
IPR & COPYRIGHT: CEVU/EUNITE MODELS AND CONSORTIUM AGREEMENT: REPORT

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Introduction

The author was part of an IPR Working Group set up within EUNITE, one of the participating cEVU initiatives. The Working Group consisted of representatives of EUNITE institutions and was lead by Stuart Brough, Head of IT Services at the University of Strathclyde.ⁱ I would like to acknowledge the work of those of my colleagues of the IPR Working Group on which this paper and conference presentation are based.ⁱⁱ

The aims of EUNITE are set out in its Memorandum of Understanding.ⁱⁱⁱ It is to help meet these aims that the IPR Working Group was set up. Whilst individual academics can and do share ideas and course materials, the exchange and sharing of the latter and/or their joint development across jurisdictions or even within a nation state requires a legal basis. In the case of EUNITE more than course materials are shared, actual courses, including accreditation, are on offer to students of other member institutions.^{iv} In particular the issues around Intellectual Property Rights (IPR) required dealing with. Of these it is Copyright that is the principle IPR that concerned the Working Group but many of the issues and agreements are relevant to other forms of IPR such as Database Right, Neighbouring Rights and, conceivably with respect to software, patents.

Context and Preparation

The EUNITE group were aware IPR impacted on their work and charged the Working Group with focusing on 'Access to digital resources and rules with respect to their use.' It was also concerned that, despite EU harmonisation, differences in national legislation might hinder development of courses and materials. In practice it appears the latter is easier to deal with than the former.

The Virtual Campus task force

EUNITE was set up in October 2000 and its Memorandum of Understanding recognised the importance of IPR to its work. It set up a task force in August 2000 to look at the implications of sharing courses and materials and many of the IPR and related issues (amongst others) dealt with by the Working Group were identified.^v

It was clear that IPR issues sit within the wider context of what EUNITE is, what it seeks to achieve and how it was organised. In particular on the continuum from education to business where does EUNITE lie? Would those who provided courses and materials be paid? Would these 'products' or 'deliverables' be commercially exploited? EUNITE, whilst it did not rule out the latter option, decided to focus on educational aims. This simplified the Working Groups remit.

The key issues the task force noted were:

- Whether a fee would be charged by the developing institution to other members of EUNITE

- Should access to EUNITE materials be restricted?
- The relationship between the author (s) of course materials, their institution and EUNITE with respect to ownership of IPR and any remuneration

A further issue that was raised in a EUNITE Steering Group meeting of December 2000 was whether the users of EUNITE materials, other than the developer, would be able to adapt and update course materials for their particular students and needs. The question of EUNITEs own legal status was also raised.

The next Steering Group meeting in April 2001 formally set up the IPR Working Group and asked it to provide recommendations with respect to three possible models of activity (cf. annexes) :

- Exchange, sharing and joint development of courses within EUNITE
- An internal market within EUNITE
- An external market outside EUNITE

The IPR Working Group, Initial Thoughts and Models

The first meeting of the Working Group took place in Glasgow in August 2001 and it took a further four meetings over two years before its work was completed. In hindsight it can be seen that both EUNITE and the Working Group narrowed its focus, partly for practical reasons. As we shall see it was decided to concentrate on the first model and to develop a legal document, a 'Consortium Agreement' that governs the exchange and development of EUNITE course materials within the consortium. It is at heart a licence by which each institution allows the others to use designated EUNITE materials.

From the beginning there were two areas the Working Group recommended should be dealt with elsewhere. Firstly technical matters such as security, authentication, interoperability and accessibility in relation to where course materials would be hosted, how they would be accessed etc. Secondly the questions of 'quality control' or peer review of course materials to ensure standards were maintained and accreditation was possible. It recommended that EUNITE set up semi-permanent committees to oversee such issues.

The first thoughts of the Working Group included:

- Copyright was the key IPR with respect to digital course materials
- Ownership of the IPR in these materials and the fact that in many institutions copyright was more governed by custom and practice rather than formal policy
- The Moral Rights of the authors
- Differences in law between jurisdictions

The Working Group also added a variation to the three models noted above, what might be called Model 2b. This would be where EUNITE would specifically commission materials and courses for its member institutions. At present all but Model 1 remain as theoretical models as EUNITE courses are still at the pilot stage.

