Before the
United States Copyright Office
Library of Congress

In the matter of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies under 17 U.S.C. § 1201

Docket No. 2014-7

May 1, 2015

REPLY COMMENTS OF PUBLIC KNOWLEDGE

1. Commenter Information.

These reply comments are respectfully submitted by Public Knowledge. Public Knowledge is a nonprofit organization dedicated to representing the public interest in digital policy debates. Public Knowledge promotes freedom of expression, an open internet, and access to affordable communications tools and creative works.

Interested parties are encouraged to contact John Bergmayer (john@PublicKnowledge.org) or Sherwin Siy (ssiy@PublicKnowledge.org) as Public Knowledge's authorized representatives in this matter. Public Knowledge's contact information is as follows:

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2. Proposed Class Addressed.

These reply comments address Proposed Class 8: Audiovisual works – space-shifting and format-shifting. Specifically, they address objections to the proposed exemption raised by The DVD Copy Control Association ("DVD CCA") and The Advanced Access Content System, Licensing Administrator, LLC ("AACS LA"), and by Entertainment Software Association; Motion Picture Association of America, Inc.; and Recording Industry Association of America (the "Joint Creators and Copyright Owners"). These reply comments refer to these commenters as "Respondents."

The class includes audiovisual works purchased by consumers in physical media such as DVD and Blu-ray discs, as well as those purchased by consumers as digital downloads. The class is intended to include audiovisual works whether they portray images in succession in order to create the impression of motion or not; e.g., an audiovisual slideshow embodied in a DVD or a downloaded file should also be considered a part of the class.

3. Overview.

The Copyright Office should grant Public Knowledge's request. Users should be able to exercise their fair use rights by space- and format-shifting audiovisual works. Respondents have implausibly claimed that such uses are not fair, and have not addressed Public Knowledge's evidence that many works that are available on DVD and Blu-Ray are not available online for purchase or streaming, making them effectively inaccessible. Respondents further argue that consumers do not own the movies they buy and that copyright law requires consumers to re-purchase things they already own. This view of copyright is misconceived and the Office should reject it.

Item 4. Technological Protection Measure(s) and Method(s) of Circumvention.

In its earlier comment, Public Knowledge proposed that consumers be permitted to bypass any technological protection measures that prevent them from taking advantage of their fair use rights to time-, place-, or format-shift copyrighted audiovisual works.

Item 5. Asserted Non-Infringing Uses.

Space- and Format-Shifting Are Fair Uses.

All applicable legal precedent agrees that personal uses such as space- and format-shifting are fair uses. In its earlier comment Public Knowledge described how making copies of DVD and Blu-Ray discs is a fair use and provided analysis under the four factors. Public Knowledge also cited additional legal authority. Respondents provide their own four-factor analysis and cite the Register and Librarian's previous, non-precedential findings in response—while selectively excluding legal opinions of similar weight. However, the Register and Librarian's previous findings were issued before the Ninth Circuit Court of Appeals and the Central District of California affirmed users' long-standing right to make copies of copyright works for such personal uses.

The Legislative History of the 1971 Sound Recording Act and the 1961 Register's Report on Motion Pictures Are as Relevant as Any Precedent Cited by Respondents.

Contrary to Respondents, the legislative history of the 1971 Sound Recording Act provides valuable insight into Congress's intent with regard to copyright law generally. The 1971 Act was intended to bring the scope of protection for sound recordings closer to alignment to the scope of protection for other works. This is in accord with the simple observation that there is only one copyright law, that should apply to all copyrightable works in like manner. Just as judicial precedents with regard to literary works are applicable to cases involving sound recordings or musical compositions, documents which

