RAY QUINNEY & NEBEKER

Copyright Year in Review: 2021

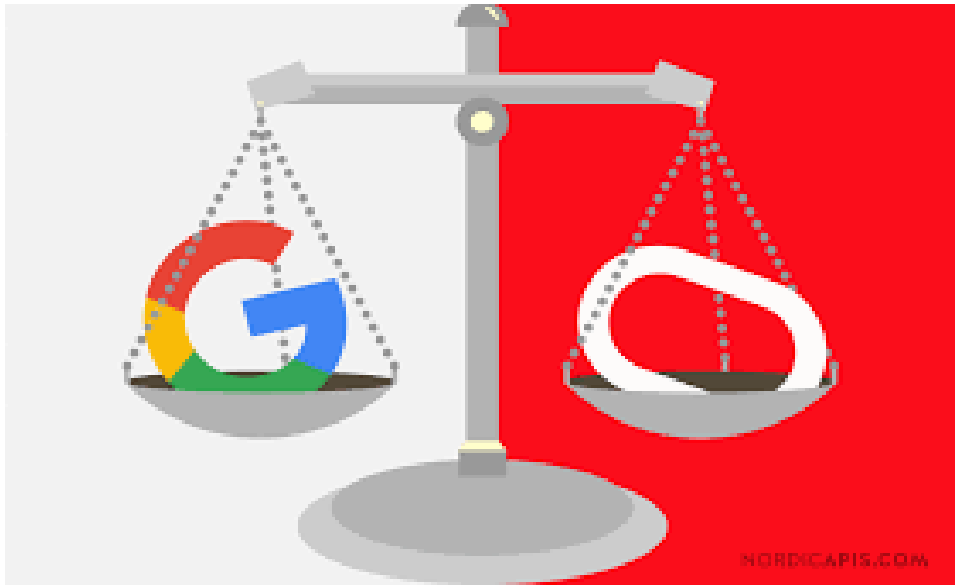
August 2021

Michael Erickson

RAY QUINNEY & NEBEKER

Supreme Court Cases

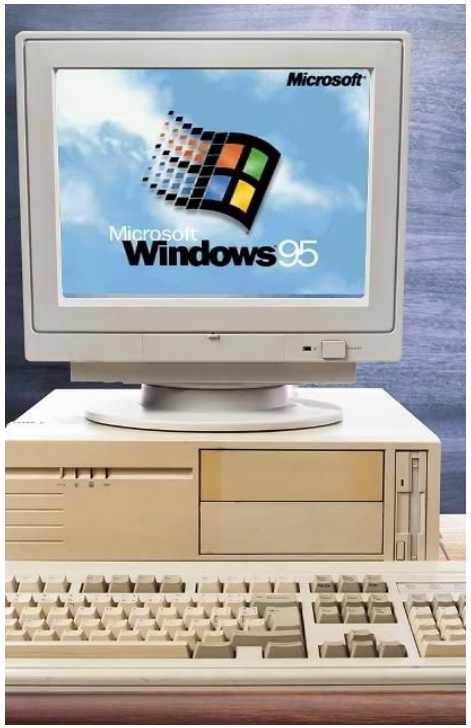
Google LLC v. Oracle Am., Inc., 141 S.Ct. 1183 (2021).

