

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

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March 11, 2022

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY: BW
DEPUTY

WAG ACQUISITION, L.L.C.,

Plaintiff,

v.

AMAZON.COM, INC.,
AMAZON WEB SERVICES, INC., and
AMAZON.COM SERVICES LLC,

Defendants.

Civil Action No. 6:21-cv-00815-ADA

**OPENING CLAIM CONSTRUCTION BRIEF OF AMAZON.COM, INC.,
AMAZON WEB SERVICES, INC., AND AMAZON.COM SERVICES LLC**

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE ASSERTED PATENTS	1
III. THE DISPUTED CLAIM TERMS AND PHRASES	3
A. “the media source”	3
B. “playback rate”	6
C. “data rate”	8
D. “as required to maintain about a predetermined number of media data elements”	11
IV. CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page(s)
<i>ACS Hosp. Sys., Inc. v. Montefiore Hosp.</i> , 732 F.2d 1572 (Fed. Cir. 1984).....	10
<i>Amgen, Inc. v. Chugai Pharm. Co.</i> , 927 F.2d 1200 (Fed. Cir. 1991).....	12
<i>Bio-Rad Labs., Inc. v. Int’l Trade Comm’n</i> , 998 F.3d 1320 (Fed. Cir. 2021).....	5
<i>Duodecad IT Services Luxembourg S.a.r.l v. WAG Acquisition, LLC</i> , IPR2015-01036, Paper 17 (Oct. 20, 2016)	8
<i>Duodecad IT Services Luxembourg S.a.r.l v. WAG Acquisition, LLC</i> , IPR2015-01036, Paper 8 (Oct. 23, 2015)	7, 8
<i>Elkay Mfg. Co. v. EBCO Mfg. Co.</i> , 192 F.3d 973 (Fed. Cir. 1999).....	8
<i>Eon Corp. IP Holdings LLC v. Silver Spring Networks, Inc.</i> , 815 F.3d 1314 (Fed. Cir. 2016).....	5
<i>Honeywell Int’l, Inc. v. ITT Indus., Inc.</i> , 452 F.3d 1312 (Fed. Cir. 2006).....	9
<i>Impulse Tech. Ltd. v. Microsoft Corp.</i> , 665 F. App’x 872 (Fed. Cir. 2016)	5, 10
<i>Luminara Worldwide, LLC v. Liown Elecs. Co.</i> , 814 F.3d 1343 (Fed. Cir. 2016).....	9
<i>MySpace, Inc. v. GraphOn Corp.</i> , 672 F.3d 1250 (Fed. Cir. 2012).....	9
<i>Nautilus, Inc. v. Biosig Instruments, Inc.</i> , 572 U.S. 898 (2014).....	11, 12
<i>O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.</i> , 521 F.3d 1351 (Fed. Cir. 2008).....	1
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (en banc).....	7
<i>Tech. Patents LLC v. T-Mobile (UK) Ltd.</i> , 700 F.3d 482 (Fed. Cir. 2012).....	10

**TABLE OF AUTHORITIES
(CONTINUED)**

	Page(s)
<i>V-Formation, Inc. v. Benetton Grp. SpA</i> , 401 F.3d 1307 (Fed. Cir. 2005).....	7, 8
<i>Wastow Enters., LLC v. Truckmovers.com, Inc.</i> , 855 F. App'x 748 (Fed. Cir. 2021)	9
 OTHER AUTHORITIES	
American Heritage Dictionary (3d ed. 1996)	13
Concise Oxford Dictionary (9th ed. 1995)	13
Harry Newton, <i>Newton's Telecom Dictionary</i> (14th ed. 1998)	8
Brad Hansen, <i>The Dictionary of Computing & Digital Media</i> (1999)	9
Webster's Third New International Dictionary (1993).....	13

