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I. INTRODUCTION

U.S. Patent Nos. 9,742,824 (Compl. Ex. A) (the “’824 Patent”); 9,729,594 (Compl. Ex. B) (the “’594 Patent”); and 9,762,636 (Compl. Ex. C) (the “’636 Patent”) to Harold Price (collectively, the “Asserted Patents”), disclose and claim systems and methods for distributing audio-visual media over the Internet. The Asserted Patents each claim priority to provisional application no. 60/231,997, dated September 12, 2000. They share similar disclosures, but claim different aspects of the disclosure.

WAG holds full title to the Asserted Patents and accuses Defendants Google LLC and YouTube, Inc. (“Defendants” or “Google”) of infringing (1) claims 1-17 of the ’594 Patent; (2) claims 1-12 of the ’636 Patent; and (3) claim 1-12 of the ’824 Patent (collectively, the “Asserted Claims”). WAG believes that the language of the claims is clear and that the Disputed Terms require no construction.

II. BACKGROUND

A. *Technological Overview*

The Asserted Claims address the problem of how to achieve the perception of immediate startup (“Instant-On”) of Internet streaming when the user clicks on an audio-visual media stream, as well as thereafter maintaining uninterrupted delivery. *See, e.g.*, ’594 Patent, 3:45-58 (“respond on demand without objectionable buffering delay”); *see also id.*, 6:15-18 (“Immediate playing on a user’s computer is afforded”).

Audio and visual media transmitted over a computer network are simply streams of data – sets of time-sequenced data elements. *Id.*, 6:30-32. When delivered over the network, the data stream flows from the source (server) to the player (client) for playback. *Id.*, 6:59-65.

A problem arises when the aim is to distribute a media program via streaming over the Internet, as opposed to transferring (downloading) an entire recorded version of the program and

playing it back after the entire recording has been transferred, because the Internet is a patchwork of relayed connections and, while it can work well for delivering data, does not guarantee timely delivery of data between nodes. *See, e.g.*, '594 Patent, 2:34-38 (citing “delays and losses that are inherent in many Internet protocols), 3:5-6, 5:7-15. The Internet can ensure that all data items will be delivered, but cannot assure when any individual item will arrive. Thus, since media programming relies on time-sequenced data, the Internet is inherently susceptible to transmission delays of varying magnitude, for delivering such programming. *See* Declaration of Keith Teruya, (“Teruya Decl.”) ¶ 12-18 (Ex. A).¹

Internet delivery delays result (*inter alia*) from transient congestion and contention at routing nodes. Larger delays in data transit potentially result in sustained interruptions for the data consumer (*see, e.g.*, '594 Patent, 2:38-42). Internet delivery delay of a stream can result in a stuttering startup and frequent recurring interruptions. *See id.*, 6:11-12 (“startup delays and dropouts”).

A long-standing partial solution is to add a buffer to the client device. *Id.*, 2:42-45. Allowing the client-side buffer first to receive and accumulate a portion of the stream, amounting to, *e.g.*, 30 seconds' worth of data, before beginning playback, allows the playback to withstand up to 30 seconds (cumulatively) of transmission delays before the client-side buffer runs out of data, which if it occurred would cause a playback interruption. *See, e.g., id.*, 3:16-27. The drawback of this approach is the need to wait on streaming startup in order to fill the client-side buffer in advance, before playback can begin. *See id.*, 2:50-55. This startup delay was the “hourglass” streaming experience that was prevalent before Plaintiff’s patents, and it was very

¹ The Teruya Declaration is of course extrinsic evidence. Plaintiff has not submitted that declaration to argue its claim construction positions, but rather has limited it to only those points where it believes technical expert input will be of assistance to the Court.

frustrating to users, severely limiting the marketability of programming streamed over the Internet. *Id.*, 3:35-41.

In one embodiment (referred to herein as the “buffering” embodiment), Harold Price’s invention uses *two* buffers, one on the server side, and one on the client side, which interact in a particular way. *See* ’594 Patent, 8:1-26. The server waits until the *server-side* buffer is full before sending this data to the client. In this embodiment, the buffer operates on a first-in-first-out (FIFO) basis – starting delivery back from the point the data was buffered from – so that there is a block of accumulated data at the server that can be sent quickly in order to jump-start the transmission to the client. *See, e.g., id.*, 9:36-45; Teruya Decl. ¶ 20.

