

**IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
WACO DIVISION**

WAG ACQUISITION, L.L.C.,

Plaintiff,

vs.

GOOGLE LLC and YOUTUBE, INC.,

Defendants.

Case No.: 6:21-cv-00816-ADA

**JURY TRIAL DEMANDED**

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**DEFENDANTS GOOGLE LLC AND YOUTUBE, LLC'S OPENING  
CLAIM CONSTRUCTION BRIEF**

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## I. INTRODUCTION

Defendants Google LLC and YouTube, LLC (collectively, “Google”) respectfully submit three claim terms in need of construction and three claim terms that are indefinite. For the three terms to be construed, Google’s proposed constructions both (i) address the parties’ disputes over the scope of the claims, and (ii) are in accordance with the plain language of the claims, intrinsic record, and extrinsic evidence consistent with the intrinsic record. In contrast, Plaintiff WAG Acquisition L.L.C.’s (“Plaintiff”) “plain meaning” constructions fail to offer any resolution to the parties’ disputes over the scope of the claims. Accordingly, the Court should issue constructions other than plain meaning and, for the reasons below, adopt Google’s proposed constructions.

Google has further identified three claim terms—“about a predetermined number,” “as fast as the data connection . . . allows,” and “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”—that render the claims indefinite under the Supreme Court’s *Nautilus* standard. A main driver behind this standard was that “absent a meaningful definiteness check, [] patent applicants face powerful incentives to inject ambiguity into their claims.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 910 (2014). Plaintiff is attempting to use these three claim terms to do just that. Indeed, Plaintiff’s “plain meaning” construction for each of these terms does nothing but maintain ambiguity in terms that lack objective boundaries. For this reason, the Court should find these terms and the claims containing them indefinite.

## II. OVERVIEW OF THE ASSERTED PATENTS

U.S. Patent Nos. 9,729,594 (the “594 Patent”), 9,742,824 (the “824 Patent”), and 9,762,636 (the “636 Patent”) (collectively the “Asserted Patents”) describe systems and methods

for streaming media via the Internet with reduced playback interruptions. All three patents are directly related, share an identical specification, and claim priority to the same provisional application filed on September 12, 2000.

The Asserted Patents claim systems and methods to stream audio and/or video media over the Internet. The '594 Patent claims a device/media player, and associated methods for operating the media player, which receives the streaming media in the form of segmented media data elements from a media source and utilizes a user-side buffer in the form of software or firmware to maintain a predetermined number of media data elements in the user buffer during playback. ('594 Patent, cls. 1, 6, 11.) As was well-known in the art, maintaining a buffer of media data elements allows for reduced interruptions during playback. (*Id.*, 6:59-7:5.)

Both the '824 and '636 Patents claim the server systems, and the methods associated with the server systems, that provide the streaming media and associated media data elements to the user systems, with the '636 Patent including streaming media from a live source. (*See* '824 Patent, cls. 1, 5, 9; '636 Patent, cls. 1, 5, 9.) For both patents, the media data elements that are sent to user systems are first stored in a data structure under the control of the server system, and then sent to user systems from that data structure. (*Id.*) All three patents' claims recite a "pull" based approach where the server system sends specific media data elements (identified by unique identifiers) to the user system only in response to requests from the user system. (*Id.*; '594 Patent, cls. 1, 6, 11.)

### **III. LEGAL STANDARDS**

#### **A. Claim Construction**

Claim terms are construed by giving words of the claim the meaning they would have to one of ordinary skill in the art "in view" of the intrinsic record consisting of the claims, specification, and file history. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1313-1315 (Fed. Cir. 2005); *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). "The starting point

for any claim construction must be the claims themselves.” *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305 (Fed. Cir. 1999). Once a court has examined the claim language, it may then consider the rest of the intrinsic evidence, beginning with the specification and concluding with the prosecution history. *Vitronics Corp.*, 90 F.3d at 1582. Courts may also consider extrinsic evidence, such as a dictionary definition or expert testimony, that “does not contradict any definition found in or ascertained by a reading of the patent documents.” *Starhome GmbH v. AT&T Mobility LLC*, 743 F.3d 849, 856 (Fed. Cir. 2014) (quoting *Phillips*, 415 F.3d at 1322-23.)