Table of Exhibits

Exhibit	Description
1	<i>Duodecad IT Services Luxembourg S.a.r.l v. WAG Acquisition, LLC</i> , IPR2015-01036, Paper 8 (Oct. 23, 2015)
2	<i>Duodecad IT Services Luxembourg S.a.r.l v. WAG Acquisition, LLC</i> , IPR2015-01036, Paper 17 (Oct. 20, 2016)
3	Harry Newton, <i>Newton's Telecom Dictionary</i> (14th ed. 1998) (excerpt)
4	Brad Hansen, <i>The Dictionary of Computing & Digital Media</i> (1999) (excerpt)
5	<i>The Concise Oxford Dictionary</i> (9th ed. 1995) (excerpt)
6	<i>The American Heritage Dictionary</i> (3d ed. 1996) (excerpt)
7	<i>Webster's Third New International Dictionary</i> (1993) (excerpt)
8	<i>Webster's Dictionary of American English</i> (1997) (excerpt)
9	<i>The Oxford American Dictionary of Current English</i> (1999) (excerpt)
10	WAG's Proposed Claim Constructions (Feb. 18, 2022)
11	U.S. Patent No. 8,364,839, titled "Streaming Media Delivery System"
12	WAG's Disclosure of Extrinsic Evidence (Feb. 25, 2022)

I. INTRODUCTION

Pursuant to the Court’s Scheduling Order (Dkt. 35), Amazon.com, Inc., Amazon Web Services, Inc., and Amazon.com Services LLC (collectively, “Amazon”) submit their Opening Claim Construction Brief addressing the disputed terms of 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”).¹

The parties dispute constructions of four terms. While Amazon’s constructions are rooted in both the claim language and the specification, and capture the meaning of the terms as they would be understood by one of skill in the art at the time of the patents, WAG offers no constructions at all. Instead, it offers unarticulated plain and ordinary meanings that it intends to later stretch to cover what the patentee did not invent. Because any plain and ordinary meaning construction of the disputed terms will result in a battle of the experts on claim construction at trial, the Court should construe the terms now rather than allow WAG to prolong this case by attempting to argue positions directly contrary to the specification and the claim language cloaked as “plain and ordinary meanings.” *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) (“When the parties present a fundamental dispute regarding the scope of a claim term, it is the court’s duty to resolve it.”).

II. THE ASSERTED PATENTS

The asserted patents are related. They share an identical specification, list the same inventor, and are identically titled “Streaming Media Delivery System.”² (’594 patent; ’824 patent; ’636 patent; *see* Declaration of Dr. Dan Schonfeld (“Schonfeld Decl.”) ¶ 25.) As the title suggests, the patents are generally directed to streaming media (*e.g.*, audio or video) over the Internet.

¹ The asserted patents are filed at Dkt. 1-1 (’824 patent), 1-2 (’594 patent), and 1-3 (’636 patent).

² For convenience, all specification citations herein are to the ’594 patent, but identical disclosures appear in the ’824 and ’636 patents.

(Schonfeld Decl. ¶ 26.) Streaming systems were in use before the patents. The specification acknowledges this. ('594 patent at 1:63-2:33; Schonfeld Decl. ¶ 27.) It claims, however, that these prior art systems sent data over the Internet at the same rate as the media was to be played to the user at his or her computer. ('594 patent at 2:57-3:4; Schonfeld Decl. ¶¶ 28-29.) Thus, any Internet connection slowdowns or drops would interrupt the data transfer, in turn disrupting the streaming at the user's computer. ('594 patent at 2:34-40; Schonfeld Decl. ¶ 28.) Prior art streaming systems avoided these disruptions by using buffers—memory for temporarily storing data—at the users' computers to pre-buffer (store) received media data that can be played even if the Internet connection is disrupted. ('594 patent at 2:41-63, 3:1-4; Schonfeld Decl. ¶ 28.) One can think of this buffered media data as a reserve to use in a time of need. According to the specification, however, because buffer levels in the existing streaming systems could not be increased while the media was playing at the user's computer, certain (longer) Internet connection issues would deplete the buffer and interrupt media playing despite data buffering. ('594 patent at 3:5-15, 3:31-41; Schonfeld Decl. ¶ 29.)