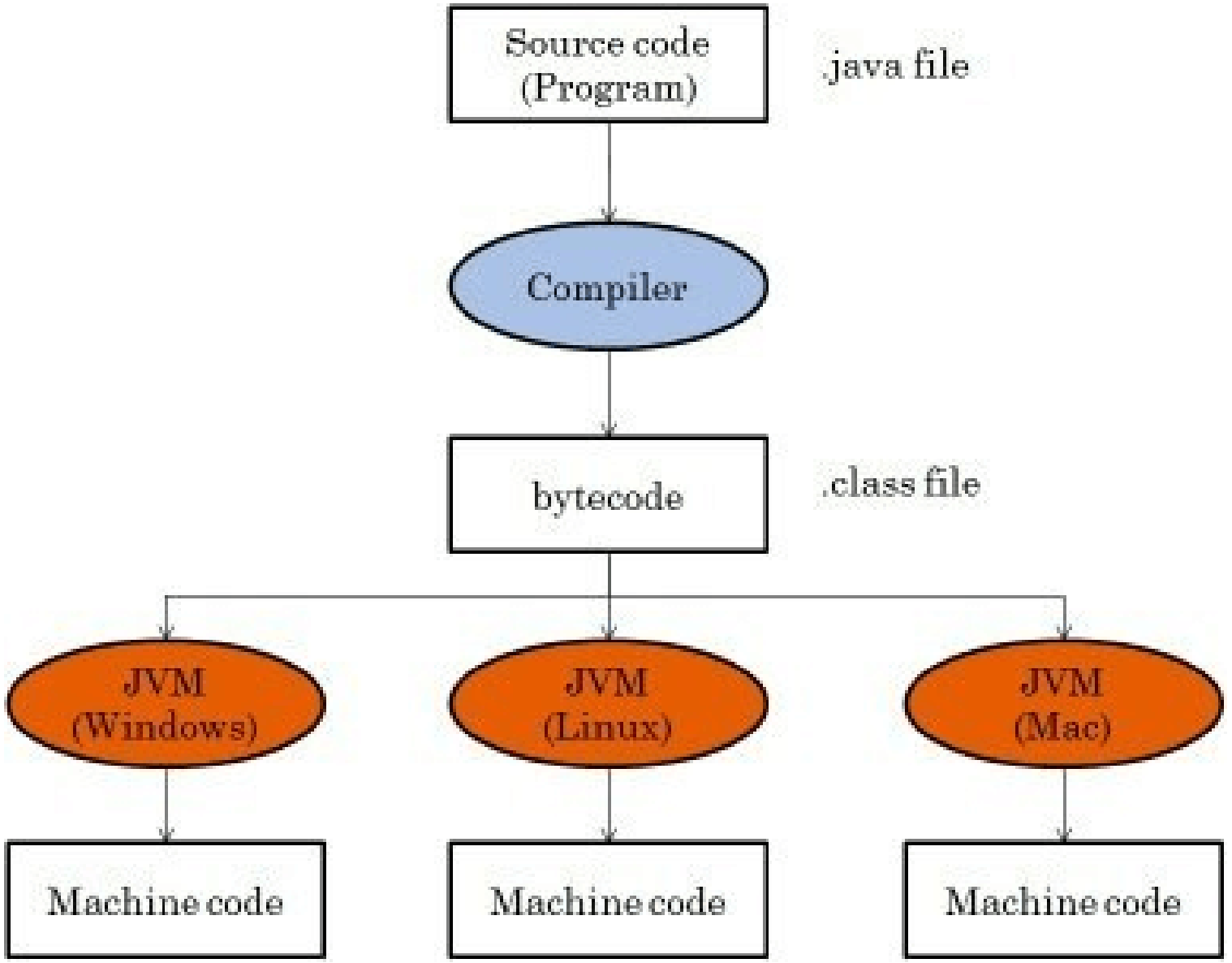


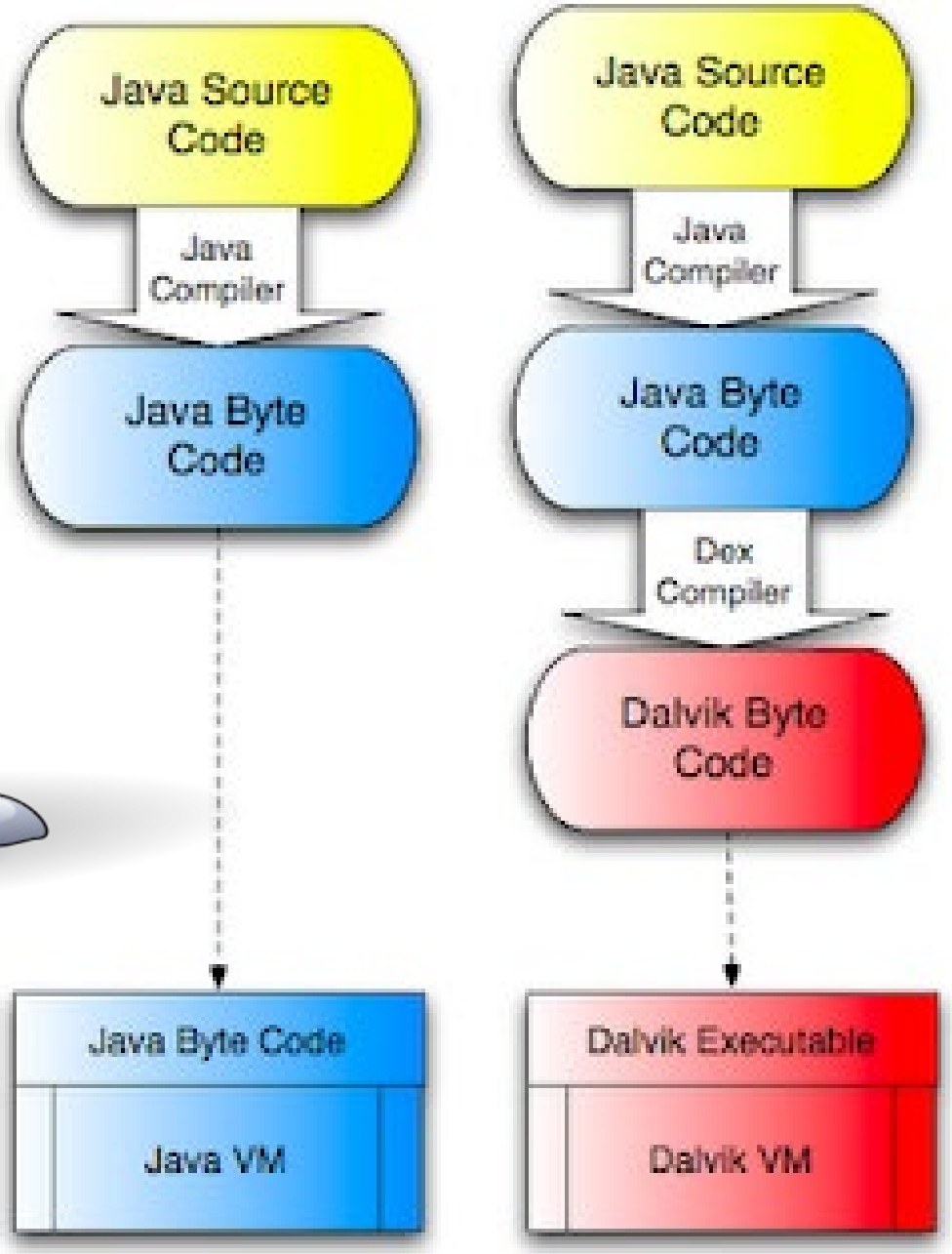
Van Buren v. United States, 141 S.Ct. 1648 (2021).