## **B. Indefiniteness**

“[I]ndefiniteness is a question of law and in effect part of claim construction.” *ePlus, Inc. v. Lawson Software, Inc.*, 700 F.3d 509, 517 (Fed. Cir. 2012). All claims must satisfy the definiteness standard of 35 U.S.C. § 112. A patent’s claims viewed in light of the specification and prosecution history must inform those skilled in the art about the scope of the invention with reasonable certainty. *Nautilus*, 572 U.S. at 901, 910-11. “The claims, when read in light of the specification and the prosecution history, must provide objective boundaries for those of skill in the art.” *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014). That is, a patent does not satisfy the definiteness requirement “merely because a court can ascribe some meaning to a patent’s claims.” *Id.* at 1370–71 (internal quotation marks and citation omitted).

## **IV. DISPUTED CLAIM TERMS**

The parties dispute the scope and meaning of the following claim terms.<sup>1</sup> Google’s

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<sup>1</sup> During the parties’ two meet-and-confers and in follow-up correspondence, counsel for Google repeatedly sought Plaintiff’s positions regarding the interpretations of the terms discussed herein, such as “a predetermined number of media data elements,” “each sending is at a transmission rate as fast as the data connection . . . allows,” “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,” and “supplying, at the server system, media data elements representing the program.” (Declaration of Cameron Vanderwall (“Vanderwall Decl.”), Ex. A.) Instead of providing its positions as to the scope of the claims or

constructions are well rooted in the intrinsic record.

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

| Google’s Construction | Plaintiff’s Construction   |
|-----------------------|----------------------------|
| Indefinite            | Plain and ordinary meaning |

*Nautilus* cautions that, while absolute precision is unattainable, the definiteness requirement “mandates clarity.” *Nautilus*, 572 U.S. at 910. Claims 1, 6, and 11 of the ’594 Patent recite that the claimed media player automatically sends additional requests for media data elements “as required to maintain **about** a predetermined number of media data elements” in memory. The claim language and intrinsic evidence, however, fail to provide any objective bounds or range for how many data elements are “about a predetermined number.” *Interval Licensing*, 766 F.3d at 1371.

While there is no general rule that terms of degree like “about” render claims indefinite, the intrinsic evidence must provide enough certainty to one of skill in the art. *Sonix Tech. Co. v. Publications Int’l, Ltd.*, 844 F.3d 1370, 1377 (Fed. Cir. 2017); *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1217 (Fed. Cir. 1995) (when such a word of approximation is used, the parameter’s “range must be interpreted in its technological and stylistic context”). Where the claims, specification, and extrinsic record fail to provide sufficient guidance as to the numerical range that “about” encompasses, the term has been found indefinite. *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200, 1217-18 (Fed. Cir. 1991) (“about” used in a claim reciting “at least about 160,000 IU/AU” was indefinite since it did not apprise as to how much below the 160,000 value was being claimed); *Synthes (USA) v. Smith & Nephew, Inc.*, 547 F. Supp. 2d 436, 454-55 (E.D.

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any clarity as to the scope of their plain meaning, counsel for Plaintiff refused to engage notwithstanding specific inquiries by counsel for Google. (*Id.*) Accordingly, Google is at a loss for what Plaintiff contends to be these terms’ plain and ordinary meaning, as discussed further below.

Pa. 2008) (“less than about 2%” was held indefinite since a competitor would not know how much above 2% would qualify as “about 2%”); *cf. Pfizer Inc. v. Mylan Inc.*, Civ. No. 15-26-SLR, 2016 WL 2641470, at \*2 (D. Del. May 5, 2016) (construing “about” to refer to the standard variability of  $\pm 0.2^\circ 20$  as the range of error recognized in the field of the invention). Here, the intrinsic and extrinsic evidence fail to provide any guidepost, let alone an explicit number or numerical range, to interpret what “about a predetermined number of media data elements” comprises. (Declaration of Dan Schonfeld (“Schonfeld Decl.”), ¶¶ 63-64, 68.)