To attempt to solve this perceived problem, the specification describes adding a server buffer. ('594 patent at 14:62-67; Schonfeld Decl. ¶ 30.) The server buffer stores sequential segments of the media that the server receives from a media source. ('594 patent at 14:62-15:8; Schonfeld Decl. ¶¶ 31-33; *see also* '594 patent at 5:33-45, 6:42-44.) The specification describes two separate embodiments for transferring the data elements from the server buffer to the user's computer. The two embodiments use conventional “push” and “pull” paradigms. The first embodiment uses the “server-push” paradigm, in which the server itself initiates sending of the media data elements to the user. ('594 patent at 9:46-61, 10:45-49; Schonfeld Decl. ¶ 34.) The second embodiment uses the “client-pull” paradigm, in which the server sends the data elements to the user only in response to a request from the user's computer, *i.e.*, the client. ('594 patent at 14:42-

15:18; Schonfeld Decl. ¶¶ 34-36.)

In the client-pull embodiment, which is the focus of the claims of the asserted patents, the data elements in the server buffer are numbered serially, and the user computer requests each data element sequentially by its serial number. ('594 patent at 14:42-60; Schonfeld Decl. ¶¶ 34-35.) In response, the server sends the requested media data elements from its buffer “more rapidly than they are played out by the user system” using “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.” ('594 patent at 13:35-38, 8:7-20; *see also* '594 patent at 9:62-66, 14:53-56; Schonfeld Decl. ¶ 35.) As in conventional streaming systems, the user’s computer has a buffer that stores “a predetermined number of media data elements” that it deletes from the buffer as it plays them to the user. ('594 patent at 15:9-15; Schonfeld Decl. ¶ 36; *see* '594 patent at 6:51-58.) The user computer keeps a record of the serial number of the last data element received from the server, so that it can request the next data element. ('594 patent at 14:45-60; Schonfeld Decl. ¶ 36.)

III. THE DISPUTED CLAIM TERMS AND PHRASES

A. “the media source”

Term	Amazon’s Construction	WAG’s Construction ³
“the media source” '594 patent, claims 1, 6, 11	the storage device or live source device from which the streaming material originates	Plain and ordinary meaning

Amazon’s construction of “media source” correctly interprets the term as the device from which the media originates, *i.e.*, the source of the media data. WAG does not dispute that the media source may be the storage device or live source device from which streaming material originates. But it maintains that the term should not be limited to the original source of the media, because the term also includes intermediate network servers over which data elements may pass

³ WAG’s proposed constructions are attached as Exhibit 10 to the Declaration of Saina S. Shamilov (“Shamilov Decl.”), filed concurrently herewith.

on their way to the user's computer. WAG's interpretation is wrong because the patentee explicitly distinguished the media source from such servers. ('594 patent at 12:45-67, claims 1, 6, 11; Schonfeld Decl. ¶¶ 44-45.)

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. ('594 patent at 12:4-14, 12:45-62; Schonfeld Decl. ¶ 44; *see also* Schonfeld Decl. ¶ 32.) According to the specification, the media source is a device that stores media files or provides a live media stream that is broadcast in real time. ('594 patent at 5:33-42 ("There are two fundamental types of streaming media . . . (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-real-time source such as from a disk file."), 6:42-44 ("The media may come from a live source . . . or from a stored file on the server 12, or another storage device, such as a hard drive."); Schonfeld Decl. ¶¶ 32, 41-43; *see also* '594 patent at 14:8-15, 14:62-67 ("the server . . . receiv[es] the sequentially numbered media data elements from a broadcast media source or a file based media source").) The user's computer can request media data from the media source, which transmits the data in response. ('594 patent at 10:49-53, 11:13-16, 12:4-14.) Alternatively, the user's computer can request media data from a server that receives the data from the source and, in turn, transmits the data to the requesting user computer. (*Id.* at 12:45-62; *see* Schonfeld Decl. ¶ 44.) The specification provides an example of this alternative scenario:

In another embodiment, . . . a system might include a source server computer co-located in a radio station studio, which transmits to a network distribution sever resident in a data center, to which users would connect. The source server [i.e., the media source] would fill its buffer, transfer the buffer to the network distribution server . . . , and then the network distribution server would transfer its buffer to the user

('594 patent at 12:46-58.) Thus, the specification makes clear that the media source is a specific

device that originates the media data, and not simply any server that may have a copy of the data for transport in the network. (Schonfeld Decl. ¶ 44.) The patentee drew the same distinction in the claims.

