UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

WAG ACQUISITION, L.L.C.,	§ § § §	
Plaintiff,	§	
– against –	§ §	No. 6:21-cv-00816-ADA Patent Case
GOOGLE LLC and YOUTUBE, INC.,	§ § §	
Defendants.	§ § § §	

<u>**PLAINTIFF'S SUR-REPLY CLAIM CONSTRUCTION BRIEF**</u>

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I.   DISPUTED CONSTRUCTIONS[1]

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

As discussed in WAG's Responsive Brief, "about" is interpreted in the technological context and depends on the underlying technological facts. *See Ortho-McNeil Pharm., Inc. v. Caraco Pharm. Labs., Ltd.*, 476 F.3d 1321, 1326 (Fed. Cir. 2007).

The purpose of maintaining "about a predetermined number of media data elements" in the user device buffer is clear. It is to ensure continuous playback. This is the context in the disclosure encompassing different types of media elements that may be queued up in a buffer, which could add up to aggregate totals (for the buffer level) that can vary, within bounds understood by a person of ordinary skill in the art. Google's hyperbole aside, Mr. Teruya has provided testimony regarding how a person of ordinary skill in the art would read this term in the context of the asserted claims and the full intrinsic record. D.I. 39-1 ("Teruya Decl.") ¶¶ 27-29.

Variable Bit Rate encoding is disclosed in the specification. *See* '594 Patent, 4:64-67 ("Variable Bit Rate encoding uses a variable number of bits to represent sounds or video, with more bits required for complex material (e.g., symphonic sounds or action scenes) than for simple sounds, silence, or still scenes."). The specification states: "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.

As disclosed in the '594 Patent, the object of the invention is to ensure "continuous and uninterrupted playback." '594 Patent, 4:6-12. This encompasses variably as well as constant encoded media, and the claims deal with this factor as well.

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

As discussed in WAG's Responsive Brief, the purpose of the buffers in the '594 Patent, including the user-side buffer, is 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. "Approximately" is equivalent to the claim term "about." The player seeks to keep approximately about a predetermined number of media data elements in its buffer. There is a range in this process, because the size of the individual data elements in the buffer can vary. This consequence yields the "about."

Depending on the encoding scheme, there are typical, known bounds to the variation between bitrates in complicated / high bitrate portions of the media, such as the "action scenes" versus less complicated / low bitrate portions of the media, such as still scenes. The differential is a result of the encoding and is known to a POSITA, or easily determined from the specification for the encoding scheme or a sampling of typical content so encoded. This is the basis for the variability required in the "about a predetermined number of media data elements," and it is a well-understood variation.

Google makes the argument that the number of media data elements stored in the buffer is not necessarily related to the size of each element. This may be true if one is free to arbitrarily shrink the encoding, but this directly reduces reproduction quality. In the real world, where *quality* of the presentation is also sought to be maximized, the size and number of elements are obviously interrelated, as the entire purpose is to maintain a buffer sufficient to avoid running out of media due to irregular reception, while maintaining the highest quality possible. This is why the specification considers this a factor, and Google cannot explain it away by contrived argument.

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