

No. _____

In the Supreme Court of the United States

COMCAST CABLE COMMUNICATIONS, LLC, PETITIONER

v.

WHEREVERTV, INC., RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a court of appeals may override the principle of party presentation by deciding *sua sponte* a non-jurisdictional issue that a party deliberately waived.

(i)

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states that Comcast Cable Communications, LLC, is a wholly owned, indirect subsidiary of Comcast Corporation and no other publicly held corporation owns 10% or more of the stock of petitioner.

(ii)

RELATED PROCEEDINGS

Patent Trial and Appeal Board:

Comcast Cable Commc'ns, LLC v. WhereverTV, Inc.,
No. 19-01482 (Mar. 3, 2020).

Comcast Cable Commc'ns, LLC v. WhereverTV, Inc.,
No. 19-01483 (Mar. 3, 2020).

United States District Court for the Middle District of Florida:

WhereverTV, Inc. v. Comcast Cable Commc'ns, LLC,
No. 18-cv-529 (June 5, 2023).

United States Court of Appeals for the Federal Circuit:

WhereverTV, Inc. v. Comcast Cable Commc'ns, LLC,
No. 23-cv-2098 (July 28, 2025).

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OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (App. 1a-22a) is unpublished but is reported at 2025 WL 2101946. The bench ruling and written order of the District Court for the Middle District of Florida (App. 23a-43a; App. 44a-46a) are unpublished, but the written order is reported at 2023 WL 3819123.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2025. App. 1a. The court of appeals denied a timely petition for rehearing on October 10, 2025. App. 59a-60a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

INTRODUCTION

This case presents a square conflict over an important question of appellate procedure: Whether a court of appeals may override the principle of party presentation by deciding *sua sponte* a non-jurisdictional issue that a party deliberately waived.

In the decision below, the Federal Circuit—which, along with one other circuit, holds that “it is a discretionary decision to forgive waivers of non-jurisdictional challenges,” *Ciena Corp. v. Oyster Optics, LLC*, 958 F.3d 1157, 1161 (Fed. Cir. 2020)—*sua sponte* raised and resolved the appeal on an issue that neither party presented or briefed and that respondent WhereverTV, Inc. deliberately and repeatedly waived. App. 1a-22a. The court went so far as to hold that the district court “legally erred” by not addressing the waived issue. App. 12a. Had this appeal arisen in the Eleventh Circuit or one of three others holding that “courts must respect” when “a party affirmatively and intentionally relinquishes an issue,” it would have come out the other way. *United States v. Campbell*, 26 F.4th 860, 872 (11th Cir. 2022) (en banc). The same is likely true had this appeal arisen in the remaining seven circuits, although they apply different standards to override waiver in limited circumstances: WhereverTV’s deliberate waiver would have been respected and petitioner Comcast Cable Communications, LLC would have prevailed.

The Federal Circuit’s approach to waiver cannot be reconciled with this Court’s precedents and the party presentation principle. “[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” *United States v. Sineneng-Smith*, 590 U.S. 371, 375

(2020) (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). “If a party passes up what seems to us a promising argument, we do not assume the role of advocate.” *Trump v. Illinois*, No. 25-443, 2025 WL 3715211, *1 (U.S. Dec. 23, 2025) (Alito, J., dissenting). Where a party deliberately chooses to withdraw an issue from the court’s cognizance, the court “abuse[s] its discretion” by addressing it. *Wood v. Milyard*, 566 U.S. 463, 466 (2012).

The Federal Circuit’s drastic departure from the party presentation principle and the courts of appeals’ divergent approaches to the question presented call for this Court’s review.

STATEMENT OF THE CASE

1. Petitioner Comcast Cable Communications, LLC is one of the nation’s largest providers of broadband, wireless, video, and voice services. App. 24a. Under the Xfinity banner, Comcast’s X1 entertainment system provides users with a cloud-based interactive program guide that allows them to access and watch media made available by Comcast. *Ibid.*

Respondent WhereverTV, Inc. is a largely defunct television company that owns U.S. Patent No. 8,656,431, titled “Global Interactive Program Guide Application and Device.” App. 2a. Aiming to free customers from a “content middleman,” like Comcast, “who limits or controls what content is available,” WhereverTV’s patented device allows users to “add, delete programming channels in ‘real-time’ that might not be available through subscribed to” cable companies. Resp. C.A. Br. 6-7 (quoting ’431 patent col. 2, 41-43); see App. 18a. Through a fully “portable set top box,” it allows users to do so “anywhere in the world”—hence the name

WhereverTV. See Pet. C.A. Br. 50 (quoting '431 patent col. 7, 29-30); App. 2a.

The key features of the invention are required by claim 1 of WhereverTV's patent (the sole claim at issue). Claim 1 covers a "content manager device comprising," among other limitations, "an interactive program guide application installed on the device that provides a user-configurable interactive program guide (IPG)"—the so-called "installed on the device" limitation—that "allows for the IPG to be configured by a user with respect to adding or deleting channels"—the so-called "adding or deleting" limitation. App. 4a-5a (quoting '431 patent col. 16 ll. 32-54).

2. WhereverTV sued Comcast for infringement, alleging that Comcast's X1 entertainment system infringed WhereverTV's patent. App. 5a. Because WhereverTV alleged literal infringement, it had to show that the "accused device contains *each and every limitation* of the asserted claims." *SIMO Holdings Inc. v. H.K. uCloudlink Network Tech. Ltd.*, 983 F.3d 1367, 1380 (Fed. Cir. 2021) (quoting *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1201, 1215 (Fed. Cir. 2014)). WhereverTV thus had to prove that Comcast's X1 system satisfied both of the two limitations relevant to this petition: Namely, that the X1 system had "an interactive program guide application installed on the device,"—*i.e.*, on the X1 system's set-top box—that provides an interactive program guide, and that the X1 guide could be "configured by a user with respect to adding or deleting channels." App. 9a.

There are "two elements of a simple patent case, construing the patent and determining whether infringement occurred." *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996). The first element—called

“claim construction”—can involve a “mongrel practice” where the parties call on a court to resolve disputes about the meaning of the patent claim’s terms. *Id.* at 378. If called upon, the court may, for example, “consult extrinsic evidence in order to understand … the background science or the meaning of a term in the relevant art during the relevant time period.” *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 331 (2015). Often, however, the parties or the court will determine that no claim construction is needed. See *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008) (“[D]istrict courts are not (and should not be) required to construe *every* limitation present in a patent’s asserted claims.”).

The construction (or not) of the claims, in turn, “dictates how the court will instruct the jury regarding a claim’s scope.” *Id.* at 1359. The second element of a patent case—the determination of whether the accused device meets the patent’s limitations—is based on the patent’s claims as construed (or not) by the court. *Markman*, 517 U.S. at 384.

In this case, WhereverTV deliberately declined to seek construction of the patent’s two relevant limitations. See App. 30a, 47a-58a. WhereverTV knowingly, deliberately, and repeatedly urged the district court *not* to construe those claim limitations and instead to use the language of the patent itself to set the standard by which infringement would be assessed. See generally *Akamai Techs., Inc. v. MediaPointe, Inc.*, 159 F.4th 1370, 1380 (Fed. Cir. 2025) (“When a claim limitation[] … is not expressly construed, a jury is entitled to give that limitation any *reasonable* meaning in determining, as a factual matter, what comes within its scope.”).

WhereverTV never proposed a construction of either limitation and insisted that claim construction was not needed. At the *Markman* stage, WhereverTV advocated that the language of both limitations should be read to the jury as is. App. 51a-53a & n.4; see Resp. C.A. Br. 17-19. WhereverTV did so in the face of local rules requiring parties to exchange “proposed interpretation[s]” and to submit a joint statement to the court identifying any “disputed claim term[s]” for judicial resolution. See M. D. Fla. Case Management Order for Patent Cases. Neither party proposed a construction of the “installed on the device” limitation—thus agreeing that the patent’s text could be used as the standard for determining infringement without elaboration from the court. App. 47a-58a; Resp. C.A. Br. 18. And WhereverTV opposed Comcast’s proposal for construction of the “adding or deleting” limitation. App. 56a. After briefing and a hearing, which included expert testimony, the district court adopted WhereverTV’s position and did not construe either of the two relevant limitations. App. 56a; see Resp. C.A. Br. 18-19 (The district court “correctly decided that [the ‘adding or deleting’] limitation does not need construction.”).

The parties accordingly proceeded to a weeklong trial on the second element of a patent case, “determining whether infringement occurred.” *Markman*, 517 U.S. at 384. Because the district court—at WhereverTV’s insistence—did not construe either limitation, the text of WhereverTV’s patent provided the standard by which infringement would be judged.

After the close of evidence, the district court granted judgment as a matter of law to Comcast. App. 44a-46a. The court applied the plain text of the “installed on the device” and “adding or deleting” limitations and held

there was insufficient evidence for a jury to find infringement of either limitation. The court’s reasoning—initially provided from the bench, App. 44a-46a, and later reduced to a written order, App. 23a-43a—was straightforward. As to the “installed on the device” limitation, the court recounted evidence showing that Comcast’s interactive program guide application “is installed and runs ‘on servers in the cloud,’” and thus “is not installed on the device (the set-top box).” App. 40a. As for the “adding or deleting” limitation, the court described evidence “regarding the rigidity of [Comcast’s] X1’s [guide] display and the immutability of the channel listings provided by Comcast,” which inhibits “a user’s ability to add or delete channels.” App. 36a-37a; see *ibid.* (Comcast’s X1 system is “in no way identical to the ... invention described in the [] Patent specification”).

The district court, in its written decision, made clear that it had not engaged in claim construction and emphasized that WhereverTV had waived the issue. See App. 30a (“WTV stated that the Court should use the plain and ordinary meaning of ‘adding or deleting.’”); App. 38a (“WTV suggested that this term [IPG] should have a ‘plain and ordinary meaning’”). It observed that “[o]n two separate occasions” before trial WhereverTV “had the opportunity to move the Court to construe” the claim terms, yet “did not do so on either occasion.” App. 30a; see App. 47a-58a (order on claim construction). “Nor did either party move to have the [limitations] construed during trial.” App. 30a-31a. Indeed, WhereverTV, in opposing Comcast’s motion for judgment as a matter of law, asked for the jury to weigh the evidence against the plain language of the claim and argued that *Comcast* improperly sought claim construction. App. 33a, 38a. For its part, Comcast agreed that claim

construction was unnecessary and inappropriate at that stage. App. 30a-31a. As Comcast saw it, WhereverTV could not avoid judgment as a matter of law on the patent's plain language; the only way that the case could be properly submitted to the jury was if the claims meant something else entirely. App. 31a n.3. The district court honored WhereverTV's deliberate waiver and ruled on the only question before it, finding the evidence insufficient to prove infringement.

3. On appeal to the Federal Circuit, WhereverTV challenged only the district court's determination that the evidence did not suffice to show that Comcast's X1 system infringed the two limitations as written.¹ WhereverTV stressed that it never sought claim construction of either limitation and argued that the district court erred by improperly engaging in claim construction. Resp. C.A. Br. 31-32; see Resp. C.A. Br. 31 ("Neither party proposed a construction for IPG application because none was needed."); Resp. C.A. Br. 47 ("No construction was needed because adding channels is familiar to anyone who has subscribed to cable television"). Comcast agreed with WhereverTV that the sole question presented to the court of appeals was whether the evidence sufficed to prove infringement applying the plain text of the relevant limitations without further construction. Pet. C.A. Br. 42-46, 52-56.

The Federal Circuit vacated and remanded. App. 22a. But the panel did not address the issue presented

¹ Comcast asserted an alternative ground for affirmance relating to a different claim limitation and cross-appealed on an issue regarding the patent's validity. Pet. C.A. Br. 58-70. The Federal Circuit rejected both of Comcast's arguments, App. 18a-22a, and Comcast does not seek review of those independent issues.

by the parties: Whether the evidence sufficed to show infringement of the patent as written. Nor did the Federal Circuit accept WhereverTV’s argument that the district court erred by *engaging in* claim construction in its judgment as a matter of law decision. Instead, the Federal Circuit addressed an issue neither party raised or briefed and that WhereverTV had repeatedly argued against—whether claim construction was needed—and held that “[t]he district court legally erred by not construing th[e] limitation[s].” App. 12a.

The Federal Circuit then engaged in partial claim construction itself—without proposed constructions or briefing from the parties, or a decision on the issue from the district court. App. 15a-18a. First, the panel held that the claim language “interactive program guide application installed on the device” “does not require that all the functionality of the IPG must reside in the claimed IPG application” on the device; “it is sufficient that the IPG application provide an IPG in coordination with [a] server.” App. 15a. Second, the panel held that “adding or deleting channels” can be accomplished by “subscribing and … unsubscribing” to channels in the program guide, even though such channels appear in the guide before they are “added” and remain there after they are “deleted.” App. 17a-18a. The Federal Circuit did so notwithstanding the fact that WhereverTV never proposed these—or any other—constructions of either limitation and instead successfully urged the district court to not engage in claim construction and apply the plain language of WhereverTV’s own patent.

Comcast petitioned for panel and en banc rehearing, arguing that the panel erred by engaging in *sua sponte* consideration of an issue that neither party raised and

that WhereverTV had deliberately waived. C.A. Pet. for Reh'g 11. Rehearing was denied. App. 59a-60a.

REASONS FOR GRANTING THE PETITION

I. There is a Deep and Entrenched Circuit Split

The circuits are divided over whether they may address deliberately waived non-jurisdictional issues. Four circuits hold that they lack the authority to address waived issues. All of the remaining circuits hold that they may address waived issues—with two circuits, including the Federal Circuit, holding that their discretion to do so is unbounded, and the remaining seven holding that they may exercise discretion to address waived issues only in limited circumstances.

The split is entrenched and widely acknowledged, with one academic commentator describing the state of the law as “a woefully undertheorized default presumption of party dominance, pockmarked by similarly undertheorized exceptions.” Scott Dodson, *Party Subordination in Federal Litigation*, 83 Geo. Wash. L. Rev. 1, 5-6 (2014); see also, e.g., Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023, 1061 (1987) (“The only consistent feature of the current system is its inconsistency.”).

To be clear: All circuits will sometimes honor a party’s deliberate waiver and decline to address a waived issue. The question presented here, on which the circuits are deeply divided, is whether and when courts of appeals may choose to override a party’s waiver to decide an issue that the party itself abandoned.

1. The Third, Sixth, Tenth, and Eleventh Circuits hold that they lack authority to address deliberately waived issues.

The en banc **Eleventh Circuit**’s decision in *United States v. Campbell*, 26 F.4th 860 (2022), exemplifies the side of the split in which courts must give effect to a party’s waiver. While the court divided over whether the issue in that case had been deliberately waived or unintentionally forfeited, it was unanimous about the import of that distinction: “Waiver directly implicates the power of the parties to control the course of the litigation; if a party affirmatively and intentionally relinquishes an issue, then courts must respect that decision.” *Id.* at 872 (majority op.); see *id.* at 901 (Newsom, J., and Jordan, J., dissenting) (“[T]here seems to be rag-ing consensus about the governing principles here: If the government *waived* the … issue by opting not to pursue it … then it’s off the table.”).