RAY QUINNEY & NEBEKER

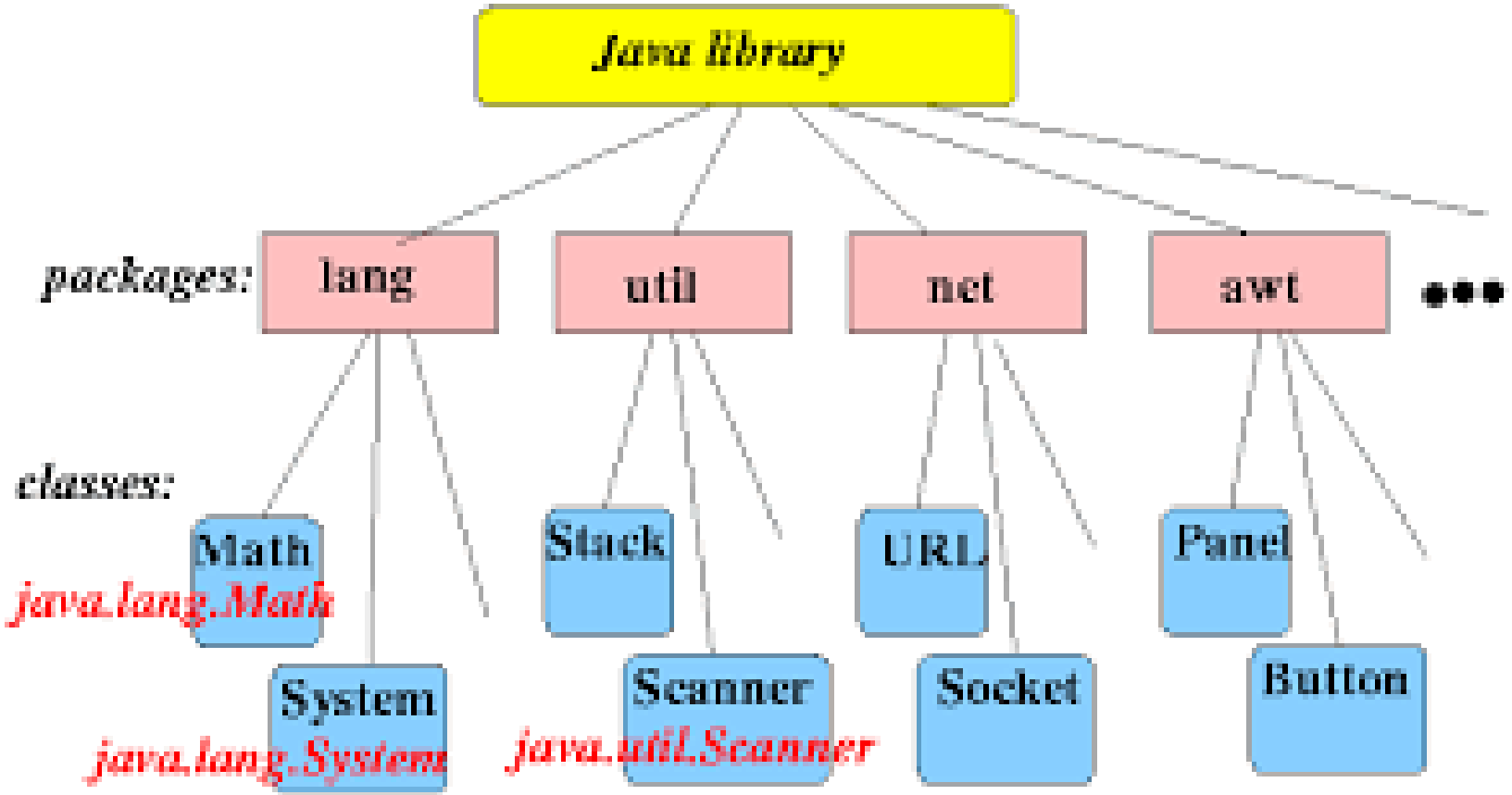
Write Once, Run Anywhere




Source code
(Program)
.java file
Compiler
bytecode
.class file
JVM
(Windows)
JVM
(Linux)
JVM
(Mac)
Machine code
Machine code
Machine code


Java Source Code
Java Compiler
Java Byte Code
Java Byte Code
Java Source Code
Java Compiler
Java Byte Code
Dex Compiler
Dalvik Byte Code
Java Byte Code
Java VM
Dalvik Executable
Dalvik VM

"Through an API, a programmer can draw upon a vast library of prewritten code to carry out complex tasks."



Java Math Library

Methods	
Math.sin()	Math.cos()
Math.log()	Math.exp()
Math.sqrt()	Math.pow()
Math.min()	Math.max()
Math.abs()	Math.PI

RAY QUINNEY & NEBEKER

Justice Thomas

[T]he legal definition for "refugee" is more than 300 words long. Rather than repeat all those words every time they are relevant, the U.S. Code encapsulates them all with a single term that it then inserts into each relevant section. Java methods work similarly.

Programmer Inputs	Sun Java API
Method Call	**Declaring Code**
java.lang.Math.max (4, 10)	Package java.lang public class Math public static int max (int x, int y)
	Implementing Code
	{ if (x >y), return x else return y }

RAY QUINNEY & NEBEKER

Two Issues

- (1) Copyrightable?
  - In no case does copyright protection for an original work of authorship extend to any idea, procedure, **process, system, method of operation,** concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. 17 U.S.C. § 102(b)

- (2) Fair Use?
  - [T]he fair use of a copyrighted work . . . for purposes **such as** criticism, comment, news reporting, teaching . . . , scholarship, or research, is not an infringement of copyright. 17 U.S.C. § 107

RAY QUINNEY & NEBEKER

Google LLC v. Oracle Am., Inc.