The term “about” does not appear in the ’594 Patent’s specification. When discussing the “predetermined number of media data elements,” the specification either states “a predetermined number” or “predetermined level” (’594 Patent, 2:50-53, 3:13-15, 6:52-54, 6:59-65, 7:20-30, 11:1-5), “predetermined buffer level” (*id.*, 13:32-35, 13:52-56, 14:16-26, 14:32-38, 14:67-15:5, 15:9-15, 15:22-24, 15:25-27), or mentions “approximately maintain[ing] the predetermined number” (*id.*, 6:65-7:2, 14:38-41, 15:15-18). “Approximately” provides no more clarity than “about” as it too fails to indicate a numerical range of media data elements that must be loaded and maintained in the user buffer and does not provide any context for understanding such a range. *Cf. Twin Rivers Eng’g, Inc. v. Fieldpiece Instruments, Inc.*, No. 2:16-cv-04502-MLH, 2018 WL 1583382, at \*4-\*6 (C.D. Cal. March 1, 2018) (rejecting patentee’s proposed construction enlarging limitation “allowing a selected IR energy range of approximately 8 to approximately 10 microns to pass” to include IR energy between 8 and 14 microns after reviewing the intrinsic and extrinsic evidence).

Further, a person of ordinary skill in the art could not determine how “about a predetermined number of media data elements” is calculated and thus would not understand with any certainty the range “the predetermined number of media data elements” maintained must fall within to meet the claimed limitation. (Schonfeld Decl., ¶ 66.) There are many conditions such

as data connection speeds, network performance, and media player capabilities/specifications that could inform the construction of “about a predetermined number of media data elements,” but without guidance in the intrinsic evidence as to which factors are taken into account or used in any purported calculation, “about” cannot be reasonably estimated. (*Id.*, ¶¶ 62-68.)

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

| Google’s Construction                                                                                         | Plaintiff’s Construction   |
|---------------------------------------------------------------------------------------------------------------|----------------------------|
| “a specified number of media data elements, set prior to the start of playback of the audio or video program” | Plain and ordinary meaning |

Based on the parties’ meet and confer discussion, there appears to be agreement that “predetermined” in the context of the claims—and otherwise—means to be set in advance. (*See e.g.* Schonfeld Decl., ¶ 70; Vanderwall Decl., Ex. 8 (Webster’s Dictionary of American English © 1997), p. 579 (defining “predetermined” as “to settle in advance: *The result was predetermined even before we met.*”); Ex. 9 (The Oxford American Dictionary of Current English © 1999), p. 620 (defining “predetermined” as “determine or decree beforehand”).) The parties’ lone dispute regarding this claim term arises from the query of when the “number of media data elements” is set. (Vanderwall Decl., Ex. A.) Google’s proposed construction adheres to the intrinsic and extrinsic evidence. Specifically, in the context of the intrinsic record, “a predetermined number of data elements” means “a specified number of media data elements, set prior to the start of playback of the audio or video program.” (Schonfeld Decl., ¶¶ 69-72.) Plaintiff, in contrast, has refused to give “predetermined” any meaning in the context of the claims<sup>2</sup>—even in light of Google’s direct inquiries regarding what Plaintiff believes to be the point of reference

<sup>2</sup> Google understands that Plaintiff has provided a position to Amazon.com, Inc. (“Amazon”) regarding the meaning of this term during the meet-and-confers held with respect to Civil Action No. 6:21-cv-00815-ADA (Plaintiff’s suit against Amazon). Plaintiff has not taken the same position in this matter, and instead has opted for silence.

(“predetermined as to what”). (Vanderwall Decl., Ex. A.)

Google’s construction is supported by both the plain language of the claims and the specification. Claim 1 of the ’594 Patent, for example, recites that “*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, cl. 1 (emphasis added); *see also id.*, cls. 6, 11.) Accordingly, as the claim language explains how the media player maintains the “predetermined number of media data elements” in the user buffer “during playing,” the “predetermined number of media data elements” would necessarily have to be set *prior to* playback. (Schonfeld Decl., ¶¶ 69-72.)