In a thorough joint opinion, Judges Newsom and Jordan (joined by three other judges) explained that respect for deliberate waiver derives from “the first principle of first principles: In this country, we have an adversarial justice system.” *Id.* at 893. This principle “has deep historical roots that predate this country’s founding.” *Ibid.* “Adversarialism and the party-presentation principle aren’t just deeply historical,” the joint opinion continued, “they’re also instrumental to—and protective of—other core values of the Anglo-American judicial tradition,” including, among others, “fundamental fairness” and the “separation of powers.” *Id.* at 895-97.

Three other circuits likewise hold that they lack authority to address deliberately waived issues.

In the **Third Circuit**, “[w]aived claims may not be resurrected on appeal.” *Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist.*, 877 F.3d 136, 146 n.7 (3d Cir. 2017); see also, e.g., *Robinson v. First State Cnty. Action Agency*, 920 F.3d 182, 187 (3d Cir. 2019) (similar).

The **Sixth Circuit** similarly holds that “[a] waiver occurs when a party intentionally abandons a known right” and “refuse[s] to consider this type of intentionally jettisoned argument.” *Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1011-12 (6th Cir. 2022). The Sixth Circuit’s language, however, is sometimes less than crystal clear and may reserve some limited and undefined discretion to address waived issues. See, e.g., *George v. Youngstown State Univ.*, 966 F.3d 446, 469 (6th Cir. 2020) (A party’s “intentional surrender *typically* precludes judicial consideration of a defense.” (emphasis added)).

Finally, in the **Tenth Circuit** “it is well-established that we do not consider arguments an appellant intentionally disclaimed or abandoned.” *Wyo-Ben Inc. v. Haaland*, 63 F.4th 857, 870 (10th Cir. 2023). The Tenth Circuit’s respect for party presentation extends even to enforcing a limitations period against a party that waived the issue, notwithstanding a “more-than-colorable question concerning whether [the limitations period] applies at all.” *Id.* at 868; see *id.* at 869-70 (“Stated otherwise, the parties’ litigation posture regarding the applicability of [the] limitations period to [the] claim provides the conceptual baseline from which our analysis proceeds”).

2. In stark contrast, both the Federal Circuit and the Fourth Circuit find no limit to their discretion to address deliberately waived issues.

As illustrated by the decision below, the **Federal Circuit** holds that it “always possess[es] ‘the discretion to decide when to deviate from th[e] general rule of waiver.’” *Ericsson Inc. v. TCL Commc’n Tech. Holdings Ltd.*, 955 F.3d 1317, 1322 (Fed. Cir. 2020) (second alteration in original) (quoting *Interactive Gift Express, Inc.*

v. *Compuserve, Inc.*, 256 F.3d 1323, 1344 (Fed. Cir. 2001)); see also, e.g., *Ciena Corp.*, 958 F.3d at 1161 (“[I]t is a discretionary decision to forgive waivers of non-jurisdictional challenges”).

The disregard for party presentation in the decision below is emblematic of the Federal Circuit’s general approach. See, e.g., *Egenera, Inc. v. Cisco Sys., Inc.*, 972 F.3d 1367, 1378 n.6 (Fed. Cir. 2020) (“[Appellee] contends that [appellant] waived any argument [on an issue]. Regardless, whether to apply the waiver rule is discretionary. ... To apply waiver would not serve judicial economy or promote fairness, and so we address the merits.”). Despite Comcast raising this issue in its petition for en banc rehearing, the Federal Circuit is unwilling to reconsider its approach. App. 59a-60a.

The **Fourth Circuit** holds that, where an issue “implicate[s] important institutional interests of the court,’ [the court] retain[s] discretion to raise and consider it *sua sponte* – even if waived.” *Billard v. Charlotte Cath. High Sch.*, 101 F.4th 316, 325 (4th Cir. 2024) (quoting *Eriiline Co. v. Johnson*, 440 F.3d 648, 654-55 (4th Cir. 2006)). But the Fourth Circuit has taken an expansive approach to defining such “institutional interests.” It has blessed *sua sponte* consideration of, for example, waived res judicata arguments and various other arguments in habeas and *in forma pauperis* cases. See *Eriiline*, 440 F.3d at 656 (“[B]oth habeas corpus and *in forma pauperis* proceedings, like failure to prosecute, abuse of process, and res judicata, implicate important judicial and public concerns”). Whether the Fourth Circuit’s claimed discretion to address waived issues is just as broad as the Federal Circuit’s, or perhaps slightly narrower, only underscores the confusion and division among the circuits.

Judge Quattlebaum’s dissent from the panel opinion in *Sweeney v. Graham*—a ruling this Court recently summarily reversed—describes the Fourth Circuit’s approach to party presentation. No. 22-6513, 2025 WL 800452 (4th Cir. Mar. 13, 2025) (Quattlebaum, J., dissenting), rev’d sub nom. *Clark v. Sweeney*, No. 25-52, 2025 WL 3260170 (Nov. 24, 2025) (per curiam). Per Judge Quattlebaum, “the majority’s special circumstances principle” for overriding party presentation “is unworkably squishy”; “[t]he total absence of standards … is concerning” and “could be used to avoid the settled requirements of the law and permit reaching preferred outcomes.” *Id.* at *39. “This is no way to run a railroad,” as “[a]ppellate review is not a game of moving target.” *Id.* at *40. See also, e.g., *Nat'l Ass'n of Immigr. Judges v. Owen*, 160 F.4th 100, 118 (4th Cir. 2025) (Quattlebaum, J., dissenting from denial of reh’g en banc) (“[T]he panel opinion shirks party presentation principles—taking off its black robes to argue a case different from the one the [party] advanced.”), petition for cert. pending sub nom. *Margolin v. Nat'l Ass'n of Immigr. Judges*, No. 25-767 (filed Dec. 23, 2025).

3. The remaining circuits articulate diverse standards (sometimes applied inconsistently) to describe the limited circumstances in which they will address waived issues.

The **First Circuit** does not appear to recognize a strict distinction between deliberate waiver and inadvertent forfeiture and instead holds that “an appellate court may, under exceptional circumstances, elect to reach unpreserved issues in order to forestall a miscarriage of justice.” *Sindi v. El-Moslimany*, 896 F.3d 1, 28 (1st Cir. 2018). Among the “considerations” the court assesses in deciding whether to address unpreserved

issues are “whether the inadequately preserved arguments are purely legal, are amenable to resolution without additional factfinding, are susceptible to resolution without causing undue prejudice, are highly convincing, are capable of repetition, and implicate matters of significant public concern,” and “whether the failure to advance an argument was deliberate or inadvertent.” *Ibid.* (citing *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 627-28 (1st Cir. 1995)).

The **Second Circuit** claims “broad discretion to consider” waived issues on the ground that “waiver rules are prudential and not jurisdictional.” *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir. 2005). The court “may rule on issues not raised in the district court ... when the issues are solely legal ones not requiring additional factfinding.” *Ibid.* (quoting *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 103 (2d Cir. 2004)). “[T]hat discretion may extend to factual determinations,” too, though the court is “seldom inclined to exercise this discretion’ when unresolved factual determinations exist.” *Okor v. Ginsberg*, 692 F. App'x 642, 643 (2d Cir. 2017) (quoting *Paese v. Hartford Life & Accident Ins. Co.*, 449 F.3d 435, 446 (2d Cir. 2006)).

The **Fifth Circuit** does not consistently distinguish between waiver and forfeiture. To address either a waived or forfeited issue, the court generally requires “extraordinary circumstances,” which “exist when the issue involved is a pure question of law and a miscarriage of justice would result from [a] failure to consider it.” *AG Acceptance Corp. v. Veigel*, 564 F.3d 695, 700 (5th Cir. 2009) (quoting *N. Alamo Water Supply Corp. v. City of San Juan*, 90 F.3d 910, 916 (5th Cir. 1996)). The court also sometimes reaches waived issues that “present purely legal questions that were briefed to the

district court ... [i]n stewardship of judicial resources.” *Glass v. Paxton*, 900 F.3d 233, 243 (5th Cir. 2018).

The **Seventh Circuit** holds that it “may, in [its] discretion, forgive waiver or forfeiture in a case that presents a pure question of statutory interpretation that the parties have fully briefed on appeal.” *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 496 (7th Cir. 2021), aff’d, 596 U.S. 450 (2022). While the court noted that it “exercise[s] such discretion sparingly,” it has elected to do so to address, for example, an “important and recurring question of statutory interpretation.” *Ibid.*

The **Eighth Circuit** requires “exceptional circumstances” to address a waived issue. *N. Bottling Co. v. PepsiCo, Inc.*, 5 F.4th 917, 922 (8th Cir. 2021) (quoting *Platte Valley Bank v. Tetra Fin. Grp., LLC*, 682 F.3d 1078, 1086 (8th Cir. 2012)). But, contrary to the courts of appeals willing to address waived issues that are purely legal, the Eighth Circuit has held that no such exceptional circumstances exist to address a purely legal choice-of-law question that a party waived in the district court. See *id.* at 922-23.

The **Ninth Circuit** has—at times—recognized that waiver of an issue “entirely precludes appellate review.” *United States v. Lopez*, 4 F.4th 706, 719 n.3 (9th Cir. 2021). Yet—at other times, including *en banc*—the court has addressed deliberately waived issues on the grounds that it has “the authority and discretion to decide questions first raised in a petition for rehearing *en banc*,” clarifying that “it is claims that are deemed waived or forfeited, not arguments.” *Brown v. Arizona*, 82 F.4th 863, 873 (9th Cir. 2023) (*en banc*) (citations omitted), cert. denied, 144 S. Ct. 1346 (2024); but see *id.* at 898 (R. Nelson, J., dissenting) (“The majority and concurrence cite no case in which we have adopted an

argument that was affirmatively disclaimed by a party. There is no precedent supporting what the majority is actually doing here.”).

Finally, the **D.C. Circuit** claims “authority to remedy errors *sua sponte* in ‘exceptional circumstances’—when they ‘seriously affect the fairness, integrity, or public reputation of judicial proceedings.’” *United States v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) (quoting *United States v. TDC Mgmt. Corp.*, 288 F.3d 421, 425 (D.C. Cir. 2002)).

II. The Decision Below Warrants Review

1. “In our adversarial system of adjudication, we follow the principle of party presentation.” *Sineneng-Smith*, 590 U.S. at 375. “[W]e rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.” *Ibid.* (quoting *Greenlaw*, 554 U.S. at 243). “[C]ourts are essentially passive instruments of government”; they “do not, or should not, sally forth each day looking for wrongs to right.” *Id.* at 376 (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh’g en banc)). “To put it plainly, courts ‘call balls and strikes’: they don’t get a turn at bat.” *Clark*, 2025 WL 3260170, at *1 (quoting *Lomax v. Ortiz-Marquez*, 590 U.S. 595, 599 (2020)).

This Court has twice in the past six years held that courts of appeals commit reversible error when they “depart [] drastically from the principle of party presentation.” *Sineneng-Smith*, 590 U.S. at 375. In *Sineneng-Smith*, this Court reversed the Ninth Circuit where it “[elect[ed] not to address the party-presented controversy,” *sua sponte* sought amicus curiae briefing, and resolved the case on an issue that had not been raised by

the parties. *Id.* at 379-80. And in *Clark v. Sweeney*, “[t]he Fourth Circuit transgressed the party-presentation principle by granting relief on a claim that [respondent] never asserted and [petitioner] never had the chance to address.” 2025 WL 3260170, at *2. The party “asserted ‘one, and only one,’ claim,” but “[i]nstead of ruling on that claim, the Fourth Circuit devised a new one.” *Ibid.* (citation omitted).

The party presentation principle applies with particular force in cases of deliberate waiver. In *Day v. McDonough*, 547 U.S. 198 (2006), this Court held that a district court has discretion to *sua sponte* raise a statute of limitations defense to a habeas corpus petition that a State had inadvertently forfeited. *Id.* at 209. But, in doing so, the Court noted that “we would count it an abuse of discretion to override a State’s deliberate waiver of a limitations defense.” *Id.* at 202; see also *id.* at 210 n.11 (“[S]hould a State intelligently choose to waive a statute of limitations defense, a district court would not be at liberty to disregard that choice.”).

In *Wood v. Milyard*, 566 U.S. 463 (2012), this Court addressed deliberate waiver head on, again in the context of the timeliness of a habeas petition. There, “the State twice informed the District Court that it ‘will not challenge, but [is] not conceding’ the timeliness” issue. *Id.* at 474. The district court accepted that waiver and decided the case on the merits, but the Tenth Circuit overrode the State’s waiver and found the petition time barred. *Id.* at 467-68.

This Court reversed. The Court was clear that the State’s “decision not to contest the timeliness of [the] petition did not stem from an ‘inadvertent error,’” as in *Day*. *Id.* at 474. Rather, the State “express[ed] its clear and accurate understanding of the timeliness issue” but

“deliberately steered the District Court away from the question.” *Ibid.* Emphasizing the need for “[d]ue regard for the trial court’s processes and time investment,” and with concern that “the appellate court act[ed] not as a court of review but as one of first view,” the Court held that the court of appeals “abused its discretion when it dismissed [the] petition as untimely.” *Id.* at 473-74. “[A] federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system.” *Id.* at 472.

There is no good reason to limit *Day* and *Wood* to the habeas corpus or statute-of-limitations contexts: Courts of appeals lack authority to override a party’s deliberate waiver of any non-jurisdictional issue in all but the rarest of circumstances.

Requiring courts of appeals to respect deliberate waiver emanates from “the first principle of first principles: In this country, we have an adversarial justice system.” *Campbell*, 26 F.4th at 893 (Newsom, J., and Jordan, J., dissenting). As Justice Scalia put it: “What makes a system adversarial rather than inquisitorial is ... the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties.” *McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991).

A party’s decision to put an issue before a court is the source of the court’s power to resolve it. It is the plaintiff—not the court—who “is ‘the master of the complaint,’” and who “gets to determine which substantive claims to bring against which defendants.” *Royal Canin U.S.A., Inc. v. Wullschleger*, 604 U.S. 22, 35 (2025) (quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987)). “[O]ur system ‘is designed around the

premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief.” *Sineneng-Smith*, 590 U.S. at 375-76 (second alteration in original) (quoting *Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment)).

A party’s decision to intentionally withdraw an issue from a court of appeals’ cognizance in turn should deprive the court of authority to address it. When a party deliberately waives an issue, they eliminate adversity with respect to that issue. Just as when parties seek voluntary dismissal, “they consent[] to the judgment against them and disavow[] any right to relief” on that ground. *Microsoft Corp. v. Baker*, 582 U.S. 23, 44 (2017) (Thomas, J., concurring in judgment). “The parties thus [a]re no longer adverse to each other” with respect to the waived issue “and the Court of Appeals could not ‘affect the[ir] rights’ in any legally cognizable manner.” *Id.* at 44-45 (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). The court, as a “passive instrument[] of government,” has no ability to revive adversarial presentation *sua sponte*, and thus cannot override a party’s decision to waive an issue. *Sineneng-Smith*, 590 U.S. at 376 (citation omitted).