The Simple Model (1)

The Working Group focused at its first meeting on how teaching and course materials could be exchanged within EUNITE with the minimum of fuss. It was decided any legal agreement would have to be between institutions that would effectively licence each other to use such resources. From a practical point of view each institution should own or at least have the right to licence (and manage) the courses and materials it contributed to EUNITE. Each institution would reach agreement with individual authors and/or creators where necessary, according to its existing policies on IPR ownership and remuneration or if they wished, develop them. The

Working Group did however recommend strongly that as a matter of principle, all institutions should uphold the Moral Rights of authors (for example the Paternity Right– the right to be correctly named and acknowledged as the creator of a resource, text, course pack etc) and that where any revenues were made from exploiting EUNITE resources, authors should be fairly rewarded.^{vi}

In discussions it was noted that individual EUNITE institutions would likely adopt different policies for ensuring materials developed by their staff could be used by EUNITE. These might include:

- Authors would assign any copyright (or other IPR) to their institution
- Authors would licence any copyright (or other IPR) to their institution
- The institutions policy and/or terms and conditions of employment asserted or required ownership of any copyright (or other IPR) in e-learning materials generated by their staff.

There is of course a whole debate around the ownership and management of copyright (and other IPR) in work produced by staff in tertiary education.^{vii} In general whilst institutions often own patents in inventions produced by employees they often do not own or do not assert their rights to academic research publications. Teaching materials tend to fall somewhere in between but the growth of e-learning has made their management and possibly their commercial as well as their pedagogical value of greater concern.

The Working Group realised that EUNITE learning materials would probably contain some third party materials (that is materials where the IPR were owned by individuals or organisations outwith the institution, such as publishers) and that these might also be covered by existing contracts, licences and agreements with the institution. The latter might apply to existing materials developed within the institution. It would be important therefore that the EUNITE ‘developing’ institutions(s) could ‘warrant’ that both these type of materials could be legally used by the EUNITE recipient institutions and their students.

The Working Group dealt with the issue of jurisdiction simply by agreeing one law would have to cover the agreement. Belgian law was eventually settled on because it was close to many other jurisdictions in IPR matters and the EUNITE secretariat was based in this country.

Other issues were discussed which the Working Group felt would need to be covered in any agreement between institutions.

- Liability for courses and resources
- Institutions who defaulted on their responsibilities to EUNITE
- The possibility courses and/or materials might be withdrawn

The final principle that was agreed from the outset was that, at least for the pilot phase of EUNITE, courses and materials would be freely available to other members of EUNITE. All costs would be underwritten by the developing institution (s).^{viii} The alternative, where fees might be charged and developers and their institutions paid for producing e-learning materials would require complex structures, which were best avoided. The Working Group recommended that where fees and revenues were involved receipts should be proportional to input. On the other hand it was accepted that individual institutions that developed courses and materials would require the right to offer them outside EUNITE, that is their use would not necessarily be exclusive to EUNITE. Were EUNITE ever to act as a legal, commercial entity in its own right, this situation might have to be revisited. It was agreed at this time that for the near future at least this would be unadvisable, there were far more factors mitigating against this course of action than for it.

A Consortium Licence Agreement

The Working Group developed the three Models for EUNITE courses and materials referred to above, along with a version of the 2nd Model, which envisaged EUNITE commissioning courses and learning materials. However from its second meeting in Leuven in November 2001 the focus of its work was the production of a Consortium Agreement. This legal document would facilitate the exchange of e-learning materials by allowing each partner in EUNITE to licence the others to use those materials developed for or contributed to EUNITE and deposited with it.

The Agreement is tied to the first Model, what became known as the ‘simple model’ of free sharing, exchange and development of courses and materials amongst EUNITE. It would have to be revisited were any of the other Models brought into operation. It conforms to EU law and is designed to deal principally with copyright. The Working Group also drafted a template for an internal licence agreement that could be used by individual institutions with their staff and a template for a ‘course description’, an inventory which would be attached to the internal agreement.

Other issues that the Agreement dealt with not yet discussed here included the following.