In a separate embodiment (*see* ’594 Patent, 14:42-15:18), which is the embodiment most pertinent to the claims asserted in this case, the pace of transmission of a stream can instead be regulated by player requests for elements of the stream. This is referred to herein as the “pull” embodiment. In the pull embodiment, streaming data elements are accumulated on the server side from a media source (similar to the “buffer” in the above-described embodiment), and are each associated with serial identifiers. In the pull embodiment, the player monitors the state of its own buffer, including without limitation the level of the buffer and what elements it needs for continuous playback, and requests them from the server by their serial identifiers, as needed to provide uninterrupted playback. So long as the connection allows each element to be sent in less time than it takes to play it back, this technique, referred to as “pull,” also serves as an effective stream control mechanism. The first so-identified element in this embodiment corresponds to the initial buffer-load of data in the buffering embodiment, and its rapid transfer likewise jump-starts the filling of the player buffer and the ability to begin playback, providing a startup benefit comparable to that provided by the buffering embodiment. *See* Teruya Decl. ¶ 22.

III. LEGAL PRINCIPLES

Claim terms are generally given their plain and ordinary meaning. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (*en banc*); *Azure Networks, LLC v. CSR PLC*, 771 F.3d 1336, 1347 (Fed. Cir. 2014) (“There is a heavy presumption that claim terms carry their accustomed meaning in the relevant community at the relevant time.”) (internal quotations and citation omitted), *vacated on other grounds*, 575 U.S. 959 (2015). The plain and ordinary meaning of a term is the “meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention.” *Phillips*, 415 F.3d at 1313.

“Although the specification may aid the court in interpreting the meaning of disputed claim language, particular embodiments and examples appearing in the specification will not generally be read into the claims.” *Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1187 (Fed. Cir. 1998) (quoting *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1571 (Fed. Cir. 1988)). “[I]t is improper to read limitations from a preferred embodiment described in the specification—even if it is the only embodiment—into the claims absent a clear indication in the intrinsic record that the patentee intended the claims to be so limited.” *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 913 (Fed. Cir. 2004).

The “only two exceptions to [the] general rule” that claim terms are construed according to their plain and ordinary meaning are when the patentee (1) acts as his/her own lexicographer or (2) disavows the full scope of the claim term either in the specification or during prosecution. *Thorner v. Sony Computer Entm’t Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012). To act as his/her own lexicographer, the patentee must “clearly set forth a definition of the disputed claim term,” and “clearly express an intent to define the term.” *Id.* (internal quotations and citations omitted). To disavow the full scope of a claim term, the patentee’s statements in the specification or prosecution history must represent “a clear disavowal of claim scope.” *Id.* at 1366 (internal

quotations and citations omitted). When “an applicant’s statements are amenable to multiple reasonable interpretations, they cannot be deemed clear and unmistakable.” *3M Innovative Props. Co. v. Tredegar Corp.*, 725 F.3d 1315, 1326 (Fed. Cir. 2013).

Further, absent clear disclaimer in the specification or prosecution history, it is improper to “interpret claim terms in a way that excludes embodiments disclosed in the specification.” *Oatey Co. v. IPS Corp.*, 514 F.3d 1271, 1277-78 (Fed. Cir. 2008); *see also Epos Techs. Ltd. v. Pegasus Techs. Ltd.*, 766 F.3d 1338, 1347 (Fed. Cir. 2014); *Vitronics Corp. v. Conception, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996).

A claim, when viewed in light of the intrinsic evidence, must “inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 910 (2014). Whether a claim is indefinite is determined from the perspective of one of ordinary skill in the art as of the time the application for the patent was filed. *Id.* at 908. As it is a challenge to the validity of a patent, the failure of any claim in suit to comply with § 112 must be shown by clear and convincing evidence. *BASF Corp. v. Johnson Matthey Inc.*, 875 F.3d 1360, 1365 (Fed. Cir. 2017).

When a term of degree is used in a claim, “the court must determine whether the patent provides some standard for measuring that degree.” *Biosig Instruments, Inc. v. Nautilus, Inc.*, 783 F.3d 1374, 1378 (Fed. Cir. 2015) (quotation marks omitted). Similarly, when a subjective term is used, the court must determine whether the patent's specification supplies some objective standard for measuring the scope and boundaries of the term. *See Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014); *Datamize, LLC v. Plumtree Software, Inc.*, 417 F.3d 1342, 1350-51 (Fed. Cir. 2005).