provide insight into Congress's intent with regard to the scope of copyright for sound recordings are applicable to copyrighted works generally. Further, the 1961 Register's Report has at least as much legal weight as the Register of Copyright's 2012 Recommendations that Respondents lean so heavily upon. Both the 1961 Register's Report and the 2012 Recommendations reflect the Register's expert, but non-precedential viewpoint. Respondents cannot cherrypick from among past statements from the Register while ignoring statements that are contrary to their views. Indeed, the 1961 Report informed Congress as it began the long process of statutory revision that culminated in the Copyright Act of 1976, and therefore provides evidence of Congressional intent with respect to copyright law generally. Its view that "We do not believe the private use of such a reproduction [of an audiovisual work] can or should be precluded by copyright"[1] should therefore be given due consideration. By contrast, the 2012 Recommendations, though carrying persuasive authority, cannot provide any insight into legislative intent with respect to fair use or the lawfulness of such personal use copies.

The Hopper Litigation Is the Latest Judicial Word on Personal Use Copies.

There are three distinct opinions in the *Fox v. DISH* litigation, and all three provide support for consumers' fair use rights. Respondents try to minimize these opinions because they so clearly show that users have a fair use right to make copies of copyrighted audiovisual works for the purpose of playing them back in a different manner, or at a different time. But the *Fox v. DISH* litigation does not stand alone—these pro-consumer decisions are the logical outgrowth of decades of precedent stretching back to the 1984 Sony Betamax case, if not further.

In the first opinion denying Fox's motion for a preliminary injunction, the district court found that "the record [was] devoid of any facts suggesting direct infringement by [Hopper] users," and that "the evidence does not suggest that consumers use [Hopper] for anything other than time-shifting in their homes or on mobile devices." *Fox Broadcasting Co. Inc. v. DISH Network, LCC, 905 F. Supp. 2d 1088, 1098 (CD Cal 2012)*. The court not only applied *Sony* to find that time-shifting on a device was a fair use, but that making a new copy (in a new format) for playback on mobile devices was, as well.

The district court was upheld by the Ninth Circuit. *Fox Broadcasting Co., Inc. v. DISH Network LLC*, 723 F. 3d 1067 (2013). The Ninth Circuit agreed with the district court's finding that *Sony* "provides strong guidance in assessing whether DISH customers' copying of Fox programs is a 'fair use,'" 1074, and acknowledged that the copying in question was more than just time-shifting, noting that "Dish customers can also watch Hopper content on their computers and mobile devices using a product called the Sling Adapter." 1071. The court then validated the district court's fair use analysis, 1074-76, and found that the district court's holdings should stand as it did not abuse its discretion.

The litigation then returned to the district court. In its summary judgment which largely found for DISH on the copyright claims, in addition to confirming once again that time-shifting is a fair use, 40-44, the district court found that the Hopper merely

[1] Copyright Law Revision, Report of the Register of Copyrights 30 (July, 1961).

> permits non-commercial time- and place- shifting of recordings already validly possessed by subscribers, which is paradigmatic fair use under existing law. See *Recording Indus. Ass'n of Am.*, 180 F.3d at 1079 (making copies "in order to render portable, or 'space-shift,' those files that already reside on a user's hard drive . . . is paradigmatic noncommercial use.")

Respondent's primary tactics with respect to this adverse precedent is to argue that it doesn't count, either procedurally, or because the district court did not spend as much time discussing this straightforward question as Respondents would like. Both these tactics fail.

First, these questions are hardly "far from concluded." DISH has conclusively won a summary judgment on the relevant copyright claims. This is a final judgment, and one that Fox is not currently appealing. After DISH's clear win on these points, DISH and Fox jointly asked the District Court to stay the litigation.[2] It is not necessary to wait for a clear statement from the Supreme Court on every case and controversy before one can rely on the precedent and reasoning of a case—especially not when, as here, the lower court case in question largely applied settled Supreme Court precedent.

