

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

WAG ACQUISITION, L.L.C.,

Plaintiff,

v.

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

Defendants.

Case No. 6:21-cv-00815-ADA

JURY TRIAL DEMANDED

PLAINTIFF'S RESPONSIVE CLAIM CONSTRUCTION BRIEF

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TABLE OF DISPUTED TERMS AND CONSTRUCTIONS

Item	WAG's Proposed Constructions	Amazons's Proposed Constructions
Item 1: “as required to maintain about a predetermined number of media data elements” '594 patent, claims 1, 6, 11.	Plain and ordinary meaning.	Indefinite under § 112.
Item 2: “playback rate” '594 patent, claims 1, 6, 11; '824 patent, claims 1, 5, 9; '636 patent, claims 1, 5, 9.	Plain and ordinary meaning.	A rate at which the data is encoded for playback to a user.
Item 3: “data rate” '594 patent, claims 1, 6, 11; '824 patent, claims 1, 5, 9; '636 patent, claims 1, 5, 9.	Plain and ordinary meaning.	The actual rate at which the data connection delivers data to the [media player / requesting user system] at any given time.
Item 7: “the media source” '594 patent, claims 1, 6, 11.	Plain and Ordinary Meaning	The storage device or live source device from which the streaming material originates.

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 Amazon.com, Inc., Amazon Web Services, Inc., and Amazon.com Services LL (“Defendants” or “Amazon”) 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

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.

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 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.” *Philips*, 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. Conceptronic, 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. DISPUTED CONSTRUCTIONS²

A. “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 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

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

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 type of 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 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 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.’” Amazon 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 flawed. 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.

B. “playback rate” (’594 patent, claims 1, 6, 11; ’824 Patent, claims 1, 5, 9; ’636 Patent, claims 1, 5, 9)

The term “playback rate” is not a technical term that requires construction, nor is it a term that would have special meaning to a POSITA, other than referring to normal as opposed to fast-forward or slow-motion playback. Teruya Dec ¶¶ 24-26. This is made clear from specifications of the Asserted Patents: “In 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.” ’594 Patent, 5:60-65. It is clear from this that the “playback rate” means exactly what the plain and ordinary language suggests: the rate at which the media is played out in a normal rendition.

Defendants’ construction is improper because it takes simple, conventional terms and injects undue complexity into them (“rate at which the data is encoded for playback”), while being entirely unnecessary to understand either these terms or their broader context within the Asserted Patents. Further, Defendants’ construction is simply confusing in that, grammatically, it seems to refer to *how quickly* the media is encoded (“a rate at which the data is encoded”) rather than how quickly the media is *played back* by the user device.

In view of the above, the Court should simply adopt the plain and ordinary meaning for this term.

C. “data rate” (’594 Patent, claims 1, 6, 11; ’824 Patent, claims 1, 5, 9; ’636 Patent, claims 1, 5, 9)

According to the claim language, “the data connection has a data rate more rapid than the playback rate of the media data elements....” *E.g.*, ’594 Patent, 16:43-45. Nothing more of “data rate” is required than this, which is plain on its face.

Defendants inject an additional limitation into this language by stating that “data rate” is “the actual rate at which the data connection delivers data to the [media player / requesting user system] *at any given time*.” Defendants’ construction is wrong not merely because it unduly narrows the claim language, but because it is flatly contradicted by the intrinsic record and runs counter to the invention itself.

By way of reference to the ’594 Patent, the specification begins by noting that “[t]ransmitting the audio or video material over a connection slower than the bandwidth requirement [of the media data] 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.” ’594 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 Asserted Patents allow the client device to play media from a media source even when there are such networking interruptions and/or slowdowns between the two. *See id.*, 9:1-17. The specification acknowledges that “[c]onnections from the server 12 through the Internet 10 commonly are much faster than the data rate required

for audio or video playback.” *Id.*, 9:22-24. However, the specification also explains that “[t]he media data will be transmitted to the user computer as fast as the data connection between the user computer and the server will allow.” *Id.*, 14:60-62. In other words, the buffering embodiment contemplates that when requested data elements are sent, it will be sent as fast as possible, where, as noted above the disclosure (at 9:22-24) further specifies that the data connection should have a data rate that is faster than the playback rate. *See* Teruya Dec. ¶ 31.

Defendants’ arguments in support of their claim construction position is, at best, confusing. According to Defendants, “[i]f 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....” Amazon Br. at 10. This is flatly contradicted by the claim language (as directly supported by the above-cited disclosure), and the claim language recites, for example, “the data connection has a data rate more rapid than the playback rate of the media data elements, and each received media data element is received at a rate as fast as the data connection between the media source and the media player allows....” ’594 Patent, 16:43-47. Obviously, apart from congestion and interruptions that the Asserted Patents are specifically tailored to deal with, the media data elements are not sent at the playback rate, but at a rate faster than the playback rate, the object being to make use of the available connection bandwidth to be able to send the requested elements as fast as possible on demand.

Defendants’ argument that “sending media data ‘at a higher than playback rate’ is what purportedly distinguishes the alleged invention from the prior art,” and then twisting this to argue “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” is also disingenuous. Amazon Br. at 9; *see also id.* at 10. The cited language in column 5 of the ’594 patent states 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.” In the pull embodiment (and the asserted claims), however, data is accumulated in identified data elements on the server, which, when sent (*i.e.*, upon the player’s request), are always sent as fast as the connection will allow. The disclosure flat-out says this at 14:60-62, and it is that simple. Defendants’ arguments attempt to graft features of the buffering embodiment into the separately disclosed pull embodiment, inviting the Court to make a mish-mosh of the intrinsic evidence in order to generate an infringement “out” for themselves.

D. “as required to maintain about a predetermined number of media data elements” (’594 Patent, claims 1, 6, 11) (alleged indefinite, but with alternate (disputed) construction proposed)

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 claims 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.

The description of the “pull” embodiment discloses that, like the buffering embodiment, the player plays out media from a buffer in the player. ’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 Dec. ¶¶ 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 & Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1557, 220 U.S.P.Q. 303, 316 (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 America, Inc.*, 2021 WL 2646214, *6–*8 (E.D. Tex. 2021) (“approximately 10 μ m,” “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.*, 2018 WL 5005791, *17–*20 (E.D. Tex. 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 Pharmaceuticals USA, Inc.*, 2016 WL 7210837, *15–*19 (E.D. Tex. 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 Technologies, LLC v. Cinedigm Corp.*, 2016 WL 3688801, *30 (E.D. Tex. 2016) (“less than approximately” not indefinite since “the parameter’s range must be interpreted in its technological and stylistic context.”).

As for Defendants’ asserted “alternate” interpretation, WAG asserts that the plain and ordinary meaning of “predetermined” in this context means a target level of elements where the target is set any time prior to executing the steps to replenish the level.

Amazon, in its proposed “alternate” interpretation, is trying to rule out a scenario in which the player monitors conditions and changes the target level for a minimum buffer during execution. The claim does not rule out changing the “predetermined” number during the course of playback, so long as it is set in advance of the request. There is no justification for reading in the additional requirement proposed by Amazon.

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

V. 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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