

Teaching Materials in a Digitalized World: Who Owns the Rights? A Comparison of Swedish and American Approaches¹

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*"Only one thing is impossible for God:
to find any sense in any copyright law on the planet."*

—Mark Twain's Notebook, 1902-1903

Historically isolated academic ivory towers, universities around the world have turned to commercialization as a way to increase revenues as well as rankings. Patenting faculty research results has been the most visible of these efforts, particularly in the wake of the legislation, the Bayh-Dole Act of 1980, granting American universities patent rights in federally-funded research projects.² The ownership of the copyright to teaching materials seems to have been in some way hijacked in this grant of university patent rights without much further discussion, despite the fact that very different interests arise in the context of the teaching materials.

One explanation for this trend can be seen as resulting from the digitalization of learning, and more specifically, teaching materials. When teaching materials comprised writing on blackboards and hand-copied lecture notes, the issues of ownership and rights were 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 questions of ownership and rights 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 the extent of even having virtual classrooms, the issue of rights takes on different legal as well as financial values. In addition, the question of the ownership of copyrights to university teaching materials lies at the heart of academic freedom.

This article compares the Swedish and American legal approaches to the rights to university teaching materials. The objective is to highlight the vulnerability of academic freedom (regardless of legal approach) in light of the current global trend of universities claiming the copyright to teaching materials.

As seen, the issue of the rights to university teaching materials touches upon several different areas of law. The focus here first is on the treatment of academic freedom by the two different systems. Second, the legal parameters for the intellectual property at issue, the copyright to university teaching materials, are addressed. The regulations found (if any) in employment and labor law creating the framework within which this issue is to be resolved are then examined, as university professors and instructors are typically employees of higher education institutions. Finally, against the backdrop of these two broad legal approaches, the Swedish and American, the debate as to the rights to university teaching materials will be assessed against the background of academic freedom as well as potential outcomes to the question, who owns the rights to teaching materials?

2 The Bayh-Dole Act or Patent and Trademark Law Amendments Act (Pub. L. 96-517, December 12, 1980), codified at 94 Stat. 3015, 35 U.S.C. § 200-212 and implemented by 37 C.F.R. 401.

The Swedish legal approach to the rights to teaching materials as well as academic freedom is first examined and can roughly be seen as a Scandinavian/Nordic model. The Swedish and Nordic legal approaches are heavily influenced by customary law and agreements between the social partners, an approach which greatly reflects the Swedish/Nordic legal approach in general, with many legal areas, particularly employment law, falling within self-regulation instead of under legislation. The American approach will then be explored, which also in many ways reflects the American legal tradition, with the courts taken a constitutional approach to the concept of academic freedom, and a freedom of contract approach with respect to employment. The conclusion drawn from this comparison is that ultimately, regardless of approach, there appears to be a relentless march by universities in both systems towards claiming the copyright to teaching materials, a march rooted in the digitalization of the classroom and at the same time, posing a threat to academic freedom.

1 The Swedish Approach

The thrust of the discussion here is on the Swedish approach to the issue of the rights to teaching materials, which serves roughly as a Nordic model. As to intellectual property rights specifically, there has been legislative harmonization by the five Nordic countries, Denmark, Finland, Iceland, Norway and Sweden, in the area of intellectual property law. This section first sets out the treatment of academic freedom in the Swedish system, then the legal framework for this type of intellectual property. The labor and employment law regulations generally and as to this issue are then addressed. Finally, the ongoing debate in Sweden in light of the concerns raised by academic freedom is analyzed.

1.1 Academic Freedom in the Swedish Context

Academic freedom is a principle espoused in most democracies, however, rarely explicitly defined. Academic freedom is loosely addressed in the Swedish legal system, taken up in the context of research. Under Article 18 of the Second Chapter of the Instrument of Government (1974:152), “[t]he freedom of research is protected according to rules laid down in law.”³ According to § 1(6) of the Act on Higher Education (1992:1434):⁴ “With respect to research, the following general principles shall govern: (1) Research

3 Chapter 2, Article 18(2) of the *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 *Högskolelag (1992:1434)*.

problems are to be freely chosen, (2) research methods are to be freely developed, and (3) research results are to be freely published.”

In a report on academic freedom published by the Swedish National Agency for Higher Education, academic freedom is seen as the result of the interaction between the state, in the form of financier, and the academy, in the form of research, a relationship that at times can be seen as antagonistic.⁵ This pragmatic approach defines academic freedom within the result of this interaction, the social contract between the state and the universities. This fifty page report discusses the ability of the state to place certain demands on the academy based on financing and the needs of society, however, the report fails to explicitly define academic freedom outside this contextual analysis.

1.2 *Swedish Intellectual Property Law*

The right of authors to copyrights is protected in Article 16 of the Instrument of Government . “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).⁶ 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 are two sub-requirements: uniqueness (*särprägel*) and originality. If the work meets this threshold of originality, the author has under the Copyright Act the author has 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 for the Protection of Literary and Artistic Works through the Berne Convention Implementation Act of 1988, which Sweden already signed in a previous version in 1904,⁷ grants authors moral rights, *droit moral*, constituting rights of control of use, misuse, attribution and patrimony in a work despite any assignment of rights or ownership. Moral rights are defined by Article 6bis of the Berne Convention as:

Independent of the author's economic rights, and even after 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.