Likewise, when describing the claimed player and system, the ’594 Patent’s specification states:

User computer 18 is associated with media player software incorporating user buffer 20. The user buffer 20 is provided with means for storing a predetermined number of the data elements. User buffer 20 is a conventional computer storage mechanism such as a hard disk, or, preferably, an electronic storage arrangement such as Random Access Memory (RAM) as suggested by the illustration. A buffer manager 22 is also associated with the user computer 18. The buffer manager 22, having the form of software or firmware, is provided with means for *receiving and storing a predetermined number of media data elements which are received sequentially by the media player, playing the data out sequentially as audio and/or video, and deleting media data elements from the buffer as they are played out (or displacing them by newly arrived elements)*.

(’594 Patent, 6:51-65 (emphasis added); *see also id.*, 6:65-7:2, 7:20-30, 15:9-18.) The specification thus also makes clear that the setting of the “predetermined number of media data elements” takes place *before* playing the data out sequentially. (Schonfeld Decl., ¶¶ 69-72.)

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

| <b>Google’s Construction</b>                                                            | <b>Plaintiff’s Construction</b> |
|-----------------------------------------------------------------------------------------|---------------------------------|
| “the storage device or live source device from which the streaming material originates” | Plain and ordinary meaning      |

Google incorporates by reference Amazon’s arguments from Civil Action No. 6:21-cv-00815-ADA regarding the construction of “the media source” as “the storage device or live source device from which the streaming material originates.”

**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, cls. 1, 5, 9; ’636 Patent, cls. 1, 5, 9)

| <b>Google’s Construction</b> | <b>Plaintiff’s Construction</b> |
|------------------------------|---------------------------------|
| Indefinite                   | Plain and ordinary meaning      |

The claim limitation “each sending is at a transmission rate as fast as the data connection between the server system and each requesting user system allows” is indefinite in claims 1, 5, and 9 of the ’824 Patent and the ’636 Patent, as a person of ordinary skill in the art could understand the limitation as at least requiring “each sending” to be at one of the three following transmission rates: (1) the maximum possible capacity of the data connection, (2) the available bandwidth on a data connection, and/or (3) the permitted bandwidth for uses on a data connection.<sup>3</sup> (Schonfeld Decl., ¶¶ 75-81.) The intrinsic evidence does not provide guidance for a person of ordinary skill in the art to discern between these multiple interpretations; hence, the limitation is indefinite. (*Id.*)

In situations where there are multiple meanings, a patent claim may be found indefinite if the claim, when read in light of the specification and the prosecution history, does not provide an objective basis for those of skill in the art to make an informed and confident choice among the contending definitions. *Media Rights Techs., Inc. v. Capital One Fin. Corp.*, 800 F.3d 1366, 1371

<sup>3</sup> Google attempted to discuss this with Plaintiff, providing these three possible interpretations, Plaintiff refused to confirm its understanding of the limitation. (Vanderwall Decl., Ex. A.)

(Fed. Cir. 2015) (“a claim is indefinite if its language might mean several different things and no informed and confident choice is available among the contending definitions” (internal quotation marks and citation omitted)); *CUPP Cybersecurity, LLC v. Trend Micro, Inc.*, No. 3:18-cv-1251-M, 2021 WL 5865393, at \*6-\*7 (Dec. 10, 2021) (finding term “file transfer speeds” in limitation “a virtual file interface configured to assist in transferring data at file transfer speeds between the host device and the secure digital security system” indefinite, because the specification did “not provide sufficient guidance of the meaning of transferring data ‘at file transfer speeds’ to give notice to the public of the boundaries between infringing and innocent activity”).