Second, the District Court may not have felt the need to discuss these issues more voluminously because, outside this proceeding, they are not controversial. As the District Court noted, it simply applied existing law. Respondents therefore also attempt to minimize that law, arguing that *RIAA v. Diamond Multimedia Systems*, 180 F. 3d 1072 (9th Cir. 1999) is inapplicable by noting that it involved a claim under the Audio Home Recording Act of 1992. But that interpretation of *Diamond Multimedia* cannot withstand a reading of the case. There, the Court expressly found that "merely mak[ing] copies in order to render portable, or space-shift" media is a "paradigmatic noncommercial personal use" by express analogy to the Supreme Court's holding in *Sony* with respect to time-shifting.

This points to the fundamental flaw in Respondents' arguments—they try to draw a line between time-shifting, which is uncontroversially a fair use, and space- and format-shifting. But no such line can be drawn. Any reasonable analysis of the fair use factors that finds that time-shifting is a fair use will likely also find that space- and format-shifting are fair uses. These kinds of personal use copies all allow a consumer to access a work she already has lawful access to, in a different time or place, or on a different device. While "time-shifting" refers to recording a broadcast program to watch it back later, it would be odd to suggest that moving a videotape from one VCR to another—place-shifting—would somehow rendered the initial recording no longer a fair use. The same is true even if one had to convert the recording into a new format to make it compatible with a new device. Similarly, a consumer who lawfully owns a DVD or Blu-ray should be allowed to take whatever steps are necessary to ensure she can actually watch it. These sorts of uses do not deprive the copyright owner of a sale,[3] but merely permit the owner of a copy to make use of it.

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[2] Ted Johnson, *Fox, Dish Network Ask Court to Pause Ad Skipping Case*, Variety (Jan. 16, 2015), http://variety.com/2015/biz/news/fox-dish-network-ask-court-to-pause-ad-skipping-case-1201407117.

[3] Copyright owners cannot claim, circularly, that an established fair use is not longer fair because they would like to sell users another copy of a work, or license to them the right to do things they can already do for free and without permission. *See* 4 Patry on Copyright § 10:152.

While new fact patterns may require new analysis (as the DISH Hopper's semi-automated recording and commercial-skipping features did), at some point if a court notes that an alleged infringement falls squarely within a kind of use previously adjudicated to be fair, it should be able to issue a finding of fair use by simply applying precedent, especially when the plaintiffs have alleged no new facts that would distinguish the current situation from past ones. Thus, when the District Court and the Ninth Circuit found that personal, space-shifted copies made with the Hopper DVR are fair uses, these holdings were neither extensions of nor departures from precedent but straightforward applications of it. Those courts saw no meaningful distinction between time-shifting and space-shifting, and plaintiffs in those cases did not offer any. If Respondents truly feel that the District Court in *Fox v. DISH* did an inadequate job of explaining why personal copies are fair uses, they need merely re-read *Sony* and *Diamond Multimedia*.

Finally, it would no doubt come as a shock to the millions of Americans who have copied media from optical discs to their computers (CDs, mostly) that their format- and space-shifting activities are illegal according to the Entertainment Software Association, Motion Picture Association of America, and Recording Industry Association of America. While content industry groups have wisely declined to sue music fans merely for copying lawfully-purchased CDs to their portable media players and smartphones, it is reasonable to suppose they would have sued electronics and computer manufacturers on a secondary theory if they thought they had a reasonable chance of prevailing. At this point in time, given the ubiquity of CD ripping it is reasonable to assume that most content interests have acquiesced to the claim that such personal, space- and format-shifted copies of lawfully-purchased music are lawful. Because there is no legal distinction between different optical disc formats apart from technical protection measures, the same conclusion must apply to Blu-Rays and DVDs as well. At the moment, Section 1201 prevents users from taking advantage of their fair use rights; were the Copyright Office to grant an exemption, they would be able to make fair use copies of their movies just as they can make fair use copies of their music. This would be a significant gain for consumers.

Item 6. Asserted Adverse Effects.

The harms Respondents claim are not cognizable by copyright law. Consumers have no obligation to re-purchase copies of works rather than make use of their fair use rights.

Ownership.