5 Högskoleverket, *Akademisk frihet – en rent akademisk fråga?*, Högskoleverket 2001. This agency was split into two different agencies in 2013, *Universitet- och högskolerådet*, the Swedish Council for Higher Education, uhr.se, and *Universitetskanslersämbetet*, The Swedish Higher Education Authority, [“uk-ambetet.se”](http://uk-ambetet.se).

6 *Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk*.

7 *Internationell upphovsrättsförordning (1994:193)*.

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,⁸ while the economic rights can.

The transfer of the economic rights in a copyright is to be explicit according to Section 27 of the Swedish 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*)⁹ with respect to patents, and an implicit teacher exception with respect to copyrights.

1.2.1 The Explicit Patent Teacher Exception based on Statute

Though the focus of this article is on the copyright to teaching materials, the Swedish 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 Patent Act (1967:837),¹⁰ 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 moral rights are not an aspect of the grant of a patent.

The Act on the Right to Employee Inventions (1949:345)¹¹ 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

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

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

10 *Patentlag* (1967:837).

11 *Lag* (1949:345) *om rätten till arbetstagares uppfindingar*.

patent right to the employer. These exceptions can be founded in the statute itself, in 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, this 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 2005.¹² 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 the above cited § 1(6) of the Act on Higher Education (1992:1434).

1.2.2 The Implicit Copyright Teacher 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 teacher 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 generally 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

12 See SOU 2005:95, *Nyttiggörande av högskoleuppfindingar*. 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 uppfindingar m.m.*

findings of the 2005 Inquiry, the right of teachers to teaching materials is based on custom that can be traced back over a century.¹³

1.3 The Swedish Labor and Employment 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 this right muddies these legal waters particularly in the labor and employment law context. Labor law is defined throughout this article as the law concerning the relationship between the social partners and employment law as the law concerning the relationship between the employee and the employer.

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 2014.¹⁴ 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.

1.3.1 Self-regulation as the Swedish Labor 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 labor 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,

13 *Id.* at 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.

14 These statistics are taken from Statistics Sweden, available at "www.scb.se".

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 labor market. The third phase came with the codification of labor and employment law in the 1970's, with the fourth phase characterized by Sweden's EU membership beginning in 1995.

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 even today cannot 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 labor union, employees are bound to the terms the local or central labor 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.

1.3.2 The System of Joint Regulation in the Swedish Labor Law Model

The system of joint regulation, also referred to as co-determination, as set out in the Swedish Labor 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 Labor 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).¹⁵ Industrial action may not be taken in order to

¹⁵ *Lag (1976:580) om medbestämmande i arbetslivet*. Also translated to English as "Employment (Co-Determination in the Workplace) Act)", see the website of the

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 Labor Court in its case law has defined the duty broadly.¹⁶

1.3.3 The Swedish Labor 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 labor and employment law model, basing any interpretation of the teacher exception with respect to copyright on custom is tenuous at best 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.

Government Offices of Sweden, “www.government.se” for an English translation of this act under the heading, Swedish Statutes in Translation.

¹⁶ See for example, AD 2012 no. 57.

1.4 *The Current Swedish 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.¹⁷ 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 ownership or rights to certain such assets to be assumed and then commercialized by the institutions. The Inquiry states that it has been premised on:

[T]he 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 scientifically 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.¹⁸

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 at issue, the main rule was that the individual who created the academic result, lecture, teaching material had the claim as to the copyright.¹⁹ 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 2012.²⁰ The 2012 Inquiry began with the assumption that “the operations supporting innovation at universities and colleges function surprisingly well against the background

17 For a rebuttal of this argument as being too simplified, see Färnstrand, Erika, and Thursby, Marie C., *University entrepreneurship and professor privilege*, 22:1 *Industrial and Corporate Change*, Oxford University Press, Oxford 2013, pp. 183-218.

18 See SOU 2005:95 at 17.

19 *Id.* at 239.

20 SOU 2012: 41, *Innovationsstödjande verksamheter vid universitet och högskolor: Kartläggning, analys och förslag till förbättringar – slutbetänkande*.

of their unsatisfactory premises. The deficiencies in the support system for innovation are extensive but can be repaired.”²¹ The Inquiry referred to the EU Commission Recommendation of 10 April 2008 on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organizations 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 to use the material in its operations at no cost.”²² 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.

1.4.1 Employer University Interpretations

The first matter that must be clarified here is that despite the conclusion reached by the 2012 Inquiry, 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.”²³ Lund University (1666) also states clearly “[a]s an employee at a Swedish University, the teacher exception is applicable, which means that it is you as a researcher, and not the university, that owns the rights to your research results.”²⁴ These older universities can be seen as preserving teachers’ rights to a greater degree, probably strongly based on concerns of academic freedom. The newer universities, for example Stockholm University (1878)²⁵ and Malmö Högskola (1998),²⁶ 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

21 *Id.* at 10.

22 *Id.*

23 See the website of Uppsala University, employee portal and checklist for research agreements, available at “uu.se/web/info/forska/forskningsavtal/checklista”.

24 See the website of Lund University, LU Innovation System – lärarundantaget, available at “www5.lu.se/anstaellld/forska/lunds-universitets-innovationssystem-luis”.

