2021-1998

United States Court of Appeals for the Federal Circuit

SOUND VIEW INNOVATIONS, LLC,

Plaintiff-Appellant,

v.

HULU, LLC,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 2:17-CV-04146-JAK-PLA, HON. JOHN A. KRONSTADT

NONCONFIDENTIAL REPLY BRIEF OF APPELLANT SOUND VIEW INNOVATIONS, LLC

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December 17, 2021

U.S. PATENT NO. 6,708,213
CLAIM 16

16. A method of reducing latency in a network having a content server which hosts streaming media (SM) objects which comprise a plurality of time-ordered segments for distribution over said network through a plurality of helpers (HSs) to a plurality of clients, said method comprising:

receiving a request for an SM object from one of said plurality of clients at one of said plurality of helper servers;

allocating a buffer at one of said plurality of HSs to cache at least a portion of said requested SM object;

downloading said portion of said requested SM object to said requesting client, while concurrently retrieving a remaining portion of said requested SM object from one of another HS and said content server; and

adjusting a data transfer rate at said one of said plurality of HSs for transferring data from said one of said plurality of helper servers to said one of said plurality of clients.

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 26.1, 28(a)(1), and 47.4, counsel for appellant certifies the following:

1. The full name of every entity represented in this case by me is:

   Sound View Innovations, LLC

2. The name of every real party in interest, if that entity is not the real party in interest, is:

   N/A

3. All parent corporations and every publicly held corporation that owns 10 percent or more of the stock of the entity represented by me are:

   Sound View Innovation Holdings, LLC

4. The names of all law firms, partners, and associates that have not entered an appearance in this appeal, and appeared for the entity in the trial court or are expected to appear for the entity in this court are:

   Desmarais LLP: Steven Balcof, Kathryn E. Bi (former), Richard M. Cowell (former), Charles Austin Ginnings (former), Kerri-Ann Limbeek, Ameet A. Modi, Jennifer Przybylski

   Hankin Patent Law APC: Marc E. Hankin

   Russ August and Kabat: Marc A. Fenster, Kent N. Shum, Benjamin T. Wang

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal include:

   Sound View Innovations, LLC v. DISH Network, LLC et al., No. 19-cv-3707 (D. Colo.), consolidated with *Sound View Innovations, LLC v. Sling TV LLC*, No. 19-cv-3709 (D. Colo.)

6. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees):

N/A

Dated: December 17, 2021 /s/ *Frederick J. Ding*

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The material omitted in the first and second omissions on page 15 describe data structures in an accused CDN's system; the material omitted in the first and second omissions on page 23 describe data structures in an accused CDN's system; the material omitted on page 29 describes a party's internal comparison of users' watch time.

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All emphasis added unless otherwise indicated.

INTRODUCTION

Just as it did in the district court, Hulu reimagines how claim construction and *Daubert* work. Hulu was wrong then, and is wrong now.

First, Hulu defends the erroneous single-buffer construction ***not*** by parsing the applicants' explicit statements—the touchstone of disclaimer and its notice function—but instead by wading into technical aspects of the prior art that the applicants never discussed or cited, to intuit a distinction the applicants never argued. But whether the applicants clearly and unmistakably disclaimed something is judged by what the applicants ***said***—and disclaimer cannot exist where a ***statement*** is subject to multiple reasonable interpretations. Here, unusually strong evidence exists of a reasonable interpretation other than the district court's. Another court even found that different interpretation "obvious."

Second, Hulu defends summary judgment of noninfringement by asserting that it wins on claim construction because the patent uses "cache" and "buffer" non-identically. Hulu leaps from that undisputed premise to an unfounded conclusion that a real-world cache cannot meet the definition of a claimed "buffer"—even though the patentee never redefined the plain meaning of "buffer," even though Hulu identifies no statement disavowing real-world caches from the claimed "buffer," and even though Claim 16 does not separately recite both "a buffer" and "a cache." By making that leap, Hulu (like the district court) violates the rule of claim construction

that terms carry their ordinary meaning in the art absent disclaimer or redefinition. Neither Hulu nor its expert nor the district court asserted that the ordinary meaning of buffer excludes storage used for caching—nor could they, as the claim explicitly requires "a buffer . . . to cache." Instead, Hulu and the district court incorrectly focus on whether an ***embodiment's "cache"*** serves as the claimed "buffer," rather than the relevant infringement analysis: can ***real-world temporary storage in Akamai and Level 3's servers***, that their engineers call a "cache," infringe the claimed "buffer"?

Finally, Hulu's attempt to defend the district court's exclusion of SVI's damages analysis based on the Yao and Conviva studies boils down to attempting to recast, as matters of admissibility, Hulu's preferred list of factual distinctions between those studies and the accused products. That is not the test. SVI's technical expert explained why the subject matter of those studies is relevant, providing ample basis for SVI's damages expert to perform his analysis. *Daubert* requires nothing more for admissibility. Indeed, Hulu's brief ***ignores*** applicable Ninth Circuit law, never confronting how the Ninth Circuit ***admitted*** expert testimony that arguably "ignored" and "overlooked very significant differences" in applying data from industry benchmarks to the case. *See Alaska Rent-A-Car, Inc. v. Avis Budget Grp.*, 738 F.3d 960, 969 (9th Cir. 2013).

Far from showing that the decisions below should be affirmed, Hulu's reliance on the same faulty premises shows that this Court should reverse the district court for failing to correctly apply the law.

ARGUMENT

I. Summary Judgment Must Be Vacated Because of Incorrect Claim Constructions.

A. The District Court Incorrectly Found a Single-Buffer Disclaimer That the Applicants Did Not Make.

Contrary to Hulu's arguments, the claim language, prosecution history, and specification do not mandate downloading from, and concurrently retrieving into, the any buffer, much less the "same buffer."