- District Court found Java's API declaring code to be uncopyrightable
  - *anyone is free under the Copyright Act to write his or her own code to carry out exactly the same [tasks]*
- Federal Circuit reversed on copyrightability and remanded for trial on fair use
  - *Google might have created a whole new **system** of dividing and labeling tasks*
- Jury found fair use
- Federal Circuit reversed finding no fair use
  - *There is nothing fair about taking a copyrighted work verbatim and using it for the same purpose and function as the original in a competing platform.*

RAY QUINNEY & NEBEKER

Google LLC v. Oracle Am., Inc.

(1) Nature of the Copyrighted Work

Unlike many other programs, its value in significant part derives from the value that those who do not hold copyrights, namely, computer programmers, invest of their own time and effort to learn ***the API's system****.*

Google LLC v. Oracle Am., Inc.

(2) Purpose and Character of the Use

Google copied portions of the Sun Java API . . . for the ***same reason*** *that Sun created those portions . . . .*

But . . . [h]ere Google's use of the Sun Java API seeks to create ***new products*** *and seeks to expand the use and usefulness of Android-based smartphones.*

RAY QUINNEY & NEBEKER

Justice Thomas, dissenting

This question is "guided by the examples [of fair use] given in the preamble to § 107." Those examples include: "criticism, comment, news reporting, teaching . . . , scholarship, or research." Although these examples are not exclusive, they are illustrative, and Google's repurposing of Java code from larger computers to smaller computers resembles none of them.

RAY QUINNEY & NEBEKER

Google LLC v. Oracle Am., Inc.

(3)The Amount and Substantiality of the Portion Used

Google copied the declaring code for 37 packages of the Sun Java API, totaling approximately ***11,500 lines of code****. . . .*

The total set of Sun Java API computer code, including implementing code, amounted to 2.86 million lines, of which the copied 11,500 lines were only ***0.4 percent****.*

Google LLC v. Oracle Am., Inc.

(4) Market Effects

(i) Sun was poorly positioned to succeed in the mobile phone market

(ii) Android was not a market substitute for Java's software

(iii) Sun foresaw a benefit from the broader use of [Java] in a new platform

On the other hand, Google's copying helped Google make a vast amount of money from its Android platform.

Justice Thomas, dissenting

[A]fter Google released Android, Amazon used the cost-free availability of Android to negotiate a 97.5% discount on its license fee with Oracle [for Kindle devices]. . . .

Google [also] interfered with opportunities for Oracle to license the Java platform to developers of smartphone operating systems. . . . [B]y copying the [declaring] code and releasing Android, Google eliminated Oracle's opportunity to license its code for that use.

RAY QUINNEY & NEBEKER

Google LLC v. Oracle Am., Inc.

This source of Android's profitability has much to do with third parties' (say, programmers') investment in Sun Java programs. It has correspondingly less to do with Sun's investment in creating the Sun Java API. We have no reason to believe that the Copyright Act seeks to protect third parties' investment in learning ***how to operate*** *a created work.*

Justice Thomas, dissenting

The nature of the copyrighted work—the sole factor possibly favoring Google—cannot by itself support a determination of fair use because holding otherwise would improperly override Congress' determination that declaring code is copyrightable.

RAY QUINNEY & NEBEKER

Van Buren v. United States

The Computer Fraud and Abuse Act of 1986 (CFAA), subjects anyone who "intentionally accesses a computer without authorization or exceeds authorized access" to criminal liability. 18 U.S.C. § 1030(a)(2).

There are also civil remedies.

RAY QUINNEY & NEBEKER

Van Buren v. United States

- Van Buren, a former police sergeant, ran a license-plate search in a law enforcement database in exchange for money. The search "plainly flouted his department's policy, which authorized him to obtain database information only for law enforcement purposes."