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

26 See the website of Malmö University College, Copyright and copying, available at “www.mah.se/upphovsratt”.

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

1.4.2 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.²⁷ 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.²⁸

1.4.3 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 no 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.²⁹

1.4.4 The Swedish Labor Union Stances

One of the labor unions most active in the question of the rights to teaching materials has naturally 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.³⁰ This exception is buttressed by the need of academic freedom in

27 See Wolk, Sanna, *Arbetstagares immaterialrättter – Rätten till datorprogram, design och uppfinningar m.m. i anställningsförhållanden*, Norstedts juridik, Stockholm 2008, p. 119.

28 SOU 2012:41, p. 69.

29 *Id.* at 79.

30 See Wolk, Sanna, XXXVIII/SULF:s Skriftserie, *Universitetslärarens upphovsrätt*, SULF Stockholm 2011, p. 12.

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 the normal operations of universities does not include acquiring intellectual property thus they have no claim under this rule.³¹

Despite the model as set out above with respect to collective solutions reached through the joint regulation of the social partners, the reality has been *ad hoc* solutions by the individual employers. This in itself perhaps is not so controversial, but when seen against the background that all these university employees are ultimately employed by the same employer, the Swedish state, the result is perhaps more remarkable. In contrast to the emphasis of the Swedish model on collective solutions, the employees at the older public universities enjoy a greater degree of clarity as well as protection with respect to their academic works than those employees of the younger universities.

2 The American Approach

Mirroring the structure above, the examination of the American approach to the rights to university teaching materials first explores academic freedom, then federal intellectual property law, and going over to employment issues.

2.1 Academic Freedom in the American Context

Academic freedom is a primary cause for the tension between teachers and employers as to the copyright in teaching materials as seen above in the Swedish system, and as seen again here in the American system. Also again here, while most recognize the importance of academic freedom, it is seldom concretely defined.

The United States Supreme Court has found constitutional protection for academic freedom under the First Amendments' free speech provisions. In one often-cited case, *Keyishian*, the Court states that:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That

31 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.

freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools...The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'³²

The *Keyishian* Court went on to state:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Despite the rather dramatic sweep of this language, the actual protection afforded academic freedom has not been more closely defined by the Court.

One bright line that has been accepted by the American courts is that there is a distinction with respect to academic freedom on the primary and secondary school levels and the higher education-university levels. Most courts addressing the rights to teaching materials at the school levels have found that the schools own the rights to the teaching materials, while at the university level, the overriding interest of academic freedom has entailed that universities do not decide how subjects should be taught, only which subjects are to be taught.³³ Under these cases, it seems quite clear that on the primary and secondary school levels, the schools rather than the teachers own the rights to teaching materials.

At the university level, academic freedom has been defined twice by the American Association of University Professors (AAUP).³⁴ In its 1915

32 *Keyishian v. Board of Regents of University of State of N. Y.*, 385 U.S. 589, 603 (1967), cites omitted.

33 See for example, *Shaul v. Cherry Valley-Springfield Cent. School*, 363 F.3d 177 (2d Cir.2004) where the Second Circuit Court of Appeals held that a high school teacher's preparation of tests, quizzes, and homework problems fell within the scope of his employment; thus, the school district rather than the teacher owned the copyright to those materials under the work-made-for-hire doctrine of the 1976 Copyright Act.

34 The AAUP comprises three interlocked entities under the AAUP umbrella: the AAUP (a professional association), the AAUP-CBC (a labor union), and the AAUP Foundation (a foundation). The AAUP's mission is "to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students,

Declaration of Principles on Academic Freedom and Academic Tenure,³⁵ it is noted that academic freedom traditionally has had two applications, to the freedom of the teacher, *Lehrfreiheit*, and to the freedom of the student, *Lernfreiheit*. Focusing on the former, the declaration defines academic freedom as comprising three elements: freedom of inquiry and research, freedom of teaching within the university or college, and freedom of extramural utterance and action. In addition, the scope and basis of power exercised by higher education institutions, the nature of the academic calling and the function of the university is emphasized in the Declaration by the following analogy: “[U]niversity teachers should be understood to be...no more subject to the control of the [university] trustees, than are judges subject to the control of the president.”³⁶

The 1940 AAUP Statement of Principles on Academic Freedom and Tenure raises the same three interests. University teachers are to be entitled to full freedom in research and in the publication of the results, freedom in the classroom when discussing their subject, and freedom from institutional censorship.³⁷ The 1940 AAUP Statement is deemed by some as a professional common or customary law of academic freedom and tenure.³⁸

2.2 *United States Federal Intellectual Property Law*

Intellectual property rights were already addressed in 1789 by the founding fathers in Art. 1 of the Constitution, “Congress shall have the power...to promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.”³⁹ Based on this, the issuance of both patents and claims to copyrights occurs on the federal and not state level. Congress has passed four patent acts, in 1790, 1793, 1836 and the one currently in force in 1952, and four copyright acts, in 1790, 1831, 1909 and the one currently in force in 1976. The United States is also a party to the Berne Convention, in

post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good.” For more information on the AAUP, see its website at aaup.org.

35 See the General Declaration of Principles in Appendix 1 to the AAUP 1915 Declaration at the aaup.org website. Also available in AAUP, *Policy Documents & Reports* (11th ed. 2014)(the “Redbook”).

36 *Id.*

37 *Id.*

38 Euben, Donna R., *Academic Freedom of Individual Professors and Higher Education Institutions: The Current Legal Landscape*, AAUP report, May 2002, p. 5, citing Finkin, Matthew W., *Towards a Law of Academic Status*, 22 *Buffalo L.Rev.* 575, 577(1972).

