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AUSFTA
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Hansard for the ~~Joint Standing Committee~~ on Treaties, Tuesday 4 May 2004, TR25:

CHAIR—The CIE report says that it is understood that material that is in the public domain and is between the 50- and 70-year periods will not go back into copyright. Is that your understanding?

Dr Clarke—It would be interesting to know where they got that understanding from. I did see that paragraph. I am not aware of any definitive statement. In my dealings with the Department of Foreign Affairs and Trade in relation to this matter, they have been extremely vague and they have primarily depended upon the flexibility of language in chapter 17 to enable them to attempt to fend off criticisms of its impacts. So I am quite surprised that the centre should have been so confident, but it would be a marginal improvement if they were right.

I have subsequently examined Chapter 17 in greater detail, and have found the relevant section of text, which I reproduce below, followed by my considered response to the Chair's original question.

The relevant section of the FTA is 17.1.10 on p. 17-2:

"Except as otherwise provided in this Chapter, including Article 17.4.5, a Party shall not be required to restore protection to subject matter, that on the date of entry into force of this Agreement has fallen into the public domain in the Party where the protection is claimed" (my emphases).

My considered reponse to the Chair's question is as follows:

As in many other areas, the CIE has drawn an extremely long bow.

Para. 17.1.10 falls a very long way short of an agreement that "material that is in the public domain and is between the 50- and 70-year periods will not go back into copyright".

The following are factors that show that FTA Chapter 17 provides no such assurance:

- (1) the key expression "except as otherwise provided" is open-ended. It would be a very brave person who said they had discovered all of the possible exceptions that could arise in a document as complex as this, overlaid over statute and common law as complex as copyright, and confused by the document's use of mixed U.S. legal and Australian legal language;
- (2) the expression "except ... 17.4.5" refers on to "Article 18 of the Berne Convention (and Article 14.6 of the TRIPS Agreement), *mutatis mutandis* ..." and reads in

17.4 to 17.6. Once again, it would be a very brave person who claimed to fully understand all of implications of the exception; and

- (3) the operative words are "shall not be required to restore protection". That is very different from the operative words in the Chair's question: "will not go back into copyright". It is true that the FTA would not bind Australia to restore protection. But nothing prevents agreement being reached separately; and nothing prevents the Government choosing to restore protection.

Roger Clarke
7 May 2004