The DVD CCA and AACS LA demonstrate a fundamental misunderstanding of copyright law, whereby users "license" copies of works, instead of owning[4] them. They write that

> [w]hen consumers buy a DVD or Blu-ray disc, they are not purchasing the motion picture itself, rather they are purchasing access to the motion picture which affords only the right to access the work according to the format's particular specifications...[5]

[4] Or renting or borrowing.
[5] DVD CCA and AACS LA Comments at 4.

This way of describing users' relationship to the goods they purchase has become unfortunately common. One further reason the Copyright Office should allow users to bypass TPMs to make lawful use of copyrighted works is to affirm traditional principles of ownership and property rights which Respondents in this proceeding seek to trample.

Contrary to DVD CCA and AACS LA's view, when consumers buy a DVD or Blu-ray disc, they are buying a copy of a work which they own outright. They are not buying intellectual property rights in the work, and they are not acquiring a license.[6] They are buying a copy of a movie in the same sense that a person might buy a copy of a book or a can of Coke. No license or contract either exists or is necessary.[7] Consumers' rights to use the copy they have purchased are, of course, limited by copyright law. A person who buys a book may not make a motion picture adaptation of it.[8] A person who buys a Blu-ray may not publicly display it in theaters or disseminate copies of it on the Internet.[9] But a consumer does not need a license to own a copy of a movie or to watch it any more than she needs a license to own a book or permission from the government or a corporation to read one. DVD CCA and AACS LA's view attempts to transform users' traditional relationship with the goods they buy in the marketplace to a form of renting where people no longer own the things they pay for. This fallacious and anti-consumer reasoning cannot serve as the basis for a decision by the Copyright Office.

Because their arguments are not grounded in the factual, legal, or economic realities of the purchase transaction,[10] Respondents appear to assume that all uses of copyrighted works must be "licensed." DVD CCA and AACS LA make statements that assume that any use for which the copyright owner has not granted specific permission is an unlawful use. Thus, they argue,

> [t]he more copies of that work are available for free from unknown third party sources or even from family and friends, the less attraction there is for consumers to actually purchase a copy of the work in any other format or part of any offering of an online service.

But Public Knowledge is not asking for the Copyright Office to grant an exemption to 1201 to allow users to unlawfully share copies of movies with their family and friends. Rather, the exemption should only extend to lawful uses. This objection is therefore inapt. However, it is true that Public Knowledge believes that, if the Copyright Office grants its requested exemption, that there would be "less attraction" for consumers to purchase additional copies of audiovisual works they already own copies of. A consumer who already owns a movie on DVD should not be required to purchase a new copy just to watch it on an iPad. Ripping a DVD or Blu-ray and converting it to a format compatible with an iPad or

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[6] To the extent that some attempt at a "license" does exist—for example, printed in an optical disc's packaging, or associated with a player's software—it is not binding. "Toni Morrison, in short, cannot stymie the aftermarket for *Beloved* by wrapping all copies in cellophane and insisting that her readers obtain only a 'license' over the books in which they read her words." 2 Nimmer on Copyright §8.12[B][1][d][ii].

[7] In the case of software, some courts have used the "licensing" model to describe a buyer's relationship to a physical copy of software. [cite vernor] But software is distinguishable from other media for at least two reasons: One, it is necessary to make a copy of software in order to use it, which naturally implicates copyright; and two, software users typically do enter into contracts with sellers.

[8] 17 U.S.C. § 106(2).

[9] 17 U.S.C. § 106(4); 17 U.S.C. § 106(1).

[10] See *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1060 (C.D. Cal. 2008) (examining "economic realities" of transaction in an examination of copyright.)

another mobile device is a fair use; Public Knowledge is merely asking the copyright office to allow consumers to bypass TPMs such that they can exercise their fair use rights—which, not unimportantly, might save them some money while preventing movie studios from collecting a windfall. However, it is not the Copyright Office's job to ensure that studios can simply sell and re-sell the same movies to viewers over and over.

