

## EU Fintech Regulation Raises US Copyright Questions

By **John Polito, Lindsey Shinn and Kayla Clark** (March 13, 2019, 3:33 PM EDT)

The EU's revised Payment Services Directive, known as PSD2, requires banking entities to provide an interface by which fintech companies, such as payment services and mobile banking providers, may securely access and use customer banking data.[1] This interface, known in the software industry as an application programming interface or API, must allow fintech companies to, for example, identify themselves, securely communicate requests for information, and initiate payments on behalf of users.[2]

These interfaces are due to be released this year; prototype APIs must be made available by Thursday, March 14, 2019, and full versions must be put into production by Sept. 14, 2019.[3] These new regulations are silent, however, on the intellectual property issues surrounding these standards.

While EU regulations may be driving the creation of PSD2 APIs, the same APIs are almost certain to be used (by banking entities, fintech companies and consumers) within the United States. This article discusses the copyright implications of selecting and implementing PSD2-compliant APIs under the federal copyright law of the United States.

### APIs for PSD2

Entities that have to comply with PSD2, referred to in the regulation as account servicing payment service providers, or ASPSPs, have several options.

They can offer a proprietary API, either by providing fintech companies the same access that customers receive, or by creating and implementing a distinct API just for fintech companies.[4] They can also implement an API from one of the many multistakeholder "market initiatives" that have sought to design, or facilitate the definition of, standards for use by multiple entities, such as Open Banking in the U.K., the Berlin Group in Germany, and the Open Bank Project.[5]

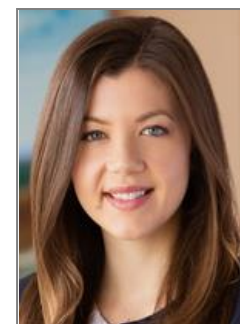
And, of course, it is possible to mix and match between these approaches, for example implementing a market-initiative API with some custom extensions.



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While there are pros and cons to each option, consideration should be given to the consequences of ownership versus licensing.

Proprietary APIs offer certain advantages.

First, they provide the maximum flexibility and the possibility for market differentiation, because the ASPSP has control over the design and creation of the API. APIs provide access to specific data and functionality, while keeping hidden the details of how an ASPSP's data is organized and how its underlying software works. A proprietary API can be customized to maximize these benefits to the ASPSP.

Second, a proprietary API would give the ASPSP exclusive copyright rights, which are likely to be held by the entity that designs and authors the API and any accompanying documentation.

There are disadvantages, however, including the cost of creation and, potentially, the onus of obtaining regulatory clearance for your proprietary API by yourself.

Conversely, market initiative APIs may be less expensive to adopt, with much of the design and development work already completed, and an infrastructure for documentation and support already in place.

For example, Open Banking has provided a standard "designed to assist any European account providers in meeting their PSD2 and RTS requirements." [6] The European Banking Authority has acknowledged that "API standardised specifications developed by market initiatives ... potentially reduce the fragmentation of the API landscape across the EU, facilitate market entry for new PSPs, allow easy upscaling of the activities of those market entrants, and foster competition and innovation." [7]

This suggests that market initiative APIs are looked upon favorably and may have more credibility with regulators, who might be more likely to approve schemes implemented by multiple parties. At the same time, the recent European Banking Authority guidelines caution that "conformity with those standards is not a guarantee that the dedicated interface itself, as implemented in the ASPSP's systems, ultimately complies with the requirements in PSD2 and the RTS." [8]

Finally, as discussed further below, APIs created by others may come with licenses that restrict future flexibility as to how you use the API, including future monetization plans.

### **Copyright Protection for APIs Under United States Law**

Under United States law, software, including APIs, is copyrightable. The definition of a "computer program" was explicitly added to the Copyright Act in 1980. [9] Since then, courts have made specific statements about the contours of the law as to various types of software. It is well-settled, for example, that source code and object code are copyrightable. [10]

If an API meets the other criteria for copyright protection, the rights-holder can seek to register and enforce the copyright in that API.[11] In 2014, the U.S. Court of Appeals for the Federal Circuit in Oracle America Inc. v. Google Inc. confirmed that APIs are copyrightable, and the U.S. Supreme Court declined to review that ruling.[12]

Copyright protection extends to the expression of an idea, but not to the underlying idea itself.[13] With this in mind, the Federal Circuit ruled that the APIs owned by Oracle were protectable expression, noting that at the time the APIs were created, there were “unlimited options as to the selection and arrangement” of the material that was copied.[14] After another round of litigation, in January 2019 Google again asked the Supreme Court to review the copyrightability of APIs.[15] The Supreme Court will likely respond later this year.