- How any disputes within the consortium over IPR and associated matters would be dealt with. Essentially this will be by external arbitration.
- What procedures were needed where an institution left EUNITE or decided to ‘pull’ a course? In both cases a notice period would be required. In the case of the latter it might distinguish between the ‘course’ and the ‘materials’.
- It was agreed that should any EUNITE courses and materials be offered outside the consortium and/or commercially this would require central approval. However it was also accepted that the developing institution could probably not be prevented from doing this.
- It was agreed that in the long term EUNITE ought to address the question of whether it is fundamentally an educational consortium or a business. All the signs are that it will choose the former but commercial activity has not been ruled out.

It was agreed that for EUNITE to work, receiving or user institutions would have to be given the right to alter, update and modify the original course materials for their particular needs. This right is built into the consortium agreement.^{ix} Where necessary, individual institutions would need to get the author or creators (on their staff) to consent. It is realised that this will be more difficult where third party materials are incorporated.

Finalising the Consortium Agreement

The consortium agreement was revised over a series of meetings from November 2001 to May 2003 with some minor amendments thereafter discussed by email. The document as circulated for signature of all consortium members includes three annexes. The first is simply a copy of the original EUNITE Memorandum of Understanding. The second is an ‘Internal Licence Agreement’ for use by institutions with their staff (teachers, authors, developers etc) where the policy or custom and practice of the institution are to leave or allow possession of copyright with individual staff. In other cases the institution will ‘own’ the copyright or other IPR. In either case the Consortium Agreement depends on all member institutions being able to license EUNITE course materials to all other members. The final annex is a template for ‘Course Descriptions’ that would be used with EUNITE courses and materials. Work on the latter will be taken forward by the Pedagogical Committee.

The Working Group also developed the different ‘Models’ and their implications for EUNITE and sent recommendations to the Steering Group. However as indicated earlier, it was clear

that in the pilot phase, it was only Model 1, 'the simple model' allowing exchange, sharing and joint development of courses and their materials that would be implemented. The Consortium Agreement only covers this model and only applies to EUNITE members.

Results

The Consortium Agreement has been signed off and forms part of the Project Management Committee's guidance on procedures to staff in EUNITE institutions. Currently there are 3 EUNITE pilot courses running with a total of 121 students involved in 2002/2003. After Easter 2004 a major awareness raising campaign to encourage staff in EUNITE institutions to offer courses and/or develop courses for EUNITE will begin. EUNITE has a business plan but at present the strategy is to focus on educational purposes. It does not currently aim to become a commercial entity nor to commission courses and materials.

Course materials are often held on local servers but a master copy will always reside with EUNITE. Support for students taking EUNITE courses will normally come from their home (or 'receiving') university unless they are studying at an institution on an Erasmus exchange. An important point is that EUNITE "courses will become an accepted part of a students degree programme." There is also an arrangement that EUNITE has called 'Virtual Erasmus'.^x It is accepted that this will work best where the numbers of students are relatively small and where students are integrated into a physical Erasmus exchange. The implication is that any examinations are taken online at the 'receiving' university but supervised by staff of the 'sending' University. Two options have been suggested:

- Students take a virtual course (eventually a full programme even) in a EUNITE institution, perhaps in preparation for or as a follow up from a physical ERASMUS exchange.
- Students take a virtual course in their own university, while abroad on a physical ERASMUS exchange.

The current EUNITE pilot courses are often taken as 'electives' and students receive a certificate of completion from EUNITE. Arrangements for the award of transferable credit under a EU system are in progress.

The Consortium Agreement

The final Consortium Agreement has 12 sections and 3 annexes (the latter as described earlier). Some of these, such as section 1 'Definitions' are straightforward and are found in many legal documents of this type. For our purposes the key sections are 4, 6 and 7 although the sections on Liability and Termination are also important but again these are fairly standard clauses.

The core sections clearly underline the responsibilities of EUNITE institutions. They will, for example (section 4), ensure that they actually hold the rights they are licensing and where necessary have concluded the necessary agreements with their staff and/or 3rd party rights holders. They also agree to deposit a master copy of all appropriate course materials and software with EUNITE. Section 6 specifically deals with arrangements between institutions and their staff but the license agreement provided in Annex A is not compulsory and institutions may draw up their own version if they wish.