1. The claim language does not support the district court's construction.

The district court incorrectly read a "same buffer" limitation into Claim 16's "downloading… while concurrently retrieving" step, even though the step does not even mention a buffer. Instead, it is the prior "allocating" step that imposes the sole buffer limitation of Claim 16. Specifically, Claim 16 "allocat[es] a buffer… to cache at least a portion of said requested SM object." That buffer has a stated purpose: ***caching*** a first portion, for example, so that first portion will be available for subsequent requests. *See* Appx0176 7:17-31. The claim places no restriction on whether a computer implementing the invention moves or copies that data before "downloading" it in the next step. Importantly, neither the "allocating" step nor the

"downloading" step says that the cached portion must be downloaded to the requesting client from that buffer.

Hulu contends that because the server is downloading the same first portion of data to the client, it "logically follows" that the helper server ***must*** download from the previously allocated buffer (Br. 16). That is not how claim construction works. Claimed method steps do not have to be consecutive, nor is it proper to impose unclaimed limitations to link up claimed steps based on how a real-world implementation could work. *See In re Affinity Labs of Tex., LLC*, 856 F.3d 902, 906, 907 (Fed. Cir. 2017) (holding that a method "comprising" semicolon-separated steps "does not prohibit additional, intervening steps" between claimed steps). Claim 16 is an open-ended method "comprising" steps; there is no grammatical or technical reason why the helper server cannot copy that first portion to another location (e.g., another buffer) before transmitting it to the client, or why the helper server cannot download the first portion to the client from another location and subsequently cache a copy in the buffer. *See* Appx0175 6:52-56 (describing storing the data in memory 45 and disk 47, streaming it to the requesting client, and third, allocating a buffer).

Hulu also argues that "retrieving" must go into the same buffer "as no other buffer is identified in the claim." (Br. 16.) That circular argument assumes its conclusion. Claim 16 does not say where the retrieved remaining portion must go,

let alone in any buffer. Further, what is retrieved is a ***second*** portion ("a **remaining** portion"), whereas the buffer is allocated to cache at least the ***first*** portion.

The claim language does not mandate that any buffer, much less the same buffer, be used for both downloading and retrieving.

2. The applicants' remarks distinguishing DeMoney do not unambiguously disclaim using multiple buffers.

Hulu fails to show that the applicants made a single-buffer disclaimer because its argument turns entirely on portions of DeMoney that the applicants did not discuss or distinguish, rather than parsing the applicants' statements. Hulu has it backwards. Disclaimer is judged by what the applicants said, not what arguments lawyers can reconstruct in hindsight from the cited prior art. *Generation II Orthotics Inc. v. Med. Tech. Inc.*, 263 F.3d 1356, 1366 (Fed. Cir. 2001).

First, Hulu wades deeply into the DeMoney reference beyond the portions actually addressed by the applicants. (*See* Br. 19 (citing DeMoney, Appx4415-4441, at 4:11-13, 12:36-40, 6:52-62, 11:21-54).) Without citing expert testimony, Hulu urges that concurrency alone would fail to distinguish Claim 16 from those newly cited portions of DeMoney unless a "same buffer" limitation is imposed. Critically, the applicants did not distinguish those portions of DeMoney or comment on whether DeMoney had one buffer or multiple buffers being used simultaneously. During prosecution, the applicants quoted only DeMoney's abstract, and cited once to DeMoney at 12:28-40, which the applicants characterized as: "the DeMoney

reference teaches filling the buffer only after the buffer is empty." Appx4410-4411 (underlining in original). And the applicants could not have been trying to distinguish Claim 16 by limiting the invention to using a single buffer, when these remarks referred to "the buffer" in DeMoney.

Hulu's contention that this Court regularly examines the contents of the prior art (Br. 31-32) misunderstands the ***intrinsic*** analysis that this Court has done when faced with alleged disclaimer. In *SpeedTrack, Inc. v. Amazon.com*, 998 F.3d 1373 (Fed. Cir. 2021), the Court considered whether the distinction would differentiate the invention by looking at ***the applicants' characterization*** of the reference being distinguished. *See id.* at 1378-79 (citing prosecution statements where "the applicants explained" their view of Schwartz's hierarchical relationship). Never once in *SpeedTrack* did the Court search the reference to determine how Schwartz's system "really" worked. The opinion does not even cite Schwartz's specification, claims, or figures. *See id.* at 1378-81.

Similarly, Hulu misreads *Vasudevan Software, Inc. v. MicroStrategy, Inc.*, 782 F.3d 671 (Fed. Cir. 2015), which proves the same rule: the touchstone is how ***the applicant characterized*** the prior art to draw his distinction. *See id.* at 679-80 (reviewing applicant's explanation of Jones); *id.* at 680 ("[T]he applicant explained that the databases accessed by Jones relied on common keys. ***The applicant said nothing about*** the databases in Jones lacking record ID columns of similar value or

format."). *Vasudevan* did not do what Hulu urges. The Court did not pincite the Jones reference, did not focus on technical aspects of Jones that the applicant did not argue about, and did not reconstruct a distinction that it thought would be needed for non-obviousness. *See generally id.* at 679-81.

And in *01 Communique Laboratory, Inc. v. LogMeIn, Inc.*, 687 F.3d 1292 (Fed. Cir. 2012), this Court relied on how the patentee's expert in reexamination differentiated the invention, without trying to mine the references to reconstruct a distinction allegedly needed to avoid invalidity, *id.* at 1298 & n.2. Mirroring the present case, the district court in *01 Communique* found a disclaimer requiring use of a "single" computer rather than multiple to perform the claimed steps. *Id.* at 1296, 1298. This Court rejected that construction because "Dr. Ganger did not address" that aspect when distinguishing the art. *Id.* at 1298-300 (reversing construction and vacating summary judgment of noninfringement).