The specification here does not provide adequate guidance to inform a person of ordinary skill in the art of a correct interpretation among the three identified above. In fact, the specification provides individual support for each of the three interpretations. (Schonfeld Decl., ¶¶ 75-76.) The specification supports the maximum possible capacity or speed interpretation because it repeatedly states that the media data elements are sent by the server to the user computer “as fast as the data connection between the user and the server will allow.” (*See, e.g.*, ’824 Patent, 14:66-15:1, 15:44-46.) This disclosure does not have any language cabining what it means to send elements “as fast as the data connection . . . will allow.” (Schonfeld Decl., ¶ 76.) For example, a person of ordinary skill could reasonably understand from this language that if the data connection between the user and the server system was at a maximum speed of 56,000 bits per second, the media data elements should be sent at a maximum speed of 56,000 bits per second. (*Id.*)

There is also support in the specification for the alternative construction of this limitation as referring to “the available bandwidth on a data connection.” (*Id.*, ¶¶ 77-79.) As understood by a person of ordinary skill, a connection between a user computer and a server can be limited by various factors, including the download of multiple files simultaneously. (*Id.*) In such a scenario,

on the same 56,000 bits per second connection as mentioned above, if the combined download rate of the other files was 36,000 bits per second, when a user connects to a server to stream media, the media data elements could only be sent to the user at a rate equal to the available bandwidth of 20,000 bits per second. (*Id.*) The specification describes a scenario in which a user's Internet connection has the necessary average bandwidth capacity to allow reception of a program, but the actual delivery rate can still fluctuate above or below the average available bandwidth. (*Id.*) As a person of skill in the art would know, this fluctuation of available bandwidth can occur based on the quality of the user's Internet connection, which in turn depends on various factors including a user's location, networking hardware specifications, and momentary Internet congestion at various points along the route over which the user's data flows.<sup>4</sup> (*Id.*) At least one embodiment in the '824 and '636 Patents addresses these potential fluctuations, and contemplates that the server will send data to the user computer at either the "highest rate that the data connection" will support, or "any lower rate that is a higher than the playback rate." ('824 Patent, 8:15-24.)

Finally, a person of ordinary skill can interpret this limitation to require the transmittal to occur at the permitted bandwidth for use on the data connection.<sup>5</sup> (Schonfeld Decl., ¶ 80.) The

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<sup>4</sup> If this limitation were to be construed as allowing a rate equal to the available bandwidth, it would be indefinite as it is impossible to accurately determine whether a single media data element was sent using the available bandwidth at any given moment. (Schonfeld Decl., ¶¶ 77-79.) This is because of how quickly and unpredictably network conditions and available bandwidth fluctuate. (*Id.*) It would thus be impossible to differentiate infringing activity from innocent activity.

<sup>5</sup> If this limitation were to be construed as relating to the permitted bandwidth for use on the data connection, this limitation would be a tautology, rendering the limitation indefinite. (Schonfeld Decl., ¶ 80 (explaining why this construction would render the limitation a tautology).) *See, e.g. Qcue, Inc. v. Digonex Techs., Inc.*, No. A-12-CA-484-SS, 2013 WL 4784120, at \*4 (W.D. Tex. Sept. 5, 2013) (rejecting plaintiff's construction because it would be a meaningless tautology); *Timecertain, LLC v. Authentidate Holding Corp.*, No. 8:05-CV-1559-T-23EAJ, 2006 WL 3804830, at \*4 (M.D. Fla. Dec. 22, 2006) (holding that plaintiff's urged construction "is [a] mere tautology and would render the patent indefinite"); *Network Appliance Inc. v. Sun Microsystems, Inc.*, No. C-07-060532 EDL, 2008 WL 4193049, at \*35 (N.D. Cal. Sept. 10, 2008) (construing

specification explicitly suggests this meaning when it discloses “the server sends buffered media data to the user ‘as fast as the network connection will permit.’” (’824 Patent, 16:3-9.) Moreover, the specification discloses an embodiment of the claimed invention that sends media data elements to the user at a rate that matches the “constant fill rate” of the server buffer after the predetermined amount of data stored in the server buffer has been transferred to the user. (*Id.*, 8:25-33.) This indicates that either the server or user system “allows” data to be sent and received at a certain rate, and the transmission rate is not merely based on the available bandwidth or the maximum available capacity. (Schonfeld Decl., ¶ 80.) A person of ordinary skill in the art would also understand that this “allow[ed]” rate can further depend on the service provided by the Internet service provider and any potential throttling protocols it enacts.