The Consortium Agreement focuses on the situation where this type of agreement is necessary on the grounds that current custom and practice in academia (and in some cases in law) means staff often 'de facto' own, or at least control, copyright in their work. Section 7 makes it clear that EUNITE materials are offered on a non-exclusive and royalty free basis. It clarifies that the agreement only applies to materials offered for EUNITE purposes and use of them is for non-commercial, educational purposes only. It states that 'users' cannot sub-licence the materials but that adaptation may be possible if agreed to by the Steering

Committee. This last point is not an ideal situation but an attempt to balance the interests of authors/creators and users.

Conclusion

The purpose of the Consortium Agreement is to help staff and institutions get courses accepted by and implemented by EUNITE with the minimum of fuss. It is one less hurdle to be overcome and it standardises, as far as possible, the procedures.^{xi} In the future, initiatives such as the 'Creative Commons' in the USA may make sharing of teaching and learning materials easier, but even these licenses have restrictions and in this example are aimed more at individual staff not groups of institutions.^{xii} For the time being Consortium Agreements such as the one under discussion here will continue to perform a vital function for e-learning consortia such as EUNITE.

References

ⁱ Dr Stuart Brough is Chairman of the EUNITE Project Management Group, the EUNITE IPR Working Group and is the University of Strathclyde's representative to EUNITE.

ⁱⁱ In particular: Professor, Dr, Marie-Christine Janssens (Leuven), Nina Schjoldager (Aalborg), Petro Suvanto (Helsinki University of Technology), Rosanne Strachan (Strathclyde) and Dr Juan Carlos Fernandez Molina (Granada).

ⁱⁱⁱ <http://www.eunite-online.org/submenu1/MoU/index.htm>

^{iv} STUART BROUGH, ANN BYGHOLM, GEORGES VAN DER PERRE AND JEF VAN DEN BRANDEN (2003) *Project Management Committee Working Document*, v 1.2, Section 5, page 6.

^v ERIC BEEKENS, JEF VAN DEN BRANDEN, REGINALD FERBER, HANS NASLUND (2000) *Towards a European Virtual University Campus. Report of the EUNITE taskforce on a European Virtual Campus*.

^{vi} Moral Rights have a long tradition in Europe but in the United Kingdom they are relatively new. Here they were first introduced in the 1988 Copyright, Designs and Patents Act. See Chapter IV of the Act in particular. See further DAVID BAINBRIDGE (1999) *Intellectual Property*, 4th Edition, Pearson Education Limited, Chapter 5, page 98ff. The full text of the UK Act is online at:

http://www.legislation.hmso.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm

^{vii} There is a considerable international literature on this issue and a range of initiatives. One starting point might be the website of the ZWOLLE initiative at <http://www.surf.nl/copyright/> The work of Stephen Harnad on Pre-Prints and Post-Prints might also help. See: <http://cogprints.ecs.soton.ac.uk/archive/00003019/>

^{viii} *Consortium Agreement* (2003), Section 5

^{ix} *Consortium Agreement* (2003), Section 6

^x STUART BROUGH, ANN BYGHOLM, GEORGES VAN DER PERRE AND JEF VAN DEN BRANDEN (2003) *Project Management Committee Working Document*, v 1.2, Section 6, page 8.

^{xi} To see how new courses might be accepted by EUNITE, see STUART BROUGH, ANN BYGHOLM, GEORGES VAN DER PERRE AND JEF VAN DEN BRANDEN (2003) *Project Management Committee Working Document*, v 1.2, Annex 4: Flowchart for the EUNITE course procedure.

^{xii} <http://creativecommons.org/>

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Annex 1:***Model one, simple model – existing web based teaching material and subsequent updates.***

EUNITE is currently deemed to be a strategic alliance of participating institutions as depicted in the memorandum of understanding and any use of the term of EUNITE relates to this partnership.

It is suggested that contracts should be between individual members (institutions) of EUNITE but they may then have to come to local agreements with their individual members of staff. Agreements between institutions should be the same or at least broadly similar across all institutions.

A general principle would have to be established on recognition of authorship/integrity right (Moral Rights/Acknowledgements).

1. Actions necessary within the institutions

In order for the model defined below to be locally implemented, the IPR group recommends that institutions should have the advice of copyright specialists.