That is how disclaimer works: it is based on what the patentee says about the prior art and his invention, not what another person might claim to find in the prior art. *See id.*; *SanDisk Corp. v. Memorex Prods., Inc.*, 415 F.3d 1278, 1289-90 (Fed. Cir. 2005). True, an applicant need not be as explicit as saying "my invention does not include X" (Br. 27 (citing *Trs. of Columbia Univ. v. Symantec Corp.*, 811 F.3d 1359, 1364 (Fed. Cir. 2016)))—but the disclaimer must nevertheless be "clear and unmistakable" based on what the applicant said. *Avid Tech., Inc. v. Harmonic, Inc.*,

812 F.3d 1040, 1046-47 (Fed. Cir. 2016) (reversing disclaimer because district court "read more into the passage than is clearly there and thus departed from the high standard for finding a disclaimer"). Diving deeply into a prior art reference to identify aspects the applicants did not address goes beyond the applicants' representations, and does not serve the purposes of the doctrine: to "protect[] the public's reliance on definitive statements made during prosecution." *Cf. SanDisk*, 415 F.3d at 1287 (citations omitted).

Hulu fails to distinguish *Generation II Orthotics*. (*See* Br. 31-32.) There, the Court considered ***what the applicant said*** about the Grabowski patent, citing only the first page of Grabowski. 263 F.3d at 1366. Though Hulu asserts that *Generation II Orthotics* similarly analyzed the contents of the prior art (Br. 31), the Court's opinion rested on two crucial points: (1) the applicant did not argue the specific distinction that the defendant argued was needed to avoid ensnaring the prior art, and (2) the Grabowski patent would not anticipate anyway because the claims contained "other differences." *Id.* That is precisely the situation here. The applicants did not argue about the number of buffers or whether concurrency is of a single buffer or of multiple buffers; and DeMoney would not anticipate anyway

because Claim 16 recites retrieval from another helper server or content server, which DeMoney did not have. Appx4411.[1]

Second, even if this Court were to permit prior art analysis (here, without any expert testimony) as an appropriate approach to disclaimer, Hulu is wrong about DeMoney. Aided by hindsight, Hulu infers technical details about concurrency that DeMoney does not disclose. Despite relying heavily on sections of DeMoney that the '213 applicants did not reference, Hulu cannot find any statement in DeMoney that its system ***concurrently*** downloads to the client and retrieves another portion. (*See* Br. 19.) It is not there. Hulu's key technical premise—that DeMoney had "each empty buffer being filled while data is sent from the other buffers in the ring"—is purely attorney argument lacking any pincite to DeMoney, any expert testimony, or any citation to the appendix. (*See id.*)

Although Hulu argues that the "deadline" for refilling a drained buffer in DeMoney is based on "how long it will take to ***concurrently*** empty the other buffers" (Br. 33 (emphasis added)), DeMoney does not say so. Nor does it say that other buffers are being emptied "concurrently." DeMoney's deadline is a maximum time

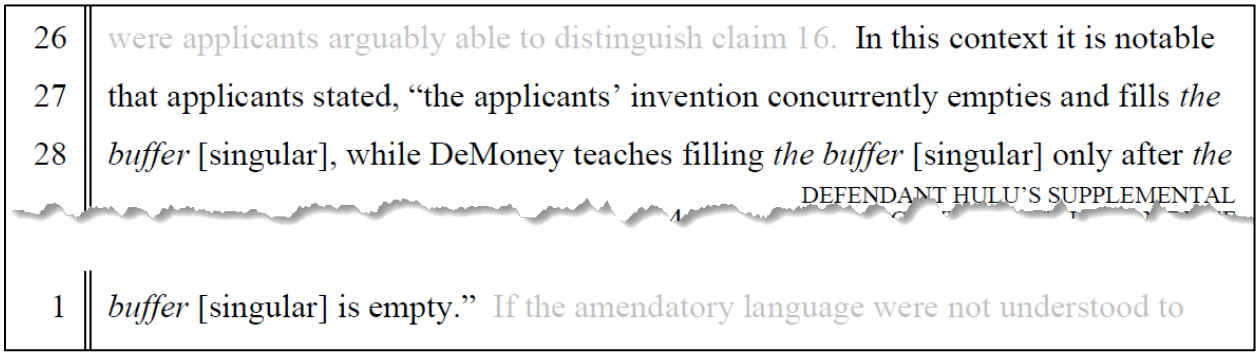
[1] Hulu dodges this second distinction that the '213 applicants emphasized by underlining, arguing that remarks can create many independent disclaimers (Br. 33-34). But that misses the point; the additional distinctions over DeMoney that the applicant cited cut against Hulu's argument that the Court must find another distinction that the applicant did not make to preserve the claim's validity. *Generation II Orthotics*, 263 F.3d at 1366.

for refilling a buffer so that buffer is ready again before all other buffers in the ring are emptied. Appx4429 4:15-21. The deadline can be satisfied by a sequential process, *e.g.*, refilling buffer 1 during a lull, after downloading out of buffer 3 and before downloading data from buffer 4. And this is what DeMoney suggests: satisfying those refill requests "during lulls" of inactivity—*i.e.*, not concurrently. Appx4433 11:28-33 ("The buffer rings 405 exploit the fact that video streaming is inherently sequential and lets the file system pre-queue storage requests. This approach allows future requests to be satisfied during lulls, shifting the load from peaks to valleys and smoothing storage activity over time.").

Even if DeMoney's ring of buffers operated concurrently, nothing in the record suggests that the applicants thought there was any meaningful distinction between DeMoney's ring of buffers (organized as a ring of data segments replaced successively) and a single ring buffer (an exemplary buffer embodiment in the '213 Patent, organized as a ring of data segments replaced successively, *e.g.*, Appx0176 7:20-27, Appx0178 (Claim 1)). Yet the district court's construction assumes that both the applicants and a PHOSITA reading their remarks would find a meaningful difference in such a single-buffer versus multiple-buffers distinction, even though it identified no supporting evidence or expert testimony for that conclusion.