Extrinsic evidence can also be useful in claim interpretation, but it is “less significant than the intrinsic record in determining the legally operative meaning of claim language.” *Phillips*, 415 F.3d at 1317 (quoting *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 862 (Fed. Cir. 2004)); see also *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 331-32 (2015) (reliance on extrinsic evidence directed to “evidentiary underpinnings” of a claim interpretation).

IV. ATTORNEY STATEMENTS IN MEET AND CONFERS

WAG has two parallel cases in this Court, but this section of the present brief concerns only WAG’s case against Google *et al.* (not WAG’s case against Amazon). Google appears to have a different view about the meet and confer process than Plaintiff. Plaintiff met and conferred with Google’s counsel in a good faith to attempt to narrow terms in dispute in this case. In those meet and confer sessions, Google inappropriately insisted on turning these discussions into a process of obtaining and making a written record of the parties’ claim construction arguments. Such discussions are not part of the file history of the patents and they are not evidence about the meaning of the terms. After Google’s counsel one-sidedly sent a written record that it created of the first such discussion, Plaintiff’s counsel told Google’s counsel that this was inappropriate and that discussions would need to be limited to the stated purpose of whether terms in dispute could be narrowed. Google now uses this to argue claim construction based on Plaintiff’s alleged “silence” about the meaning of terms.

Without any authority, under the rubric of “meet and confer,” Google propounded what amounted to written interrogatories concerning claim construction arguments. Not satisfied that Plaintiff objected to the same, its counsel then opted to submit an attorney declaration in the present briefing, attaching Google’s email record of the meet & confer process. See Exhibit A to the Declaration of Cameron Vanderwall, D.I. 37-2. Plaintiff respectfully submits that this submission of M&C correspondence is inappropriate and should be ignored or stricken. Plaintiff

does not believe it needs to respond herein to the various statements in Google’s opening claim construction brief about meet and confer discussions.

V. DISPUTED CONSTRUCTIONS²

A. “as required to maintain about a predetermined number of media data elements” (*’594 Patent, claims 1, 6, 11*) (alleged indefinite)

Terms such as “about” or “approximately” are not inherently definite or indefinite, since “the definiteness requirement must take into account the inherent limitations of language,” and as such, “[s]ome modicum of uncertainty ... is the price of ensuring the appropriate incentives for innovation.” *Nautilus*, 572 U.S. at 909 (internal quotations omitted). Words like “approximate” and “about” are thus appropriately used to “avoid[] a strict numerical boundary to the specified parameter.” *Ortho-McNeil Pharm., Inc. v. Caraco Pharm. Labs., Ltd.*, 476 F.3d 1321, 1326 (Fed. Cir. 2007). When a word of approximation is used, the related “range must be interpreted in its technological and stylistic context,” and as such “depends upon the technological facts of the particular case.” *Id.* The Court “must look to the purpose that the [] limitation serves” to determine the scope of the claimed variance indicated by the claim language. *Cohesive Techs., Inc. v. Waters Corp.*, 543 F.3d 1351, 1368 (Fed. Cir. 2008). When “nothing in the specification, prosecution history, or prior art provides any indication as to what range ... is covered,” the claim can be found indefinite. *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200, 1218 (Fed. Cir. 1991). Unlike the situation in *Amgen*, the intrinsic record here provides ample support to apprise a POSITA as to the scope and purpose of the “about a predetermined number of media data elements” limitation.

² WAG contends that, unless otherwise noted, the Disputed Terms may be construed consistently across the Asserted Patents.

The description of the pull embodiment discloses that, like the buffering embodiment, the player plays out media from a buffer in the player. *See* '594 Patent, 15:9-15. The buffer is there for the same reason as the other embodiment – to ensure a steady flow of media for continuous playback. The disclosure states:

As data is played out, the next sequential data elements are requested from the server in such a fashion as to approximately maintain the predetermined number of data elements in the user's buffer.

Id., 15:15-18. Clearly, “approximately” is equivalent to, and supports, the claim term “about.”