- It was an FBI sting operation, and Van Buren was charged with a felony violation of CFAA.

Van Buren v. United States

The "exceeds authorized access" clause of the CFAA covers those who "obtain information from **particular areas in the computer**—such as files, folders, or databases—to which their computer access does not extend. It does **not cover** those who, like Van Buren, have **improper motives** for obtaining information that is otherwise available to them." 141 S.Ct. at 1652.

RAY QUINNEY & NEBEKER

Van Buren v. United States

"exceeds authorized access" means "to access a computer with authorization and to use such access to obtain . . . information in the computer that the accesser is not entitled ***so*** *to obtain." § 1030(e)(6)*

Van Buren v. United States

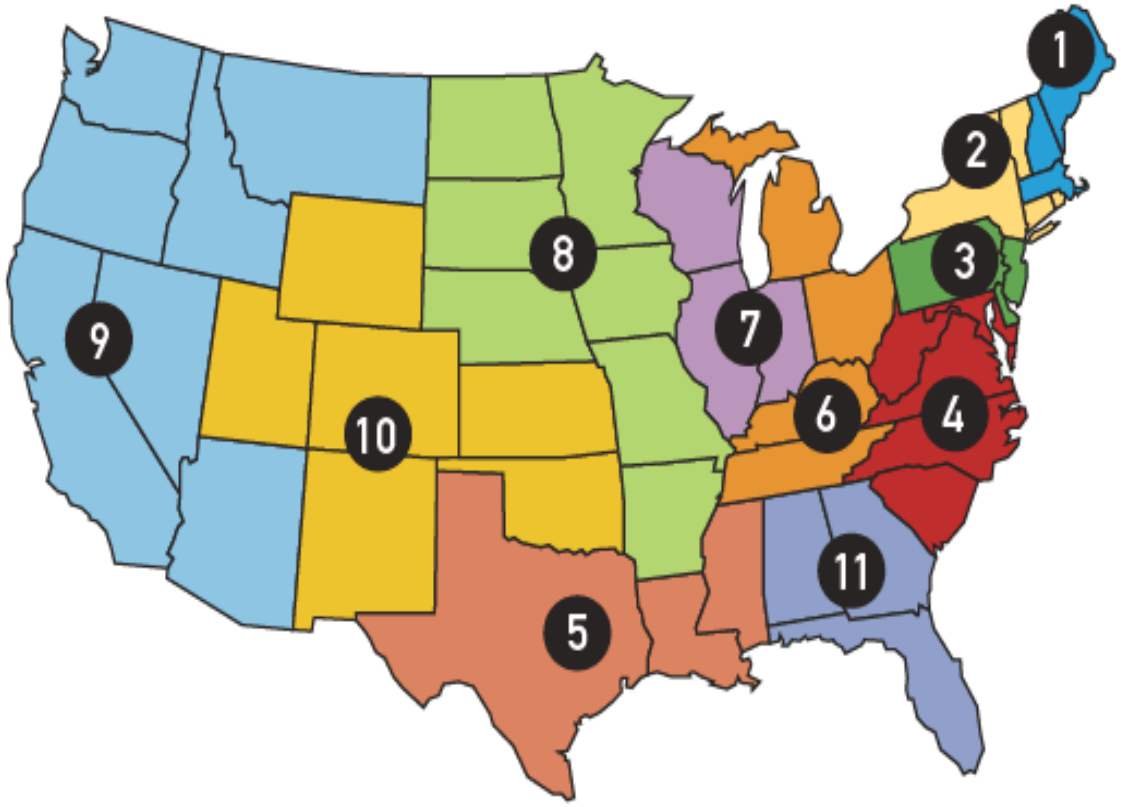
J. Thomas Dissent

(joined by J. Roberts and J. Alito):

•The dissent would have confirmed Van Buren's conviction arguing that "the text [of § 1030(a)(2) of the CFAA] makes one thing clear: Using a police database to obtain information in circumstances where that use is expressly forbidden is a crime." 141 S.Ct. at 1669.