Appx0020.[2] And regardless of how DeMoney functioned, the applicants' statements do not unambiguously show that the number or identity of buffers was the intended point of contrast. *See Cadence Pharms. Inc. v. Exela PharmSci Inc.*, 780 F.3d 1364, 1372-73 (Fed. Cir. 2015).

Third, Hulu re-formats the applicants' words to support its purported disclaimer. To downplay the applicants' literally underlined timing distinction, Hulu un-quotes "once" from "once one of its buffers is consumed" (Appx4411), shifting focus to the singular buffer as if that were the applicants' intended emphasis in quoting DeMoney's abstract. (*See* Br. 21-22.) Hulu relied on the same sort of alterations in the district court, removing the applicants' underlined emphasis and replacing it with Hulu's own chosen emphasis:


were applicants arguably able to distinguish claim 16. In this context it is notable that applicants stated, "the applicants' invention concurrently empties and fills *the buffer* [singular], while DeMoney teaches filling *the buffer* [singular] only after *the buffer* [singular] is empty." If the amendatory language were not understood to

DEFENDANT HULU'S SUPPLEMENTAL

[2] While Hulu relies heavily on extrinsic portions of DeMoney, the district court's claim construction order discussed only the intrinsic evidence and the portion of DeMoney's abstract quoted in the prosecution history. *See* Appx0020-0021. Because it did not resolve factual disputes, its finding of disclaimer amounts to a pure determination of law, reviewed *de novo*. *Shire Dev., LLC v. Watson Pharms., Inc.*, 787 F.3d 1359, 1364 (Fed. Cir. 2015); *id.* at 1368.

Appx4625-4626 (emphasis added by Hulu, ***applicants' original underlining omitted by Hulu***). Hulu's repeated reformatting of the applicants' statements here and in the district court is further proof that Hulu itself believes that the applicants' statements were not clear and unmistakable disavowals. A PHOSITA approaching the prosecution history, however, would see what the applicants themselves chose to underline: matters of concurrency. *See* Appx4411-4412. It is Hulu—not the applicants—that placed weight on the singular form of the words.[3]

Fourth, to sweep aside the District of Delaware finding of no disclaimer, Hulu attacks a strawman issue-preclusion argument (Br. 28-29) rather than confront the relevance of that decision. SVI never argued that one district's construction binds another, or that the Central District of California was "preclude[d]" from deciding differently. Rather, the Delaware opinion is persuasive evidence that the applicants did not unambiguously make Hulu's purported disclaimer. After all, the legal

[3] Hulu points out that the presumption that "a" and "the" include the plural comes from cases about claim language, not prosecution statements. (Br. 27-28.) Still, examiners, prosecuting attorneys, and PHOSITAs read words in patent documents with those rules of construction in mind. And where the standard for disclaimer requires unambiguity, a clear disavowal of using plural buffers would not be buried in the word "the."

Hulu argues alternatively that even if the invention could have more than one buffer, the applicants' remarks would require ***each*** buffer individually to be concurrently emptied and filled. Br. 28. That argument assumes that "the buffer" refers to a singular antecedent. But where the antecedent is plural, "the buffer" refers back to that ***set*** of buffers, not necessarily a singular one among that plurality of buffers. *See Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342 (Fed. Cir. 2008) ("[A]ny later reference… merely reflects the same potential plurality.").

standard for disclaimer is "clear and unmistakable." *Comput. Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1374 (Fed. Cir. 2008). If a learned jurist can conclude that a different interpretation of the applicants' statements is "obvious," Appx4595, that is a strong indication that Hulu's purported disclaimer is not actually "clear and unmistakable."

Fifth, Hulu incorrectly contends that, by identifying a one-buffer embodiment as written description support, the applicants thereby limited the claim to all the aspects of that embodiment, including using "only the single buffer" (Br. 22-23). As SVI observed in its principal brief, the cited embodiment describes two "concurrent process[es]" corresponding to "downloading" and "retrieving," where filling a buffer with the retrieved data is not part of either concurrent process. (Appellant's Br. 33-35 (discussing Appx0176 8:50-61).)

Citing § 112 support does not import all the limitations of the embodiment into the claim when the applicants do not make arguments addressed to those features, such as the number or identity of buffers. *Iridescent Networks, Inc. v. AT&T Mobility, LLC*, 933 F.3d 1345 (Fed. Cir. 2019) does not support Hulu's overgeneralized rule. There, the applicant explicitly used its own definition of a claim term by reference to specific numerical parameters. *Id.* at 1351. That applicant stated:

> 'high QoS (quality of service) ***may be viewed in the present application as*** having speeds varying from

> approximately 1-300 megabits per second, packet loss requirements that are typically about 10-5, and latency requirements that are typically less than one second'

Id. (emphases added); *id.* (noting that the applicant's definition in the prosecution history "are the illustrated parameters… in Figure 3"). The Court found that by relying on those parameters to overcome a rejection and to define a term that had no customary meaning, the applicant limited the term to the stated numerical requirements. *Id.* at 1351-52. By contrast, despite excerpting the specification, the '213 applicants did not argue about the criticality of a ***single*** buffer in the Figure 7B embodiment—instead, the applicants emphasized the simultaneous timing that the embodiment illustrates. Appx4412. Absent words of manifest limitation, unclaimed features of Figure 7B, like its single buffer, do not limit the claims.