It is particularly inappropriate for a court to substitute its view of the party’s best interests for the party’s own. There are many reasons why parties may waive winning issues, reasons which may be—and often should be—unknown to the court. Parties may seek to invite (or avoid) precedent on specific issues of broader significance. See, e.g., *Certain Underwriters at Lloyds London v. Perraud*, 623 F. App’x 628, 635 (5th Cir. 2015) (King, J., dissenting) (hypothesizing that a party’s

waiver sought “to force a ruling … which will undoubtedly impact … future cases”). They may need to balance multiple competing issues in a single case—as often happens in patent cases, where securing broad claim constructions may increase the risk that a patent will be found invalid. Cf. *Amgen Inc. v. Sanofi*, 598 U.S. 594, 613 (2023) (“[T]he more a party claims, … the more it must enable.”). They may fear that success in the courtroom will harm their standing with customers or the public. See Claire Fahy, *Disney Backs Down from Effort to Use Disney+ Agreement to Block Lawsuit*, N.Y. Times (Aug. 20, 2024). Or they may simply think it is the right thing to do. See *Day*, 547 U.S. at 217-18 (Scalia, J., dissenting) (“There are many reasons why the State may wish to disregard the statute of limitations, including the simple belief that it would be unfair to impose the limitations defense on a particular defendant.”). Whatever the reason, what matters is this: It is for the parties and not the court to decide which issues to raise and which to waive. Courts in our adversarial system must respect that decision.

Respect for a party’s deliberate waiver finds support in the history and constitutional structure of our judicial system. As Judges Newsom and Jordan noted, “[a]dversarialism has deep historical roots that predate this country’s founding.” *Campbell*, 26 F.4th at 893 (Newsom, J., and Jordan, J., dissenting). The “limits placed on federal judges by the adversarial system comported with the views of those who drafted the Constitution.” *Ibid.* (quoting Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374, 381 (1982)).

Consistent with this history, Article III limits the power of the federal courts “to questions presented in an adversary context.” *Flast v. Cohen*, 392 U.S. 83, 95

(1968); see *Muskrat v. United States*, 219 U.S. 346, 357 (1911) (Article III “implies the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.” (citation omitted)). “[A]llowing unelected and unaccountable federal judges ‘to transgress the limits of the parties’ arguments gives them the power to set their own agendas—a power normally reserved for the political branches.” *Campbell*, 26 F.4th at 895-96 (Newsom, J., and Jordan, J., dissenting) (quoting Amanda Frost, *The Limits of Advocacy*, 59 Duke L.J. 447, 481 (2009)).

Moreover, the “opportunity to respond” is “fundamental to due process.” *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465-68 (2000). A court of appeals’ *sua sponte* decision to override a party’s deliberate waiver may deny the parties “adequate notice of the critical issue that the judge was actually debating.” *Lankford v. Idaho*, 500 U.S. 110, 120 (1991).

Respect for deliberate waiver also advances “other core values of the Anglo-American judicial tradition.” *Campbell*, 26 F.4th at 895 (Newsom, J., and Jordan, J., dissenting). “[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error.” *Ibid.* (quoting *Mackey v. Montrym*, 443 U.S. 1, 13 (1979)); see also *Trump v. Illinois*, 2025 WL 3715211, at *9 (Gorsuch, J., dissenting) (disregarding waiver deprives questions of “the full airing they so clearly deserve”). “If a court engages in what may be perceived as the bidding of one party by raising claims or defenses on its behalf,” or disregarding its decision to waive issues, “the court may cease to appear as a neutral arbiter.” *Campbell*, 26 F.4th at 896 (Newsom, J., and Jordan, J., dissenting) (quoting *Burgess v. United States*, 874 F.3d 1292, 1300 (11th Cir. 2017)).

Respecting deliberate waiver also ensures “[d]ue regard for the trial court’s processes and time investment.” *Wood*, 566 U.S. at 473. “Finally, adherence to the adversarial method and the party-presentation principle ‘promotes litigant and societal acceptance of decisions rendered by the courts.’” *Campbell*, 26 F.4th at 896 (New-som, J., and Jordan, J., dissenting) (citation omitted).

To be sure, there may be a narrow set of issues or circumstances where a court of appeals does not err by overriding a party’s deliberate waiver. For example, issues implicating subject-matter jurisdiction generally are “not subject to waiver.” *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 20 (2017). There could be unusual situations in which honoring a party’s deliberate waiver would compromise inviolable constitutional commands. Cf. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 851 (1986) (“When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive”). And courts may in appropriate circumstances consider issues that were inadvertently forfeited, not deliberately waived. But the possibility of such exceptions does not detract from the general principle of party presentation—*i.e.*, that the courts of appeals lack authority to address a non-jurisdictional issue that a party deliberately waives.

2. A straightforward application of this rule compels reversal of the Federal Circuit’s decision in this case.

In the decision subject to this appeal, the parties disputed and asked the district court to address only one of the “two elements of a simple patent case”: “whether infringement occurred.” *Markman*, 517 U.S. at 384. WhereverTV repeatedly and deliberately waived the other element—claim construction—by telling both the district court and the court of appeals not to construe

the relevant claim language and to measure infringement by the plain text of WhereverTV’s own patent. See pp. 5-8, *supra*. Had the Federal Circuit addressed the sole question WhereverTV put before it—whether the district court erred in ruling that the evidence did not suffice to show infringement—Comcast would have prevailed and the case would have been over.

Instead, the Federal Circuit—consistent with circuit precedent allowing it to freely consider waived issues—overrode WhereverTV’s repeated and deliberate waiver of claim construction. The court went so far as to hold that “[t]he district court legally erred” by not overriding WhereverTV’s waiver and addressing only the party-presented controversy. App. 12a.

The panel suggested that *O2 Micro*, 521 F.3d at 1351, requires district courts to resolve latent claim construction disputes, even when no party asks for claim construction and the issue has been deliberately waived. App. 12a. But that cannot be for the simple reason that the Federal Circuit cannot unilaterally abrogate the party presentation principle for claim construction—or any other issue. Indeed, the Federal Circuit has elsewhere made clear that claim construction, just like any other issue, *can* be waived. See *Kaufman v. Microsoft Corp.*, 34 F.4th 1360, 1369 (Fed. Cir. 2022) (“[A] party must ‘sufficiently request further construction of the relevant limitation’ to ‘raise an actual dispute.’” (quoting *LifeNetHealth v. LifeCell Corp.*, 837 F.3d 1316, 1322 (Fed. Cir. 2016))). The problem, however, is that the court believes it may override such a waiver in any particular case for any reason (or none at all)—as it did here.

Worse still, the Federal Circuit went on to decide the waived issue itself. Unsurprisingly, the panel’s *sua*

spponte claim constructions make little sense. According to the Federal Circuit, channels can be “added” to the program guide even if they already appear in the guide beforehand and can be “deleted” from the guide even if they continue to remain in the guide afterwards. App. 17a-18a. And, again according to the Federal Circuit, an “interactive program guide application installed on the device that provides a user-configurable interactive program guide” “need not provide all the functionality for operation of the [interactive program guide].” App. 14a-15a.

Had the Federal Circuit applied the plain language of WhereverTV’s patent—as both parties urged—it would have had no choice but to affirm the district court. As the district court correctly recognized, the evidence showed that Comcast’s X1 system prohibited adding or deleting channels and lacked an interactive program guide application installed on the set-top box that provided an interactive program guide. App. 36a, 40a. Instead, the parties must now proceed to a potential second trial on remand. The decision below illustrates exactly why “the adversary process”—not *sua sponte* consideration of waived issues “[i]s the best means of ascertaining truth and minimizing the risk of error.” *Mackey*, 443 U.S. at 13.

III. The Question Presented is Important and Merits Review in this Case

1. The question of whether a court of appeals may override a party’s deliberate waiver of non-jurisdictional issues or must instead respect party presentation is of obvious legal and practical significance. Cf. *Clark*, 2025 WL 3260170, at *1; *Sineneng-Smith*, 590 U.S. at 371; *Wood*, 566 U.S. at 463. Under the Federal Circuit’s

regime—and in any of the nine courts of appeals where the court may override a waiver—the court may decide, if it so chooses, issues the parties have deliberately taken off the table. Parties must accept the possibility that the court of appeals will transform their appeals *sua sponte*, perhaps without notice or opportunity to respond, as occurred here. And district courts risk reversal when they address and correctly resolve only the party-presented controversy.

The Federal Circuit's approach, as illustrated by the decision below, alone merits this Court's attention. In arrogating to itself the right to override party presentation—and by holding that district courts sometimes *must* override a party's deliberate waiver of claim construction—the Federal Circuit injected profound uncertainty into every patent case where a patentee asks that infringement be measured by the plain language of its own patent.² District courts must now sally forth to identify and resolve claim construction issues not presented by the parties on pain of reversal. The waste of court and party resources the decision below invites in patent cases nationwide alone justifies this Court's intervention.

But the significance of the question presented extends far beyond patent cases. Any waived non-jurisdictional issue is always up for grabs on appeal in two

² Patentees frequently forego claim construction entirely, relying on the patent as written, or else seek constructions of only a subset of claim terms—indeed, some courts impose limits on the number of claims that may be construed. See generally Timothy A. Richard, *The Timing of Claim Construction: An Analysis of Claim Construction Procedure and a Proposed Rule to Ensure Cost Effective and Timely Relief in Patent Infringement Cases*, 33 Cath. U. J. L. & Tech 85, 104-11 (2025).

circuits, and sometimes up for grabs in seven more. The question presented, moreover, raises significant structural and constitutional concerns. “This Court … has a significant interest in supervising the administration of the judicial system” particularly in matters “relate[d] to the integrity of judicial processes.” *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). Our adversarial system and Article III limit the federal courts to addressing genuine disputes selected and presented by the parties. The decision below flouts those limits, and the vast circuit split creates different systems of judicial review across the geographic circuits—and still another for patent cases.

There is no reason to await further percolation. Every court of appeals has addressed this issue. The courts of appeals have long been deeply divided and remain so after *Sineneng-Smith*. The Federal Circuit confirmed that its extreme position—directly at odds with at least the en banc Eleventh Circuit’s and several others’—is here to stay by denying Comcast’s petition for rehearing en banc. Numerous scholars have identified this issue and called for this Court’s review.³ This Court’s intervention is needed now.

³ See, e.g., Rory Little, *Party Presentation: A Mysterious New Rule?*, SCOTUSblog (Dec. 17, 2025) (“I hope and expect the justices to say more, and I’ll wager not unanimously, on the topic soon.”); Owen B. Smitherman, *Grounding the Party Presentation Principle*, 101 Notre Dame L. Rev. (forthcoming 2026), at 6 (identifying “the ongoing conflict over party presentation in the lower courts”), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4804849; Jeffrey M. Anderson, *The Principle of Party Presentation*, 70 Buff. L. Rev. 1029, 1109 (2022) (“For decades commentators have agreed that there are no clear rules guiding courts considering whether to raise new issues *sua sponte*.”); Joan E. Steinman, *Appellate Courts*

2. This case is an ideal vehicle for deciding the question presented.

There is no concern about preservation or presentation. The Federal Circuit, in its unpublished opinion,⁴ *sua sponte* raised and resolved an issue neither party had presented and WhereverTV had deliberately waived. Had WhereverTV's waiver been respected, the court would have affirmed the district court's ruling of non-infringement and affirmed its judgment. Comcast raised this issue at the first available juncture, in a petition for rehearing and rehearing en banc, which was denied. See C.A. Pet. for Reh'g 11; App. 59a-60a.

WhereverTV's waiver was explicit, deliberate, and repeated. There can be no possible argument that this case involves inadvertent forfeiture. Cf. *Campbell*, 26 F.4th at 877 (finding an issue forfeited rather than waived). WhereverTV repeatedly disclaimed any need for construction of the disputed claim terms and insisted on proceeding with the claim's plain language. The district court acknowledged and respected that waiver. The Federal Circuit did not.

as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance, 87 Notre Dame L. Rev. 1521, 1619 (2012) ("[T]he Supreme Court can and should do better than it has done in ... guiding federal [appellate courts] in their exercises of discretion to hear or not to hear new issues."); Frost, *The Limits of Advocacy*, *supra*, 59 Duke L.J. at 463 ("[J]udges have not articulated a clear set of conditions that lead them to deviate from their typical practice of letting the parties frame the dispute.").

⁴ "[T]he fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987).

Although this petition arises from a patent case, it provides the Court with a clean vehicle to address a pure procedural question of broad significance. And it avoids any potential complexities that might result from a party’s waiver of questions of constitutional or statutory interpretation. See *Schor*, 478 U.S. at 851 (addressing waiver of constitutional issues); *U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993) (“We need not decide whether the Court of Appeals had, as it concluded, a ‘duty’ to address the status of” a relevant statute); cf. *Teva*, 574 U.S. at 331 (“[T]his Court has never previously compared patent claim construction in any here relevant way to statutory construction.”).

Nor is the case’s interlocutory posture any reason to deny review of a dispositive issue. Had the Federal Circuit properly respected party presentation and honored WhereverTV’s deliberate waiver, it would have affirmed the district court, and this case would have been over. Instead, the Federal Circuit’s decision means that the parties must proceed towards a costly and burdensome potential retrial on remand—and must do so under the Federal Circuit’s improper and misguided *sua sponte* claim constructions. That is a reason to grant rather than deny review. Cf. *Clark*, 2025 WL 3260170, at *1 (reviewing the court of appeals’ grant of a new trial).

The decision below conflicts with this Court’s recent and repeated admonitions to courts of appeals directing them to respect rather than override party presentation. It deepens an acknowledged split among the courts of appeals on an important issue. And it imposes a rule that disrupts trial and appellate practice nationwide. The Court should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.
The Court may wish to consider summary reversal.

Respectfully submitted.

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JANUARY 2026

APPENDIX

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APPENDIX A

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-2098, 2023-2150

WHEREVERTV, INC.,

Plaintiff-Appellant

v.

COMCAST CABLE COMMUNICATIONS, LLC,

Defendant-Cross-Appellant

Appeals from the United States District Court for
the Middle District of Florida in No. 2:18-cv-00529-
WFJ-NPM, Judge William F. Jung.

Decided: July 28, 2025

ADAM COOPER SANDERSON, Reese Marketos LLP,
Dallas, TX, argued for plaintiff-appellant. Also
represented by BRETT ROSENTHAL.

ROBERT NILES-WEED, Weil, Gotshal & Manges LLP,
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Washington, DC; DAVID LISSON, ASHOK RAMANI, Davis
Polk & Wardwell LLC, Menlo Park, CA.