39 U.S. Const. art. I, § 8, cl. 8.

force in the United States as of March 1, 1989, although in essence providing little, if no actual protection as to moral rights in American law to date.⁴⁰

Under section 102 of the Copyright Act of 1976,⁴¹ copyright protection is granted to “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” The category of “works of authorship”⁴² relevant here is literary works.

The main requirements under the copyright act consequently are that the work must be original, and fixed in a medium (there is no requirement of publication). The category of literary work encompasses two types of academic works, non-fiction scholarly publications and teaching manuals.⁴³ The main rule is that the copyright in a work of authorship initially belongs to the author unless the copyright has been assigned to another party in a signed, written agreement or by operation of law.⁴⁴ Section 201(b) carves out an exception from the main rule of the author for a proprietary right⁴⁵ with respect to works

40 The question of recognizing moral rights is one of degree with respect to compliance with the provisions of Article 6bis of the Berne Convention. Notwithstanding its language that moral rights exist independently of the author's economic rights, and even after the transfer of the said rights, the Berne Convention provides that the "means of redress for safeguarding [moral] rights ... shall be governed by legislation of the country where protection is claimed," allowing for an interpretation that the United States has exploited. *See* Abrams, Howard B., *Law of Copyright Database, International Copyright Protection* § 19:15. *United States adherence to the Berne Convention—Moral rights and American law—Summary* (2014).

41 Pub. L. 94-553 (Oct. 19, 1976), 90 Stat. 2541, codification primarily 17 U.S.C. §§ 101-810, *see also* 44 U.S.C. §§ 505 & 2113; 18 U.S.C. § 2318.

42 Section 102 categorizes works of authorship as follows:

1. literary works,
2. musical works, including any accompanying words,
3. dramatic works, including any accompanying music,
4. pantomimes and choreographic works,
5. pictorial, graphic, and sculptural works,
6. motion pictures and other audiovisual works,
7. sound recordings and
8. architectural works.

43 *See* the U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* (3rd edition 2014 public draft not final), §§ 503.1(A) and 716 (hereinafter “Compendium”). The U.S. Copyright Office, a department of the Library of Congress, registers claims to copyrights, *see* 17 U.S.C. § 408(a). The Compendium is available at the website of the U.S. Copyright Office at copyright.gov.

44 *See* 17 U.S.C. §§ 201(a) and 204(a).

45 First legislated with Pub.L. No. 61-281, § 24, 61 Stat. 652, 659 (1947). The Copyright Act lists four types of proprietary works in which the proprietor, rather than the person creating the work, may claim the copyright: works made for hire, composite works, posthumous

made for hire, stating that “[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.”

2.2.1 The Work-made-for-hire Exception

The work-made-for-hire exception began as a creature of case law under the Copyright Act of 1909.⁴⁶ The exception was codified into section 101 of the Copyright Act of 1976, which states that a “work made for hire” is:

- (1) a work prepared by an employee within the scope of his or her employment; or
- (2) a work specially ordered or commissioned for use as ... an instructional text, as a test, as answer material for a test... if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.

For this exception to apply, the original copyright claimant/employer generally must have secured the copyright by virtue of employing the creator, rather than through any transfer of rights after the work was completed.⁴⁷

The United States Supreme Court decision in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) is seen as the benchmark case interpreting the work-made-for-hire provisions of the 1976 Copyright Act. The *Reid* Court considered whether the work of an independent contractor who had created a sculpture was a work made for hire under the Copyright Act. The Court noted that “[t]he structure of § 101 indicates that a work for hire can arise through one of two mutually exclusive means, one for employees and one for independent contractors, and ... the classification of a particular hired party

works, and “any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author)”.

46 This doctrine was created by the courts within the penumbra of the 1909 Copyright Act, see, e.g., *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28, 31 (2d Cir. 1939) (right to the copyright to a painting accrued to the party paying the commission for the painting); *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565, 567 (2d Cir. 1966)(copyrights to advertisements remained with the merchants in the absence of an express agreement reserving copyright to plaintiff newspaper whose staff prepared the advertisements); *Picture Music, Inc. v. Bourne, Inc.*, 457 F.2d 1213, 1216 (2d Cir. 1972)(work on song was performed for hire and right to renew copyright accrued exclusively to the proprietor); and *Murray v. Gelderman*, 566 F.2d 1307, 1310 (5th Cir. 1978)(plaintiff not working for herself but rather for a corporation and an employment relationship existed thus the work-made-for-hire doctrine was applicable). See further *Easter Seal Society for Crippled Children & Adults of Louisiana, Inc. v. Playboy Enterprises*, 815 F.2d 323, 325-28 (5th Cir. 1987)(videotape that public television station prepared was not a “work made for hire); and *Saenger Org., Inc. v. Nationwide Ins. Lic. Assoc., Inc.*, 119 F.3d 55 (1st Cir. 1997).

47 See Note to Compendium § 2115.5(C)(2).

should be made with reference to agency law.”⁴⁸ Because Reid was an independent contractor, 17 U.S.C. § 101(2) applied. Consequently, Reid’s work had to fall within one of the nine enumerated categories of that provision and there had to be an express writing stating that the work was one made for hire. As these requirements were not met, the Court ruled that Reid, rather than the client, owned the copyright to the work.