Similarly, DVD CCA and AACS LA complain that

> the proponents request that content protected using a TPM, including those offered by DVD CCA and AACS LA, should be entirely freed, forever, from any restraints on consumer use, including further copying or redistribution to millions of other consumers, none of whom will have paid for the original work.[11]

The flaw in this argument should be apparent to anyone with a passing familiarity with the prevalence of online file-sharing. Users who wish to access unlawfully distributed copies of content can already do so. The "harms" Respondents complain of have already happened. The exemption Public Knowledge is asking for would lessen them: Allowing users who wish to make fair-use copies of lawfully acquired copies of works would reduce the likelihood they would turn to file-sharing services to acquire copies of works without TPMs. While it is easy enough for technically-inclined individuals to circumvent most TPMs today, if the Copyright Office granted Public Knowledge's proposed exemption, ordinary users would find it easier to make fair use copies of their media. Such an exemption would keep them in the lawful media ecosystem, which would benefit Respondents.

Availability.

Respondents have not addressed Public Knowledge's specific arguments about the availability of media online. In particular: Public Knowledge has provided evidence that the majority of audiovisual titles available on DVD and Blu-ray are not available online through any lawful means, and that, even if they were, they are not practically available to many Americans due to a lack of adequate broadband. Petitioners, instead, have made nonresponsive claims about the availability of certain titles online, and have argued that the Copyright Office ought to ignore practical barriers to accessibility.

There is no central data source that lists what works have been issued on DVD or Blu-ray, and what works are currently available through online services. (Some respondents may have this information, but they choose not to share it. Public Knowledge also asked independent sources that track availability if they had such data; they did not.) The best source Public Knowledge was able to use is Amazon.com: It sells physical media, and its online service offers titles both for digital download, and on-demand streaming. Comparing the titles available through various means Public Knowledge has estimated that only about 15% of titles that have been released on DVD or Blu-ray are available online. Respondents do not attempt to refute this, instead simply reciting claims about the titles that are available online and the services that offer them. In one sense this is besides the point—a consumer who lawfully possesses a copy of a movie on DVD or Blu-ray should not be required to buy a new copy to watch it on a

[11] DVD CCA and AACS LA Comments at 6-7.

device without an optical drive. But even granting that availability is a relevant metric, because most devices do not have DVD or Blu-ray drives and because most works are not available through online services, a consumer's real choice is between format-shifting and not watching a title at all.

On this point, the Joint Creators and Copyright owners claim that Public Knowledge "fail[ed] to reference the most comprehensive and up- to-date website providing information on titles that are available for online streaming or download, which is the 'Where To Watch' website at http://wheretowatch.com/." Far from being comprehensive and up-to-date, this website does not even list tiles that are available on the two most popular streaming services, YouTube and Netflix.[12] However, even if the Where To Watch service did accurately list what titles are available online, this criticism would still miss the mark. Public Knowledge is not arguing that it is difficult to find out which online service offers a particular title, rather, that most titles are not available online through any service.

Public Knowledge also argued that, even for titles that are offered online, they may not be practically "available" to many users due to issues with broadband and the media marketplace. Respondents claim that these arguments about broadband availability and utility are not relevant. But the FCC's findings regarding inadequate broadband availability are directly relevant to claims about the online availability of titles. It means that in practical terms, for many Americans, titles that have been put online are still not available *to them*. Technological barriers like the lack of broadband and the lack of optical drives in common devices stand in the way of consumers accessing copyrighted works. Legal barriers, such as prohibitions on circumventing TPMs, should not stand in the way, as well.

