Testimony of Shira Perlmutter
Vice President and Associate General Counsel, Intellectual Property Policy
AOL Time Warner, Inc.

on the Draft Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters

U.S. Patent and Trademark Office

AOL Time Warner appreciates the opportunity to present its views on the draft Hague Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. It is our position that it is premature at this juncture to codify international rules on the divisive and unsettled issues of tort jurisdiction and consumer contracts, and if the Convention is to be concluded, it should be narrowed to focus on business-to-business transactions.

Our interest in the subject matter arises from the operation of our various businesses in countries around the world, both through the use of physical facilities and, increasingly, online. As a producer and distributor of motion pictures and records, a publisher of magazines and books, a broadcaster, and an online service and Internet access provider, we find ourselves in courts in many countries. We are sometimes a plaintiff asserting rights, including all types of intellectual property rights as well as contractual and other rights, and sometimes a defendant, charged with having violated a local law.

On the one hand, since copyright is the lifeblood of our content producing businesses, and trademarks secure our ability to communicate the origin of our products to consumers, we need the ability to bring suit wherever an infringer can be found, particularly in an age of immediate digital dissemination internationally of protected works and marks. On the other hand, as a large American corporation that creates and distributes content that may disturb or affect sensibilities, we may be the target of lawsuits alleging that that content has caused some type of harm. Accordingly, the international rules that determine who can be sued where, and when and where the resulting judgments will be enforced, are of great importance to our company.

In today's global and electronic markets, it is important to have a structure of stable and predictable rules for jurisdiction and enforcement of judgments. The Hague process has been immensely valuable in placing the issues on the table and provoking international thought and debate. It must be acknowledged, however, that the scope of coverage of the draft Convention is remarkably broad and ambitious. The draft sweeps within its ambit all types of civil cases, whether involving businesses or consumers, and whether based on contract, tort, or real, personal or intangible property. It also seeks to

reconcile for the first time at an international level two fundamentally different approaches to jurisdiction.

On a substantive level, the draft builds on established rules of private international law that have been developed over decades of litigation and scholarship. But the world has changed rapidly in the past few years, with the development of digital technology and e-commerce. Rules that worked well in the physical world do not necessarily work well in the digital world, and cannot simply be transposed. Most of the fundamental rules of jurisdiction in the past were based on localizing acts and actors; such localization is either not possible, or has different policy implications, in the e-commerce environment. It is no longer always clear, for example, where a good was delivered or a service performed. The Hague Conference has begun to examine these issues carefully, with the assistance of private sector experts, but this work only started in early 2000, and much remains to be done.

Of course, rules are today being applied and developed in this new environment even without an international treaty. The courts are going about their daily business of deciding cases, and in the process principles and distinctions are emerging that may prove workable. The issuance of some difficult and controversial decisions, however, demonstrates that codification is not yet a simple matter. For example, in the now-famous Yahoo! case, a French court exercised jurisdiction based on a claim regarding content on an auction site in the United States, and issued an injunction under French law that is inconsistent with U.S. concepts of free speech. An Australian court recently held that Dow Jones could be sued in Australia for an allegedly defamatory Barron's article on a U.S. website. The process of developing the law in this new and evolving area needs further time and experience before locking in a set of international rules.

Over the past year or so, as this process has filtered more into public consciousness, much has been said and written expressing concern over the effect of the proposed Convention. Some of this concern may be caused by anxiety over untested treaty language that appeared to be moving toward adoption on a fast track; some may also be based on confusion over the relationship between jurisdiction and applicable law. While concerns about applicable law and the differences in legal systems should not be permitted to distort the jurisdictional principles embodied in the Convention, they are relevant in considering the impact of applying those principles.