With regard to works prepared by employees, the *Reid* Court noted that the term “scope of employment,” as used in 17 U.S.C. § 101(1) is a widely-used term of art in agency law.⁴⁹ Referring to Restatement (Second) of Agency § 228(1),⁵⁰ an employee’s conduct falls within the scope of employment “only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.” An employee’s conduct does not fall within the scope of employment if “it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.” Since *Reid*, courts have relied on the Restatement (Second) of Agency § 228 to determine whether a work is prepared in the scope of employment.⁵¹

2.2.2 Copyright to University Teaching Materials

Teaching materials are a complication under the current copyright statutory scheme and the work-made-for-hire exception. A teacher exception to the work-made-for-hire doctrine was judicially created under the 1909 act.⁵² However, this case law exception was not codified into the Copyright Act of 1976. The Seventh Circuit Court of Appeals decided two cases in the 1980’s that continued the teacher exception on the basis of custom.⁵³ In the latter case, *Hays*, the Seventh Circuit noted that until the Copyright Act of 1976, the

48 *Reid*, 490 U.S. at 742–43.

49 *Id.* at 740.

50 Restatement (Second) of Agency § 228 (1957).

51 See for example, *Molinelli Freytes v. University of Puerto Rico*, 2012 WL 4667638 (D. Puerto Rico)(copyright to an educational proposal written by employees at the direction of the employer accrued to the university under the Restatement); and *Avtec Systems, Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir.1994). In two other cases, the courts applied *Reid* without discussing any possible teacher or academic exception: *Vanderhurst v. Colorado Mountain College Dist.*, 16 F.Supp.2d 1297 (D.Colo.1998) (professor’s outlines were works for hire where outlines were incidental to his employment and a method of carrying out employment’s objectives, even though he prepared them on his own time and with his own materials); *Genzmer v. Public Health Trust of Miami–Dade*, 219 F.Supp.2d 1275 (S.D.Fla.2002) (computer program written by postgraduate physician as assigned research project during his fellowship at county hospital was a work made for hire; therefore, copyright was owned by hospital).

52 See *Williams v. Weisser*, 273 Cal.App.2d 726, 78 Cal.Rptr. 542 (1969).

53 See *Hays v. Sony Corp. of America*, 847 F.2d 412 (7th Cir.1988), *abrogated on other grounds by Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406–09 (1990) and *Weinstein v. University of Illinois*, 811 F.2d 1091 (7th Cir.1987).

statutory term “work-made-for-hire” was not defined, and some courts had adopted a teacher exception whereby academic writing was presumed not to be work made for hire.⁵⁴ The Seventh Circuit went on to state that the authority for conclusion was in fact scanty:

but it was scanty not because the merit of the exception was doubted, but because, on the contrary, virtually no one questioned that the academic author was entitled to copyright his writings. Although college and university teachers do academic writing as a part of their employment responsibilities and use their employer's paper, copier, secretarial staff, and (often) computer facilities in that writing, the universal assumption and practice was that (in the absence of an explicit agreement as to who had the right to copyright) the right to copyright such writing belonged to the teacher rather than to the college or university. There were good reasons for the assumption. A college or university does not supervise its faculty in the preparation of academic books and articles, and is poorly equipped to exploit their writings, whether through publication or otherwise; we may set to one side cases where a school directs a teacher to prepare teaching materials and then directs its other teachers to use the materials too.⁵⁵

Judge Richard Posner went on to reason in *dictum* that “[t]he reasons for a presumption against finding academic writings to be work made for hire are as forceful today as they ever were.” Raising the absence of any discussion by Congress as to a teacher exception in the legislative history with respect to the Copyright Act, Posner continues:

To a literalist of statutory interpretation, the conclusion that the Act abolished the exception may seem inescapable. The argument would be that academic writing, being within the scope of academic employment, is work made for hire, per se; so, in the absence of an express written and signed waiver of the academic employer's rights, the copyright in such writing must belong to the employer. But considering the havoc that such a conclusion would wreak in the settled practices of academic institutions, the lack of fit between the policy of the work-for-hire doctrine and the conditions of academic production, and the absence of any indication that Congress meant to abolish the teacher exception, we might, if forced to decide the issue, conclude that the exception had survived the enactment of the 1976 Act.⁵⁶

This discussion by Posner predated *Reid*, and the question is whether the teacher exception outlived the agency test adopted by the *Reid* Court with respect to works made for hire.

54 *Hayes* at 416 citing Dreyfuss, Rochelle Cooper, *The Creative Employee and the Copyright Act of 1976*, 54 U.Chi.L.Rev. 590, 597–98 (1987).

55 *Hayes* at 417 citing Simon, Todd F., *Faculty Writings: Are They “Works for Hire” Under the 1976 Copyright Act?*, 9 J. College & University L. 485, 495–99 (1982).

56 *Id.*

2.3 *American Labor and Employment Law Generally*

Despite the fairly prevalent belief that there is little statutory regulation of labor and employment law in the United States, the opposite is the case. There are extensive federal regulations with respect to labor and employment law. Areas of federal regulation include wage and hours legislation, discrimination protection, workplace safety regulations and certain benefits such as healthcare.