The Federal Circuit decision is not without controversy. An earlier decision by the U.S. Court of Appeals for the First Circuit, Lotus Development Corp. v. Borland International Inc., held that Lotus’ menu command hierarchy (commands such as “Copy,” “Print” and “Quit”), which could be used to create macros, was not copyrightable.[16] Opponents of copyright protection for APIs argue that APIs cannot be distinguished from menu command hierarchies and thus should not be protectable.[17] Proponents of protection counter that the pull-down menu commands in Lotus were found to lack sufficient creativity to qualify for copyright protection, and that no actual code was copied in that case, rendering the Lotus decision inapplicable to APIs.[18]

Until and unless the Supreme Court or Congress announces a uniform rule settling the dispute, entities deciding whether to adopt a third-party API or create their own should consider the possible copyright ramifications of doing so.

### **Limits on the Use of Market-Initiative APIs**

As discussed above, if an ASPSP creates its own API from scratch, it likely has copyright in that creation, which it can license to other entities. Conversely, if an ASPSP adopts the API of another organization, it must pay close attention to the restrictions that come with the license to use the API. The ASPSP adopting another’s API may be limited in what it can do, including its ability to create or sell software that works with the API.

For example, Open Banking provides a number of APIs and accompanying technical specifications.[19] The Open Banking terms and conditions for both API providers (those who implement and make available APIs that adopt the Open Banking standards) and API users (those who use the APIs) state that “[e]xcept as expressly provided in the Participation Conditions, neither Party will acquire any proprietary rights, title or interest in or to any Intellectual Property Rights of the other Party or any other Participant pursuant to the Participation Conditions.”[20]

However, Open Banking otherwise provides the software and documentation under an open license, and states that, subject to conditions, “[p]ermission is hereby granted, free of charge, to any person obtaining a copy of this software and associated documentation files (the ‘Software’), to deal in the

Software without restriction, including without limitation the rights to use, copy, modify, merge, publish, distribute, sublicense, and/or sell copies of the Software, and to permit persons to whom the Software is furnished to do so.”[21]

Another grant provided the provider or user is a “limited, revocable, non-exclusive, non-transferable, non sub-licensable (subject to Clause 15.2) royalty-free licence, for the duration of such [API provider or user’s] participation in the Open Banking Services, to use, distribute and copy the Documentation solely to the extent necessary to carry out the [API Provider or User’s] obligations under the Participation Conditions.”[22] Users of APIs may not “[c]all any API, or use or present the Open Data, in any way or for any purpose which is in breach of any rights of any third party (including intellectual property rights).”[23] The API providers who have adopted the Open Banking APIs are thus limited in terms of their ability to obtain ownership rights to the APIs and documentation, but appear to have a great deal of flexibility to sell and distribute software created using the Open Banking APIs.[24]

While ready-made APIs may be helpful for standardization and reducing time to implementation, consideration should be given to how the APIs are likely to be used (both during this initial implementation phase, and in the future to service customers or monetize other aspects of the business) to avoid any potential intellectual property issues relating to the APIs.

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[1] Directive 2015/2366 of the European Parliament and of the Council 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation 1093/2010, and repealing Directive 2007/64/EC (“PSD2”), Article 98; Commission Delegated Regulation 2018/389 of 27 November 2017 supplementing Directive (EU) 2015/2366 of the European Parliament and of the Council with regard to regulatory technical standards for strong customer authentication and common and secure open standards of communication (“RTS”), Articles 30-32.

[2] See RTS, Article 30.

[3] RTS, Article 38; “Open Banking and Financial APIs: How to Integrate Your Company with the Digital Financial Ecosystem,” Nov. 20, 2018, <https://www.altexsoft.com/blog/engineering/open-banking-and-financial-apis-how-to-integrate-your-company-into-digital-financial-ecosystem/>.

[4] RTS, Articles 31-32.

[5] European Banking Authority, Final report, Guidelines on the conditions to benefit from an exemption from the contingency mechanism under Article 33(6) of Regulation 2018/389 (RTS on SCA & CSC), Dec. 4, 2018, 4, 9-10 (“EBA Guidelines”); Open Banking, <https://www.openbanking.org.uk/>; The Berlin Group, <https://www.berlin-group.org/>; Open Bank Project, <https://www.openbankproject.com/>.