The '594 patent claims require that the request for media data elements is sent to and received by the media source. ('594 patent, claim 1, 6, 11.) By contrast, the claims of the '824 and '636 patents more generally require that the request is received “at the server system,” which may or may not be the “media source.” (*Compare* '594 patent, claim 1, *with* '824 patent, claims 1, 5, 9, *and* '636 patent, claims 1, 5, 9; *see also* '594 patent, claims 6, 11; Schonfeld Decl. ¶ 45.) WAG seeks to eliminate this clear and intentional distinction in the claims by expanding “media source” to be any server, under the guise of its “plain and ordinary meaning.” That is not permitted: “[i]nventors are masters of their claims, and the words they use to describe and claim their invention are decisive and binding.” *Bio-Rad Labs., Inc. v. Int’l Trade Comm’n*, 998 F.3d 1320, 1331 (Fed. Cir. 2021); *see also Impulse Tech. Ltd. v. Microsoft Corp.*, 665 F. App’x 872, 878 (Fed. Cir. 2016) (patentee’s use of two different terms in the specification means they refer to “two separate concepts”); *Eon Corp. IP Holdings LLC v. Silver Spring Networks, Inc.*, 815 F.3d 1314, 1317, 1321 (Fed. Cir. 2016) (claim terms “mobile” and “portable” did not cover “fixed or stationary products” because the specification distinguished between “mobile”/“portable” units and “fixed”/“stationary” units). Nothing in the intrinsic record supports WAG’s attempt to rewrite the claims. (*See* Schonfeld Decl. ¶¶ 44-45.) Nor does WAG’s rewrite make linguistic sense. When a son sends a letter to his mother, that letter may travel through a post office, but the post office is not the *source* of the letter; the son is. Because Amazon’s construction is consistent with the intrinsic record and WAG’s interpretation cloaked as a “plain and ordinary meaning” is designed to capture what the inventor did not claim, the Court should adopt Amazon’s construction. (*See id.* ¶¶ 42-45.)

B. “playback rate”

Term	Amazon’s Construction	WAG’s Construction
“playback rate” ’594 patent, claims 1, 6, 11 ’824 patent, claims 1, 5, 9 ’636 patent, claims 1, 5, 9	a rate at which the data is encoded for playback to a user	Plain and ordinary meaning

The asserted claims recite “each media data element comprising a digitally encoded portion of the audio or video program and having a playback rate” and variations thereof. (’594 patent, claims 1, 6, 11; *see also* ’824 patent, claims 1, 5, 9 (“each media data element comprising a digitally encoded portion of the program and having a playback rate”); ’636 patent, claims 1, 5, 9 (“each media data element comprising a digitally encoded portion of the program and having a playback rate”).) Each media data element has a “playback rate” at the time the media data element is “suppl[ied] at the server system” (’824 patent, claims 1, 5, 9; ’636 patent, claims 1, 5, 9), and at the time the media player at the user’s computer “send[s] [a] request[]” for the media data element (’594 patent, claims 1, 6, 11)—*i.e.*, before the media data element is sent to the user. (Schonfeld Decl. ¶¶ 50-51.) In other words, the “playback rate” is an intrinsic aspect of the media data element set *before* any transport. (*See id.* ¶¶ 48, 50-51.) The specification thus defines the “playback rate” as “the rate at which [media data] *will be* played out” to the user: media data “is simply transmitted from the server to the user at the rate at which it will be played out (*the ‘playback rate’*).” (’594 patent at 5:60-65 (emphasis added); Schonfeld Decl. ¶ 48.) Thus, a POSITA would have understood that, in the patents, the playback rate is a characteristic of the encoded media elements—“a rate at which the data is encoded for playback to a user.” (Schonfeld Decl. ¶ 48.) WAG again offers a non-construction in the form of a “plain and ordinary meaning” so it can later argue the playback rate can be any rate at which the media data is actually played out to the user and not the rate at which the media data is intended to be played—directly contrary to the claim language and

the specification. (*See* Schonfeld Decl. ¶¶ 49-52.)