The law defining the actual employment relationship is at the state level. In the vast majority of states, the assumption is that employment relationships are at-will. This means that employers and employees are free to terminate the relationship at any time and for either a legitimate reason or no reason. There are termination grounds that are unlawful, falling mostly within the category of public policy, such as unlawful discrimination, retaliation for certain actions such as whistle-blowing, or in bad faith, for example to avoid paying a bonus.

In contrast with the Swedish system, where the collective agreements can be seen as the primary employment law document, and any individual agreements, if in existence, secondary at best, within American law, the individual employment contract is seen as the primary law document. If the contract is valid and lawful, as a basic rule it is enforced in lieu of the at-will doctrine.

This approach as to the individual employment contract, in combination with the low union membership density in the United States, entails that labor unions do not have the same general degree of self-regulation, or even influence, when determining the content of labor and employment law as they do in Sweden. There are however certain sectors where unions in the United States can be seen as having significant influence within the sector, one of these being the educational sector. The National Education Association (“NEA”), founded in 1858, is the largest professional organization and largest labor union in the United States, representing 3.2 million public school teachers and other support personnel, faculty and staffers at colleges and universities, retired educators, and college students preparing to become teachers.⁵⁷ The American Federation of Teachers (“AFT”),⁵⁸ founded in 1900 and representing 1.5 million teachers, is affiliated with the American Federation of Labor and Congress of Industrial Organizations (“AFL–CIO”). At the university level, the AAUP-CBC, founded by the AAUP in 1976, represents approximately 47,000 university teachers.⁵⁹

2.4 *The Current American Debate as to the Teacher Exception*

As in Sweden, the rights to university teaching materials when addressed is greatly debated. Scholars disagree on the current state of the law with regard to this issue. Some commentators have expressed doubt that the teacher exception

57 For more on the NEA, *see* its website at “nea.org”.

58 For more on the AFT, *see* its website at “aft.org”.

59 For more on the AAUP-CBC, *see* its website at “aaupcbc.org”.

continues to exist after the 1976 Copyright Act.⁶⁰ Certain scholars maintain that the 1976 Copyright Act did not disturb the teacher exception to the work-made-for-hire doctrine.⁶¹ Others find that the teacher exception is no longer necessary because, under *Reid*, most teachers' works fall outside the work-made-for-hire doctrine.⁶² Given the lack of a legal bright line as to this question, university employers and employee organizations have individual solutions that naturally straddle both sides of the rights fence.

2.4.1 Employer University Interpretations

The American Association of Universities (AAU), founded in 1900, represents sixty universities who in turn represent over one-half of university research grants and contract income as well as one-half of the doctorates awarded in the United States.⁶³ The stance taken by the AAU is that courses are “correlative creations” at universities, thus universities should own the derivative intellectual property as created by faculty with the substantial aid of the university.⁶⁴

As in the Swedish case, the individual university employers have been making their own interpretations and acting accordingly. According to a survey of 110 higher education institutions with respect to online courses, 71 % had campus-wide intellectual property policies defining ownership rights, with only 10 % percent letting faculty keep sole ownership. More than one-third of these universities claimed complete control over courses and materials, and another 41 % allowed for joint ownership—meaning, for example, that professors might own the course materials they write but their colleges or universities keep the multimedia components.⁶⁵

The individual policies of four different universities are explored here, demonstrating the spectrum of treatments by employers from initial absolute university ownership by Dartmouth College to a new doctrine, “directed work”

60 See Packard, Ashley, *Copyright or Copy Wrong: An Analysis of University Claims to Faculty Work*, 7 *Comm. L. & Pol'y* 275, 314 (2002).

61 See for example, Townsend, Elizabeth, *Legal and Policy Responses to the Disappearing “Teacher Exception,” or Copyright Ownership in the 21st Century University*, 4 *Minn. Intell. Prop. Rev.* 209 (2003); and Lape, Laura G., *Ownership of Copyrightable Works of University Professors: The Interplay Between the Copyright Act and University Copyright Policies*, 37 *Vill. L.Rev.* 223, 238–46, 268–69 (1992).

62 See Brown, JoLynn M., & Wadley, James B., *Working Between the Lines of Reid: Teachers, Copyrights, Work-For-Hire and A New Washburn University Policy*, 38 *Washburn L.J.* 385, 432 (1999): “[S]ince the Court's decision in the *Reid* case provides the necessary reasoning to support the proposition that some academic works created during employment are outside the work-made-for-hire doctrine, it is questionable whether an explicit ‘teacher exception’ for academic works is needed.”

63 For more information on the AAU, see its website at “aau.edu”.

64 Hoyt, Jeff E., and Oviatt, Darin, *Governance, Faculty Incentives, and Course Ownership in Online Education at Doctorate-Granting Universities*, 27:3 *American Journal of Distance Education* 165 at 167 (2013).

65 *Id.* at 172.

as defined in the University of Minnesota's policy with respect to copyright and academic publications.

2.4.1.1 Dartmouth College

Dartmouth College's copyright policy begins by stating that "[u]nder copyright law, the copyright to works created by persons in the course of their employment belongs to their employer rather than to the individual creator. Therefore, absent other agreements or institutional policies, works created by faculty members in the course of their teaching and research, or by staff members in the course of their jobs, are the property of the College."⁶⁶ This is a rather dire beginning for authors. However, the policy goes on to state:

As a matter of fundamental principle, however, the College encourages wide dissemination of scholarly work produced by members of the Dartmouth community, including copyrightable works. Therefore, the copyright policy at Dartmouth — and most peer institutions — is that, except as provided for below, scholarship, literary works, computer software, artistic works and other items of copyrightable work created by faculty or other employees are deemed to be the property of the writer/developer, who is entitled to determine how the works are to be disseminated and to keep any net income they produce.