Since the three interpretations discussed above are each supported by the intrinsic evidence, a person of ordinary skill in the art has no guidance to discern the correct interpretation of the claim language. As a result, this claim limitation is indefinite.

- 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, cls. 1, 5, 9; ’636 Patent, cls. 1, 5, 9)**

| Google’s Construction | Plaintiff’s Construction   |
|-----------------------|----------------------------|
| Indefinite            | Plain and ordinary meaning |

Claims 1, 5, and 9 of the ’636 and ’824 Patents describe “stor[ing] the media data elements in a data structure under the control of the server system” and require that “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.”

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claim term in favor of defendant because applying plaintiff’s proposed construction would result in “an even more confusing tautology”).

Google asserts that this term is indefinite based on its understanding of Plaintiff's position on the scope of the claim language from a review of its infringement contentions. That is, Plaintiff's position seems to be that this phrase merely requires *either* that the same media data elements are sent *or* that media data elements are sent from the same structure. Plaintiff's position highlights a fundamental ambiguity in this language, thus rendering these claims indefinite. *Nautilus*, 572 U.S. at 910-11. Google's position as to the scope of the disputed claim term differs and is consistent with its expert, Dr. Schonfeld, who has opined that a person of ordinary skill would understand from this claim language and the shared specification that all of the media data elements that are sent by the server system to the requesting user system are sent from the *same data structure* in which they were first stored and *in the same format* as they were "first stored therein." (Schonfeld Decl., ¶¶ 82-83.) Plaintiff appears to read this claim language differently.<sup>6</sup>

As an initial matter, the plain language of the '636 and '824 Patents' independent claims requires that media data elements be stored in a data structure, and that those *same* media data elements are sent to a requesting user system from that *same* data structure. To see this, the relevant portions of claim 1 of the '824 Patent are depicted below:

1. A method for distributing over the Internet, from a server system to one or more user systems, a pre-recorded audio or video program stored in digitally encoded form on computer-readable media, the method comprising:

...

storing the media data elements in a data structure under the control of the server system;

...

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

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<sup>6</sup> To be fair, Google has this understanding—not through any explicit confirmation from Plaintiff—but because Plaintiff did not confirm that its understanding comported with Google's. (Vanderwall Decl., Ex. A.)

as the media data elements were first stored therein.

(’824 Patent, cl. 1; *see also id.*, cls. 5, 9; ’636 Patent, cls. 1, 5, 9.) The highlighted language above demonstrates that the earlier claim language requiring “storing the media data elements in a data structure under the control of the server system” provides the antecedent basis for the phrases “the media data elements” and “the data structure” appearing in the disputed phrase. A person of ordinary skill would thus understand the references to “the media data elements” and “the data structure” in the disputed phrase to refer to the *same* media data elements and data structure discussed earlier in the “storing” limitation. (Schonfeld Decl., ¶¶ 82-83.)

In spite of this apparent meaning to a skilled artisan, Plaintiff appears<sup>7</sup> to take the position that this limitation may be met where *either* the same media data elements are sent *or* the media data elements are sent from the same data structure. That is, in its amended infringement contentions, Plaintiff merely contends for this limitation that “the media data elements are stored on YouTube’s servers as reflected in the client requests, as indicated in a manifest, and that *the media data elements so structured are served to the requesting user systems as first stored.*” (E.g., Vanderwall Decl., Ex. B at 21 (’636 Contentions – YouTube) (emphasis added).)<sup>8</sup> It is unclear from this language whether Plaintiff alleges that the same media data elements that are stored on YouTube’s servers are served to requesting user systems “as first stored,” or that media data elements are stored on YouTube’s servers and then served from those same servers (“so

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<sup>7</sup> Google’s understanding of Plaintiff’s position is informed by its current understanding of Plaintiff’s infringement allegations in this case. The parties met-and-conferred twice to discuss their respective claim construction positions, on March 1st and March 4th, and Plaintiff declined to confirm its reading of the disputed claim language’s requirements during both meetings. (Vanderwall Decl., Ex. A.) Plaintiff’s inability to explain the plain and ordinary meaning of this claim language underscores its ambiguity and ultimately these claims’ indefiniteness.