As a fallback, Hulu resorts to the alternative argument that, even absent disclaimer, the single-buffer embodiment and the applicants' remarks require the construction. (Br. 24.) That "disclaimer-lite" theory of claim construction would vitiate the high standard for disclaimer and convert embodiments into claim limitations. None of Hulu's cases go that far. In *Trustees of Columbia University*, the applicant had done more: statements emphasizing an advantageous feature of the invention were held to be definitional, "not simply descriptions of the preferred embodiment." *Columbia Univ.*, 811 F.3d at 1365. Here, nothing in the intrinsic record emphasizes using the same versus different buffers, or one versus multiple

buffers, as a benefit of the invention. Absent lexicography or disclaimer, the claims are not limited by the embodiments. *E.g.*, *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898, 906 (Fed. Cir. 2004). Hulu does not provide a reason to give embodiments and ambiguous statements the same effect as disclaimer, and this Court should not accept the invitation to dilute that standard.

3. Without the district court's "same buffer" construction, summary judgment must be vacated.

Without the "same buffer" requirement, no issue turns on whether an Akamai or Level 3 server's cache used for Hulu's content can be that "same buffer." (Appellant's Br. 35 n.6.) The only buffer that appears in the claim is in the "allocating" step, and Hulu admitted when moving for summary judgment that its CDN edge servers do allocate buffers to cache portions of requested SM objects. *See* Appx3596 ¶17 ("Akamai's edge servers cache [redacted (1)] in its own ***allocated buffer***."), Appx3598-3599 ¶¶24-25 ("Edge servers on Level 3's CDN… ***allocate buffers***… to store [redacted (2)]" of a requested multimedia object). Therefore, the Court should reverse the finding of disclaimer and vacate summary judgment.

B. The District Court Incorrectly Granted Summary Judgment Based on an Erroneous Construction That Excluded All Caches.

Hulu insists that the district court was not required to state any construction beyond determining as a matter of law that nothing called a cache can be within the

(1): data structure in accused CDN's system
(2): data structure in accused CDN's system

scope of "buffer." (*See* Br. 38, 42-43.) Permitting that form of summary judgment would abolish the required two-step process of first determining claim scope (question of law), then assessing that meaning against facts about the accused product (question of fact). Rather than set forth affirmative meanings of words and phrases, courts would be free to decide, "I do not know what the term means, but it cannot be this." That shortcut—which risks usurping the jury's role of measuring facts against properly construed claims—is reserved for those situations where "express disclaimer or independent lexicography" requires such an exclusion—a situation that does not apply here. *Ethicon*, 847 F. App'x at 907.

Hulu does not identify any case where this Court affirmed a ***grant*** of summary judgment that ruled for one side's view of claim scope without stating what the dispositive construction is.[4] In all its cases—*Eon Corp.*, *O2 Micro*, *Summit 6*, and *Bayer Healthcare*—the district court allowed the case to be tried. *See Eon Corp. IP Holdings v. Silver Spring Networks*, 815 F.3d 1314, 1316 (Fed. Cir. 2016); *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008); (Appellant's Br. 40 & n.8 (distinguishing *Summit 6* and *Bayer Healthcare*)).

[4] Hulu recasts the procedural history by arguing that the "same buffer" distinction was actually the case-dispositive claim construction. (Br. 37-38.) But at summary judgment, the court obviously believed the dispute over the scope of "buffer" was the dispositive issue it needed to rule on. Appx0006.

Hulu further argues that the district court did not apply an "unstated construction" (Br. 44), did not adopt a negative limitation (Br. 45), did not need to find express disavowal (Br. 47), and did not further construe the term (Br. 43). Unsurprisingly, Hulu has a hard time finding terminology for whatever doctrine the district court applied to conclude that no caches can ever be a buffer. The court's construction fails under each of the rubrics of claim construction.

1. Hulu, like the district court, fails to articulate a plain meaning of "buffer."

Hulu's brief attacks SVI's plain meaning of "buffer"—"temporary storage for data being sent or received"—as vague and overbroad, but does not offer an alternative. The district court provided none. Appx0008. And Hulu does not identify what specific portion of SVI's definition misstates the ordinary meaning in the art.

Breadth is not vagueness. Here, the definition captures the essential characteristics of a buffer: (1) it is for temporary rather than permanent storage, and (2) it is used to hold data that is being sent or received. (*See* Appellant's Br. 44.) This is the well-supported meaning of the term in the art, as, for example, Newton's Telecom Dictionary suggests. Appx3977; Appellant's Br. 47-48. SVI's definition is strikingly consistent with cases imparting meaning to the word "buffer." In *TiVo, Inc. v. EchoStar Commc'ns Corp.*, 516 F.3d 1290 (Fed. Cir. 2008), for example, this Court's opinion repeatedly referred to a "temporary data storage buffer," reflecting

the same essential characteristics of a buffer that SVI's construction captures. *See id.* at 1309-10; *see also Flash-Control, LLC v. Intel Corp.*, No. 2020-2141, 2021 WL 2944592, at *1 (Fed. Cir. July 14, 2021) (equating "a temporary storage location" with "'buffer'").

Next, Hulu takes issue with the idea that the plain meaning would sweep in all data storage, or the entire helper server, the client devices, and other components. (Br. 48-49.) That is a strawman. SVI has not accused entire computers or helper servers as a "buffer." Of course, each of those devices could have its own buffers. *See, e.g.*, Appx0176 8:12-14 (playout buffers at clients), Appx0176 8:52 (playout buffer at helper servers). And those buffers could exist in various forms of physical memory, such as main memory (random-access memory), flash memory, disk memory, or others. Appx3990 ¶5. That is the deserved breadth of the term, in view of the diversity of buffers in the art. *See id.*; Appx3795-3796 ¶101 (Hulu's expert, stating that such structures are "ubiquitous").