The actual rate at which the media is played out to the user is controlled by the user. (Schonfeld Decl. ¶ 49.) A user could choose to play media data at any rate, for example, by listening to an audiobook at 1.5x or 2x the intended rate set by the encoder. (*Id.*) The term “playback rate” does not and cannot refer to the actual rate at which the media is played out to the user, because in the claims, each media data element must have the “playback rate” *before it is sent to the user*. (’594 patent, claims 1, 6, 11; Schonfeld Decl. ¶¶ 50-51; *see also* ’594 patent at 5:60-65; Schonfeld Decl. ¶ 52.) Amazon’s construction is thus correct. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1314-15 (Fed. Cir. 2005) (en banc) (claims “must be read in view of the specification” and “the context of the surrounding words of the claim also must be considered in determining the ordinary and customary meaning of those terms”).

Amazon’s construction is also identical to the construction of “playback rate” that the Patent Office adopted in an *inter partes* review of U.S. Patent No. 8,364,839 (the “’839 patent”). (Shamilov Decl. Ex. 1, *Duodecad IT Services Luxembourg S.a.r.l v. WAG Acquisition, LLC*, IPR2015-01036, Paper 8 (Oct. 23, 2015) (“*Duodecad* Institution Decision”) at 10; *see* Schonfeld Decl. ¶ 47.) The ’839 patent is the grandparent of the asserted patents with an identical specification. (’594 patent at 1-2; ’824 patent at 1-2; ’636 patent at 1-2 (“Related U.S. Application Data”); Schonfeld Decl. ¶ 47; *see also* Shamilov Decl. Ex. 11, ’839 patent.) The Patent Office’s decision is cited on the face of each asserted patent, rendering the decision intrinsic evidence to be considered during claim construction in this case. (’594 patent at 8; ’824 patent at 8; ’636 patent at 5); *see V-Formation, Inc. v. Benetton Grp. SpA*, 401 F.3d 1307, 1311 (Fed. Cir. 2005) (finding that information “cited in a patent or cited in the prosecution history of the patent constitutes intrinsic evidence” (citation omitted)). The Patent Office construed “playback rate” as “a rate at which the

data is encoded for playback to a user,” as Amazon proposes here.⁴ (Shamilov Decl. Ex. 1, *Duodecad* Institution Decision at 10.) The Patent Office reached its construction based on the definition in the ’839 patent, which is repeated verbatim in the identical specification of the asserted patents: “media data . . . is simply transmitted from the server to the user at the rate at which it will be played out (*the ‘playback rate’*).” (*Id.* (emphasis added); Shamilov Decl. Ex. 11, ’839 patent at 5:37-42 (emphasis added); *see* ’594 patent at 5:60-65.) The Patent Office’s construction, like Amazon’s, captures the definition in the specification, is consistent with the claim language, and is thus correct. *Elkay Mfg. Co. v. EBCO Mfg. Co.*, 192 F.3d 973, 980 (Fed. Cir. 1999) (“When multiple patents derive from the same initial application, the prosecution history regarding a claim limitation in any patent that has issued applies with equal force to subsequently issued patents that contain the same claim limitation.”); (*see* Schonfeld Decl. ¶¶ 47-52).