The reason why the amount sought to be maintained in the buffer is (and in general *must be*) “approximate” is because the size of the data elements can vary as a result of variable bitrate (VBR) encoding. This is specifically addressed in the Asserted Patents: “Statements in this specification concerning “constant data rates and the like should be understood as subject to appropriate variation where VBR-encoded data may be involved.” *Id.*, 5:3-6. Due to this potential swing in bitrates in the encoding, as the specification discloses, it follows that the size of the elements can vary (within bounds), and that target buffer levels may therefore must be approximate.

Read in context, the specification says that there is a dynamic process of refilling the player buffer to a target level as elements are played out (*i.e.*, at the playback rate) and that, due to encoding variability as well as the granular nature of the elements, the process is of necessity approximate. There is no evidence or suggestion that a POSITA would not understand how to do this, or that minor differences in what is regarded as “approximate” as a floor buffer level make any operational difference. *See* Teruya Decl. ¶¶ 27-29.

The claim language here thus reflects a well-understood variability introduced by the underlying technology itself. *See id.* ¶ 29. Courts routinely find similar terms definite under similar circumstance. *See, e.g., W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1557

(Fed. Cir. 1983) (“stretching ... at a rate exceeding about 10% per second” not indefinite since “[i]nfringement is clearly assessable through use of a stopwatch.”); *Neodron, Ltd. v. Fujitsu Am., Inc.*, No. 220CV00239JRGRSP, 2021 WL 2646214, at *6–8 (E.D. Tex. June 28, 2021) (“approximately 10 μm ,” “approximately 5%,” and “approximately 90%” not indefinite since their meanings were “reasonably certain given the explanation of the purposes of the parameters in the ’574 Patent”); *Immersion Corp. v. Samsung Elecs. Am., Inc.*, No. 2:17-CV-572-JRG, 2018 WL 5005791, at *17-20 (E.D. Tex. Oct. 16, 2018) (“approximately planar” not indefinite since the “specification discloses features that might prevent the surface from being perfectly planar” and “provides context for understanding the meaning of the term”); *Allergan, Inc. v. Teva Pharms. USA, Inc.*, No. 2:15-CV-1455-WCB, 2016 WL 7210837, at *15-19 (E.D. Tex. Dec. 13, 2016) (“the specification and the nature of the art suggest limits to the term ‘about’ that are defined by the understandings of persons of skill in the art as to the general range of variation of components such as those in this case that are permissible in the industry and not considered so great as to alter the nature of the product.”); *Max Blu Techs., LLC v. Cinedigm Corp.*, No. 2:15-CV-1369-JRG, 2016 WL 3688801, at *30 (E.D. Tex. July 12, 2016) (“less than approximately” not indefinite since “the parameter’s range must be interpreted in its technological and stylistic context.”) (internal quotations and citations omitted).

B. “a predetermined number of media data elements” (’594 Patent, claims 1, 6, 11)

There is nothing so confusing about this language that it requires interpretation for a jury to understand. Defendants assert no explicit definitions in the specification or disavowal of claim scope with regard to this claim term. The Court should thus accord this term its plain and ordinary meaning.

“Predetermined” simply means “determined beforehand.” See <https://www.merriam-webster.com/dictionary/predetermine>. The dispute between the parties is nothing more than “before what,” and for that the Court need look no further than the claim language itself.

According to the claims, “as the received media data elements are played, the media player automatically send[s] additional requests for subsequent media data elements for storage in the memory of the media player as required to maintain about a predetermined number of media data elements in the memory of the media player during playing.” ’594 Patent, 16:53-57. Functionally, “predetermined” arises in the context of the media player “sending additional requests for subsequent media data elements for storage in the memory of the media player.” In this context, then, the “predetermined number of media data elements” is determined at least before this sending of additional requests. The plain language of the claims requires no earlier time.

Defendants, however, would further limit the “predetermination” to occur not only before sending the additional requests (as the plain language would indicate), but instead move it all the way back to “prior to the start of playback of the audio or video program.” Defendants have pointed to nothing in the intrinsic record that would rise to the level of disclaimer as to any later predetermination period explicitly contemplated by the claim language. Instead, Defendants are simply seeking a construction driven by non-infringement arguments, ruling out scenarios in which the player monitors network conditions and can change the target level for a minimum buffer during execution. Neither the claim language nor the specification, however, rule out changing the “predetermined” number of media data element during the course of playback, so long as this number is set in advance of the sending of the respective requests.