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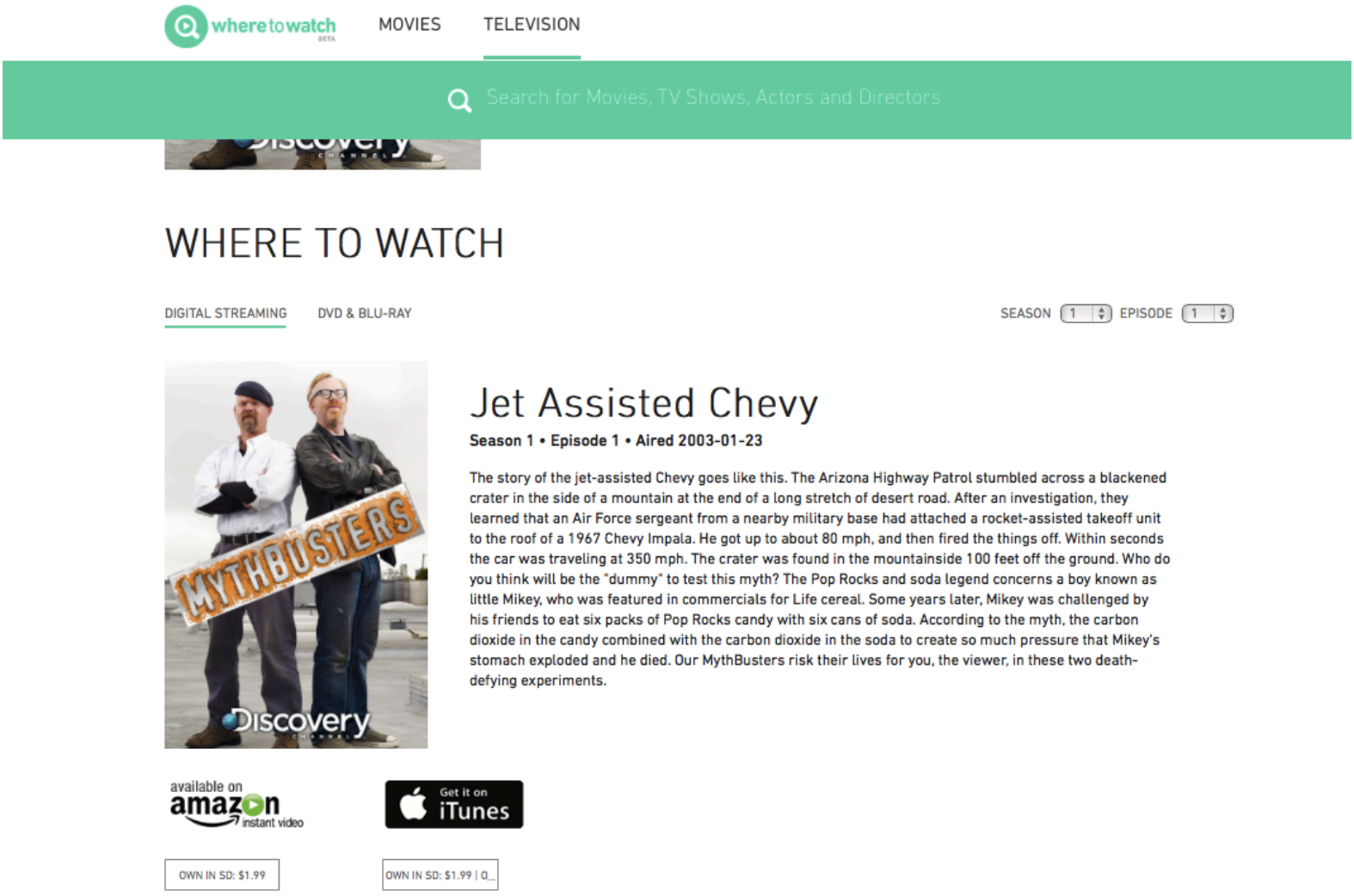
Because Respondents fail to raise material objections, the Librarian should grant the proposed exemption.

