

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

TOUCHSTREAM TECHNOLOGIES, INC.,

Plaintiff,

v.

**CHARTER COMMUNICATIONS, INC. et
al.,**

Defendants.

TOUCHSTREAM TECHNOLOGIES, INC.,

Plaintiff,

v.

**COMCAST CABLE COMMUNICATIONS,
LLC, D/B/A XFINITY, et al.,**

Defendants.

Lead Case No. 2:23-cv-00059-JRG

Member Case No. 2:23-cv-00062-JRG

**TOUCHSTREAM'S SUR-REPLY IN OPPOSITION TO
CHARTER DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

I. Introduction

Charter's Reply underscores the numerous factual disputes underlying each of its bases for summary judgment. *First*, Charter's non-infringement argument for Spectrum Guide STBs is premised on the alleged inability for its Spectrum TV App ("STVA") to start playback of more than one of the following video content types—linear TV, VOD, and DVR. For linear TV, Charter admits the STVA can start playback. For VOD, Charter also does not deny that it represented for years in sworn testimony and interrogatory responses that its STBs all function in materially the same way for initiating VOD—that a physical STB remote is required to start playback. And Charter admits these representations were proven false as to one type of STB by Touchstream's expert who was able to start VOD playback from the STVA for one guide creating a genuine fact issue as to the remaining guides that Charter has represented all work the same way. For DVR, Charter further admits that its 30(b)(6) witness testified that the STVA can start DVR playback in all STBs other than for "a very small percentage" of users, but Charter now claims that its corporate designee was wrong because he was merely "speculating." Regardless, other documents and evidence support that the STVA can start DVR playback. Charter's Motion thus relies on disputed facts and credibility determinations that are inappropriately decided on summary judgment.

Second, Charter's non-infringement arguments regarding the "synchronization code" and "unique identifier" terms in the Asserted Claims rely on factual disputes regarding whether Charter's Accused Services satisfy these limitations under their plain and ordinary meaning to a POSITA. Charter seeks to avoid the jury's resolution of these factual disputes by manufacturing belated claim construction arguments premised on alleged prosecution disclaimer. But Touchstream's infringement allegations are based on the plain and ordinary meaning of these terms and, in any event, Charter cannot show clear and unmistakable prosecution history disclaimer.

Touchstream's infringement allegations rely on straightforward interpretations of the plain claim language. Touchstream respectfully requests the Court to deny Charter's Motion.

II. Fact Disputes Preclude Summary Judgment for Spectrum Guide STBs.

The Court should deny Charter's non-infringement argument for its Spectrum Guide STBs because each argument relies on disputed issues of material fact and fundamental credibility determinations of Charter and its witnesses.

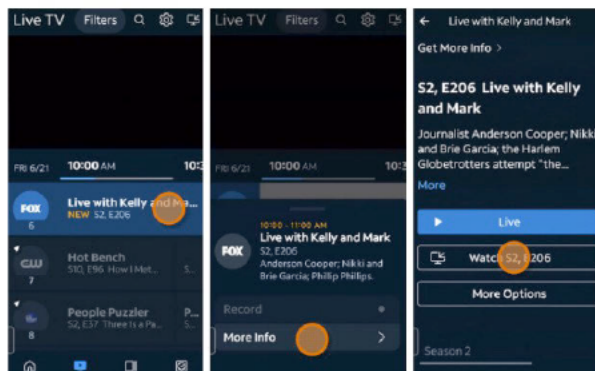
For linear TV, Charter argues there are no messages identifying a "piece of content" or a "video file" for linear TV broadcasts. To support this assertion, Charter argues that its 30(b)(6) witness, Mr. Frusciano, "[REDACTED]." (Reply Br. at 1). But Mr. Frusciano's verbatim testimony is to the contrary:

Q. And then, depending on the *type of content* that the user is attempting to play, there may be *different identifiers that identify the content*; is that correct?