The plain and ordinary meaning for this term should therefore be adopted.

C. “the media source” (’594 Patent, claims 1, 6, 11)

The plain and ordinary meaning of “media source” requires no construction – it refers simply to a source of media. The term is used in this conventional sense in the claims of the ’594 patent, which recite a “method for operating a media player to receive and play an audio or video program, from a remote media source via a data connection over the Internet...” ’594 Patent, 16:30-32. The very first recited step of this method includes “sending requests from the media player to the media source via the data connection,” in order to obtain the underlying media. *Id.*, 16:34-35. Exactly how this media data came to be on the media source itself (*i.e.*, the media source of the media source) is not claimed or even particularly relevant to the underlying invention.

Nonetheless, the specification offers a specific examples of where and how a media source may obtain the underlying media data, observing that “[t]here are two fundamental types of streaming media, which affect, in some respects, the requirements for smooth and continuous delivery: (i) material that originates from a source having a realtime nature, such as a radio or TV broadcast, and (ii) material that originates from a non-realtime source such as from a disk file.” *Id.*, 5:33-38. That is, the discussion concerns the types of media, not the types of media sources. Regardless of how this media is ultimately originated, “there is in each case at least one user computer 18 (or similar device) connected to the server 12 via the Internet 10” to receive the media data *from the server*. *See id.*, 6:42-7:5. Moreover, the specification explicitly contemplates that “the buffer concept of this invention can be daisy-chained between multiple Servers. For example, a system might include a source server computer co-located in a radio station studio, which transmits to a network distribution server resident in a data center, to which users would connect.” *Id.*, 12:46-51. Hence, regardless of the type of media, from the perspective of the user computer, to which the claims of the ’594 Patent are directed, the “media source” is whatever

server the user computer connects to so as to obtain the underlying media data. “Media source” has no more specialized meaning than this – its plain and ordinary meaning.

Defendants go seriously astray by injecting the phrase “from which the streaming material *originates*” into the plain meaning of this term. In justifying this position, Defendants (incorporating claim construction arguments made in a companion case by Amazon, Civil Action No. 6:21-cv- 00815-ADA) allege that the “specification explains that the user computer may request and receive media data elements from a media source, or from a server that is *not* the media source,” thereby assuming at the outset the conclusion they would have the Court reach. Amazon Br. at 4 (emphasis in original). Any computer that the client connects to is a source of media data and thus a media source. Defendants have pointed to no clear disclaimer in the specification or file history that would require interpreting “media source” to refer to only the *originator* of the underlying data. Rather, it is quite clear from the material quoted by Defendants that the “media source” could be both an intervening server or the “originator” of such data.

In fact, Defendants’ construction injects ambiguity where none originally existed, since it is not clear under Defendants’ definition what “the streaming material *originates*” from means. For example, in a live context illustrated in Fig. 1 of the ’594 Patent, a performer may speak into a microphone that is, in turn, connected to a computer and a hard disk. What is the “originator” in this context? The performer, the microphone, the hard disk that stores data for transmission, or the computer itself? Under Defendants’ construction the Court could traverse down a rabbit hole looking for the ultimate “originator” of the underlying data, when in reality the answer is quite simple and plain from the intrinsic record: the *originator* is irrelevant to the *media source*, which is the *source* that provides *media data* to the claimed client device.

Defendants would drum up a distinction without a difference when they point out that the '594 Patent claims recite a media source whereas the '824 and '636 Patents recite servers, and again assume the conclusion by stating that such servers “may not be the ‘media source.’” Google Br. at 5. The difference in claiming style is obvious, since the '594 Patent is directed to the client side, whereas the '824 and '636 Patents are directed to the server side. To the client, every server is a potential media source, and the '594 Patent claims reflect this. By contrast, the '824 Patent recites “reading, by at least one computer of the server system, the pre-recorded audio or video program from the computer-readable media” ('824 Patent, 16:40-42), while the '623 Patent recites “receiving at the server system a continuous digitally encoded stream for the audio or video program, via a data connection from a live source....” '623 Patent, 16:31-33. In each case, the claims in these two patents respectively distinguish between pre-recorded and live media sources. From the standpoint of the client, however, the difference is irrelevant in this regard – both are “media sources” and the ultimate origin of the media is immaterial.