Contrary to Hulu's argument, the patent and the conventional meaning in the art do not require a particular physical form of memory, such as random-access memory, for a buffer.[5] True, the specification discloses "***ring*** buffers in the memory of the HS." (Br. 47 (emphasis added).) And other passages refer to a memory buffer. (*See* Appellant's Br. 46-47.) Those examples of a specific type of buffer do not

[5] The district court did not adopt such a construction, either. Appx0008.

redefine all buffers to be limited to memory. Other claims are careful to explicitly add maintaining ring buffers "in the memory" or de-allocating them "from the memory" when a particular physical medium is required precisely because the term "buffer" alone does not carry such restrictions. *See* Appx0178 (Claim 1), Appx0179 (Claim 11).

2. Hulu, like the district court, fails to identify any lexicography of "buffer" or disclaimer excluding caches from "buffer."

Hulu cannot properly support the district court's conclusion that a buffer excludes temporary storage used for caching, unless Hulu identifies in the patent a redefinition or disclaimer warranting such a construction. *Ethicon LLC v. Intuitive Surgical, Inc.*, 847 F. App'x 901, 907-08 (Fed. Cir. 2021); *see also Thorner v. Sony Comput. Entm't Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012). Hulu's opposition brief fails to identify such evidence.

First, Hulu asserts that the written description "provide[s] an express lexicography for buffers and the cache." (Br. 47.) That is untrue as to buffers. The '213 Patent provides ***no*** lexicography for "buffer" whether in its "terms and definitions" section or anywhere else. *See* Appx0174 4:5-30. Hulu's brief also does not identify where the alleged lexicography of "buffer" is found. The question is not whether the patent defines "cache"—the thing purportedly excluded—but whether the patent defines "***buffer***"—the disputed term recited in Claim 16—to exclude a

cache. *See Ethicon*, 847 F. App'x at 907. And, defining the '213 Patent's "cache" (as a noun) to be on disk does not logically or technologically preclude some buffer from being located on disk.

Hulu argues that contrasts between the "distinct meanings of 'cache' and 'buffer'" in the specification are sufficient to show mutually exclusive meaning. (Br. 47.) It dismisses intrinsic statements that evince overlapping meanings. (*But see* Appellant's Br. 43.) As it did in the district court, Hulu relies heavily on embodiments that contain both buffers and caches, like Figure 9. (*See* Appellee Br. 47, 50.) That misapprehends the invention. Figure 9 is an RTSP/RTP embodiment that facially supports Claim ***17***. *Compare* Appx0171 *with* Appx0179 (Claim 17). The RTSP/RTP embodiment has both buffers and caches, just as Claim 17 claims means relating to buffers and caches—but ***Claim 16 does not recite a separate cache.*** *See infra* p. 21. In lieu of a separate cache, Claim 16 says "a buffer… to cache…," at least indicating that the "buffer" acts as a cache. Hulu does not explain why the features of the RTSP/RTP embodiment requires excluding caches from Claim 16's differently constituted buffers.

Moreover, *Ethicon* rejected precisely the same type of inference. The separateness of two components in embodiments "does not necessarily support reading that arrangement or structure into the claims absent express claim language requiring as much." 847 F. App'x at 907. Even though "rotary drive" and "trigger"

were consistently described as separate and different components, *Ethicon* refused to infer that the term "rotary drive" "exclude[s] a trigger" from its scope. *Id.* The same applies here: even if the Figure 9 embodiment depicts buffers and caches as separate components, that does not mean that the patent redefined "buffer" from its normal meaning to one that excludes a cache.

3. Claim 16 does not claim both a buffer and a cache, so there is no rule preventing a real-world storage location labelled a "cache" from being the buffer.

A "cache" (as a noun) is not claimed. No infringement issue depends on satisfying the '213 Patent's definition of a cache, so any intrinsic discussion of caches sheds no light on whether a real-world Akamai or Level 3 "cache" can constitute the claimed buffer in Claim 16. *Cf. Becton, Dickinson & Co. v. Tyco Healthcare Grp.*, 616 F.3d 1249, 1254 (Fed. Cir. 2010) ("***Where a claim lists elements separately,*** 'the clear implication of the claim language' is that those elements are 'distinct component[s].'" (emphasis added)). It is not as if the temporary storage in the real-world Akamai and Level 3 edge servers is serving double-duty for two components of claim 16. Instead, the edge servers' caches are mapped only to one element: the "buffer" allocated "to cache."

4. Summary judgment must be vacated.

Summary judgment based on an erroneous claim construction must be vacated. *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305 (Fed. Cir.

1999). Hulu offers no contrary law, instead asserting a different basis for noninfringement that the district court did not decide. (*See* Br. 51-52.) Hulu's alternative grounds that the accused systems do not perform another claim step ("allocating a buffer…") cannot support affirmance on this record. Its new argument was not the basis of Hulu's summary judgment motion below. *See* Appx3581, 3583-3589.

This is a court of review, not of first view. *See Fireman's Fund Ins. Co. v. United States*, 909 F.2d 495, 499 (Fed. Cir. 1990). While Hulu included arguments about allocation to support its claim construction argument about what a buffer means, the lower court did not pass judgment on that theory. *See* Appx0008.[6] Affirmance on alternative grounds is usually limited to fully briefed pure issues of law, such as dispositive claim constructions. *Glaxo Grp. v. TorPharm, Inc.*, 153 F.3d 1366, 1371, 1373-74 (Fed. Cir. 1998). Here, there is enough to raise a triable issue of fact on whether the accused systems perform the "allocating" step if caches can be the buffers.[7] For example, Hulu represented that Level 3 servers "allocate a

[6] To justify its decision about the scope of "buffer," the district court stated that a cache "could not necessarily be 'allocated' in the same manner as a buffer." Appx0008. The district court did not take up Hulu's invitation—first raised in a supplemental brief—to find noninfringement because of that step. *See* Appx3997-3998.