Some of the areas that will require detailed internal discussion and which should be considered to be the responsibility of the parent institution:

- What type of IPR are involved (Copyright, Database Rights, Software Patents, Trade Marks, Designs, Patents) within the institution.
- Applicable law (originating country).
- Checking content. This should include a database of items (an inventory of all assets of the course), a list of contractual limitations on use (e.g. already existing licenses). Each institution will make the necessary arrangements and create the necessary documentation to deal with these issues.
- A standard template should be created so that all EUNITE institutions can use a common model to describe their courses.
 - Copyright clearance (for third party and author).
 - Confidentiality – courses must preclude any confidential material.

Actions required of the course originator

- If ownership of IPR is at an individual level the IPR should be assigned or licensed to the institution on a perpetual non-exclusive basis. This would be for use of the material within the framework of EUNITE (with rights to sub-license).
- In the case of a license, a clause should be inserted into the agreement stating that the institution, as licensee, should be able to represent the IPR holder.

- There should be no financial payment to the individual, however, if there are commercial implications relating to the transfer of rights which cause financial payments back to the institution then the individual should be compensated.
- Specify contractual limitations on use, already existing licenses for example.
- The creator(s) of the course material will have to guarantee to the institution that the necessary updating/customisation/modification of the course and its materials is performed to the recommendations of the Scientific/Technical Committee. The creator(s) will also retain the right to update/customise/modernise their own material.
- The creator(s) will also give permission for an EUNITE backup copy to be made of all web based materials.

2. Points requiring clarification from the EUNITE Steering Group

The IPR Working Group felt that clarification was required on a variety of topics summarised below. The Working Group would, however, be able to offer advice and guidance on a variety of these issues but the final decision would be required from the EUNITE Steering Group.

- On what terms and conditions should courses be made available to EUNITE institutions?
The IPR Working Group would suggest that the consortium agreement would specify the terms and conditions of use.
- Should IPR remain with the institution or be jointly owned by all EUNITE partners?
This group would recommend that IPR remains with the institution but EUNITE partners would be granted a license. Because EUNITE is not a legal entity it cannot own IPR.
- Would all courses be available to all participating EUNITE members free of charge?
This group recommends that the material be freely available to members of EUNITE during the course of the first year. The extent to which material is also available to other institutions outside EUNITE will depend on individual agreements between the owner and the institution (assignment versus license).
- Under what law should EUNITE operate?
EUNITE should operate in accordance with Dutch law.
- How should arbitration between institutions be dealt with?
It is recommended that arbitration be dealt with either through the European/International Chamber of Commerce or WIPO.
- What arrangements should be made if a course has to be withdrawn?

We recommend that the withdrawal of a course requires consultation between all participating institutions (relevant Scientific Committee). A year's notice may be sensible with the retention of the current version. It is recommended that a course should not be withdrawn during an academic year.

- How should deviating conditions or local limitations in institutional policy, law, academic structures be dealt with?

Special clauses or annexes may be required to the Consortium Agreement to deal with deviating conditions e.g. specific funding or contractual limitations. One of the annexes must include a description of the courses and the materials.

General Questions for EUNITE Steering Committee /Institutions

- What will be the security mechanisms and technical standards for the course material? For example, site security, watermarks, server location, and encryption, liability for virus detection and removal. Responsibility for technical services.

The Working Group recommends that a separate Technical Committee should be set up to resolve these issues.

- Should EUNITE be reconstituted and administered as a legal entity?

We recommend that in the first instance, in order to make progress quickly, EUNITE should not be constituted as a legal entity. In the longer term this is likely to be necessary especially if commercial activities are to be undertaken. In this case EUNITE could become the owner of IPR or the managing agent for licensing course material. The details of how any company will be set up and operated will be partly dependent on the jurisdiction of where the company is constituted and is currently beyond the scope of this working group. This model will require a separate or updated agreement between EUNITE members.

- Should the material be free to members of EUNITE or not?

We recommend in the first instance (pilot phase) web based teaching materials and courses should be free to all participating EUNITE members. If not a remuneration scheme would be considered. This should be based on an easily understandable and cost-effective model. The group would recommend that each institution should equally contribute to the pool of material and in this instance no transfer of funds between institutions would occur. This situation should be reviewed at the end of the pilot phase and a re-evaluation of finances should take place at this time.

