying on the rule of thumb mentioned above without specifically naming it. With this interpretation, there is not a right to any specific compensation for the institution's license. In addition, it is the institution that ultimately decides on how the teaching material is to be presented, made available and archived. With this interpretation, a line is drawn with respect to the economic rights of the copyright, in that with the production of textbooks, article and other academic rights, any royalties would accrue to the teacher.[28]

[26] See Sanna Wolk, Arbetstagares immaterialrätter – Rätten till datorprogram, design och uppfinningar m.m. i anställningsförhållanden (Norstedts juridik, 2008), p. 119.
[27] SOU 2012:41, p. 69.
[28] *Ibid.* p. 79.

3.2 Employee/Labour Union Stances

One of the labour unions most active in the question of the ownership of teaching materials naturally has been the Swedish University Teacher's Union (Sveriges universitetslärarförbund SULF, www.sulf.se). In a brochure addressing the copyrights of university teachers, the long custom of the copyright teacher exception is noted as support for teachers having the copyright in their teaching materials.[29] This exception is buttressed by the need of academic freedom in the context of education, that teachers have the primary responsibility with education and the right to form themselves their teaching and teaching materials. The educational institution is to decide only how much the teacher is to teach, not how. Another aspect of academic freedom as pointed out by SULF is that the teacher is to decide if and when teaching materials are to be published. SULF argues that any license an institution of higher education may have is limited only to works arising in the administrative parts of a teacher's job, as well as schedules, course plans, course information and examination questions.

Another organization representing textbook authors, Sveriges Läromedelsförfattares Förbund (SLFF) has also contested the invocation of the rule of thumb by universities, arguing that their normal operations are not acquiring intellectual property thus they have no claim under this rule.[30]

4. Analysis of the Right to Teaching Materials

The following analysis with respect to the right to teaching materials focuses on three primary points: the constitutional protections granted under the Instrument of Government, the peculiar nature of copyright as well as academic freedom, and finally, the inability of the Swedish labour law model to address this issue in a consistent manner.

4.1 The Constitutional Protection of Copyright

In some ways, there is a very simple solution to the above-posed dichotomy between certain of the Swedish institutions of higher education and the

[29] See Sanna Wolk, XXXVIII/SULF:s Skriftserie, Universitetslärarens upphovsrätt (SULF 2011), p. 12.

[30] See Letter dated 4 November 2012 to the Department of Education written by Jöran Enqvist and Jenny Lundström on behalf of SLFF as a response to SOU 2012:41, available at the website of SLFF, slff.se.

rights of teachers, and that is to turn to the language of the Instrument of Government. Article 16 states that "[a]uthors, artists and photographers shall own the rights to their works in accordance with rules laid down in law." It is highly questionable whether custom can be seen as "laid down in law" in this constitutional context. By way of comparison, Article 14 in the same chapter states that "[a] trade union or an employer or employers' association shall be entitled to take industrial action unless otherwise provided in an act of law or under an agreement." A basic rule of statutory interpretation is that when the lawmaker makes a difference in language, the lawmaker intends a difference in result. If the copyrights were something that could be contracted away, Article 16 should be drafted in the same fashion as Article 14. Instead, Article 16 states "laid down in law" and not "or under an agreement."

Another aspect of this constitutional protection is that it explicitly encompasses copyrights and not patents. Paradoxically, there is legislation with respect to patents created at work, despite this lack of constitutional protection, but no legislation with respect to copyrights created at work despite the requirements of the wording of Article 16 as "laid down under law."

4.2 Peculiar nature of Copyright and Academic Freedom

In addition to the heightened constitutional protection afforded copyrights, there is the aspect of moral rights that are a component of copyrights but not patents. Moral rights include the right of attribution, the right to have the work published anonymously and the right to the integrity of the work. This last aspect of moral rights dovetails the need for academic freedom. For reasons of both the integrity of the work and the right for the teacher to decide what to teach and how to teach, the university should not be claiming even a license with respect to teaching materials. Certain academic fields, such as law, and particularly tax law, can change almost daily, which means that using materials that are outdated becomes a reflection of the teacher's professional reputation and scholarship. According to several of the academic institutions invoking such a license, the teacher would no longer have the right determine that the materials should not be used, thus potentially damaging a teacher's integrity. Forcing teachers to update materials that the institution wishes to use under this concept of a license can also be seen as a violation of academic freedom as the teacher no longer has the right to decide.

Another aspect to the current debate in Sweden is that the digitalization of research and teaching materials in some aspect seems to be a driving factor. Research and teaching materials are being treated in the debate as assets that can be commercialized and exploited. Unharnessed, this drive for commercialization and exploitation can have a great impact on academic freedom, with less commercially attractive research negatively affected.

4.3 The Limits of the Swedish Labour Law Model

The issue of who has the rights to teaching materials is ultimately one of employment, albeit employment in a very distinct environment. The Swedish labour law model has been based on self-regulation by the social partners, the employer and employee sides. The issue of who owns the rights to teaching materials takes this approach to the extreme, for now different positions are being argued by both sides as both being supported by custom with no reconcilement in sight.

Another aspect of the Swedish model that this issue underscores is how the ad hoc solutions entered into by the social partners can have different outcomes. Almost all university teachers in Sweden are employed by the state of Sweden with ultimately the same employer. However, the specific working conditions of the different institutions of higher education, particularly in light of something as vitally important to any society as academic freedom, differ greatly, with the difference only become more exacerbated in the foreseeable future.

5. The way forward

The strongest arguments for teachers having the right to their teaching materials are the constitutional protections of copyrights as set out in the Instrument of Government buttressed by a constitutional analysis of academic freedom as emanating from different constitutionally protected areas including the freedoms of ideas, speech and association as already set out in the Instrument of Government. The current debate simply skips over the specific interests that are involved with respect to teaching materials, instead conflating them into the debate about the commercialization of patents, patents which are not constitutionally protected nor invoke moral rights in their creation. The issues of the specific rights and interests with respect to teaching materials need to be raised up to this constitutional level and in this respect, per-

haps the self-regulation model of Swedish labour law is not sufficient enough of a safeguard to guarantee the same levels of protection of academic freedom for all university teachers.

The need for academic freedom must be seen as an overriding factor for any of the interests being claimed by employers with respect to the teacher exception. Without academic freedom, research such as that which is conducted at the Stockholm Commercial Law Centre would not be possible, research which though perhaps not always commercially profitable, is necessary to create greater justice and equality in society.