Before TARANTO, STOLL, and STARK, *Circuit Judges*.
STOLL, *Circuit Judge*.

WhereverTV, Inc. sued Comcast Cable Communications, LLC for patent infringement in the United States District Court for the Middle District of Florida, and the case proceeded to a jury trial on infringement of claim 1 of U.S. Patent No. 8,656,431. After the close of evidence but prior to a jury verdict, however, the district court granted Comcast's motion for judgment of noninfringement as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure. WhereverTV appeals the district court's JMOL, alleging that it rests on erroneous constructions of two terms in claim 1. As an alternative ground for affirmance, Comcast argues that it is entitled to JMOL based on what it asserts is the correct interpretation of a separate claim term, and it cross-appeals the district court's determination that claim 1 is not indefinite under 35 U.S.C. § 112. Because we agree with WhereverTV that the district court erred in its claim construction, and we reject Comcast's alternative grounds for affirmance as well as its argument that claim 1 is indefinite, we vacate the district court's JMOL of noninfringement and remand for proceedings consistent with this opinion.

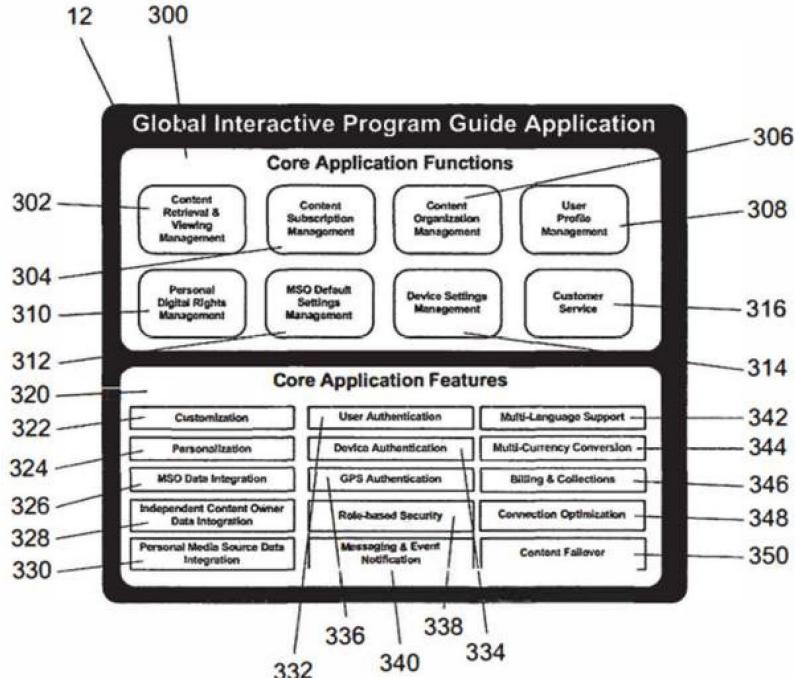
BACKGROUND

The '431 patent discloses “[a] system and device . . . that employs a global interactive program guide [(‘IPG’)] to receive, access, manage, and view digital entertainment services such as live television, television on demand, and pre-recorded video and audio programming from one or more content sources, via an internet-enabled device, anywhere in the world.” U.S. Patent No. 8,656,431 Abstract. The content sources

include not only cable operators but also independent content providers. The '431 patent states that its “goal is to shift the control of content availability, organization, and access from MSO’s [(i.e., multi-system operators)], which is today’s cable television model, to a new user-centric model where the user can choose whether or not to purchase content from a content consolidator or directly from independent content providers.” *Id.* at col. 6 ll. 39–44. The specification explains that, at the time of the invention, there was “no application or interface that [would] allow[] a user to manage multiple subscriptions from multiple content owners in an easy to use format.” *Id.* at col. 2 ll. 36–38.

As explained below, the district court relied on patent Figures 4 and 8 in construing claim 1 at JMOL. Figure 4 (reproduced below) is a graphical representation of the functions of an IPG that is “comprised of eight Core Application Functions 300 and fifteen Core Application Features 320, which may be used in whole, or in parts, to present content to the user.” *Id.* at col. 11 ll. 17–21; *see also id.* at col. 11 l. 22–col. 13 l. 7. Figure 8 is a flow chart that illustrates the logic undertaken by a user to add new content to the IPG. *See id.* at col. 15 l. 13–col. 16 l. 7.

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Id. Fig. 4.

The sole asserted claim, independent claim 1, reads:

1. A content manager device comprising:

a server resident on a network containing descriptive program data about video content available from one or more multiple cable system operators (MSOs) and one or more non-MSOs;

a device capable of establishing and maintaining a connection with the network via a communications link; and

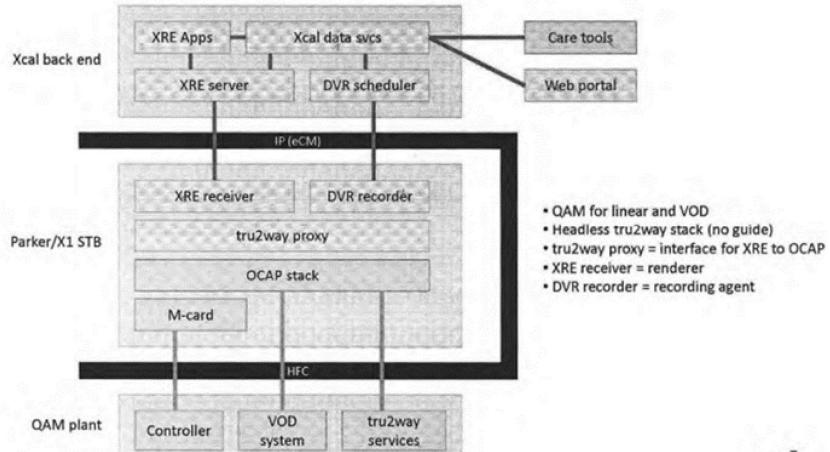
an interactive program guide application installed on the device that provides user-configurable interactive program guide (IPG) listing at least one channel of video content

available from each of the one or more MSOs and each of the one or more nonMSOs and descriptive program data from the server for the video content available on each of the channels, *wherein each of the channels is selectable for receiving only or virtually entirely streaming video programming from its respective MSO or non-MSO source via the communications link and the network; wherein the server is distinct from at least one of the one or more MSOs and one or more non-MSOs, and wherein the application allows for the IPG to be configured by a user with respect to adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs.*

Id. at col. 16 ll. 32–54 (emphases added to emphasize limitations at issue).

WhereverTV accused Comcast's entertainment platform known as the Xfinity X1, which allows users to access video content from both their cable provider and streaming providers through a cloud-based system, of infringing claim 1 of the '431 patent. The X1 system includes the XRE receiver, which is an application located on the X1 set-top box (or "STB") device, and the cloud-based XRE server. Comcast's documentation illustrates the division of its system:

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J.A. 15921. The same document describes the division of the XRE receiver and server:

- XRE Receiver running on device is thin client
 - Is a light weight renderer
 - Accepts and forwards user input
 - Application logic does not execute here
 - Does not have to be updated to update user experience and features
- XRE Server runs in the cloud
 - Integrates with the back end services
 - Interprets user input (as passed from XRE Receiver)
 - Executes all of the application business logic
 - Generates rendering instructions for the XRE Receiver

J.A. 15922.

At the claim construction stage before the district court, the parties disputed seven terms: (1) “multiple cable system operators (MSOs)”; (2) “non-MSOs”; (3) “wherein the server is distinct from at least one of the one or more MSOs and one or more non-MSOs”; (4) “only or virtually entirely streaming video programming”; (5) “wherein each of the channels is selectable for receiving only or virtually entirely streaming video programming”; (6) “interactive program guide”; and (7) “adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs.” *See WhereverTV, Inc. v. Comcast Cable Commc’ns, LLC*, No. 2:18-cv-529-FTM-NPM, 2020 WL 13823257, at *3 (M.D. Fla. Nov. 13, 2020) (“*Claim Construction Order*”). The district court construed “multiple cable system operators (MSOs)” to mean “a cable, satellite, or Internet television content consolidator that receives and then broadcasts channels of video content,” and “non-MSOs” to mean “a video content provider that does not act like an MSO because it does not receive and then broadcast channels of video content.” *Id.* As for the remainder of the disputed terms, the district court determined that “[n]o further construction is necessary.” *Id.*

Comcast also contended that the term “only or virtually entirely streaming video programming” was indefinite under 35 U.S.C. § 112. But the district court determined that “these words can be understood by those skilled in the art, particularly since Comcast itself was able to propose a construction for [‘wherein each of the channels is selectable for receiving only or virtually entirely streaming video programming,’] which contains the same language.” *Id.* Specifically, Comcast proposed interpreting “wherein each of the channels is selectable for receiving only or virtually entirely streaming video programming” as: “wherein

each of the channels is configured such that, in immediate response to selection of its assigned channel number, and without further searching, video programming is only or virtually entirely transmitted over the Internet . . . and made available for viewing while the transmission is occurring.” *Id.* The district court thus determined that Comcast had not met its burden to show that the term was indefinite by clear and convincing evidence.

At the summary judgment stage, the district court recognized that the parties still disputed the scope of the limitation “wherein the server is distinct from at least one of the one or more MSOs and one or more non-MSOs.” The district court explained that “[WhereverTV] conceptualize[d] such distinctness in terms of the tasks and processes of the server and the MSO and non-MSO, while Comcast conceptualize[d] the distinctness in terms of a business entity’s ownership or control of the MSO and server.” J.A. 11460. To resolve this dispute, the district court ordered a supplementary evidentiary hearing that included the presentation of exhibits and expert testimony concerning the construction of the limitation.

After considering intrinsic and extrinsic evidence, the district court determined that “the meaning of ‘distinct from,’ in context, is best read to pertain to functional differences between the server and the MSO(s) and nonMSO(s), rather than differences with respect to control.” J.A. 11467–68. Based on this determination, the court construed the term to mean “wherein the server is functionally distinct from at least one of the one or more MSOs and one or more non-MSOs.” J.A. 11468.

The case proceeded to a jury trial. At the close of WhereverTV’s case-in-chief, Comcast moved for a

directed verdict of noninfringement on the “adding or deleting” limitation (“wherein the application allows for the IPG to be configured by a user with respect to adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs”), as well as the “IPG application” limitation (“an interactive program guide application installed on the device that provides user-configurable interactive program guide (IPG)”). The district court granted JMOL after the close of evidence.

In its written order, the district court first addressed the adding or deleting limitation and reaffirmed its plain and ordinary meaning construction of this term. The district court then determined that “[a]t no point during trial did [WhereverTV] introduce evidence that an X1 user could subscribe to a channel that was not already offered on the accused X1’s IPG, thereby increasing the number of channels offered on the IPG.” *WhereverTV, Inc. v. Comcast Cable Commc’ns, LLC*, No. 2:18-cv-529-WFJ-NPM, 2023 WL 3819123, at *5 (M.D. Fla. June 5, 2023) (“JMOL Order”). “Nor did [WhereverTV] introduce any evidence that a user who unsubscribed from a particular app—such as Netflix—could remove that app from the X1’s IPG entirely such that . . . the app would not be displayed on the IPG.” *Id.* The district court faulted WhereverTV for “encouraging the jury to accept that subscribing is adding and unsubscribing is deleting,” which the court viewed as “a departure from the plain and ordinary meaning of these terms.” *Id.* The district court held that “[WhereverTV] may not assert literal infringement based on the theory that unsubscribing from an app . . . is conceptually similar to deleting that app simply because both actions create impediments for the user who wants to watch content offered by the app.” *Id.* at *6. The district court further explained that

“the rigidity of the X1’s IPG display and the immutability of the channel listings provided by Comcast,” as testified to by both parties’ witnesses, “is in no way identical to the customizable and restriction-free invention described in the [’]431 Patent’s specification.” *Id.* at *7. The district court also determined that, “[w]hile the [’]431 Patent allows users to increase the number of channels available to them—true to the plain and ordinary meaning of ‘adding’—the X1 only allows users to log in and out of channels that Comcast, and *only* Comcast, chose irrevocably to emplace on the IPG.” *Id.*

The district court next addressed the IPG application limitation, again noting that it was maintaining a plain and ordinary meaning construction despite recognizing that the “term’s plain and ordinary meaning is not readily apparent.” *Id.* The district court then held that there was “uncontested evidence” that the IPG application is not installed on the accused device because the XRE guide application is on the server and not the STB. *Id.* at *8. The district court also found that the XRE guide application provides the “brains” for the IPG. *Id.* The district court further determined that it was “undisputed that the cloud-based XRE server, and not the XRE receiver, provides ‘the data necessary for the . . . IPG.’” *Id.* at *9 (omission in original) (emphasis removed) (citation omitted). As to WhereverTV’s argument that the XRE receiver on the STB is the IPG application, the district court determined that “the [’]431 Patent’s specification does not support this conclusion,” in view of Figures 4 and 8. *Id.* at *8. The district court, in considering WhereverTV’s expert testimony that the XRE receiver is a “thin client” capable of rendering and signaling, found that this did not show that an IPG application

was installed on the STB. *Id.* at *8–9 (citation omitted).

WhereverTV appeals and Comcast cross-appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

DISCUSSION

On appeal, WhereverTV primarily argues that the district court’s JMOL rests on erroneous constructions of both the “IPG application” and “adding or deleting” limitations. For its part, Comcast presents two issues. First, Comcast introduces an alternative ground to affirm the district court’s JMOL, contending that the district court misconstrued the limitation “wherein the server is distinct from at least one of the one or more MSOs and one or more nonMSOs.” Finally, Comcast cross-appeals the district court’s determination that the limitation “selectable for receiving only or virtually entirely streaming video programming” is not indefinite.

We review a district court’s grant of JMOL under the standard of the regional circuit, *Cyntec Co., Ltd. v. Chilisin Elecs. Corp.*, 84 F.4th 979, 984 (Fed. Cir. 2023), here the Eleventh Circuit, which reviews the grant of JMOL de novo. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1278 (11th Cir. 2005). Substantive patent law issues are reviewed under the law of our own circuit. *Accenture Glob. Servs., GmbH v. Guidewire Software, Inc.*, 728 F.3d 1336, 1340 (Fed. Cir. 2013). We review claim construction based on intrinsic evidence de novo and review factual findings about extrinsic evidence for clear error. *SpeedTrack, Inc. v. Amazon.com*, 998 F.3d 1373, 1378 (Fed. Cir. 2021) (citing *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 331–32 (2015)). “Whether a claim complies with the definiteness requirement . . . is a matter of claim

construction.” *Noah Sys., Inc. v. Intuit Inc.*, 675 F.3d 1302, 1311 (Fed. Cir. 2012).

We review in turn each issue raised by the parties.

I

WhereverTV contends that the district court erred in holding, as a matter of law, that Comcast’s accused product does not satisfy claim 1’s IPG application limitation—an “interactive program guide application installed on the device that provides user-configurable interactive program guide (IPG).” We agree.