Defendants’ analogy of a son sending a letter to his mother is inapposite. If one wishes to rely upon such analogies, in the instant context a more proper one would be a television tuning in to a television station, for which the television station transmitter (or upstream cable station) is the “source” of the media transmission even though it is not the “originator” of such content.

The Court should thus afford this term its plain and ordinary meaning.

D. “each sending is at a transmission rate as fast as the data connection between the server system and each requesting user system allows” ('824 Patent, claims 1, 5, 9; '636 Patent, claims 1, 5, 9) (alleged indefinite)

Although the plain meaning of this term is clear, Defendants seek to manufacture artificial complexity and then seek to extract indefiniteness from this. The crux of Defendants’ argument is that a POSITA would allegedly understand this limitation to be one of three possible rates: (1) a theoretical maximum rate of the data connection, (2) the available bandwidth of the

data connection, and/or (3) the permitted bandwidth for the data connection. *See* Google Br. at 8. Defendants then argue that since the specification is unclear as to which of the three is intended, the limitation must be indefinite. The premise fails, however, because each of these three is subsumed within the limitation, since the sending is at a transmission rate “as fast as the data connection ... *allows*.”

To the extent that one wishes to delve into the weeds of otherwise plain and simple claim language, as Defendants elect to do, the specification provides ample guidance as to what this term means. The specification begins by noting that “[t]ransmitting the audio or video material over a connection slower than the bandwidth requirement results in unsatisfactory viewing or listening, if viewing or listening is possible at all,” and then discusses that for a data connection with a “maximum receive data rate of 56,000 bits per second,” “achieving adequate audio and video over the Internet may consume a considerable portion of the listener's available bandwidth.” ’824 Patent, 4:44-54. The specification goes on to add that “[e]ven if a user's Internet connection has the requisite average bandwidth capacity to allow reception of the program, the actual rate of delivery of data to the user can fluctuate widely above, and more particularly, below, this average, as a function of the quality of the user's connectivity at any given time,” and provides examples as to why this may occur. *Id.*, 5:7-12. The specification then observes that, “[i]n conventional systems for streaming media over the Internet, media data (whether real-time or file based) is simply transmitted from the server to the user at the rate at which it will be played out (the ‘playback rate’), regardless of the data rate capabilities of the connection between the server and the user.” *Id.*, 5:60-65. In contrast, in the claimed invention, “media data is sent to the user computer at a rate faster than the playback rate, which may be the highest rate that the data connection between the server and the user computer will support...”

Id., 8:17-20. No distinction is made as to *why* the data connection “allows” or “supports” the data rate that it does, or factor may account for its ultimate limit, as this is irrelevant to the underlying method. Rather, the claim recites that the server sends the media data as fast as possible – in contrast to the prior art that metered sending of the data to the playback rate.

Google’s claim, that the specification provides no guidance as to how the delivery rate for data, is belied by the specification itself, which ties it to the full speed of the connection with the client established by:

A data communications transport mechanism, such as the TCP protocol, may be used for the reliable delivery of data in an ordered sequence from the source of the media data to the server, or from the server to the media player software of the user computer. Resending missing data is the responsibility of the reliable transport mechanism. *The server buffer 14 “sends” data by delivering it to the transport mechanism.* The transport mechanism actually manages transmission of the data across the communications medium, and has processes to determine if all the data that has been sent has been received by the destination.

Id., 8:38-48 (emphasis added). It is second nature to a POSITA what a TCP connection does with data delivered to it. Teruya Decl. ¶ 30. The technical underpinnings of TCP, which Defendants’ arguments are directed to, are not discussed and it is well-established that they do not need to be. *See Application of Eltgroth*, 419 F.2d 918, 921 (C.C.P.A. 1970) (“This court has often observed that the minutiae of descriptions or procedures perfectly obvious to one of ordinary skill in the art yet unfamiliar to laymen need not be set forth.”).

Defendants’ citations to case law are inapposite.

In *CUPP Cybersecurity, LLC v. Trend Micro, Inc.*, No. 3:18-cv-1251- M, 2021 WL 5865393 (N.D. Tex. Dec. 10, 2021), there was an actual question of what “file transfer speeds” meant and there was language that certain speeds qualified while others did not. That is not the

case here, where “as fast as the data connection will allow” is clear and encompasses all technical minutiae underlying the data connection.