C. “data rate”

Term	Amazon’s Construction	WAG’s Construction
“data rate” ’594 patent, claims 1, 6, 11 ’824 patent, claims 1, 5, 9 ’636 patent, claims 1, 5, 9	the actual rate at which the data connection delivers data to the [media player / requesting user system] at any given time	Plain and ordinary meaning

Unlike “playback rate,” which is the rate at which the media is encoded for playback, “data rate” is the actual rate at which the data is delivered to the user’s computer, as dictionaries at the time of the patents confirm. (Shamilov Decl. Ex. 3, Harry Newton, *Newton’s Telecom Dictionary* (14th ed. 1998) at 211-212 (“data rate” is “rate at which a channel carries data,” and “data rate . . . may be very different (i.e., less) than what the channel is theoretically capable of”);

⁴ In its final written decision, the PTAB adopted its construction of “playback rate” as final. (Shamilov Decl. Ex. 2, *Duodecad IT Services Luxembourg S.a.r.l v. WAG Acquisition, LLC*, IPR2015-01036, Paper 17 (Oct. 20, 2016) at 9.) The PTAB’s final written decision is also cited on the face of the asserted patents, rendering it intrinsic evidence. (’594 patent at 8; ’824 patent at 8; ’636 patent at 6); *see V-Formation, Inc.*, 401 F.3d at 1311.

Shamilov Decl. Ex. 4, Brad Hansen, *The Dictionary of Computing & Digital Media* (1999) at 76 (“data rate” is “[t]he speed at which the data flows”); Schonfeld Decl. ¶ 58.)

Indeed, the claims require that the data connection, over which the user’s computer receives the media, “has a data rate more rapid than the playback rate” of the media data elements. (’594 patent, claim 1, 6, 11; ’824 patent, claims 1, 5, 9; ’636 patent, claims 1, 5, 9.) The specification states that “[w]ith the present invention,” the server sends media data to the user “at a higher than playback rate.” (’594 patent at 9:36-39.) Thus, the claimed “data rate” must be the rate at which the data connection actually delivers data to the user for the present invention to work. (Schonfeld Decl. ¶ 54); *Luminara Worldwide, LLC v. Liown Elecs. Co.*, 814 F.3d 1343, 1353 (Fed. Cir. 2016) (claim scope is limited by statements in specification describing “the present invention”); *Honeywell Int’l, Inc. v. ITT Indus., Inc.*, 452 F.3d 1312, 1318 (Fed. Cir. 2006) (holding that “[t]he public is entitled to take the patentee at his word” when the specification states that “the present invention” is a fuel filter). “An inventor is entitled to what he has invented, and no more.” *MySpace, Inc. v. GraphOn Corp.*, 672 F.3d 1250, 1256 (Fed. Cir. 2012). And according to the patents, this actual data rate is important: sending media data “at a higher than playback rate” is what purportedly distinguishes the alleged invention from the prior art. (’594 patent at 13:67-14:4, 5:60-65; Schonfeld Decl. ¶ 30.) Sending media data at a rate higher than the playback rate allegedly allows media data to be built up in the user buffer during playing, which purportedly reduces interruptions in playback on the user’s computer. (’594 patent at 6:13-29, 9:62-66, 10:22-39, 13:66-14:4; Schonfeld Decl. ¶¶ 30, 57.) In order to achieve this alleged benefit, the claimed “data rate” must be the rate at which data is actually delivered to the user. (Schonfeld Decl. ¶ 57); *Wastow Enters., LLC v. Truckmovers.com, Inc.*, 855 F. App’x 748, 751 (Fed. Cir. 2021) (device claims are limited to a universal folding boom trailer where “[t]he specification . . . ties the stated benefits of the invention over prior art to the use of a universal folding boom trailer”).

In the parties’ conference of counsel, WAG rejected Amazon’s construction and instead suggested that the “data rate” can be a potential rate at which the data connection could theoretically deliver data. But the “data rate” in the asserted patents is not a theoretical rate at which the data connection *could* deliver data—it is the *actual* rate at which data is delivered, which reflects any Internet slowdowns that occur. (’549 patent 3:20-27, 4:40-43; Schonfeld Decl. ¶¶ 55-57.) Indeed, the patents clearly distinguish between the capacity of an Internet connection and the actual rate at which data is delivered, which “can fluctuate widely”:

Even 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*.