It should be noted that teaching materials are not explicitly included in this list. Two exceptions are made from the grant of copyright back to the academic author by the college, those of assigned tasks and special circumstances. With both, there are explicit agreements between the faculty member and the college as to the ownership of the copyright. Consequently, despite the policy beginning with the assumption that the college owns all copyrights, the academic faculty actually has the copyright unless an explicit agreement is signed by both the faculty member and the college.

2.4.1.2 University of California

According to the policy of the University of California ("UC"), when a work is prepared by an employee within the scope of employment, the copyright is owned by the employer as part of the "work made for hire" doctrine. However, the policy goes on to make the distinction: "While university staff who create works as part of their jobs generally do not retain copyright, faculty do traditionally own copyright to the scholarly works that they produce."⁶⁷ The UC Copyright Ownership Policy goes on to state that:

A scholarly/aesthetic work is a work originated by a designated academic appointee resulting from independent academic effort. Ownership of copyrights to scholarly/aesthetic works shall reside with the designated academic appointee originator, unless they are also sponsored works or contracted facilities works,

⁶⁶ The Dartmouth College Copyright Policy is available on its website at "www.dartmouth.edu/~osp/resources/policies/dartmouth/copyright.html".

⁶⁷ See the website of the University of California at "copyright.universityofcalifornia.edu/ownership/index.html".

or unless the designated academic appointee agrees to participate in a project which has special provisions on copyright ownership...⁶⁸

Under the UC policies, the works of staff and students are the property of the university, while the works by academics entailing independent academic effort belong to the author.

2.4.1.3 University of Texas

The University of Texas has extensive information available as to its Copyright Policy and contract documents, including a Copyright Crash Course for staff.⁶⁹ The University of Texas applies the work-made-for-hire doctrine, entailing that the main rule as with Dartmouth is that the Board of Regents automatically owns the intellectual property created by its employees.⁷⁰ Notwithstanding the main rule, however, under the policy the Board of Regents will “not assert an ownership interest in the copyright of scholarly or educational materials, artworks, musical compositions, and literary works related to the author’s academic or professional field, regardless of medium of expression.”⁷¹ This exception applies not only to faculty, but also to students, professions and non-faculty researchers. Two sample contracts are set out, a “Faculty Sole Ownership Agreement - Educational Course Materials” and a “Work Made for Hire Agreement – Educational Course Materials.”⁷² Under the first agreement, in return for the University providing “significant” kinds and/or amounts of University resources, the University receives either a non-profit educational use, non-exclusive or exclusive commercial license. The Work Made for Hire agreement is termed a contract for the services of creating teaching materials, with the University receiving all rights and the author receiving specific payment for creating the work.

2.4.1.4 University of Minnesota

The University of Minnesota (“UMN”) policy is that an academic’s writings are the property of the academic unless they are a “directed work”, which copyright then falls to the University of Minnesota. This initial stance is the obverse of those taken by the institutions above. Under Section 3 of the Aims and Objectives of the UMN Copyright Policy, the University of Minnesota owns the copyright in “directed works”, defined as “a work agreed upon

68 The UC Copyright Ownership Policy is available at “copyright.universityofcalifornia.edu/resources/copyright-ownership.html”.

69 Information about the University of Texas Copyright Policy is available on its website, “www.utsystem.edu/ogc/IntellectualProperty/copyrighthome.htm”. The Copyright Crash Course can be found at copyright.lib.utexas.edu.

70 The University of Texas System, Rules and Regulations of the Board of Regents, Rule: 90101, para. 2 § 2.

71 *Id.*

72 These agreements can be found at the website for the Office of the General Counsel for the University of Texas System at “www.utsystem.edu/ogc/IntellectualProperty/copyright_agmts.htm”.

between the University and faculty creator(s), the creation of which is based on a specific request by the University and which requires substantial University resources.” To qualify as a “directed work” the following three conditions must be satisfied:

1. a specific request by the University;
2. substantial resources invested by the University; and
3. agreement between the University and the faculty creator.

The UMN website contains several examples of this policy in action. The first concerns a faculty member writing a monograph, using campus computing resources, library, and assistance from a research assistant, creating an academic work. As the UMN policy adopts a higher standard of “substantial resources” as a touchstone for university ownership and not “university resources”, as is the case in some institutions, the faculty member owns the copyright in the academic work. The second scenario is where a faculty member creates lecture notes for his/her course and puts them on the UMN web-learning site. Lecture notes according to the policy are academic works and the faculty member owns copyright to all academic works, regardless of form. The third scenario is a faculty member creating a set of teaching materials (analytic guide, PowerPoint overview of concepts, supplementary documents, online interactive tutorial) to support her course. Teaching materials are academic works according to the policy and the faculty member owns the copyright.

