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CLASS:Literary works, including computer programs and databases, protected by access control mechanisms in which the mechanism controls access both to copyrighted works and to works not under copyright.

SUMMARY:Access to material in the public domain needs to be assured, even if the publisher restricts access by technological mechanisms used also for copyrighted works.

ARGUMENT:

Publishers since 1998 have issued many works in the public domain but protected by access controls under U.S.C. 1201(a), and used the very same technological mechanisms to control access to works under copyright. Presumably "unauthorized" access in the former instance is perfectly legal but not in the latter, and, because of a defect in the assumptions of the legislation, "trafficking" (1201(a)(2)) in either is prohibited. This rulemaking is restricted to 1201(a). But access under 1201(a) is denied to public domain material because of the false assumption that all mechanisms only protect copyrighted material, and by the prohibition on "trafficking" or any user's informing anyone else how to access public domain material so controlled. The alternatives are (1) to prohibit anyone including libraries or archives from "unauthorized" access to all material so locked up whether under copyright or not, and sharing the means to do so with others (the present situation), or (2) to establish an affirmative right for everyone to access material that is in the public domain, no matter what the technological mechanism controlling access, and also to freely share circumvention techniques for such works. I suggest (2). Otherwise publishers will be able to use the provisions of 1201(a) to prevent lawful access to public domain material, simply by using the same mechanism for all works. Remember that every work will enter the public domain at some point unless Congress passes an unlimited copyright term extension. Thus all works under copyright are affected by this defect, which needs to be corrected immediately. In many cases, such as software programs, no alternative medium is available that is not so protected. In balancing the rights of the public domain against commercial interests, I say that that public officials need to favor the public domain.