(’594 patent at 5:7-20 (emphasis added); *see* Schonfeld Decl. ¶¶ 59-60.) The patentee explicitly distinguished the actual data rate from the theoretical bandwidth of the connection, referring to the latter as “data rate *capabilities* of the connection.” (’594 patent at 5:60-65 (emphasis added); Schonfeld Decl. ¶ 56); *Impulse Tech. Ltd.*, 665 F. App’x at 878 (specification “describes the sensor viewing area . . . and the ‘defined physical space’ using different terms, thus suggesting that they are two separate concepts”). The data rate of the connection is the actual rate at which the connection delivers data at any given time, as Amazon’s construction correctly captures. (Schonfeld Decl. ¶¶ 59-60.) If the data rate were merely a theoretical capability of the data connection, as WAG intends to argue, the claims would allow the media data elements to be sent at the playback rate and read on prior art systems that the patents criticize for purportedly causing frequent interruptions because “the user’s buffer level can never be increased or replenished while it is playing.” (’594 patent at 3:5-15, 5:60-65; Schonfeld Decl. ¶ 57); *Tech. Patents LLC v. T-Mobile (UK) Ltd.*, 700 F.3d 482, 493-94 (Fed. Cir. 2012) (affirming district court’s construction where the alternative construction “would arguably cover the very . . . system that the patent criticized”); *ACS Hosp.*

Sys., Inc. v. Montefiore Hosp., 732 F.2d 1572, 1577 (Fed. Cir. 1984) (“claims should be so construed, if possible, as to sustain their validity”). There is simply no support in any of the intrinsic record for WAG’s interpretation of the term. The Court should adopt Amazon’s construction to prevent WAG from improperly stretching the claims to cover technologies that the inventor did not conceive.

D. “as required to maintain about a predetermined number of media data elements”

Term	Amazon’s Construction	WAG’s Construction
“as required to maintain about a predetermined number of media data elements” '594 patent, claims 1, 6, 11	Indefinite under § 112, ¶ 2. “A predetermined number of media data elements” means “a specified number of media data elements, set prior to the start of playback of the audio or video program.”	Plain and ordinary meaning

For this term, WAG yet again proposes a “plain and ordinary meaning” construction. But plain meaning only confirms the indefiniteness of the language, as the term fails to “afford clear notice of what is claimed.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). The '594 patent claims require “maintain[ing] about a predetermined number of media data elements in the memory of the media player.” ('594 patent, claims 1, 6, 11.) The “memory of the media player” is the user buffer referenced in the specification, and stores media data elements before they are played out. (Schonfeld Decl. ¶ 68; '594 patent at 6:51-58, 15:15-18; *see* Schonfeld Decl. ¶ 36.) But the plain and ordinary meaning of “*about* a predetermined number” could encompass a range of 1% above or below the “predetermined number” of elements in the buffer, or 5%, 10%, or 50%. (*See* Schonfeld Decl. ¶¶ 63, 68.) The claims, specification, and prosecution history are silent on what range of user buffer levels, above and below the “predetermined number,” is within the scope of the claims. (*Id.* ¶¶ 63-68.) Nor is there any extrinsic evidence that can provide any insight, because the word “about,” outside of the context of the asserted patents,

connotes no reasonable certainty of its value; indeed, WAG cites none. (Shamilov Decl. Ex. 12, WAG’s disclosure of extrinsic evidence.) If a car loan is offered at “about a prime rate,” one would not be able to determine that rate with any certainty. And a POSITA here is no better positioned than that car buyer, because “about” provides no more guidance when talking about buffer levels than interest rates. (See Schonfeld Decl. ¶¶ 63-68.) The term fails to provide any reasonable certainty of what constitutes “about a predetermined number,” and is thus indefinite. *Amgen, Inc. v. Chugai Pharm. Co.*, 927 F.2d 1200, 1218 (Fed. Cir. 1991) (claim reciting EPO protein with a specific activity of “at least about 160,000 IU/AU” was indefinite where “nothing in the specification, prosecution history, or prior art provides any indication as to what range . . . is covered”); *Nautilus, Inc.*, 572 U.S. at 909 (A patent must “be precise enough to afford clear notice of what is claimed, thereby apprising the public of what is still open to them.” (internal quotation marks omitted)).