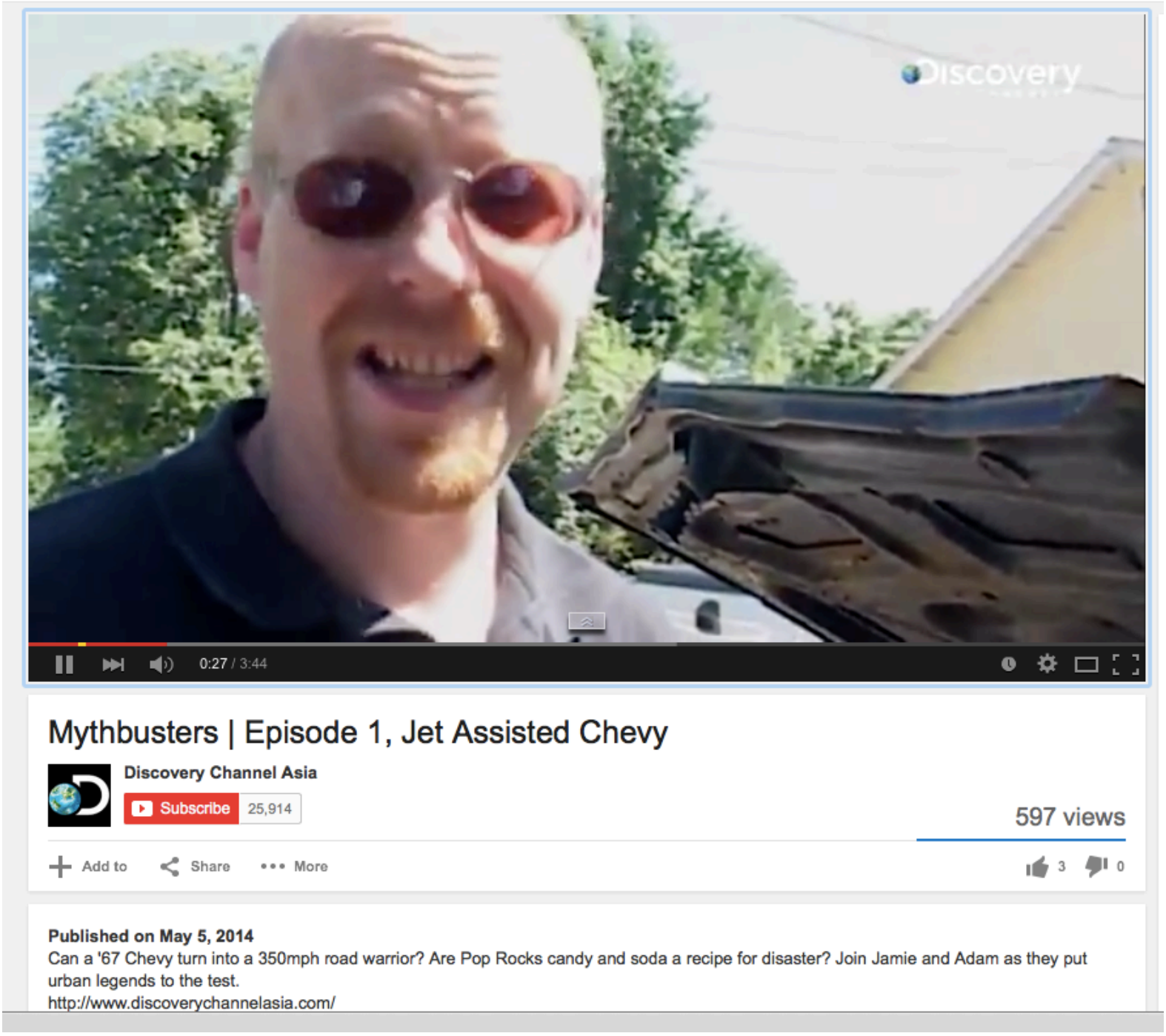
[12] *See* Appendix A.

APPENDIX A.