A. Yes, it is.

[REDACTED]

(Resp. Ex. 5, at 29:15-30:7) (emphasis added). Charter cannot square its corporate witness testimony with its assertion that linear TV messages do not identify a piece of content or a video file. Indeed, Touchstream's expert's testing demonstrated how a user selects a piece of content or video file on the STVA for live TV, and how the STVA delivers the message to the STB:



[REDACTED]

(Touchstream Ex. 7 at ¶¶ 176-178). Ample evidence refutes Charter's assertion that linear TV messages do not identify a piece of content or video file.

For VOD, Charter argues Touchstream cannot meet its burden of proof to show Spectrum Guide STBs support VOD playback from the STVA. (Reply Br. at 2-3). But Charter does not deny that it consistently told Touchstream and other parties for years—through verified interrogatory response and sworn corporate testimony—that its STBs all operated similarly with respect to VOD playback functionality, including that the STVA could not initiate playback of VOD but rather launched an asset details screen requiring confirmation through a physical remote. And Charter admits these representations were proven false through Dr. Wicker's testing of the STVA on Charter's ODN guide. (Reply Br. at 2). Yet Charter argues that Dr. Wicker's VOD playback testing is insufficient because he did not use a Spectrum Guide STB. (*See id.*). Charter is wrong.

In his infringement report, Dr. Wicker opined that his testing of VOD playback for ODN guide was representative of the other STB guides. In particular, Dr. Wicker opined that: (1) Charter consistently represented the STVA could not initiate playback of VOD on any guides, (2) his testing of the exemplary ODN guide proved this representation false, and (3) based on Charter's consistent representations about the similarities among guides with respect to VOD playback, he believes the other guides operate similarly for VOD playback. (Touchstream Ex. 7 at ¶¶ 165-166). While Dr. Wicker observed certain differences throughout his report about other aspects of ODN and Spectrum Guide STBs (*see, e.g.*, Ex. 7 at ¶¶ 144-145 (describing differences in the conversion step)), Dr. Wicker made explicit his understanding—based on his testing and Charter's representations of similarities among guides—that VOD could be played directly from the STVA without use of a physical remote. (Touchstream Ex. 7 at ¶¶ 165-166). Charter fails to cite a single case requiring, as a matter of law, Dr. Wicker to test every STB guide to confirm similarities in

[REDACTED]

each accused functionality to prove infringement. This is particularly true where, as here, Charter maintained that VOD playback functionality was materially identical across all STBs.

Rather, courts routinely find methodologies like Dr. Wicker's sufficient to show infringement, including in circumstances where the defendant did not misrepresent the functionality of the accused products as Charter did here. *See Kenexa Brassing, Inc. v. Taleo Corp.*, 751 F.Supp.2d 735, 747 (D. Del. 2010) (granting summary judgment of infringement, and rejecting defendant's argument that plaintiff was required to show representativeness of every product, reasoning in part that "Defendants cannot group their products together when asked whether they differ, then turn around and claim that plaintiff has failed to meet its burden of showing that they operate in the same way."); *TiVo, Inc. v. EchoStar Communications Corp.*, 516 F.3d 1290, 1308, 85 U.S.P.Q.2d 1801, 1814 (Fed. Cir. 2008) ("While it is true that Dr. Gibson testified in detail with respect to only one type of device, there is nothing improper about an expert testifying in detail about a particular device and then stating that the same analysis applies to other allegedly infringing devices that operate similarly, without discussing each type of device in detail."); *Coleman Company, Inc. v. Team Worldwide Corporation*, No. 2:20-cv-351, 2022 WL 1837942, *2–*3 (E.D. Va. 2022) ("TWW asserts that Dr. Singhose does not rely on sufficient facts because he did not individually test each accused product, and while it concedes that 'representative analysis is useful,' it contends that this is only so when there is a reliable basis for comparison. However, Dr. Singhose's representative analysis and reliance on exterior features does provide a sufficient basis for his opinion; whether that basis is reliable or persuasive enough to be accepted by a jury must be considered to go to the weight of the evidence, not its admissibility.").

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