March 25, 2004

Mr. Jeffrey Kovar
Assistant Legal Advisor for Private International Law
U.S. Department of State
2430 E Street, NW
Suite 203, South Building
Washington, DC 20037-2851

Dear Mr. Kovar:

Re: Draft Hague Convention on Exclusive Choice of Courts Agreements

This letter is written on behalf of the American Association of Law Libraries, the American Library Association, and the Association of Research Libraries. (A description of our associations is attached.) As you know, the library community has been following the development of this Convention for several years because of the importance of jurisdictional matters, particularly those concerning contracts and intellectual property rights. We appreciate the opportunity to participate in the upcoming session at the U.S. Patent and Trademark Office concerning the nexus between the Convention and intellectual property rights, and here briefly set forth our views on this important aspect of the current draft Convention.

Libraries negotiate contracts for goods and services every day. In doing so, we are able to ensure 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. (Even now, for many libraries, especially smaller ones, non-negotiated licenses represent the bulk of their transactions.) The growing use of non-negotiated contracts presents serious issues for libraries, ones that could be greatly exacerbated by the draft Hague convention. Our concerns are shared by many other educational, research, and cultural organizations with whom we collaborate regularly.

In particular, libraries fear that shrink-wrap, browse-wrap, and click-on licenses for information products will increasingly contain terms that will prohibit uses permitted by the U.S. Copyright Act, such as the making of copies for preservation, inter-library loan, or other fair use

purposes. U.S. courts might rule that these terms are preempted by the Copyright Act or are unenforceable because the licensee did not manifest assent to the agreement. However, if a content provider pursues a breach of contract action against a library in a foreign court pursuant to a choice of court clause in the license, the foreign court might conclude that these terms are enforceable. And a U.S. court might then be obligated under the Convention to enforce the judgment.

Previously, we identified two aspects of the Convention's text that exacerbated this problem. First, earlier drafts contained requirements for the "formal validity" of an agreement. While this language was intended to be neutral on the substantive validity of the underlying contract, we believed the wording of the provision on "formal validity" would increase the likelihood that written non-negotiated contracts would be enforced. We are pleased that the current draft eliminates the concept of "formal validity" that we found so troubling in the earlier drafts.

Second, we noted the inadequacy of the "escape clauses" contained in then-Articles 4 and 7. We appreciate your efforts to have the current draft include more specific language, particularly in Articles 5 and 7, but we believe that inadequacies remain. Under Article 4, a court in the designated forum can decline jurisdiction only if the choice of court agreement is "null and void" under the law of that State. Article 5 contains more expansive grounds for a court in another forum to exercise jurisdiction, but the public policy exception is still too narrow and vague: "giving effect to the agreement would lead a *very serious* injustice or would be manifestly contrary to *fundamental* principles of public policy." (Emphasis supplied.) Similarly, Article 7's public policy basis for a court to decline enforcement of a foreign judgment is also too stringent and indefinite: "enforcement would be manifestly incompatible with the public policy of the requested State, in particular if the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State."

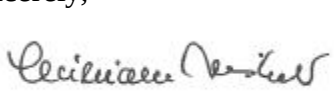
These escape clauses are simply insufficient and unreliable ways of addressing the manifest unfairness of allowing one party to a contract to mandate - with no opportunity for negotiation - which court shall have jurisdiction to hear and settle disputes between the parties. As noted above, it is conceivable that a U.S. court will feel obligated to enforce a judgment rendered by a foreign court designated in a choice of court agreement, when the U.S. court considering the merits of the dispute would have reached a different result.

In previous rounds of negotiations, the libraries have suggested revisions to the escape clauses that would make it clear that choice of court clauses in non-negotiated contracts are not enforceable where the agreement "has been obtained by an abuse of economic power or other unfair means." We renew this request. Similarly, we renew our suggestion that choice of court clauses in non-negotiated contracts with certain institutions should not be automatically enforced, through an exception 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.

Yet another option would be to exclude non-profit, non-commercial organizations (such as non-profit libraries, archives, and educational and other cultural institutions) from the Convention's application altogether, such as has been done in Article 1(2) with consumers.

Sincerely,



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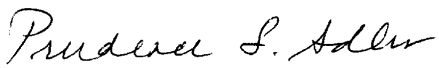

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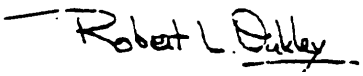

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The **American Library Association** ("ALA") is a nonprofit educational organization of approximately 65,000 librarians, library educators, information specialists, library trustees, and friends of libraries representing public, school, academic, state, and specialized libraries. ALA is dedicated to the improvement of library and information services and the public's right to a free and open information society.

The **Association of Research Libraries** ("ARL") is a nonprofit association of 123 research libraries in North America. ARL's members include university libraries, public libraries, government and national libraries. Its mission is to shape and influence forces affecting the future of research libraries in the process of scholarly communication. ARL programs and services promote equitable access to and effective uses of recorded knowledge in support of teaching, research, scholarship and community service.

The **American Association of Law Libraries** ("AALL") is a nonprofit educational organization with over 5,000 members nationwide. AALL's mission is to promote and enhance the value of law libraries to the legal and public communities, to foster the profession of law librarianship, and to provide leadership in the field of legal information and information policy.