The district court legally erred by not construing this limitation using the claim construction framework set forth in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005). While the district court held that the plain and ordinary meaning of the limitation applies, it also stated that the plain and ordinary meaning is “not readily apparent” and never clarified what it viewed as the plain and ordinary meaning. *JMOL Order*, at *7. Moreover, the parties clearly disputed the scope of this term. In *O2 Micro International Ltd. v. Beyond Innovation Technology Co.*, we held that where the parties dispute the scope of a claim limitation, the district court is to construe the claims at least to the extent necessary to resolve the dispute. 521 F.3d 1351, 1360 (Fed. Cir. 2008); *see also id.* at 1361 (“A determination that a claim term . . . has [a] ‘plain and ordinary meaning’ may be inadequate . . . when reliance on a term’s ‘ordinary’ meaning does not resolve the parties’ dispute,” in which case “claim construction requires the court to determine what claim scope is appropriate in the context of the patents-in-suit.”). We have also held that a district court should not construe claims in light of an accused product and should instead analyze the claim lan-

guage, specification, and prosecution history, if relevant. *See Wilson Sporting Goods Co. v. Hillerich & Bradsby Co.*, 442 F.3d 1322, 1330 (Fed. Cir. 2006) (“[C]laims may not be construed with reference to the accused device.” (citation omitted)).

The district court’s JMOL cannot stand under the proper construction of this limitation. We begin with the claim language: “interactive program guide application installed on the device that provides user-configurable interactive program guide (IPG).” *See Phillips*, 415 F.3d at 1314 (emphasizing importance of claim language). The parties primarily dispute what it means for the IPG application to “provide” a user-configurable IPG. Comcast asserts that the limitation’s use of the word “provides” means that the claimed IPG application alone must provide the functionality of the user-configurable IPG. *See* Cross-Appellant’s Br. 45–46, 56. But the term “provides” is commonly understood to have a broader meaning,¹ and neither party suggests that it is a technical term with a more limited meaning in the relevant field of art. Used alone, “provides” does not require that the IPG application do all the work to make the IPG operable.

This understanding of “provides” is also consistent with the entire claim limitation, which requires an “interactive program guide application installed on the device that provides user-configurable interactive program guide (IPG) listing at least one channel of video content available from each of the one or more MSOs and each of the one or more non-MSOs and *descriptive program data from the server.*” Claim 1 itself contemplates that the server provides descrip-

¹ For example, I can *provide* dinner for my kids whether I am cooking a meal from scratch or ordering a pizza for delivery.

tive program data. The claim is also open-ended, using the transitional phrase “comprising,” which allows for the use of an additional IPG application in the server. *AFG Indus., Inc. v. Cardinal IG Co., Inc.*, 239 F.3d 1239, 1244–45 (Fed. Cir. 2001) (“When a claim uses an ‘open’ transition phrase, its scope may cover devices that employ additional, unrecited elements. We have consistently held that the word ‘comprising’ is an open transition phrase.” (citation omitted)). In addition, as discussed in more detail below, claim 1 recites that the IPG application “allows for the IPG to be configured by a user with respect to adding or deleting channels.” The broad language “allows for” is consistent with the view that the IPG application need not provide all the functionality for operation of the IPG.

Turning to the specification, we conclude that the district court improperly read additional requirements into claim 1 based on the embodiments shown in Figures 4 and 8 of the ’431 patent, including that the IPG application “procures digital rights via stored profile,’ locates and authenticates’ new content sources, and ‘downloads and synchronizes content metadata from new content sources.” *JMOL Order*, at *8 (citation omitted). In particular, the district court held that the accused device’s XRE receiver is not an IPG application as required by the claims because it does not “offer[] any of the functions or features illustrated in Figures 4 or 8.” *Id.* But none of these functions or features are recited in claim 1, let alone recited as being performed by the IPG application. Moreover, the specification does not define an IPG application as limited to the embodiments in Figures 4 and 8. Nor does it disclaim placing some of the functionality in Figures 4 and 8 in a server and other functionality in a receiver. We are not inclined to read the functionality from Figures 4 and 8 into the claim

in such a limiting manner absent lexicography or express disclaimer. *See GE Lighting Sols., LLC v. AgiLight, Inc.*, 750 F.3d 1304, 1308–09 (Fed. Cir. 2014) (“[C]laim terms must be construed in light of the specification and prosecution history However, the specification and prosecution history only compel departure from the plain meaning in two instances: lexicography and disavowal. . . . [H]ere, while the specification[] only disclose[s] a single embodiment of [the claimed term] in Figure 6, [it] do[es] not disavow or disclaim the plain meaning of [the term] or otherwise limit it to that embodiment.” (citation omitted)).

Based on the claim language and the specification,² we agree with WhereverTV’s interpretation that the language “interactive program guide application installed on the device that provides user-configurable interactive program guide (IPG)” does not require that all the functionality of the IPG must reside in the claimed IPG application. In other words, it is sufficient that the IPG application provide an IPG in coordination with the server.

II

The parties also disputed the meaning of claim 1’s adding or deleting channels limitation—i.e., “wherein the application allows for the IPG to be configured by a user with respect to adding or deleting channels.” WhereverTV asserts that channels can be added by

² On appeal, neither party relies on the prosecution history of the ’431 patent for this term, and the only extrinsic evidence cited that is unconnected to a comparison between the claim language and the accused product is the uncontested definition of “application” from WhereverTV: a “program designed to assist in the performance of a specific task, such as word processing, accounting, or inventory management.” Appellant’s Br. 20 (citing J.A. 15665).

subscribing and deleted by unsubscribing, whereas Comcast asserts that adding a channel is limited to making the channel appear on the IPG user interface and deleting a channel is limited to making the channel no longer appear on the IPG user interface. The district court purported to use the plain and ordinary meaning of the limitation,³ which in its view excluded the broader understanding that WhereverTV asserted. *See JMOL Order*, at *4–5. We adopt WhereverTV’s broader construction.

Again, we begin with the claim language. Claim 1 requires listing at least one MSO channel and at least one non-MSO channel, wherein “each of the channels is selectable” and “the application allows for the IPG to be configured by a user with respect to adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs.” The claim language does not say “adding or deleting channels” *to or from the IPG user interface*.⁴ Rather the claim recites adding or deleting channels from the MSOs or non-MSOs. In addition, the claim focuses on channels that

³ The district court’s plain and ordinary meaning analysis focused on dictionary definitions, but extrinsic evidence cannot take precedence over the intrinsic record in a court’s claim construction analysis. *See Phillips*, 415 F.3d at 1317 (“[W]hile extrinsic evidence can shed useful light on the relevant art, we have explained that it is less significant than the intrinsic record in determining the legally operative meaning of claim language.” (quotation marks and citation omitted)).

⁴ Comcast’s vague contention that WhereverTV should be estopped from making this argument on appeal is underdeveloped and unpersuasive. Accordingly, we do not address this contention further. *See, e.g., In re Killian*, 45 F.4th 1373, 1386 (Fed. Cir. 2022) (explaining appellants “forfeit[] any argument on appeal . . . by failing to present anything more than a conclusory, skeletal argument”).

are “selectable for receiving,” suggesting that adding or deleting could relate to making channels selectable or non-selectable. In light of the overall language of the claim, we understand “adding or deleting channels” as including adding a channel either by adding it to the user interface or making it selectable and deleting a channel either by removing it from the user interface or by making it non-selectable. Indeed, the claims do not specify what is meant by adding or deleting, and the language is broad enough to encompass either changing the ability to select the channel or changing the user interface. Had the patentee intended to limit the claims to modifying the display to include a new channel not previously displayed, it could have included language in the claims to that effect.⁵

Turning next to the specification, it appears that the specification treats subscribing to channels interchangeably with adding channels in at least one embodiment of the patented invention, despite Comcast’s arguments to the contrary. In describing Figure 8, the specification states at one point that the figure is “a flow chart of the method for *subscribing* to new content using the global IPG of the instant invention.” ’431 patent col. 8 ll. 58–59 (emphasis added). The specification goes on to also describe

⁵ Comcast’s arguments on claim differentiation are unpersuasive. Comcast points to various dependent claims, none of which use the term “subscribing,” but instead claim a “digital rights management module that obtains viewing rights for at least one of the channels” (claim 3), an IPG that further “assists the user in managing rights to receive the streaming video programming” (claim 15), or “automatically authenticat[es] the user to one or more of the MSO or non-MSO sources” (claim 26). Cross-Appellant’s Br. 25 (citation omitted). These terms can all be fairly interpreted as adding further limitations to an independent limitation, even if that limitation encompasses subscribing.

Figure 8 as “a flow chart that illustrates the logic undertaken by a user *to add* a new content source at Step 800.” *Id.* at col. 15 ll. 13–14 (emphasis added). Figure 8 and the specification’s description of it thus lend support to WhereverTV’s broader reading of the adding or deleting channels limitation. Moreover, Comcast does not point to anything in the specification that explicitly limits the step of adding or deleting channels to exclude subscribing and unsubscribing.

Based on the claim language and the specification, we agree with WhereverTV’s interpretation that “wherein the application allows for the IPG to be configured by a user with respect to adding or deleting channels” encompasses making the channel selectable and non-selectable on the IPG through subscribing and unsubscribing.

III

We have also considered Comcast’s assertion that the district court erred in its construction of the limitation “wherein the server is distinct from at least one of the one or more MSOs and one or more non-MSOs” in claim 1. We disagree and adopt the district court’s construction.

Comcast proposes that this limitation “reflects the invention’s goal of freeing users from the ‘traditional cable-television, content aggregation model where the MSO, rather than the user, is in control of what content is available,’” Cross-Appellant’s Br. 58 (quoting ’431 patent col. 2 ll. 41–43), and should be construed to mean that the limitation requires a server that is “distinct from” Comcast itself. *Id.* at 58–59. But this proposal improperly imports unclaimed limitations into the term. Comcast seeks to import the overarching goal of the patented invention into the term

“distinct from.” But if the patentee had wanted to claim a server that was not controlled by a cable company, the patentee could have used language to that effect. Comcast further seeks to import into this limitation that MSO means a cable company as a business entity.⁶ Comcast makes this argument despite (1) Comcast not explicitly disputing on appeal the district court’s separate construction of MSO that defines the term in a functional sense—i.e., as “a cable, satellite, or Internet television content consolidator *that receives and then broadcasts channels of video content*,” *Claim Construction Order*, at *3 (emphasis added); and (2) the specification also referencing MSOs with respect to functionality, *see, e.g.*, ’431 patent col. 7 ll. 46–51; *see also* J.A. 11464. We agree with the district court that, in the context of the ’431 patent, “[t]o say that an MSO *is* a cable company simply because an MSO is *a part* of a cable company appears to be an invalid syllogism distorting the plain meaning of the terms in question.” J.A. 11464. We are thus unpersuaded that the district court erred in reaching its underlying factual findings and ultimate construction of the “distinct from” term based on the language in the claims, the prior constructions by the district court

⁶ As the district court acknowledged, importing into the term that the claimed MSO is Comcast would be to import not just Comcast’s ability to consolidate and broadcast video content, but its entire business, including its “billing, accounting, legal, HR, and IT departments” and any other services it provides, like “internet and phone services.” J.A. 11463. As WhereverTV crystallized on appeal, to say that a server is distinct from a corporation like this would create a claim term that falls outside the understanding of a person of ordinary skill and would instead concern legal questions over who controls said server. *See* Appellant’s Reply Br. 31–32. We see no reason in either the intrinsic or extrinsic record here to read in such a meaning to this claim limitation.

that Comcast has not challenged, the specification, and the extrinsic evidence in the form of dictionary definitions and expert testimony.

IV

Finally, we reject Comcast's indefiniteness argument raised on cross-appeal. Comcast asserts that the phrase "only or virtually entirely" in the limitation "wherein each of the channels is selectable for receiving only or virtually entirely streaming video programming" is indefinite. We agree with the district court and WhereverTV that this limitation "can be understood by those skilled in the art." *Claim Construction Order*, at *3.

Reading the limitation in the context of claim 1 as a whole supports our holding. The limitation recites: "wherein each of the channels is selectable for receiving only or virtually entirely streaming video programming from its respective MSO or non-MSO source via the communications link and the network." Comcast itself proposed that the limitation be interpreted as "wherein each of the channels is configured such that, in immediate response to selection of its assigned channel number, and without further searching, video programming is only or virtually entirely transmitted over the Internet . . . and made available for viewing while the transmission is occurring." *Id.* Thus, the parties appear to agree that streaming means transmission over the Internet. *See* Appellant's Reply Br. 45; *Construction Order*, at *3. And despite its arguments on appeal, Comcast also appeared to agree at claim construction that "only or virtually entirely" modifies streaming of video programming, such that the claim requires "only or virtually entirely" streaming video programming. *See* *Construction Order*, at *3. In this context, we agree with the district court that the

limitation is not indefinite. In the context of this claim, the term “virtually”—similar to terms like substantially, about, and nearly—is simply a term of degree that modifies entirely. It does not render the claim indefinite. *See One-E-Way, Inc. v. Int'l Trade Comm'n*, 859 F.3d 1059, 1067 (Fed. Cir. 2017) (“While we note that ‘virtually’ is a term of degree, one that slightly expands the scope of the term . . . ,[] the inclusion of ‘virtually’ in these claims does not render them indefinite.” (citation omitted)).

Comcast agrees that “virtually” is a term of degree, but suggests that the patent fails to provide any “standard for measuring that degree.” Cross-Appellant’s Br. 66–67 (citation omitted). But our case law does not foreclose the use of terms of degree in claims, and as discussed, here the inclusion of “virtually” slightly expanded the scope of the claim from receiving only streaming video programming data to also include receiving effectively or almost entirely streaming video programming data, the bounds of which a skilled artisan would be informed of.

* * *

In light of the proper construction of claim 1’s IPG application limitation and adding or deleting channels limitation, as well as our decisions on Comcast’s alternative arguments, we remand WhereverTV’s infringement allegations to the district court for trial to determine infringement based on the correct construction of the claim terms. *See Rambus Inc. v. Infineon Techs. Ag*, 318 F.3d 1081, 1095 (Fed. Cir. 2003) (“In sum, the district court erred in its construction of each of the disputed terms. In light of the revised claim construction, this court vacates the grant of JMOL of noninfringement and remands for the district court to reconsider infringement.”).

CONCLUSION

We have considered Comcast's remaining arguments and find them unpersuasive. For the foregoing reasons, we vacate the district court's JMOL of non-infringement and remand for further proceedings consistent with this opinion.⁷

VACATED AND REMANDED

COSTS

Costs to Appellant.

⁷ At oral argument, Comcast represented that there was another validity defense apart from the indefiniteness challenge resolved in this appeal that is still live and will need to be resolved on remand based on the correct construction of the claim terms. *See Oral Arg. at 31:50–32:07, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-2098_02042025.mp3.*

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No: 2:18-cv-529-WFJ-NPM

WHEREVERTV, INC.,

Plaintiff,
v.