- Should material that is distributed via the EUNITE web site be restricted for use by EUNITE members and the originating institution d?

This Group recommends yes, during the pilot phase. If external academic institutions or commercial organisations wish to make use of EUNITE web based courses this will need to be agreed by the Steering Committee, originating institutions and in some cases the originator, depending on local conditions. An

amendment to the Consortium Agreement, to allow for such wider distribution, would be required.

- Should member institutions be free to offer their own materials to non-EUNITE parties? (for commercial or non-commercial reasons).

Yes. The Consortium Agreement will only include a non-exclusive license for EUNITE parties.

- How would the material be quality assured (peer review)?

We recommend that a separate Scientific Committee is constituted for peer review. We also recommend that there should be a standard template for course structure and description.

- How should EUNITE deal with defaulting members?

The Steering Committee must make provision for this eventuality (see proposal for Consortium Agreement).

- What is the legal liability of EUNITE or the partner institutions? For example, what happens if the course is cancelled at short notice?

We strongly recommend that the Steering Committee makes provisions for this eventuality (see proposal for Consortium Agreement).

Annex 2

Model Two – material specifically commissioned and paid for by EUNITE members for EUNITE members.

The utilisation of Model 2 would come about after the initial pilot phase e.g. if external funding was successfully secured EUNITE may ask a member institution to prepare course work for the EUNITE partners.

This model should be seen as a variation on Model 1 and much of what follows will depend on the final status of EUNITE as an organisation.

The underlying premise for this model is that there will be pre-existing course material which is not web based, which can be translated or converted into web based course material. It is envisaged that in this case the IPR will be assigned from the creator to the relevant EUNITE institution and/or distributor. The major difference in this model is that the IPR is maintained at an institutional level whereas in Model 1 the IPR may reside with the individual author or creator.

1. Actions necessary within the institutions

- The compensation scheme between the participating institutions and the individual provider of material, and the persons carrying out any conversion work, would be subject to local arrangements. The underlying principle should be that there would be a reward mechanism for this work.

- The areas that require discussion under Model 2 would be the same as for those in Model 1.
- The original provider would always retain the copyright of their original material. Moreover, he/she will have the right to use the derived web based material for education and research purposes whilst remaining at an EUNITE institution. The web based course would be available to be licensed under the standard EUNITE rules.
- There may be in this model far fewer ownership problems as IPR will be assigned to the member institution with full rights, including the right to update/modify/sub-license the web based material. It would be the responsibility of the commissioned institution to ensure that any third party copyright or pre-existing licenses were dealt with. Where a member institution employs a subcontractor to do the conversion they will ensure that IPR rights are assigned and third party rights and licenses are respected.

2. Points requiring clarification from the EUNITE Steering Group

- Will EUNITE commission the conversion of already existing courses and their materials or create a completely new course from scratch?
It is anticipated that the former would apply in the first instance as the costs to prepare a new course from scratch may be prohibitive. We also recommend that the courses and material to be converted should be reviewed for quality control by a Scientific Committee.
- Would there be common technical/design standards?
We recommend that there should be a common EUNITE template for the presentation of course material. Proposals should come from the Technical Committee.
- What would happen if a course were withdrawn at short notice?
We recommend that, as per Model 1, fair warning would be given before courses were withdrawn or substantially changed.
- How would the moral rights of the creator/author be dealt with?
The moral rights of the creator/author would always be maintained.

The same general questions for the EUNITE Steering Committee that appear in Model 1 will also need to be discussed in relation to this model.

Annex 3

Model Three – commercial model, commissioned with a view to selling it.

In order for this model to be operative EUNITE would have to become some kind of legal entity, possibly an actual company of some type.

In order to achieve this there would have to be some discussion on a mechanism by which the IPR could be transferred or licensed from the institutions to the new company. We don't envisage this happening in the first phase of EUNITE course production. We anticipate that in the pilot phase Model 1 will apply and over time Models 2 and possibly 3 will come into play. Much will depend on the business plan currently under construction.

There may be two sub groupings within this model – commercial utilisation of pre-existing course material and secondly, commissioning of material for commercial gain.

The details of how any company will be set up and operated will be partly dependent on the jurisdiction of where the company is constituted and is beyond the scope of this working group. This model will require a separate or updated agreement between EUNITE members.