October 17, 2001

Mr. Nicholas P. Godici
Acting Under Secretary of Commerce for Intellectual Property and
Acting Director, United States Patent and Trademark Office
Box 4
United States Patent and Trademark Office
Washington, DC 20231
Attention: Velica Steadman

Dear Mr. Godici:

Re: draft Hague Convention on Jurisdiction and
Foreign Judgments in Civil and Commercial Matters

The American Library Association ("ALA") hereby responds to your invitation to submit comments on the draft Hague Convention, as set out in your Federal Register notice of August 20, 2001, 66 Fed. Reg. 43,575-43,578. As the notice pointed out, although there is a new draft resulting from the June 2001 session of the Diplomatic Conference, there remain many unresolved issues, including those involving intellectual property. The U.S. library community continues to believe that our members, both institutions and individuals, could be adversely affected by the resolution of some of these issues.

ALA is a nonprofit educational organization of approximately 61,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services and defense of the public's right to a free and open information society. In addition to ALA, the various libraries in this country (and in some cases, in other countries) are represented by the other four major national library associations, with which ALA works closely: Association of Research Libraries, American Association of Law Libraries, Special Libraries Association, and Medical Library Association.

The library community has a huge stake in the outcome of the deliberations on jurisdictional matters, particularly those concerning contracts and intellectual property rights. We believe that many other educational, research, and cultural organizations with which we collaborate regularly on information policy issues share our concerns.

In general, U.S. courts are only beginning to grapple with jurisdictional issues underlying transborder enforcement of contracts entered into or torts allegedly committed over the Internet. Without a clearer understanding of both the underlying issues and the trends in U. S. law, particularly in the areas of copyright and speech, we believe the delegates to the Hague Conference should be exceptionally cautious in developing international agreements regarding the Internet. The inadvertent effects of agreements ostensibly intended to address commercial activity could be quite destructive to the large, robust, and vital areas of non-commercial speech and information services on the Internet and very harmful to organizations such as schools and libraries that support these activities.

We have the following particular concerns:

1. Our libraries and educational institutions have embraced technological advances and are a significant element in the United States' electronic commerce. We not only provide patrons with computerized access to electronic information products and services, we also use software to run our internal operations. As a result, we are among the largest consumers of software. In addition to expenditures for hardware, software, network support and equipment, and personnel, we are also the largest consumers of fee-based electronic services and databases. For example, in 1999 one hundred and five research libraries in the U.S. alone spent $100 million on electronic resources. All told, the nation's public, academic, medical, special, and government libraries together expend many hundreds of millions of dollars in fees

each year for software, databases, and electronic library materials. These purchases are utilized across the entire academic and library enterprise, affecting payroll operations; safety, health and environmental programs; accounting systems; and more.

Libraries negotiate contracts for goods and services every day. In doing so, we are able to ensure both that the contract terms to which we agree will take into account our mission to the public as well as our business and institutional needs, and that those terms comply with other legal requirements (e.g., state legal requirements for state institutions). Increasingly, though, contracts for information goods and services are non-negotiated instruments, and we expect this trend to continue. The growing use of non-negotiated contracts presents serious issues for libraries and our patrons that could be greatly exacerbated by the Hague agreement as currently drafted.

In that regard, Article 4 of the current draft treaty continues to make "choice of court" provisions enforceable without exception, including those provisions contained in non-negotiated contracts (such as shrink-wrap or click-on contracts). Our concerns with enforcing terms in non-negotiated contracts that are contrary to public policy extend beyond the choice-of-court issues, but we confine our comments here to the manifest unfairness of allowing one party to a contract to mandate, with no opportunity for negotiation, which court shall have jurisdiction to hear and settle disputes between the parties. The current Article 4 by its very terms implies an "agreement" between the parties, whereas non-negotiated shrink-wrap or click-on contracts allow no opportunity for a "meeting of the minds" -- long considered to be an essential element of a contract.

We had suggested, prior to the June 2001 conference, a revision to Article 4 that would make it clear that such choice of court clauses in non-negotiated contracts with certain institutions would not be automatically enforced, along the following lines:

> Agreements conferring jurisdiction and similar clauses in non-negotiated contracts with non-profit, non-commercial organizations, including non-profit libraries, archives, and educational institutions, shall be without effect.

Such an express embodiment of public policy was not accepted, nor was a suggestion by other interested parties that would except the automatic enforcement of court-of-court provisions where the agreement "has been obtained by an abuse of economic power or other unfair means." (We note the heavily bracketed version of Article 4 in the June 2001 interim version of the text, plus footnote 24 to that same text indicates the lack of consensus of the delegates about these points.) Without some exception for non-negotiated contracts, we believe that the treaty would be unacceptable and contrary to public policy.

2. Access to information is essential not only to research and educational institutions, but also to our citizenry at large. The role of libraries in the dissemination and preservation of information in our society and our culture -- indeed, throughout the world -- is directly and critically affected by today's economic and technological developments. We are being challenged in new ways to ensure the balance in law and public policy between protecting intellectual property and providing access to it. In this regard, we are concerned that the draft Convention, with its current rules regarding forum selection, could subject Internet users in the United States to intellectual property infringement in other countries for activities that are lawful in the U.S. For example, users could be sued for engaging in conduct falling within the fair use doctrine, codified at 17 U.S.C. Section 107, or conduct that would be protected by our First Amendment. Such judgments would have to be enforced by U.S. courts under the Convention as it now stands.