[6] <https://www.openbanking.org.uk/providers/standards/>. In contrast, another convening group, Open

Banking Europe does not provide an API or API software, but rather a repository of information relating to PSD2 and other related initiatives. <https://www.openbankingeurope.eu/who-we-are/>.

[7] EBA Guidelines at 10.

[8] *Id.*

[9] 17 U.S.C. § 101.

[10] *Computer Assoc. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 702 (2d Cir. 1992) (“It is now well settled that the literal elements of computer programs, i.e., their source and object codes, are the subject of copyright protection.”); *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983) (“a computer program in object code embedded in a ROM chip is an appropriate subject of copyright”); *Johnson Controls, Inc. v. Phoenix Control Sys. Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989) (both source code and object code “are consistently held protected by a copyright on the program.”).

[11] The scope of protection for APIs in the EU may be more constrained. See *Case C-406/10, SAS Institute, Inc. v. World Programming Ltd.*, 3 C.M.L.R. 4 (2012) (concluding that “Article 1(2) of Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs must be interpreted as meaning that neither the functionality of a computer program nor the programming language and the format of data files used in a computer program in order to exploit certain of its functions constitute a form of expression of that program and, as such, are not protected by copyright in computer programs for the purposes of that directive”).

[12] *Oracle Am., Inc. v. Google Inc.*, 750 F.3d 1339, 1348 (Fed. Cir. 2014), cert. denied, 135 S. Ct. 2887 (2015).

[13] *Id.* at 1354 (citing *Mazer v. Stein*, 347 U.S. 210, 217 (1954)).

[14] *Id.* at 1361.

[15] Although Google is technically appealing the Federal Circuit’s decision rejecting Google’s Fair Use defense, *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018), Google’s petition also seeks review of the earlier copyrightability order. Petition for Writ of Certiorari at 11-21, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (Jan. 24, 2019).

[16] *Lotus Development Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 815 (1st Cir. 1995), *aff'd* without opinion by equally divided court, 516 U.S. 233 (1996).

[17] Petition for Writ of Certiorari at 19-20, *Google LLC v. Oracle Am., Inc.*, No. 18-956 (Jan. 24, 2019).

[18] *Oracle*, 750 F.3d at 1365 (further noting that the Lotus hierarchy was “essential to operating” the system, whereas none of the APIs, “other than perhaps...the three core packages,” needed to be copied by Google).

[19] <https://www.openbanking.org.uk/providers/standards/>.

[20] “Open Banking Terms and Conditions for API Users,” Section 8.1,

<https://www.openbanking.org.uk/wp-content/uploads/Terms-and-Conditions-for-API-Users.pdf>; “Open Banking Terms and Conditions for API Providers,” Section 8, <https://www.openbanking.org.uk/wp-content/uploads/Terms-and-Conditions-for-API-Providers.pdf>. In turn, “Intellectual Property Rights,” are defined broadly as “(a) patents, trade marks, service marks, registered designs, trade and business names, domain names, unregistered trade marks and service marks, copyrights (including future copyrights), semiconductor or circuit layout rights, know-how, trade secrets, database rights, rights in designs and inventions, in each case (except in relation to future copyright) from the time such rights come into existence; and (b) applications for any of those rights (where such applications can be made); and (c) rights of the same or similar effect or nature as or to those in (a) or (b) or which would in any way prevent or hinder the use or exploitation of the matters to which they relate, in each case in any jurisdiction.” *Id.* at Schedule 1.

[21] “Open Banking MIT Licence,” <https://www.openbanking.org.uk/open-licence/> (“[u]nless otherwise stated, all specifications and downloadable reference applications are subject to this MIT Open Licence”).

[22] “Open Banking Terms and Conditions for API Users,” Section 8.4(a), <https://www.openbanking.org.uk/wp-content/uploads/Terms-and-Conditions-for-API-Users.pdf>; “Open Banking Terms and Conditions for API Providers,” Section 8.4(a), <https://www.openbanking.org.uk/wp-content/uploads/Terms-and-Conditions-for-API-Providers.pdf>. See also *id.*, Section 8.4(b)-(c).

[23] Open Banking Open Licence,” Section 3.1(c), <https://www.openbanking.org.uk/wp-content/uploads/Open-Licence.pdf>.

[24] See 17 U.S.C. §§ 101, 103.