COMCAST CABLE COMMUNICATIONS, LLC,

Defendant.

ORDER

On April 26, 2023, following the parties' presentation of evidence during a six-day jury trial, the Court granted Defendant Comcast Cable Communications, LLC's ("Comcast") Rule 50(a) Motion for Judgment as a Matter of Law, Dkt. 409. *See* Dkt. 414. At the Court's invitation, Plaintiff WhereverTV, Inc. ("WTV") and Comcast filed supplemental briefs on the Court's ruling. Dkts. 428 & 429. Both parties also submitted rebuttal briefs. Dkts. 430 & 431. Upon careful consideration and in accordance with its earlier ruling, the Court directs final judgment to be entered in favor of Comcast and against WTV.

BACKGROUND

Founded in 2006, WTV is a "television service provider that offers live-streaming video content to subscribing customers around the world and through a wide range of internet enabled devices." Dkt. 30 ¶ 11.

WTV is the assignee and owner of the '431 Patent, which was issued by the United States Patent and Trademark Office ("USPTO") in February 2014. Dkt. 418-1. The '431 Patent discloses "[a] system and device . . . that employs a global interactive program guide [IPG] to receive, access, manage, and view digital entertainment services such as live television, television on demand, and pre-recorded video and audio programming from one or more content sources, via an internet-enabled device, anywhere in the world." *Id.* at 1. The '431 Patent states that "[t]he goal is to shift control of content availability, organization, and access from MSO's [multi system operators], which is today's cable television model, to a new user-centric model where the user can choose whether or not to purchase content from a content consolidator or directly from independent content providers." *Id.* at 15.

In 2009, cable television and internet provider Comcast began developing an entertainment platform known as the Xfinity X1 (the "X1"). Dkt. 30 ¶ 24; Dkt. 420 at 122. The X1 allows users to access video content from their cable provider and streaming providers through a "cloud-based system." *See, e.g.*, Dkt. 420 at 118–20, 136. Among other components, the X1 is comprised of the XRE¹ receiver, which is located on the X1 set-top box, and the cloud-based XRE server. *See* Dkt. 417-3 at 9.

In 2018, WTV filed the instant action against Comcast, claiming that Comcast "directly infringed and continues to directly infringe all the claims of the '431 Patent . . . by making, using, offering for sale, and

¹ The acronym "XRE" stands for Xcalibur rendered engineering, with "Xcalibur" being Comcast's initial internal name for the Xfinity project. *See* Dkt. 420 at 121, 129.

selling the Xfinity X1 Platform.” Dkt. 30 ¶¶ 47–48. Claim 1, the independent claim that remains the sole issue in the case, reads in full:

1. a content manager device comprising:
 - a server resident on a network containing descriptive program data about video content available from one or more multiple cable system operators (MSOs) and one or more non-MSOs;
 - a device capable of establishing and maintaining a connection with the network via communications link; and
 - an interactive program guide application installed on the device that provides user-configurable interactive program guide (IPG) listing at least one channel of video content available from each of the one or more MSOs and descriptive program data from the server for the video content available on each of the channels, wherein each of the channels is selectable for receiving only or virtually entirely streaming video programming from its respective MSO or non-MSO source via the communications link and the network; wherein the server is distinct from at least one of the one or more MSOs and one or more non-MSOs, and wherein the application allows for the IPG to be configured by a user with respect to adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs.

Dkt. 418-1 at 20.

Following a Markman hearing in 2020, Chief Judge Timothy Corrigan issued a claim construction order on seven disputed terms within Claim 1 and other dependent claims. Dkt. 172. Finding further construction necessary for only two of those seven terms, Judge Corrigan construed “multiple cable system operators (MSOs)” to mean “a cable, satellite, or Internet television content consolidator that receives and then broadcasts channels of video content” and “non-MSOs” to mean “a video content provider that does not act like an MSO because it does not receive and then broadcast channels of video content.” *Id.* at 5. Relevant to this Order, Judge Corrigan declined to construe the terms “independent program guide” and “adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs.” *Id.* at 8–9. The case was thereafter transferred to Judge Badalamenti, who held a second Markman hearing and adopted Judge Corrigan’s pertinent constructions. Dkt. 302 at 15. After several amendments to the parties’ case management and scheduling order, the case was set for a March 2023 jury trial. *See* Dkt. 326.

One week before the scheduled trial, the trial was continued, Dkt. 365, and the case was transferred to the undersigned, Dkt. 374. A jury trial before the undersigned subsequently commenced on April 19, 2023. By that time, the parties had narrowed the case to the WTV’s claim of literal infringement of Claim 1 of the ‘431 Patent. At the close of WTV’s case, Comcast moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), asserting a lack of sufficient evidence showing that the X1 meets Claim 1’s “adding or deleting channels” limitation or “interactive program guide application installed on the device” limitation. Dkt. 409. The Court took oral argument on Comcast’s motion outside the presence of

the jury following the parties' closing arguments on the sixth day of trial. Dkt. 424 at 127–55. Finding that no reasonable jury could find direct infringement of the “adding or deleting channels” or the “interactive program guide application installed on the device” limitations, the Court granted Comcast judgment as a matter of law. *Id.* at 155–56. This final Order follows.

LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 50(a), a “district court should grant judgment as a matter of law when the plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for [plaintiff] on a material element of [plaintiff’s] cause of action.” *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1278 (11th Cir. 2005) (citations omitted). Accordingly, a court should grant a Rule 50(a) motion “only if the evidence is so overwhelmingly in favor of the moving party that a reasonable jury could not arrive at a contrary verdict.” *Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1246 (11th Cir. 2001). In deciding a Rule 50(a) motion, a court must view all evidence and draw all reasonable inferences in the non-moving party’s favor. *Walker v. NationsBank of Fla., N.A.*, 53 F.3d 1548, 1555 (11th Cir. 1995).

ANALYSIS

In moving for judgment as a matter of law, Comcast asserts that WTV failed to present sufficient evidence for a reasonable jury to conclude that the X1 meets each and every limitation of Claim 1. Specifically, Comcast avers that no reasonable jury could find that the X1 meets either the “adding or deleting channels” limitation or the “interactive program guide application installed on the device” limitation.

Because WTV is arguing that the X1 “literally infringed” the ‘431 Patent, WTV has the burden of proving by a preponderance of the evidence that the X1 literally embodies every limitation of Claim 1. *See Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, 563 F.3d 1358, 1369 (Fed. Cir. 2009); *Biovail Corp. Int'l v. Andrx Pharms., Inc.*, 239 F.3d 1297, 1302 (Fed. Cir. 2001) (“Literal infringement requires a patentee to prove by a preponderance of the evidence that every limitation of the asserted claim is literally met.”). “If any claim limitation is absent from the accused device, there is no literal infringement as a matter of law.” *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d at 1247.

The Court notes that literal infringement is distinct from infringement under the doctrine of equivalents, which “requires that the accused product contain each limitation of the claim *or its equivalent*.” *See Cortland Line Co. v. Orvis Co.*, 203 F.3d 1351, 1359 (Fed. Cir. 2000) (emphasis added). Unlike the doctrine of equivalents, which dictates that infringement can be found so long as the differences between the accused product and a claim element are “insubstantial” to one of ordinary skill in the art, *see Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 40 (1997), literal infringement requires more exactitude, *see Southwall Techs., Inc. v. Cardinal IG Co.*, 54 F.3d 1570, 1575 (Fed. Cir. 1995) (“To establish literal infringement, every limitation set forth in a claim must be found in an accused product, exactly.”).

A literal infringement analysis involves two steps. “First, the asserted claims must be interpreted by the court as a matter of law to determine their meaning and scope. In the second step, the trier of fact determines whether the claims as thus construed read

on the accused product.” *Id.* (internal citations omitted). The Court considers the sufficiency of WTV’s evidence² with respect to the two disputed limitations in turn.

I. “Adding or Deleting Channels” Limitation

Relevant to the “adding or deleting channels” limitation, Claim 1 states that “the application allows for the IPG to be configured by a user with respect to adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs.” Dkt. 30-1 at 19. WTV’s infringement argument hinges on its understanding of “adding or deleting.”

At trial, WTV argued that an X1 user who subscribes (or unsubscribes) to a particular channel offered by Comcast on X1 has added (or deleted) that channel within the meaning of those terms as used in Claim 1. *See, e.g.*, Dkt. 419 at 198. For example, WTV explained in its opening argument that, with the X1, “[y]ou can add and delete channels. You can manage subscriptions right there through the X1 guide. . . . If you want to add the Starz channel, Showtime channel, Cinemax channel, Movie channel, Netflix channel, you can add any of them.” *Id.* Thus, WTV contends that the X1 infringes Claim 1 because a user managing subscriptions to channels is akin to a user adding or deleting channels.

However, because WTV abandoned its infringement claims under the doctrine of equivalents, WTV cannot prevail merely by showing that “subscribing” to a

² The evidence was closed on April 27, 2023, at the conclusion of trial. In connection with its supplemental, post-trial brief on this matter, WTV filed fourteen exhibits—including a new declaration from its expert—on the docket eighteen days after the close of evidence and this Court’s ruling. *See* Dkt. 428 (exhibits). Untimely evidence will not be considered.

channel is substantially the same as, or similar to, adding a channel to the IPG. WTV must instead show by a preponderance of the evidence that subscribing is literally “adding” and that unsubscribing is literally “deleting.” This means that the X1 cannot be said to literally infringe the “adding or deleting channels” limitation unless a user can, in fact, add or delete a channel from the IPG.

After reviewing the evidence presented at trial, the Court finds that WTV did not meet its burden of proof as to this literal infringement argument. Specifically, WTV did not introduce sufficient evidence at trial for a reasonable juror to conclude that the X1’s IPG can “be configured by a user with respect to adding or deleting channels.” Thus, as the Court explains below, WTV has failed to establish literal infringement.

- A. Because the Court declined to construe the “adding or deleting” channels limitation, the Court interprets the term according to its plain and ordinary meaning.

The Court twice engaged in claim construction in this case, and both times it declined to construe the adding or deleting channels limitation. Dkt. 172 at 8-9; Dkt. 302 at 15. WTV stated that the Court should use the plain and ordinary meaning of “adding or deleting.” *See* Dkt. 172 at 8-9. On two separate occasions WTV had the opportunity to move the Court to construe “adding or deleting channels” in a manner that would explicitly accommodate “subscribing and unsubscribing.” *Id.*; *see also* Dkt. 302 at 15. WTV did not do so on either occasion. Nor did either party move

to have the “adding or deleting channels limitation” construed during trial.³

The Federal Circuit has repeatedly held that a district court is not obligated to construe terms with ordinary meanings. *See, e.g., Biotec Biologische Naturverpackungen GmbH & Co. KG v. Biocorp, Inc.*, 249 F.3d 1341, 1349 (Fed. Cir. 2001) (finding no error in non-construction of “melting”); *Mentor H/S, Inc. v. Med. Device All., Inc.*, 244 F.3d 1365, 1380 (Fed. Cir. 2001) (finding no error in court’s refusal to construe “irrigating” and “frictional heat”). Generally, there is a “heavy presumption in favor of the ordinary meaning of claim language.” *See Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989 (Fed. Cir. 1999). And where a district court determines that a claim term does not require further construction, that term receives its plain and ordinary meaning as understood by a person of skill in the art. *See Phillips v. AWH Corp.*, 415 F.3d 1303, 1314 (Fed. Cir. 2005). “In some cases, the ordinary meaning of claim language as understood by a person of skill in the art may be readily apparent even to lay judges, and claim construction in such cases involves little more than the application of the widely accepted meaning of commonly understood words.” *Id.*; *see also Brown v. 3M*, 265 F.3d 1349, 1352 (Fed. Cir. 2001) (“We agree with this construction of the claim, for it is the plain reading of the claim text. These are not technical terms of art, and do not require elaborate interpretation.”).

³ The Court notes that Comcast orally requested after the close of evidence that “if the Court is inclined to submit the issue to the jury, as we’re aware courts often do, we object to the failure to construct and request that the term be construed.” Dkt. 424 at 134.

Here, “adding” and “deleting” are not used idiosyncratically and do not have discrete, technical meanings within the field of art, as WTV noted. *See* Dkt. 172 at 8–9. The prior judges’ decisions to not further construe “adding or deleting” was therefore in accord with the significance of these terms and the role that these terms play within the context of Claim 1 of the ‘431 Patent. As such, these terms will receive their plain and ordinary meaning. *See Phillips*, 415 F.3d at 1312 (“Because the patentee is required to define precisely what his invention is . . . it is unjust to the public, as well as an evasion of the law, to construe it in a manner different from the plain import of its terms.”).

To determine the plain and ordinary meaning of a claim term, courts may look to general purpose dictionaries. *See id.* at 1314. Merriam-Webster’s Dictionary defines “add” as “to join or unite so as to bring about an increase or improvement” and “delete” as “to eliminate especially by blotting out, cutting out, or erasing.” *Add*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/add> (last visited May 31, 2023); *Delete*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/delete> (last visited May 31, 2023). The Oxford English Dictionary defines “add” as “[t]o join (something) to something else so as to increase the amount, size, importance, etc.; to put in as an additional element or ingredient” and “delete” as, among other things, “[t]o remove (a character, a selection of text or string of characters, or piece of other data) from an electronic document or a program’s interface” or “[t]o remove (a file) from the memory of a computer or (in later use) electronic device, computer network, etc. Also: to uninstall (a program or application).” *Add*, *Oxford English Dictionary*, <https://www.oed.com/view/Entry/2155?rskey=hrC8Nv&result=2#eid> (last visited May 31, 2023);

Delete, Oxford English Dictionary, <https://www.oed.com/view/Entry/49325?rskey=cQCvpb&result=2&isAdvanced=false#eid> (last visited May 31, 2023).

While dictionary definitions alone are not controlling as to the plain and ordinary meaning of a particular claim term, they are “useful to assist in understanding the commonly understood meaning of words” where, as here, there is no competing art-specific evidence of meaning. *See Phillips*, 415 F.3d at 1322. The Court therefore reiterates the earlier claim construction order determining that “adding or deleting channels” is afforded its plain meaning. No further claim construction is required as common-sense, ordinary understandings of “adding” and “deleting” are confirmed by the above referenced dictionary definitions, and the parties have introduced no evidence tending to yield more than one “ordinary” meaning for these terms. Nor did WTV request the same.

B. Channels cannot be added or deleted on the X1 under the plain meaning of “add” and “delete,” meaning the X1 does not literally infringe Claim 1.

The second step in the literal infringement analysis asks, “whether the claims as thus construed read on the accused product.” *Southwall Techs.*, 54 F.3d at 1575. As explained below, WTV did not introduce any evidence at trial that X1 users can add or delete channels in a manner that accords with the plain and ordinary meaning of those terms. WTV therefore failed to show by a preponderance of the evidence that the X1 literally infringes the “adding or deleting channels” limitation of Claim 1.