RAY QUINNEY & NEBEKER

U.S. Court of Appeals Copyright Cases



- *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253 (9th Cir. 2021).
- *Design Basics, LLC v. Signature Constr., Inc.*, 994 F.3d 879 (7th Cir. 2021).
- *Bitmanagement Software GmBH v. United States*, 989 F.3d 938 (Fed. Cir. 2021).
- *MidlevelU, Inc. v. ACI Info. Grp.*, 989 F.3d 1205 (11th Cir. 2021).
- *DuBay v. King*, 844 F. App'x 257 (11th Cir. 2021).

RAY QUINNEY & NEBEKER

Desire, LLC v. Manna Textiles, Inc.

- Manna, a rival fabric designer, modified Desire's 2D floral print textile design by "30-40%" and then sold that design to three apparel manufactures, each of which sold garments made from the textile design to individual retailers.

- After jury trial, Manna jointly and severally liable for infringements by manufacturers and retailers. The three manufacturers jointly and severally liable for infringements of respective retailers.

RAY QUINNEY & NEBEKER

Desire, LLC v. Manna Textiles, Inc.

- Section 504(c)(1) allows for "an award of statutory damages for all infringements [of a single work] for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally"
- Majority: Act does not permit multiple statutory damages for the infringement of one copyrighted work where at least one defendant is jointly and severally liable with each of the other defendants.
- Dissent: Bad policy to promote separate lawsuits.

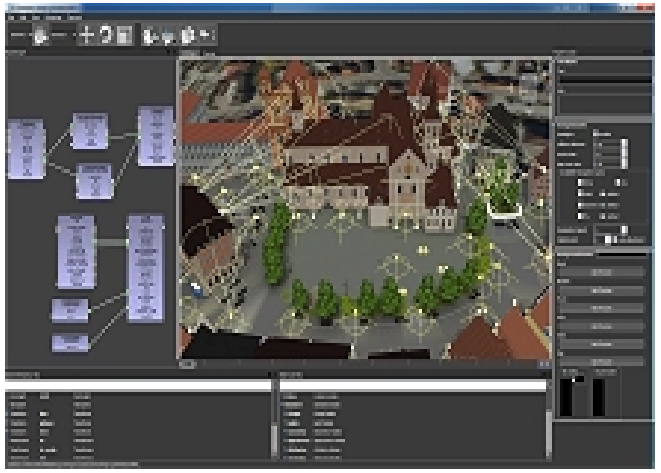
RAY QUINNEY & NEBEKER

Design Basics, LLC v. Signature Constr., Inc.

- Design Basics (copyright troll) holds only thin copyright protection in its floor plans. The functional requirements of living spaces dictate that particular rooms be placed close together. There are only a limited number of possible floor plans, and by creating more than 2,800 of these plans, Design Basics attempted to occupy the entire field. If Design Basics held any more than thin copyright protection in its floor plans, it would own nearly the entire field of suburban, single-family home design.

RAY QUINNEY & NEBEKER

Bitmanagement Software GmBH v. United States



- Copyright owner and Navy had a meeting of the minds, as required to form an implied-in-fact copyright license for Navy to use software.
- An implied-in-fact copyright license was not precluded by existence of express contract. However, the Navy failed to comply with condition of implied-in-fact copyright license, rendering its use infringement.