We are aware that the U.S. Delegation has taken the position that the above result would be no different under the draft convention than it is now, i.e., that U.S. courts would ordinarily enforce such judgments

today. (And that is the reverse situation -- getting foreign courts to enforce our court judgments -- that is sought, in part, to be remedied.) We disagree. In the specific case of Internet transactions, US courts are only beginning to address transborder enforcement issues, particularly those involving non-negotiated licenses, at the interstate level, much less at the international level. We need only point to the intense ongoing debate over the Uniform Computer Information Transaction Act (UCITA), to see that major questions are far from resolved in the U.S. In particular, it is by no means obvious that a U.S. court would enforce a foreign judgment on a U.S.-based web site if the site were non-infringing under U.S. copyright law but deemed infringing under some other legal regime. But, even conceding that possibility, one cannot disregard the practical, and perhaps dispositive, effect of the treaty, if signed, on the ability of our courts to refuse enforcement. The only grounds then available for an American court to refuse would be Article 28(f). That provision allows a court of a member country to refuse to enforce a judgment if recognition of the judgment "would be manifestly incompatible with the public policy" of the enforcing state. Surely Article 28(f) must be viewed as an extraordinary "out," lest the U.S. lose the benefit of the treaty in ensuring enforcement of our court judgments. As such, we suggest that it is far better to ensure that the convention does not put our courts in that extremely difficult situation.

As your Federal Register notice noted, these and numerous other problems that have been identified in the course of recent discussions about the draft convention have led to a debate over whether copyright cases and other intellectual property matters should be taken out of the draft convention altogether. ALA, at its June 2001 annual conference, passed the enclosed Resolution on the draft Hague Convention, which states in pertinent part:

> That the American Library Association urges the negotiators at the Hague Conference to remove intellectual property cases, including copyright cases, from the scope of the draft Convention or to adopt such language as necessary to assure that non-profit libraries, archives, educational institutions and other public service institutions in the United States continue to benefit from the Constitutionally based protections they currently enjoy.

Although ALA believes that the goal of uniform rules for international enforcement of judgments is desirable, we believe that the current attempt at crafting those rules continues to fall short of a treaty that will be helpful to many members of the public. We would be glad to provide additional comments and to participate in future discussions about the draft treaty.

Sincerely,

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Enclosure

2000-2001 CD #20.8

# RESOLUTION REGARDING THE DRAFT HAGUE CONVENTION ON JURISDICTION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERICAL CASES

WHEREAS, The Draft Hague Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Cases would create jurisdictional rules governing international lawsuits and provide for recognition and enforcement of judgments by the courts of Member States; and

WHEREAS, Disputes over copyright and other intellectual property are adjudicated as private tort actions and would be governed by the draft Convention;

WHEREAS, Disputes over contracts and license agreements would be governed by the draft Convention;

WHEREAS, The Internet is a global medium connecting information providers and users without regard to national boundaries;

WHEREAS, In many cases, foreign national copyright laws do not contain or protect as strongly the constitutionally mandated balances such as fair use and first sale in U.S copyright law or the equivalent protection of the U.S. First Amendment;

WHEREAS, The Hague agreement as presently drafted threatens to expose libraries, archives and educational institutions (as well as other public service organizations such as museums) to suits charging infringement under more stringent foreign copyright laws;

WHEREAS, The Hague agreement as presently drafted threatens to require non-profit institutions, including libraries, archives and educational institutions, to travel to remote locations to defend against lawsuits through the enforcement of choice of forum clauses in non-negotiated contracts;

WHEREAS, Libraries worldwide are similarly threatened;

WHEREAS, The U.S. Department of State, the U.S. Department of Commerce, the Federal Trade Commission, and the U.S. Copyright Office have been receptive to hearing library concerns in their public meetings on the draft Convention;

WHEREAS, Negotiations on the draft Convention language take place in closed diplomatic sessions without the opportunity for substantive comment and advice from those who are not part of the formal delegation; now, therefore, be it

RESOLVED, That the American Library Association expresses appreciation to the U.S. Department of State, the U.S. Department of Commerce, the Federal Trade Commission, and the U.S. Copyright Office for their efforts to date to seek and consider library input to their deliberations; and be it further

RESOLVED, That the American Library Association urges the U.S. Department of State to include a representative from the library and educational community on the official U.S. delegation to the Hague Conference, in order that the public interest perspective be fully represented in their deliberations; and be it further

RESOLVED, That the American Library Association urges the negotiators to be mindful of the vast public, non-commercial resources and services that are provided on the Internet and to refrain from establishing jurisdictional rules intended to regularize electronic commerce that have unintended negative consequences for the public interest; and be it further

RESOLVED, That the American Library Association urges the negotiators at the Hague Conference to remove intellectual property cases, including copyright cases, from the scope of the draft Convention or to adopt such language as necessary to assure that non-profit libraries, archives, educational institutions and other public service institutions in the United States continue to benefit from the Constitutionally based protections they currently enjoy.

Sponsored by: Committee on Legislation

Endorsed in principle by:
ACRL Copyright Committee
Government Documents Roundtable
Intellectual Freedom Committee
International Relations Committee
LAMA
OITP Advisory Committee
OITP Copyright Advisory Committee