<sup>8</sup> Plaintiff also served HLS and DASH-specific contentions, which merely quote the relevant standards without any explanation. Plaintiff’s allegations in these contentions do nothing to illuminate its interpretation of this claim language.

structured”) to the requesting user systems, or both.<sup>9</sup> Regardless, Plaintiff’s vague allegations create a fundamental ambiguity in the meaning of the disputed claim language such that a person of ordinary skill reading the terms in the context of the claims and the specification would not understand with reasonable certainty the objective bounds of the claims. *Interval Licensing*, 766 F.3d at 1371. Accordingly, the claims incorporating this language are indefinite.

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

| Google’s Construction                                                          | Plaintiff’s Construction   |
|--------------------------------------------------------------------------------|----------------------------|
| “creating, at the server system, media data elements representing the program” | Plain and ordinary meaning |

The claim language makes it clear that “supplying” means “creating” in the context of claims 1, 5, and 9 of the ’824 and ’636 Patents. For instance, claim 1 of the ’636 Patent recites:

A method for distributing a live audio or video program over the Internet from a server system to a plurality of user systems, the method comprising:

receiving at the server system a continuous digitally encoded stream for the audio or video program, via a data connection from a live source, in real time, the server system comprising at least one computer;

upon receipt of the stream by the server system,

**supplying**, at the server system, media data elements representing the program, each media data element comprising a digitally encoded portion of the program and having a playback rate . . . .

(’636 Patent, cl. 1 (emphasis added).) The claim discloses a method for distributing a live program, in which the server system receives a “continuous digitally encoded stream.” (*Id.*) Upon receipt of this stream by the server system, the server system “suppl[ies],” or creates, “media data

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<sup>9</sup> Should the Court elect to construe this limitation, doing so to require only one of either the same media data elements or the same data structure would be improper. As set out above, both terms derive their antecedent basis from earlier claim language discussing storage in a data structure. And requiring only that the data elements be sent from the same data structure would render the claim language “as the media data elements were first stored therein” superfluous.

elements” that represent the live program and comprise a digitally encoded portion of the program having a playback rate. (*Id.*) The very first disclosure of “media data elements” in the claim is within this claim limitation—“supplying, at the server system, the media data elements representing the program . . . .” Accordingly, when the server system “suppl[ies]” the media data elements, it is creating the elements.

The same holds true for the claim language of the ’824 Patent. For example, with claim 1 of the ’824 Patent, the server system first “read[s]” a “pre-recorded audio or video program” and then “suppl[ies]” (or creates) media data elements representing the program. (’824 Patent, cl. 1.) The ’636 and ’824 Patents do not disclose that the programs already comprise the recited media data elements; rather, the claimed server system is responsible for creating the media data elements that represent either the live or pre-recorded programs and have a playback rate once it receives or reads the program. (’636 Patent, cl. 1; ’824 Patent, cl. 1.) Another possible meaning is that “supplying” too means “receiving,” but this would render claim language, particularly that of the ’636 Patent, superfluous, as the claimed server system has already received the live audio or video program. Thus, this interpretation is at odds with the claim language.

As with the other claims discussed above, Google met-and-conferred with Plaintiff regarding this term. (Vanderwall Decl., Ex. A.) Google again was seeking confirmation of its understanding of “supplying” to reach an agreed construction, but Plaintiff refused to provide an affirmative position on the term’s scope. (*Id.*) Accordingly, it is unclear what Plaintiff contends is the plain and ordinary meaning of “supplying” in the context of the claims.

## V. CONCLUSION

Google’s proposed constructions attempt to resolve issues of scope for the Asserted Patents and take into account the intrinsic record, while Plaintiff’s proposed constructions fail to do so.

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Respectfully submitted,

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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 March 11, 2022.

/s/Paige Amstutz  
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