The word “about” renders the disputed term “as required to maintain about a predetermined number of media data elements” indefinite, and so the Court need not construe any other words in this term. But should the Court decide to do so, the phrase that comes after “about”—“a predetermined number of media 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.) The “predetermined number” must be set before the start of playback because that (or its unbounded approximation) is the number of media data elements that must be maintained in the user buffer “during playing,” as recited in the ’594 patent claims. (’594 patent, claim 1 (“*as the received media data elements are played, the media player automatically send[s] additional requests for subsequent media data elements . . . as required to maintain about a predetermined number of media data elements in the memory of the media player during playing*”) (emphasis added); see also ’594 patent at 15:15-18, claims 6, 11.) Nothing in the intrinsic record suggests that the number

would be determined during playback, nor would such a determination meet the claim limitation because the number would not be “*maintain[ed]*” for part of the time “during playing,” contrary to what the claim requires. (Schonfeld Decl. ¶¶ 71-72.) The “predetermined” number has to be determined before a certain point in time, as dictionaries available at the time of the patents confirm. (*Id.* ¶¶ 70; *see also* Shamilov Decl. Ex. 5, The Concise Oxford Dictionary (9th ed. 1995) at 1076 (“predetermine” means “[d]etermine or decree beforehand”); Shamilov Decl. Ex. 6, The American Heritage Dictionary (3d ed. 1996) at 1426 (“predetermine” means “[t]o determine, decide or establish in advance”); Shamilov Decl. Ex. 7, Webster’s Third New International Dictionary (1993) at 1786 (“predetermine” means “to determine beforehand: settle in advance”).) The ’594 patent teaches that this point in time is the start of playback of the audio or video program. (Schonfeld Decl. ¶¶ 71-72.)

During the parties’ conference of counsel, WAG alleged that “predetermined” means “determined before what follows” in the claims. But the phrase “a predetermined number of media data elements” only appears in the *last* limitation of each of the independent claims of the ’594 patent, and thus there is no method step or system limitation that “follows” the phrase or takes place “following” the predetermination. (’504 patent, claims 1, 6, 11; Schonfeld Decl. ¶¶ 73-74.) Thus, under WAG’s interpretation, the claim provides no clarity as to what “predetermined” means, which only confirms the indefiniteness of the disputed term.

IV. CONCLUSION

For the foregoing reasons, the Court should adopt Amazon’s proposed constructions and indefiniteness positions.

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Respectfully submitted,

Of Counsel:

Deron R. Dacus (TX Bar #00790553)
ddacus@dacusfirm.com
THE DACUS FIRM, P.C.
821 ESE Loop 323, Suite 430
Tyler, TX 75701
Tel: (903) 705-1117
Fax: (903) 581-2543

By: /s/ Saina S. Shamilov

J. David Hadden (CA Bar No. 176148)
Email: dhadden@fenwick.com
Saina S. Shamilov (CA Bar No. 215636)
Email: sshamilov@fenwick.com
Ravi R. Ranganath (CA Bar No. 272981)
Email: rranganath@fenwick.com
Donna Long (CA Bar No. 312520)
Email: dlong@fenwick.com
FENWICK & WEST LLP
Silicon Valley Center
801 California Street
Mountain View, CA 94041
Telephone: (650) 988-8500
Facsimile: (650) 938-5200

Counsel for Defendants

AMAZON.COM, INC., AMAZON WEB SERVICES, INC., AND AMAZON.COM SERVICES LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2022, I electronically filed the foregoing with the Clerk of the Court using the Electronic Dropbox system for the Waco Division, as authorized by the ECF Help Desk because the CM/ECF system was unavailable at the time of this filing, and that a true and correct copy of the foregoing document and accompanying exhibits were served via electronic mail to counsel of record for all parties.

By: /s/ Saina S. Shamilov
Saina S. Shamilov