[7] Per local court rules, the parties excerpted and redacted exhibits to trim them to the issues pertinent to then-live disputes. Because the "allocating" step was not Hulu's basis for noninfringement, the record lacks some testimony and documents relevant to that issue. For example, the excerpted Knox deposition transcript in the summary

different portion of the cache for [redacted (3)]" (Appx3586); for Akamai, Dr. Richardson explained that pieces of streaming multimedia are "stored in the Akamai edge server's cache by allocating portion(s) of disk memory to store the [redacted (4)]" (Appx3930 ¶402); and Dr. Richardson identifies deposition testimony relating to allocation (Appx3928-3929).

If this Court determines that the claimed "buffer" does not necessarily exclude all caches (e.g., those in Akamai's and Level 3's edge servers), it should vacate summary judgment and remand for further proceedings.

II. The Orders Excluding Damages Opinions Should Be Reversed.

Hulu's defense of the district court's analysis boils down to the notion that there are many factual differences between the Yao study and Conviva press release that SVI's experts did not address, and that although SVI's experts addressed why Yao and Conviva are relevant, they did not address every difference Hulu identified. That is not the *Daubert* standard for admissibility, and is not the Ninth Circuit's substantive test.

Regional circuit law governs exclusion of expert testimony. *Sundance, Inc. v. DeMonte Fabricating Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2008). Hulu's brief ignores Ninth Circuit law, particularly a contrary holding in *Alaska Rent-A-Car v.*

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judgment record (Appx3870-3874) omits a four-page discourse about the allocation of storage on disk, involving a file system, files, and whether other objects can be stored in the same location once that portion of disk has been used.

(3): data structure in accused CDN's system
(4): data structure in accused CDN's system

Avis Budget Grp., 738 F.3d 960 (9th Cir. 2013). (*See* Appellant's Br. 52-53, 56 n.12.) In that case, the defendant sought exclusion because an expert's extrapolation from a local rental car market to the statewide rental car market arguably "***ignored the differences***," and the expert's extrapolation from a national market similarly "***overlooked very significant differences***" between how the national and Alaska markets worked. 738 F.3d at 968-69 (emphases added). The Ninth Circuit rejected those reasons for exclusion, because such arguments "amount to impeachment," and "none go to admissibility." *Id.* at 969.

Hulu's arguments are no different. Just as *Alaska Rent-A-Car* allowed an expert to apply data from an aggregate statistic to a specific area—despite allegedly "significant differences" that the expert did not address—Mr. Yurkerwich (SVI's damages expert) is permitted to apply those aggregate statistics to Hulu without first having to defend each purported distinction.

Expert testimony just requires "a valid connection to the pertinent inquiry." *City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1044 (9th Cir. 2014). That is a low bar: it does not mean the expert has to have an explanation for everything, just that he has at least a rationale for connecting the present case to the comparator. *See Alaska Rent-A-Car*, 738 F.3d at 969-70. So long as the expert has a rationale and is not connecting the case "to existing data only by… *ipse dixit*," *Daubert* does not require exclusion. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

The district court here abused its discretion because it demanded far more: that an expert have answers ex ante for each distinction the other side raises.

A. Mr. Yurkerwich's Opinions About the Yao Study Are Admissible Because He Provided A Valid Connection to the Case Based on Dr. Richardson's Technical Opinions, Even If Mr. Yurkerwich Did Not Preemptively Refute Hulu's Factual Differences.

Nothing in Hulu's brief denies the essential facts that support admissibility of the damages opinion based on the Yao study: SVI's technical expert opined why Yao's findings are of technical relevance and comparable to the benefits of the invention, and SVI's damages expert relied on that technical analysis to apply the Yao study in a damages analysis. Those unchallenged facts are the key to admissibility. *See Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1316 (Fed. Cir. 2014) (finding that damages expert's extrapolation from trackpad to touchscreen was "supported by the testimony of one of Apple's technical experts… who concluded that the touch gestures of the Trackpad are 'comparable or similar' to the claimed features").

Dr. Richardson (SVI's technical expert) provided technical reasons why Yao's findings apply to Hulu: Yao studied the same quality and buffering benefits, represented the same delta between adaptive bitrate ("ABR") and non-ABR that Hulu would face if it had to switch to a noninfringing alternative (non-ABR), and its experimental setup did not prevent its findings from being useful in the context of Hulu's infringement. (*See* Appellant's Br. 53; Appx2640-2642 ¶¶857-864.) That is

all the basis *Daubert* requires for Mr. Yurkerwich to rely on the Yao study: the opinions are not connected by Dr. Richardson's say-so, or Mr. Yurkerwich's say-so, but instead by a valid rationale explicitly laid out in their expert reports. Hulu does not dispute that Yao studied similar technical advantages as the invention for improving stream quality and avoiding buffering. (*See* Br. 55-56; Appx3175; Appx3178.)

According to Hulu, none of that is sufficient: instead, SVI's experts had to have an explanation for all factual "differences" Hulu could pick out—such as where in the world Yao conducted his study, what type of device was used, and what sort of cellular or wired signal was used. (Br. 57-58 & n.5.) This erects an impossible hurdle: a plaintiff's expert would be forced to pre-but all conceivable distinctions just to present an admissible opinion. And Hulu's approach would make all disputes about the factual closeness of the underlying data into issues of admissibility, not weight. The proper way to address allegedly shaky evidence is for Hulu to present contrary evidence and cross-examine, not for the court to exclude it.[8]

The district court abused its discretion by excluding Mr. Yurkerwich's use of the Yao study.

[8] On appeal, Hulu newly argues that "Sound View does not dispute" that Mr. Yurkerwich "failed to" address the impact of the invention on Hulu's streaming platform in the U.S. (Br. 57.) That is incorrect. Mr. Yurkerwich ***combined*** Yao's findings with actual Hulu data about re-buffering events, to estimate the effect on buffering events for Hulu specifically. Appx3250.

B. Mr. Yurkerwich's Opinions About the Conviva Analysis Are Admissible Because He Provided A Valid Connection to the Case Based on Dr. Richardson's Technical Opinions.