In our view, the most fundamental concern about the impact of the Convention on e-commerce can be summarized as follows: Under the proposed rules, individuals and entities involved in the dissemination of material on the Internet could face exposure to suit in every country from which a website containing the material is accessible. These countries may have quite diverse legal standards which may be applied by their courts. The resulting judgments would then be subject to enforcement in every country party to the Convention, including not only money judgments but preliminary and final injunctive relief (potentially restricting the online content available in other countries). This scenario is of concern to a wide range of parties, including content and online service

providers as well as individuals who may express themselves on homepages or in online forums (who also may be considered "content providers," albeit not commercial ones).

The negative consequences could be, first, the inconvenience of defending against suits in every country, with the attendant potential prejudice against a foreign defendant (especially American corporations). Second, there are the problems caused by divergent laws, not only because of the difficulty of researching the law of every country before acting on the Internet, but also because a court may be tempted to apply its own country's law even where this is not appropriate under principles of private international law. These judgments can then be enforced in countries around the world, including in the home country of the content or service provider, where laws may differ. While the Convention contains an exception permitting non-enforcement where the judgment is "manifestly incompatible" with the public policy of the forum state, the scope of application of this exception is uncertain.

These risks are of particular concern in the area of torts and consumer protection (Articles 10 and 7 of the Convention), where public policies tend to diverge to the greatest extent. For example, libel and defamation claims in the United States are subject to strong First Amendment protections, which do not exist or are significantly weaker in many other countries. Countries are also more likely to experiment with novel torts in a new area of activity like the Internet, where conduct such as spamming may cause harm not clearly covered by existing causes of action.

The problems with e-commerce torts are thus not specific to intellectual property. In the copyright area, in fact, the problems may be less, since this is an area where harmonization is relatively high, due to several multilateral treaties. While copyright systems still tend to differ in some respects, for example in the scope of fair use, or on new technology issues such as online service provider liability, many scholars believe that systems are converging more than ever in the past. For these reasons, a carve-out of copyright, or intellectual property generally, from the scope of the Convention would not be an appropriate or sufficient solution. (Moreover, such a carve-out could have other adverse implications, to the extent it suggests that ordinary enforcement and procedural rules do not apply.)

Given all of these factors, we believe it is premature to codify at international level rules that would affect or even impede the evolving world of e-commerce. The issues are new and complex, and their impact on how businesses and consumers choose to utilize the Internet could be substantial. In our view, it would be a mistake to rush to conclusion on a framework of international rules in this area, which will not easily be able to be modified as new online markets, technology and legal analysis mature.

The U.S. delegation to the Hague has been a leader in raising the e-commerce issues, and the Hague Conference is to be commended on its openness and desire to understand and resolve these problems. In the Ottawa and Edinburgh meetings, delegates have sought solutions, and tried to articulate dividing lines between reasonable and unreasonable bases for jurisdiction. Not surprisingly, however, given the complexity and

the short time frame, no consensus has yet emerged. Considerably more time is needed to evaluate the issues, in particular with regard to the relationship between jurisdiction and applicable law, fundamental constitutional and fairness concerns, commercial versus noncommercial contexts, and the technological feasibility and policy implications of either targeting or limiting website availability.

If the treaty process is to move forward at this point, AOL Time Warner therefore urges that the scope be cut back to cover only those issues as to which there is a realistic chance of achieving consensus. We believe this could be accomplished by eliminating the unsettled and divisive issues of tort jurisdiction and consumer contracts, and focusing on the narrower but economically important areas of business-to-business transactions. A treaty limited to this field would be valuable in ensuring the international enforcement of judgments arising from business dealings. It could then be built on and expanded as the time becomes ripe.

Such a narrowing could eliminate any calls for separate treatment of intellectual property issues in the treaty at this time. The question has been raised whether some version of the Article 12 provisions dealing with exclusive jurisdiction for patent and trademark claims should nonetheless be retained. While the Convention would still apply to business disputes over I.P. license agreements, in which validity claims might be raised, existing principles of private international law may be sufficient here without the need for specific treaty provisions.

Thank you for your attention and consideration of our views.