WTV premised its infringement argument on its contention that a user “managing subscriptions” is the

same as that user “adding or deleting channels.” Dkt. 419 at 198. WTV first made this argument in its claim construction briefing asserting that “[a]dding a channel refers to ‘integrating’ the channel into the IPG. One way to add a channel to the IPG is to subscribe to the channel.” Dkt. 96 at 25. At the first Markman hearing, however, the previously assigned judge expressed skepticism as to this syllogism, asking, “Why would you add to the guide something that’s already there, and why would you delete from the guide something that’s going to be there after you delete it? I don’t get it.” Dkt. 165 at 132. That concern highlights the issue with respect to WTV’s infringement argument on this particular limitation.

To begin, in attempting to elide plain English and get the jury to adopt its narrow and idiosyncratic reading of “adding or deleting,” WTV improperly contorted the Court’s instruction as to the scope of the limitation. At no point during trial did WTV introduce evidence that an X1 user could subscribe to a channel that was not already offered on the accused X1’s IPG, thereby increasing the number of channels offered on the IPG. Nor did WTV introduce any evidence that a user who unsubscribed from a particular app—such as Netflix—could remove that app from the X1’s IPG entirely such that search results for content contained in that app would not appear or that the app would not be displayed on the IPG. Thus, by encouraging the jury to accept that subscribing is adding and unsubscribing is deleting, WTV encouraged a departure from the plain and ordinary meaning of these terms.

Even if WTV could argue that subscribing is like adding, under the plain and ordinary meaning of adding, mere equivalence is not enough to satisfy literal infringement. Again, to argue literal infringe-

ment, WTV must state that subscribing *is* adding and unsubscribing *is* deleting. WTV may not assert literal infringement based on the theory that unsubscribing from an app—so as to restrict that app’s content by “graying it out” or placing it behind a paywall or a request for credentials—is conceptually similar to deleting that app simply because both actions create impediments for the user who wants to watch content offered by the app. WTV must show that an X1 user can actually delete the app from the IPG. WTV, however, has introduced no evidence that this is possible, and in fact, its witnesses confirmed just the opposite. One cannot delete a channel from the X1. Nor can one add a channel that Comcast did not deign to include. WTV’s case in chief failed to prove that the X1 user can add or delete channels.

In its case in chief, WTV called Jessica Sant, who leads the team that builds the X1 user interface at Comcast, to testify. Dkt. 421 at 79. When asked how a user can add or delete apps from the IPG on the X1, Ms. Sant stated, “[i]t’s not possible. All the apps that are available to a customer are listed here. There’s no way for a customer to add an app or remove it.” *Id.* at 80. Ms. Sant elaborated that a user could not add or delete an app because “[t]hat’s simply not how the system was designed. All the channels that are available to a customer are present in the guide, in the IPG, whether or not they are subscribed to them.” *Id.* In sum, Ms. Sant testified that subscribing to or authenticating a channel cannot be “adding” that channel to the X1 IPG because, irrespective of the user’s actions, the channel—including its content and metadata—will be present on the IPG. That is, “[t]he rows that exist are all there[.] There’s no way to add or remove them.” *Id.*

WTV's technology expert, Dr. William C. Easttom II, confirmed this fact. Dr. Easttom testified that new channels cannot be added to the X1 IPG because when a user searches for content on the X1 system, the system will "show you every place you can watch it" and provide "a listing of all of them in one single IPG." Dkt. 420 at 148. Thus, when a user searches for particular content on the X1, the results yielded by the X1 will include every channel containing that content, irrespective of whether the user is subscribed to the channel. *Id.* As Dr. Easttom testified, even if a user did not want the Netflix app on her X1's IPG and had no intention of ever subscribing to Netflix, the Netflix app would still appear, and the user would not be able to delete it. *Id.* at 277. In this regard, Dr. Easttom essentially conceded that the user cannot "configure the IPG with respect to adding or deleting channels," as Claim 1 requires given that, irrespective of the user's personal preferences as to what channels appear on the IPG, all channels offered by Comcast would still be displayed on the IPG. *See id.*

Ms. Sant and Dr. Easttom's testimony regarding the rigidity of the X1's IPG display and the immutability of the channel listings provided by Comcast is in no way identical to the customizable and restriction-free invention described in the '431 Patent's specification. That specification explains in relevant part:

The present invention allows a user to move from location to location and easily acquire, organize and view digital entertainment content from one or more independent content sources (including channel listings, programming information, and saved content) via a "follow me" personalized global IPG that is available on any device that is connected to

the Public Internet. The goal is to shift the control of content availability, organization, and access from MSO's, which is today's cable television model, to a new user-centric model where the user can choose whether or not to purchase content from a content consolidator or directly from independent content providers.

Dkt. 30-1 at 14. Users of the X1 cannot "easily acquire . . . content," and they have no "control of content availability" because, as Ms. Sant testified, the X1 does not allow users to pick and choose whatever channels they want on their devices. *See* Dkt. 421 at 92 (Ms. Sant explaining, "One of the reasons that we designed it that way is so that Comcast can really control what content is available to our customers so we can provide a really high-quality experience so there's not any rogue content on the system."). Simply put, the role that "adding or deleting channels" plays in the '431 Patent's efforts to permit users to pick and choose what content is available to them, wherever they are in the world, is totally dissimilar to the role that "managing subscriptions" plays on the X1. While the '431 Patent allows users to increase the number of channels available to them—true to the plain and ordinary meaning of "adding"—the X1 only allows users to log in and out of channels that Comcast, and *only* Comcast, chose irrevocably to emplace on the IPG.

In sum, WTV has not shown that a user's ability to manage subscriptions on the X1 literally embodies a user's ability to add or delete channels as described in Claim 1. Instead, the evidence introduced by WTV at trial highlights the marked dissimilarities between the '431 Patent and the X1, particularly vis-à-vis what the inventor described as the "goal" of the invention—to allow a user to exercise full, unrestricted dominion

over the content available to her on the IPG. *See* Dkt. 30-1 at 14. For these reasons, the Court finds that no reasonable juror could find that WTV has shown by a preponderance of the evidence that the X1 literally infringes the “adding or deleting channels” limitation of Claim 1.

II. “Interactive Program Guide Application Installed on the Device” Limitation

Turning to the second disputed limitation, Claim 1 also calls for an “interactive program guide application installed on the device[.]” Dkt. 418-1 at 20. At trial, WTV maintained that the X1 meets this limitation because the XRE receiver, which the parties agree is installed on the X1 set-top box (i.e., “the device”), is an IPG application. However, no reasonable jury could make this finding based upon the evidence presented at trial. As set forth below, there is insufficient evidence to support a finding of literal infringement.

A. Because the Court declined to construe the “interactive program guide application installed on the device” limitation, the term is afforded its plain and ordinary meaning.

As with the “adding or deleting channels” term, the Court previously declined to further construe “interactive program guide” or “interactive program guide application” during either claim construction. Dkt. 172 at 8; Dkt. 302. WTV suggested that this term should have a “plain and ordinary meaning, namely a program guide that enables user interaction.” Dkt. 172 at 8. Accordingly, the term “interactive program guide application” receives its plain and ordinary meaning as understood by a person of ordinary skill in the art in question at the time of the invention. *Phillips*, 415 F.3d at 1312–13. Notably, “the person of ordinary skill

in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent[.]” *Id.* at 1313.

Where, as here, a term’s plain and ordinary meaning is not readily apparent, courts look to “those sources available to the public that show what a person of skill in the art would have understood the disputed claim language to mean,” including “the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms, and the state of the art.” *Id.* at 1314 (quoting *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1116 (Fed. Cir. 2004)); *see also Medrad, Inc. v. MRI Devices Corp.*, 401 F.3d 1313, 1319 (Fed. Cir. 2005) (“We cannot look at the ordinary meaning of the term . . . in a vacuum.”). It is with this understanding that the Court considers whether WTV offered sufficient evidence to show literal infringement of the “interactive program guide application installed on the device” limitation.

- B. The X1 does not literally infringe Claim 1 because the X1 does not have an “interactive guide application program installed on the device.”

When considering the meaning of an “interactive program guide application” as understood by a person of ordinary skill in the art, it is apparent that WTV failed to present sufficient evidence to show that the X1 has an “interactive program guide application installed on the device.” WTV therefore failed to carry its burden to show that the X1 literally infringed this limitation.

Turning first to the claim language, Claim 1 requires “an interactive program guide application *installed on the device* that provides user-configurable interactive program guide (IPG) listing at least one channel of video content . . . and descriptive program data from the server for the video content available on each of the channels.” Dkt. 418-1 at 20 (emphasis added). This language plainly describes a client-server architecture in which the interactive program guide application is installed on the device, i.e., the set-top box, and descriptive program data resides on a server. Though Dr. Easttom asserted that the X1 utilizes this architecture, *see* Dkt. 420 at 135–36, it is undisputed that the X1 has an “XRE guide” application that exists and runs not on the X1 set-top box. Rather, the XRE guide is installed and runs “on servers in the cloud”—namely, the XRE server. *Id.* at 284. Dr. Easttom acknowledged that it is this XRE guide application that “directs the set-top box as to what to display” and “generates rendering instruction for the XRE receiver” with respect to the IPG. *Id.* at 284. Therefore, the uncontested evidence shows that the interactive program guide application is not installed on the device (the set-top box).

Despite the undisputed existence that the “XRE guide application” in the cloud provides all the data assembly and “brains” necessary for the interactive program guide, WTV maintained throughout trial that the XRE receiver on the set-top box is the X1’s IPG application. However, the ‘431 Patent’s specification does not support this conclusion. Figure 8⁴ in the ‘431 Patent depicts an IPG application that, among other

⁴ WTV specifically directed the Court to Figures 7 and 8 of the ‘431 Patent in arguing its opposition to the instant motion. Dkt. 424 at 139–40, 150–52.

things, “procures digital rights via stored profile,” “locates and authenticates” new content sources, and “downloads and synchronizes content metadata from new content sources.” Dkt. 418-1 at 12. Indeed, counsel for WTV conceded that Figure 8 is, “in a sense,” a helpful illustration to understand the functions of an interactive program guide application. Dkt. 424 at 153. Moreover, Figure 4 within the ‘431 Patent serves as “a conceptual architectural diagram of the global IPG application.” Dkt. 418-1 at 16. Figure 4 depicts the invention’s IPG application as having “Core Application Features” such as data integration, user authentication, and customization and personalization of the IPG, as well as “Core Application Functions” like content subscription management, content organization management, and user profile management. *Id.* at 8, 18.

WTV presented no evidence that the XRE receiver in the X1 set-top box “device” offers any of the functions or features illustrated in Figures 4 or 8. Instead, Dr. Easttom testified that the XRE receiver is a “thin client”⁵ capable of performing only two major functions: “draw[ing] what you see on the screen pixel by pixel” and sending “whatever input you give it through the remote control” to the cloud-based XRE server, “which may send data back.” Dkt. 420 at 189, 285. In other words, at best WTV proved the accused device (the X1 set-top box) is a thin client, signaling device, and WTV never showed that the interactive program guide application was installed therein. This was confirmed by WTV’s counsel, who described the XRE receiver as a “graphics program.” Dkt. 424 at

⁵ In computing parlance, a “thin client” is a system with limited processing power, whereas a “fat client” is a system with greater processing power. *See* Dkt. 420 at 284–85; Dkt. 423 at 58.

148–49. How a “graphics program” constitutes an “interactive program guide application” was never made clear.

Moreover, both parties’ experts agreed that Comcast intentionally designed the X1 set-top boxes to work as thin clients that do not execute application logic.⁶ Dkt. 423 at 58 (Dr. Terveen); Dkt. 420 at 201–02, 285 (Dr. Easttom). Dr. Terveen explained that, while placing IPG applications on set-top boxes “was really the way things worked in the industry” at the time of the ‘431 Patent application in 2006, Comcast chose to depart from “the old way of doing things” by placing the X1’s IPG application on a cloud-based server that executes all application logic. Dkt. 423 at 45–46, 58. Dr. Terveen testified without contradiction that Comcast made this decision because a server has “a lot more computational power than a set-top box,” and Comcast could update the IPG application on the server instead of requiring customers to download updated versions onto their set-top boxes. *Id.* at 47; *see also* Dkt. 420 at 202, 283–84 (Dr. Easttom similarly testifying that Comcast does not “have to change the receiver every single time something changes in [the] back end” because the application logic is executed on the XRE server). Due to this design choice, it is undisputed that the cloud-based XRE server, and *not* the XRE receiver, provides “the data necessary for the . . . IPG.” Dkt. 420 at 189 (Dr. Easttom).

Ultimately, while the XRE receiver in the X1 set-top box may be an “application installed on the device,” WTV failed to sufficiently demonstrate that the XRE

⁶ The parties’ experts described this “application logic” as how the IPG application processes user inputs, such as remote key presses, “behind the front end.” *See* Dkt. 420 at 201; Dkt. 423 at 58.

receiver constitutes an “*interactive program guide* application installed on the device” as understood by a person of ordinary skill in the art. This is particularly evident in light of the language of Claim 1, the ‘431 Patent specification, and relevant proof at trial. With insufficient evidence for a reasonable jury to find that the X1 meets the “interactive program guide application installed on the device” limitation, WTV cannot show the X1’s literal infringement of Claim 1 of the ‘431 Patent.

CONCLUSION

Based on the foregoing, Comcast is entitled to judgment as a matter of law. The Clerk is directed to enter final judgment in favor of Comcast and against WTV and close this case.

DONE AND ORDERED at Tampa, Florida, on June 5, 2023.

/s/ William F. Jung
WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

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Counsel of Record

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 2:18-cv-529
April 26, 2023

WHEREVERTV INC.

vs.

COMCAST CABLE COMMUNICATIONS LLC

JURY TRIAL - DAY 6
Heard in Courtroom 15B
Sam M. Gibbons United States Courthouse
801 N. Florida Avenue
Tampa, FL
April 26, 2023

BEFORE THE HONORABLE WILLIAM F. JUNG
UNITED STATES DISTRICT JUDGE

Official Court Reporter:

Tana J. Hess, CRR, FCRR, RMR
U.S. District Court Reporter
Middle District of Florida
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[155]

THE COURT: All right. Notwithstanding the forensic -- substantial forensic skills shown by the plaintiff, I'm granting the motion. I find that this is literal infringement. There's no legally -- legally appropriate evidence for a reasonable jury in a light viewed most favorable to the plaintiff, including its inferences, to find infringement for the two reasons that we've discussed.

I've evaluated all the evidence and find that the Rule 50 standard applies. so the motion is granted. I rule against the plaintiff and for the movant.

I'm going to put a final order out on this -not a final order -- final order out on this June 2nd. If anybody wants to do substantive briefing, that date -- deadline is may 14th. And the -- and the -- any rebuttal pleadings, if you wish, is may 24th. I'll issue the order June 7th.