Defendants also cite to *Media Rts. Techs., Inc. v. Cap. One Fin. Corp.*, 800 F.3d 1366, 1371 (Fed. Cir. 2015), which is not a case where there were even two competing potential constructions for a term. Rather, the case concerned a means-plus-function limitation in question without adequate structure.

Defendants have essentially drummed up competing strawman constructions and then alleged that they cannot tell the difference between them. In reality, the claimed concept is not complicated. As discussed in the specification, there is a distinction between certain sending rates that are metered by the media server software itself, *e.g.*, limiting sending to the playback rate, and other rates including sending data as fast as the data connection will allow, *e.g.*, by the claimed process handing the data to a utilized transport layer connection. In that (claimed) event, the sending is as fast as the data connection (*e.g.*, a TCP or other transport protocol connection) will allow.

E. “all of the media data elements that are sent by the server system to the requesting user systems are sent from the data structure under the control of the server system as the media data elements were first stored therein” (’824 Patent, claims 1, 5, 9; ’636 Patent, claims 1, 5, 9) (alleged indefinite)

The plain and ordinary meaning of a recital that something is sent from a container (data structure) as “first stored” therein, is simply that the media data elements do not change in content or order between the time they are first stored in the recited data structure and the time they are sent. There is nothing in the specification or Plaintiff’s infringement contentions that even suggests any other interpretation, let alone purports to define it otherwise or disclaims any of its scope.

Rather, what Google does is create another strawman based on what it speculates “seems to be” Plaintiff’s position as gleaned from M&C conferences, which speculation is misinformed, improper as a claim construction submission, and wrong. Google then contrasts this manufactured misstatement with a formulation by its expert, to argue that, because of the alleged disconnect between the two, the meaning of the claim term must therefore be “indefinite.” Google’s footnote 6 in fact gives this away. This is “extrinsic evidence” gone completely bad. The Court will no doubt see through this contrived attempt to bootstrap an indefiniteness position based on a (mis)representation of a M&C discussion.

As for actual extrinsic evidence, Google’s expert’s position on this does not differ materially from what Plaintiff understands as the plain and ordinary meaning.

***F. “supplying, at the server system, media data elements representing the program”
(’824 Patent, claims 1, 5, 9; ’636 Patents, claims 1, 5, 9)***

Google’s argument for departing from plain meaning for this limitation simply does not add up. Google argues, with reference to a stream for a live program that: “Upon receipt of this stream by the server system, the server system ‘suppl[ies],’ *or creates*, ‘media data elements’...” Google Br. at 14-15 (emphasis added, brackets in original). Google is the party that included the word “creates” in this sentence. Google’s argument flows from inserting the word that it wants. Google proceeds to argue that the first disclosure of the media data elements in the claim is when they are supplied, so therefore the recited act of “supplying” must include “creating.” *Id.* at 15. Google makes the same argument with respect to the claims of the ’824 and ’636 Patents, arguing that “the claimed server system is responsible for creating the media data elements.” *Id.*

The argument does not follow from the language of the claims. Supplying only means supplying. Google is trying to substitute the narrower word creating for supplying, as some sort of necessary step for the claimed server to take. But, of course, all of the claims at issue here use

the open word “comprising,” allowing for other, unclaimed steps. *See, e.g., David Netzer Consulting Eng’r LLC v. Shell Oil Co.*, 824 F.3d 989, 998 (Fed. Cir. 2016) (“[T]he word ‘comprising’ appearing at the beginning generally allows for additional, unclaimed steps in the accused process, but each claimed step must nevertheless be performed as written.”) (citation omitted).

A patent claim does not need to recite every step that occurs, but all recited steps must be present for infringement. Whether or not the server “creates” the media data elements, the word “supplying” has its own plain and ordinary meaning, which is clear. The media data elements are supplied by the server. It would be improper to re-write the word “supplying” and change the nature and scope of the actual claim language. One can supply that which was created by the same or another actor at an earlier time or at another place. Supplying is not limited to creating.

VI. CONCLUSION

For the forgoing reasons, the Court should construe each of the above-noted limitations to have its plain and ordinary meaning, which interpretation is consistent with the internal language of the claims themselves and the specification.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record on April 1, 2022.

/s/ Brandon R. Oates
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