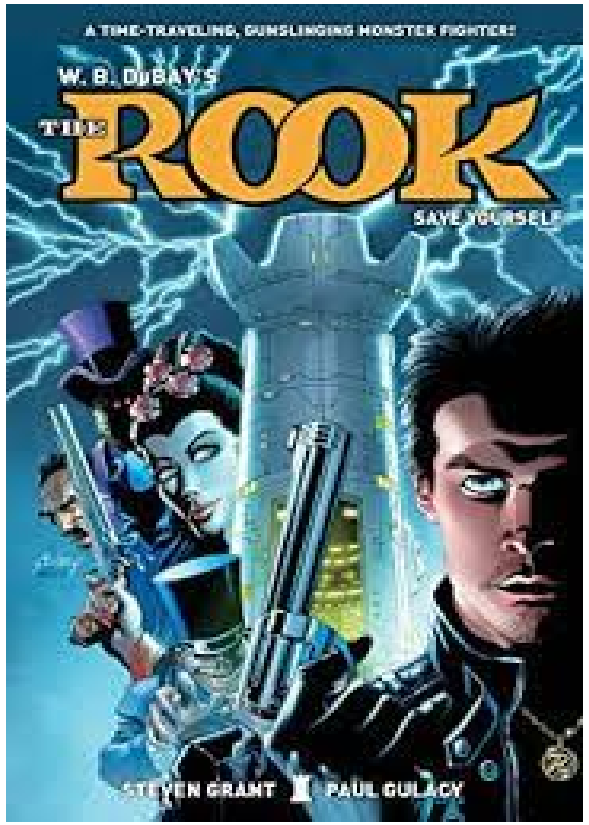
RAY QUINNEY & NEBEKER

MidlevelU, Inc. v. ACI Info. Grp.

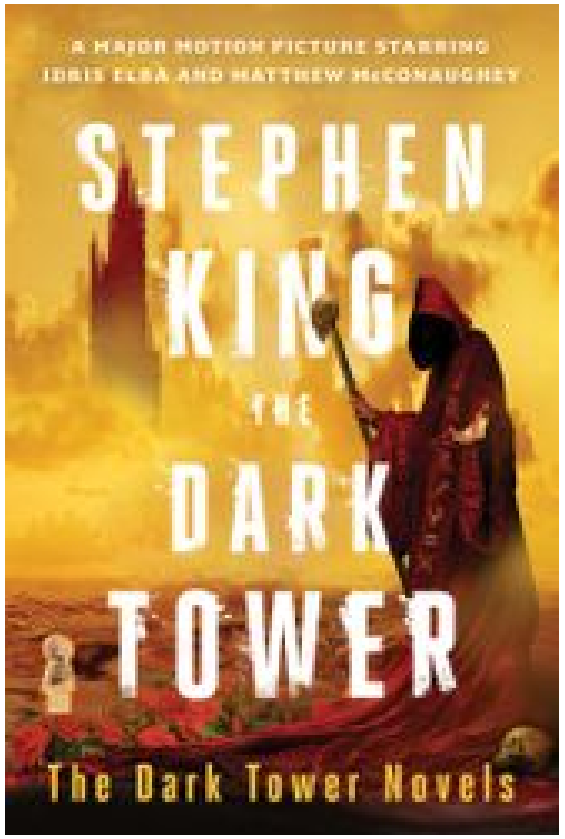
- A jury could not have reasonably inferred that plaintiff blog owner impliedly granted defendant aggregator a license to copy and publish its content. Therefore, the aggregator did infringe the copyright.
- Reasonable minds could differ on all the fair use factors. Thus, the jury could have reasonably found that defendant did not establish its fair-use defense and the court refused to overturn the verdict.

RAY QUINNEY & NEBEKER

Dubay v. King



- Characters' names did not merit copyright protection, and any similarities concerning characters' knightly heritage, travel to different times and parallel worlds, Western attire, fictionalized Alamo histories, and knife-wielding were too general to merit protection.
- While both characters were related to towers and tower imagery and had bird companions, elements were portrayed in different ways, and characters had different stories and contexts.



CASE Act

- Copyright Alternative in Small-Claims Enforcement Act

- Creates a “Copyright Claims Board” within the Copyright Office for claims of copyright infringement up to $30,000.

RAY QUINNEY & NEBEKER

Case Act

- Voluntary (opt in and opt out)
- Registered work or application filed simultaneously
- Limited written discovery and generally no formal motions
- For statutory damages, no determination of willfulness
- Non-precedential opinions posted online
- Safeguards against abuse (attorney's fees and case limits)
- Limited review, in the Copyright Office and federal courts
- Begins December 27, 2021 (June 25, 2022 for good cause)

RAY QUINNEY & NEBEKER

Protect Lawful Streaming Act (PLSA)

Makes high-level commercial streaming a felony offense, much as it is for download services now.

RAY QUINNEY & NEBEKER

Contact:

Michael Erickson
Ray Quinney & Nebeker P.C.
36 South State, #1400
Salt Lake City, UT 84111
MErickson@rqn.com
801-323-3351