I find that the two terms that we've discussed, the interactive program guide installed on a device and also the adding and deleting portions of Claim 1, are not met by the plaintiff.

Anything else, plaintiff?

[156]

Hearing nothing.

Anything else -- yes?

MR. ROSENTHAL: Your Honor, I'd just move to reconsider that the -- you cannot as a matter of law -- the Federal circuit has been very clear. You cannot import limitations to the claim from a specification.

THE COURT: All right. well, I've taken argument on that, and I've ruled as I've ruled today.

So thank you. Any substantive -- the case is over.
I've granted the JMOL under Rule 50.

Anything else from the defense?

MR. RAMANI: Nothing else from the defense, Your Honor. Thank you.

THE COURT: Again, June 2nd -- this is not a final order. June 2nd is my final order. May 14th if anyone has supplemental pleadings, and May 24th for any rebuttal thereto.

Thank you, counsel. I'm going to go talk to the

(End of proceedings.)

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No. 2:18-cv-529-FtM-32NPM

WHEREVERTV, INC.,

Plaintiff,
v.

COMCAST CABLE COMMUNICATIONS, LLC,

Defendant.

ORDER

In this patent infringement action, WhereverTV, Inc. alleges that Comcast Cable Communications, LLC's Xfinity X1 Platform infringes on a patent owned by WhereverTV, U.S. Patent No. 8,656,431 B2, titled Global Interactive Program Guide Application and Device (the '431 Patent) (Doc. 30-1). This matter is before the Court for patent claim construction, as described in *Markman v. Westview Invs., Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (en banc), *aff'd*, 517 U.S. 370 (1996). The Court has considered the submissions of the parties, including the memoranda, exhibits, and expert declarations (Docs. 95, 95-1, 96, 96-1, 107, 108, 108-1, 109, 109-1, 161, 162), and the argument of counsel at the June 12, 2020 *Markman* hearing about seven disputed claim terms¹ (Doc. 165, transcript).

¹ There were twelve disputed claim terms but to narrow the scope of disputed issues, Comcast agreed to withdraw its request

The record of that hearing is incorporated here by reference. Following the hearing, the Court made tentative indications on the record about the parties' arguments and proposed constructions (Doc. 165 at 140-42) and allowed the parties time to consider settlement, but they did not settle. (Docs. 168, 169).

I. CLAIM CONSTRUCTION STANDARDS

“The proper construction of a patent’s claims is an issue of Federal Circuit Law.” *Powell v. The Home Depot U.S.A., Inc.*, 663 F.3d 1221, 1228 (Fed. Cir. 2011). “[T]here is no magic formula or catechism for conducting claim construction.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1324 (Fed. Cir. 2005). Claim construction begins with the words of the claims themselves. *Allergan Sales, LLC v. Sandoz, Inc.*, 935 F.3d 1370, 1374 (Fed. Cir. 2019); *Phillips*, 415 F.3d at 1312. “[T]he words of a claim ‘are generally given their ordinary and customary meaning.’” *Phillips*, 415 F.3d at 1312 (quoting *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996)). Such ordinary meaning “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.” *Id.* at 1313. “Furthermore, a claim term should be construed consistently with its appearance in other places in the same claim or in other claims of the same patent.” *Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1342 (Fed. Cir. 2001). Accordingly, “the specification is always highly relevant to the claim construction analysis.” *Phillips*, 415 F.3d at 1315 (quotation marks omitted). This is true because a

as to five disputed terms: “the device,” “digital rights management module,” “filtering module,” “voice recognition module,” and “relay module.” For this litigation only, Comcast accepts WhereverTV’s proposed constructions for those five terms. (Doc. 160).

patentee may define his own terms, give a claim term a different meaning than the term would otherwise possess, or disclaim or disavow the claim scope. *Id.* at 1316.

“[W]hile claims are to be interpreted in light of the specification and with a view to ascertaining the invention, it does not follow that limitations from the specification may be read into the claims.” *Comark Commc’ns, Inc. v. Harris Corp.*, 156 F.3d 1182, 1186 (Fed. Cir. 1998) (quoting *Sjolund v. Musland*, 847 F.2d 1573, 1581 (Fed. Cir. 1988)). Importing limitations from the specification therefore “should be avoided unless the patentee clearly ‘intends for the claims and the embodiments in the specification to be strictly coextensive.’” *Pfizer, Inc. v. Ranbaxy Laboratories Ltd.*, 457 F.3d 1284, 1290 (Fed. Cir. 2006) (quoting *Phillips*, 415 F.3d at 1323). “In addition to consulting the specification, ... a court should also consider the patent’s prosecution history, if it is in evidence².... Like the specification, the prosecution history provides evidence of how the [Patent and Trademark Office (‘PTO’)] and the inventor understood the patent.” *Phillips*, 415 F.3d at 1317 (quotations and citations omitted).

Although intrinsic evidence is preferred, courts may also rely on extrinsic evidence, which is “all evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and learned treatises.” *Markman*, 52 F.3d at 980.

II. THE PATENT

The ’431 Patent discloses novel methods and systems for receiving, accessing, managing and viewing digital

² The ’431 Patent’s prosecution history is attached as Exhibit B to Doc. 94.

entertainment services such as live television, television on demand, and pre-recorded video and audio programming from one or more content sources via an Internet-enabled device. To access the video content, the user uses an interactive programming guide application. The '431 Patent states that “[t]he goal is to shift control of content availability, organization, and access from MSO's, [multi system operators], which is today's cable television model, to a new user-centric model where the user can choose whether or not to purchase content from a content consolidator or directly from independent content providers.” (Doc. 30-1 at 6:39-44).

The text of Claim 1, the asserted independent claim, reads in full:

1. a content manager device comprising:

a server resident on a network containing descriptive program data about video content available from one or more multiple cable system operators (MSOs) and one or more non-MSOs;

a device capable of establishing and maintaining a connection with the network via a communications link; and

an interactive program guide application installed on the device that provides user-configurable interactive program guide (IPG) listing at least one channel of video content available from each of the one or more MSOs and descriptive program data from the server for the video content available on each of the channels, wherein each of the channels is selectable for receiving only or virtually entirely streaming video programming from

its respective MSO or non-MSO source via the communications link and the network; wherein the server is distinct from at least one of the one or more MSOs and one or more non-MSOs, and wherein the application allows for the IPG to be configured by a user with respect to adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs.

(Doc. 30-1 at 16:32-54).

III. CLAIM CONSTRUCTION

The claims for the *Markman* hearing are seven disputed terms recited in independent Claim 1 and dependent Claims 8, 9 of the '431 Patent. Dependent claims include all the limitations of the independent claim (Claim 1), plus the added limitation described in the dependent claim. "A claim in dependent form shall be construed to incorporate by reference all the limitations of the claim to which it refers." 35 U.S.C. § 112(4).³

Considering the parties' submissions, the arguments at the *Markman* hearing, and given the above standards, the Court makes these constructions:

³ Because the '431 Patent was filed before the adoption of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 4(e), the previous version of § 112 governs. *See AbbVie Deutschland GmbH & Co. v. Janssen Biotech, Inc.*, 759 F.3d 1285, 1290, n.3 (Fed. Cir. 2014).

1. “multiple cable system operators (MSOs)”
(Claims 1, 9)

WhereverTV's Proposed Construction	Comcast's Proposed Construction	Court's Construction
a traditional cable or Internet television content consolidator that receives and rebroadcasts channels of video content	an aggregator of video content that provides user access to the video content in more than one community and that exercises control over what video content is made available to the user	a cable, satellite, or Internet television content consolidator that receives and then broadcasts channels of video content

2. “non-MSOs” (Claims 1, 9)

WhereverTV's Proposed Construction	Comcast's Proposed Construction	Court's Construction
“non-MSO” should receive its plain and ordinary meaning in light of the definition of MSO	a non-aggregator of video content that distributes its own content	a video content provider that does not act like an MSO because it does not receive and then broadcast channels of video content

3. “wherein the server is distinct from at least one of the one or more MSOs and one or more non-MSOs” (Claim 1)

WhereverTV's Proposed Construction	Comcast's Proposed Construction	Court's Construction
the server does not stream digital television content from at least one of the MSOs and does not stream digital television content from at least one of the non-MSOs	wherein the server is not controlled by the one or more MSOs and is not controlled by the one or more non-MSOs	The Court does not adopt either parties' construction. No further construction is necessary.

4. “only or virtually entirely streaming video programming” (Claim 1)

WhereverTV's Proposed Construction	Comcast's Proposed Construction	Court's Construction
plain and ordinary meaning, which the jury understands to mean exclusively or almost exclusively video programming ⁴	indefinite	No further construction is necessary. <u>See below.</u>

⁴ The Court asked Plaintiff's counsel at the hearing why WhereverTV asserts plain and ordinary meaning and also proposes what the jury understands. (Doc. 165 at 39:9-40:19). Counsel explained that if the term is given its plain and ordinary meaning no jury instruction is needed. (Doc. 165 at 112:14-18). The Court makes no determination at this time how the jury will be instructed.

To promote clarity, a patent specification must “conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.” 35 U.S.C. § 112(2). This “definiteness” requirement mandates that “a patent’s claims, viewed in light of the specification and prosecution history, [must] inform those skilled in the art about the scope of the invention with reasonable certainty.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 910 (2014). “If a claim employs a term of degree, the intrinsic record must provide those skilled in the art with ‘objective boundaries’ with which to assess the term’s scope.” *In re Walter*, 693 F. App’x 1022, 1026 (Fed. Cir. 2017) (quoting *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1371 (Fed. Cir. 2014) (addressing indefiniteness in claim construction)). Terms of degree are not inherently indefinite. *Interval Licensing*, 766 F.3d at 1370.

Patents are presumed valid under 35 U.S.C. § 282, so “[a]ny fact critical to a holding of indefiniteness . . . must be proven by the challenger by clear and convincing evidence.” *Cox Commc’ns, Inc. v. Sprint Commc’n Co. LP*, 838 F.3d 1224, 1228 (Fed. Cir. 2016) (quoting *Intel Corp. v. VIA Techs., Inc.*, 319 F.3d 1357, 1366 (Fed. Cir. 2003)).

It is admittedly a close question whether the term “only or virtually entirely streaming video programming” fails for indefiniteness. The claim term was added during the patent prosecution (Doc. 94-5), but at the oral argument WhereverTV offered no clear indication what issue the claim term was intended to resolve. Even so, the Court believes these words can be understood by those skilled in the art, particularly since Comcast itself was able to propose a construction for term 5, which contains the same language. Thus, at

this stage, the Court finds that Comcast has not met its burden to show by clear and convincing evidence that the term fails for indefiniteness under 35 U.S.C. § 112.

5. “wherein each of the channels is selectable for receiving only or virtually entirely streaming video programming” (Claim 1)

WhereverTV's Proposed Construction	Comcast's Proposed Construction	Court's Construction
plain and ordinary meaning, which the jury will understand to mean that each of the channels, when selected, provides only or virtually entirely streaming video programming	wherein each of the channels is configured such that, in immediate response to selection of its assigned channel number, and without further searching, video programming is only or virtually entirely transmitted over the Internet (or other network implementing the Internet Protocol) and made available for viewing while the transmission is occurring	No further construction is necessary. The Court does not adopt WhereverTV's position on what the jury will “understand.”

6. “interactive program guide” (Claims 1, 8, 9)

WhereverTV’s Proposed Construction	Comcast’s Proposed Construction	Court’s Construction
plain and ordinary meaning, namely a program guide that enables user interaction	a listing of channels that includes, for each channel, a selectable channel number and associated descriptive program data	No further construction is necessary.

7. “adding or deleting channels from any of the one or more MSOs or the one or more non-MSOs” (Claim 1)

WhereverTV’s Proposed Construction	Comcast’s Proposed Construction	Court’s Construction
plain and ordinary meaning, which the jury will understand is “adding or deleting from the IPG at least one of the MSO channels or at least one of the non-MSO channels.”	adding channels to the IPG that, absent such adding, are not otherwise displayed in the IPG, or deleting channels from the IPG such that, after deletion, the channel is no longer displayed in the IPG	The Court does not adopt either parties’ construction or what the jury will “understand.” No further construction is necessary.

IV. SUPPLEMENT THE RECORD

WhereverTV requests that the Court consider arguments made in its Motion to Supplement the Record (Doc. 133) and supplement the claim construction record with a supplemental appendix containing the parties' briefing before the Patent Trial & Appeal Board (PTAB) and the PTAB's two decisions (Doc. 133-1). Comcast does not object to admitting the supplemental appendix but does object to the procedural and substantive arguments in Plaintiff's Motion to Supplement. (Doc. 160 ¶ 5). Without objection, the Court will supplement the claim construction record with the supplemental appendix (Doc. 133-1).

V. CONCLUSION

As stated in a previous Order (Doc. 164, n.1), the Court will reestablish discovery and other deadlines and will take up consideration of the Motion to Compel (Doc. 137) and the Motion to Quash (Doc. 148). (Doc. 164). Although the Court's *Markman* rulings could affect the parties' positions on deadlines and the pending discovery motions, the Court will let the assigned Magistrate Judge address those issues.

Accordingly, it is hereby ORDERED:

1. Absent further order, further proceedings will be consistent with this Order.
2. Plaintiff's Motion for Leave to Supplement the Claim Construction Record Based on New Evidence (Doc. 133) is GRANTED to the extent the Court admits the supplemental appendix (Doc. 133-1) into the claim construction record.
3. Based on this Order and the status report (Doc. 169) filed by the parties the assigned Magistrate

Judge will set a schedule for remaining case events. Now that Judge Badalamenti has assumed the Fort Myers docket, this case will be transferred to him for all future proceedings. Once the record is more fully developed, Judge Badalamenti is free to revisit any of these rulings as he sees fit.

4. The Clerk is directed to re-open the case.

DONE AND ORDERED in Jacksonville, Florida, the 13th day of November, 2020.

/s/ Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

Copies:

Honorable John L. Badalamenti
United States District Judge

Honorable Nicholas P. Mizell
United States Magistrate Judge

Counsel of Record

APPENDIX E

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-2098, 2023-2150

WHEREVERTV, INC.,

Plaintiff-Appellant

v.

COMCAST CABLE COMMUNICATIONS, LLC,

Defendant-Cross-Appellant

Appeals from the United States District Court for
the Middle District of Florida in No. 2:18-cv-00529-
WFJ-NPM, Judge William F. Jung.

ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST,
REYNA, TARANTO, CHEN, HUGHES, STOLL,
CUNNINGHAM, and STARK, *Circuit Judges*.¹

PER CURIAM.

¹ Circuit Judge Newman did not participate.

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ORDER

Comcast Cable Communications, LLC filed a combined petition for panel rehearing and rehearing en banc. The petition was first referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

[SEAL UNITED STATES
COURT OF APPEALS FOR
THE FEDERAL CIRCUIT]

/s/ Frances M. McNulty
Frances M. McNulty
Chief Deputy Clerk of Court

October 10, 2025
Date