The fourth example is a “directed work” where a UMN department wishes to develop a core course with instructional materials that can be used by multiple faculties. The Dean requests a faculty member to develop these materials and the faculty member agrees to do so. The Dean spends a large amount of money to hire additional personnel support, buy customized software packages, a new computer and assigns a full time informational technology staff to the project assisting the faculty member. Such additional resources are not generally available to other faculty. The facts in this scenario satisfy the three requirements of a directed work and copyright to the new instructional materials would be owned by the University.⁷³

2.4.2 American Labor Union Approaches

Not surprisingly, the labor unions representing teachers zealously maintain the rights of teachers as to teaching materials, at both the primary/secondary school levels and in higher education. The NEA believes that staff should own the copyright to the materials they create for use in the classroom and supports amending the Copyright Act of 1976 to recognize a teacher exemption to the

⁷³ These examples are found on the website of the University of Minnesota, available at “www.academic.umn.edu/provost/reports/copyright.html#scenarios”.

work-made-for-hire doctrine.⁷⁴ The AAUP-CBC as the bargaining unit for the AAUP endorses the Principles of Academic Freedom as set out above. The AFT, in its Resolution, Promoting academic freedom in the 21st Century College and University, sets out the standard that “[a]ll faculty and instructional staff are entitled to full intellectual property rights in developing and delivering their teaching materials.”⁷⁵

3 The Right to University Teaching Materials

Despite the fairly different paths taken in the Swedish and American legal systems, the destinations appear the same: There is no clear rule as to the rights to university teaching materials, underscored by the intense debate on this issue in light of academic freedom. The following analysis with respect to the rights to university teaching materials focuses on the three primary points raised above: Academic freedom, intellectual property rights, and the solutions as asserted by employer universities.

3.1 *The Parameters set out by the Law*

Both the Swedish and American approaches embrace academic freedom, however, without explicitly defining it in law in a way as to give actual protection to university teachers with respect to the issue of copyright to teaching materials. Academic freedom has been afforded protection by the United States Supreme Court, and particularly in light of its language of avoiding “the pall of orthodoxy”, this protection could easily be extended by the courts to the rights to teaching materials. This argument was strongly made by Judge Posner in *dictum* in the *Hays* case as discussed above, but which to date has failed to be squarely held by a court. In both the American and Swedish systems, academic freedom has been defined just sufficiently enough to muddle the “rule of thumb”/work-made-for-hire doctrines of copyright.

In contrast, the constitutional and legislative parameters of copyrights generally are clear in both systems. In some ways, a very simple solution could be argued under the language of the Swedish 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

74 See statement made by the NEA Office of General Counsel, available at the NEA website, “www.nea.org/home/37583.htm”.

75 See the AFT Resolution, Promoting academic freedom in the 21st Century College and University, available at the ATF website, “www.aft.org/resolution/promoting-academic-freedom-21st-century-college-and-university”.

under an agreement.” A basic rule of 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 Swedish constitutional protection is that it explicitly encompasses copyrights and not patents. Paradoxically, there is Swedish 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.” The American constitutional protection does not allow for this same loophole, “securing for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings.”

Another route for protection of copyrights in teachers can be seen under the Berne Convention, the aspect of moral rights that are a component of copyrights but not patents. Moral rights include the rights of attribution and to the integrity of the work. The latter 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 daily, entailing that using outdated materials 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. This is a strong argument that can be made in Sweden, however, the United States in essence has yet to give effect to the requirement of upholding an author’s integrity of the work under the Berne Convention.

3.2 *Employer Solutions*

The issue of who has the rights to university teaching materials is ultimately one of employment, albeit employment in a very distinct environment. In both systems, different solutions have been argued by employers and the social partners. The best solution from the perspective of university teachers would naturally be that taken by the older Swedish universities, that such rights automatically accrue to the teacher based on academic freedom, with the university making no demands.

However, given the pervasive trend that has been occurring internationally, that of universities claiming rights to teaching materials, a more nuanced approach ought to also be explored. Of the different employer solutions presented above, arguably that of the University of Minnesota seems to best balance the needs of the university commercially and the needs of the author from the perspective of academic freedom. By deviating from the work-made-

for-hire doctrine, and creating a new category of “directed work”, this solution can be seen as optimal for several reasons from the perspectives of both parties. First, the absence of a written agreement as to directed work entails that the rights to the work automatically accrue to the author. Second, the directed work as well as agreement have to be the result of a specific request by the university as to the result, and in addition, funded by substantial resources invested by the university, not simply resources. The requirement of the combination of all three of these factors entails that faculty cannot avoid knowing that they are engaged in a directed work, and not be aware of the allocation of rights with respect to the product. This solution of directed work also places the onus on the university with respect to making the request, having a signed written agreement, and providing substantial resources.

4 The Way Forward

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 the protection of academic freedom, the giving of intellectual property rights to universities can result in research and resultant teaching materials that more reflect commercial rather than academic interests. This in its turn can give rise to a type of stranglehold in which research that is not always commercially profitable withers away. Commercially viable topics are not always those necessary to further knowledge and perhaps ultimately, create greater justice and equality in society.

The current debate with respect to teaching materials often simply skips over the specific interests that are involved, instead conflating them into the debate about the commercialization of patents, patents that are not to the same degree constitutionally protected nor invoking moral rights in their creation. The issues of the specific rights and interests with respect to teaching materials need to be addressed explicitly. Adopting a doctrine of “directed work” as opposed to trying to come to terms with the rule-of-thumb or work-made-for-hire doctrines, is a way to better incorporate the balance that needs to be achieved between academic freedom and the employment relationship.