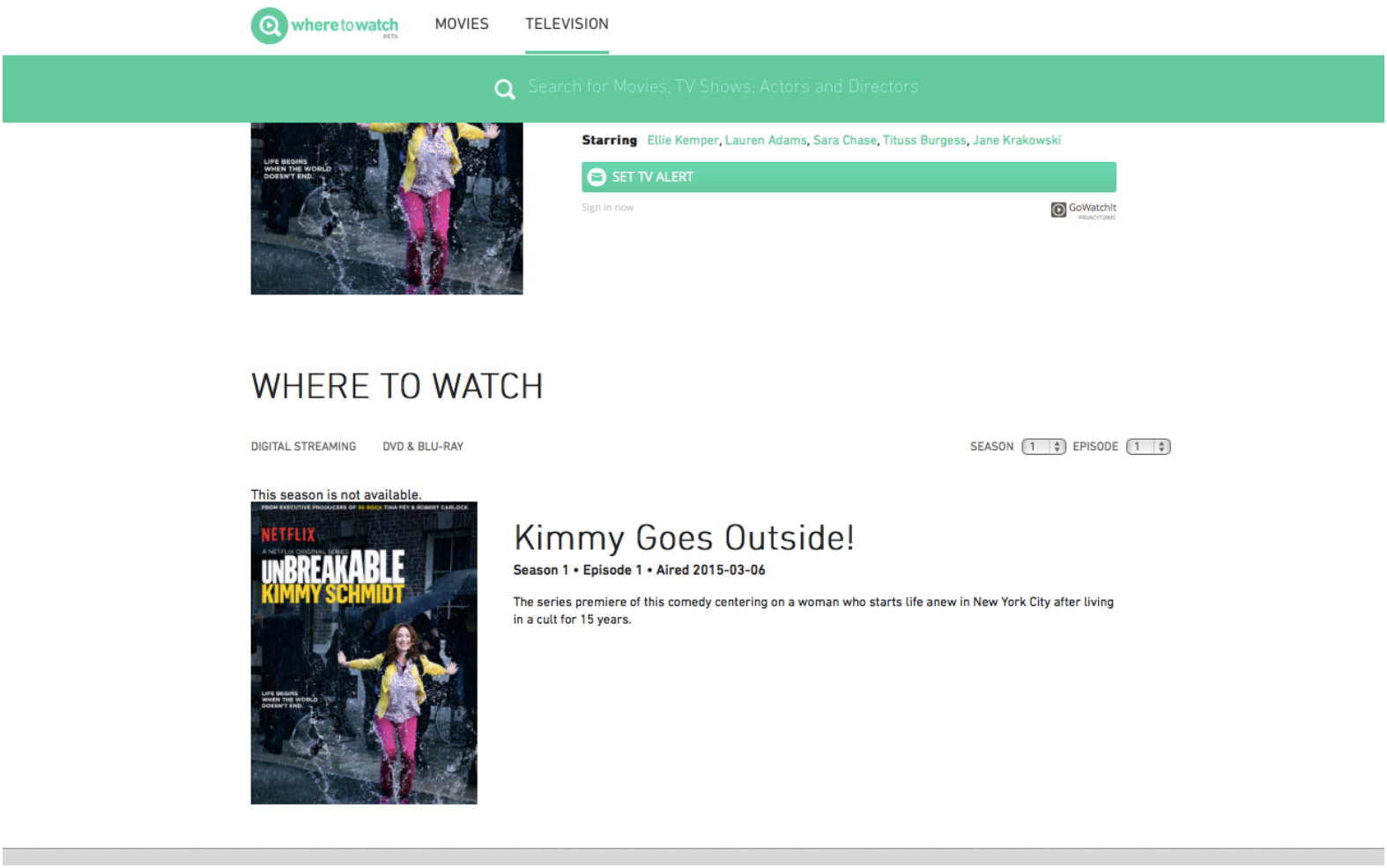
According to Where to Watch, Mythbusters is only available on Amazon and iTunes.



However, Discovery makes it available, for free, on YouTube.



According to Where to Watch, Unbreakable Kimmy Schmidt is not available online.



Of course, it is a Netflix series, available on Netflix.