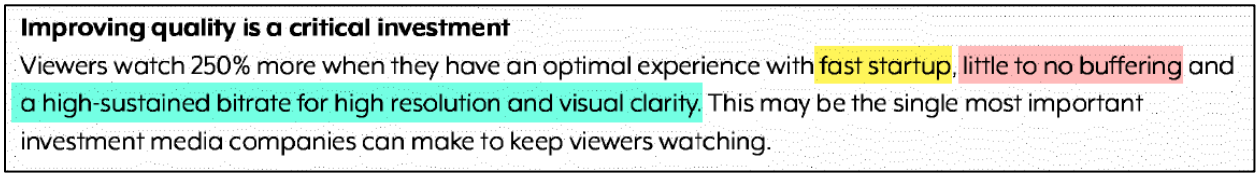
1. Conviva's analysis is sufficiently tied to the facts of this case because Conviva attributed an increase in viewership to the same technical advantages as the invention.

Mr. Yurkerwich's use of the Conviva analysis similarly provides a valid connection for why those statistics are relevant: the press release attributed the 250% increase in viewership to ***the same benefits*** as the "benefits of the '213 patent according to Dr. Richardson," and was published by the same company that Hulu hired to quantify those benefits. *See* Appx3455 ¶267 (citing Dr. Richardson's infringement report for the benefits); Appellant's Br. 61-62. Hulu dismisses that connection as "post hoc reasoning" because (1) Mr. Yurkerwich did not again consult with the technical expert, Dr. Richardson, specifically about Conviva once the district court granted leave for Mr. Yurkerwich to supplement his analysis to replace the Yao study (Br. 61), and (2) the increase in viewership could be due to "other benefits which Mr. Yurkerwich ignored" (Br. 62). Hulu is wrong on both points.

Hulu's first argument presupposes that a damages expert may not rely on any study that the technical expert has not specifically opined on, even if the technical expert has opined on the relevance of the same benefits that study addresses. This demands a technicality *Daubert* does not impose. Damages experts are regularly tasked with quantifying the benefits or footprint of an invention, in reliance on

general technical opinions about what those benefits are. *Cf. Eidos Display, LLC v. Chi Mei Innolux Corp.*, No. 6:11-CV-00201-JRG, 2017 WL 1079441, at *3-4 (E.D. Tex. Mar. 22, 2017) (noting that technical expert's role was to provide opinions "regarding the technical advantages and benefits of the claimed technology," whereas the "economic analysis" must rest with the damages expert); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp. 1116, 1120 (S.D.N.Y. 1970) (considering in a damages analysis the "utility and advantages" of the invention and "the benefits to those who have used the invention" (factors 9-10)). Mr. Yurkerwich did that here, and *Daubert* does not make that a basis for exclusion.

Hulu's second argument that the Conviva press release "still lists other benefits" is wrong on the facts and the law. The press release connected only three benefits to the statistic of "250% more" viewership:


Improving quality is a critical investment
Viewers watch 250% more when they have an optimal experience with fast startup, little to no buffering and a high-sustained bitrate for high resolution and visual clarity. This may be the single most important investment media companies can make to keep viewers watching.

Appx3327 (highlighted); Appellant's Br. 62. Hulu's argument also fails as a matter of law. To be admissible, an opinion need not refute all potential distinctions that allegedly undermine it. *Alaska Rent-A-Car*, 738 F.3d at 969 ("Basically, the judge is supposed to screen the jury from unreliable nonsense opinions, but not exclude opinions merely because they are impeachable."). "Vigorous cross-examination" and the "presentation of contrary evidence" are the "appropriate means of attacking

shaky but admissible evidence." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993).

Therefore, Mr. Yurkerwich's application of Conviva's findings to the case is admissible.

2. Mr. Yurkerwich's methodology is not unreliable just because he used Conviva's press release rather than the report it summarized.

Hulu's aspersions about Mr. Yurkerwich using a press release instead of the Conviva report itself are not grounds for exclusion. (Br. 59.) The record shows why: the underlying report was no longer available, and Mr. Yurkerwich testified that he attempted but was unable to retrieve the full report himself, or through counsel. Appx3421-3422. Hulu's expert could not obtain the report either. Appx3363. The press release was the best available information about the study, and it corroborated the connection between Conviva's findings of increased viewership and the technical benefits of the '213 invention.

Hulu further faults Mr. Yurkerwich for applying industry-level data from Conviva's global analysis rather than a Hulu-specific data point. (Br. 60-61.) But that is blaming Mr. Yurkerwich for lacking data that was in Hulu's control. SVI requested, in discovery, the Hulu-specific report from Conviva underlying the finding in Hulu's documents that Hulu's users watched [redacted (5)] content with adaptive bitrate streaming, and followed up in correspondence in June 2018 at

(5): party's internal comparison of users' watch time

least three times about those metrics. Hulu never produced that Hulu-specific Conviva report. *See, e.g.*, Appx3419-3420 ("we don't have the data"). Because the Hulu-specific Conviva analysis was not available, Mr. Yurkerwich reasonably turned to the next best-available data, Conviva's worldwide study.

* * *

In sum, the district court's evidentiary exclusions were an abuse of discretion.

CONCLUSION

SVI respectfully requests that this Court vacate summary judgment of noninfringement, reverse the exclusions-in-part of Mr. Yurkerwich's testimony, and remand for further proceedings.

December 17, 2021

Respectfully submitted,

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FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2021-1998

Short Case Caption: Sound View Innovations, LLC v. Hulu, LLC

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FORM 31. Certificate of Confidential Material **Form 31**
July 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF CONFIDENTIAL MATERIAL

Case Number: 2021-1998

Short Case Caption: Sound View Innovations, LLC v. Hulu, LLC

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