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June 26, 2003

Dear Mr. Kovar

I write on behalf of the Motion Picture Association of America (MPAA) and its international counterpart, the Motion Picture Association (MPA). We serve as the voice and advocate of the American motion picture, home video and television industries, domestically through the MPAA and internationally through the MPA. The members include: The Walt Disney Company; Sony Pictures Entertainment Inc.; Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corporation; Twentieth Century Fox Film Corp.; Universal City Studios LLLP; and Warner Bros.

We very much appreciate all your efforts on this matter over the last decade, and especially your efforts to inform and be informed by interested non-governmental parties. As companies that do business in every corner of the globe, we have a profound and abiding interest in promoting certainty in contracts. A global convention that assures businesses that the choice of court provisions they contract for will be honored and enforced in every country, absent extraordinary circumstances, would certainly promote the growth of commerce and trade. We believe that the Preliminary Result of the Work of the Informal Working Group on the Judgments Project (Working Group Draft) is a solid start toward that laudable goal, and a useful focus for the Hague Conference. We support the U.S. Government's efforts to continue discussions with other nations on this draft, and improve the final product.

We understand that, at the moment, you are not seeking detailed comments, but instead more general views on the Working Group Draft draft. Reserving such detailed comments for a more appropriate time, we offer the following broad observations.

First, we strongly disagree with the suggestions of some that seek to carve out from the reach of the Convention certain classes of business-to-business (B2B) transactions, whether based on the character of the contracting entity (e.g., libraries or educational institutions), the amount of the transaction, the nature of the negotiations (e.g., so-called "non-

negotiated contracts") or the substance of the underlying transaction (e.g., mass-market licenses). Any attempt to exempt whole classes of parties or transactions from a convention designed to honor the choice of court agreements to which the parties had agreed could only promote chaos, not certainty. Moreover, it would force courts around the world to engage in complex factfinding even to reach the preliminary question of whether a particular party or transaction is encompassed within the scope of the treaty. For example, the court would need a full-fledged evidentiary hearing to determine whether a particular non-profit organization constituted a "library" or whether the choice of court provision was the product of an adequate negotiation between the parties.

Going down this road would be an exercise in futility, for no useful Convention could ever emerge from it. Rather than straining to serve groups that hope to maximize their future ability to avoid their contractual obligations, the Government should work to preserve the broad reach of the Working Group Draft, which encompasses the vast bulk of B2B choice-of-court provisions.

For the same reasons, we would strongly oppose any move to provide special status to Internet Service Providers (ISPs), a proposal also raised at the recent meeting. We have not heard sufficient justification to warrant treating ISPs any differently under the Convention than banks, widget makers or movie studios when they enter into business agreements. Indeed, acceding to pleas for special treatment based on ill-defined concerns can only lead to other industries around the world asking for their own special provisions, defeating the sound objective of providing all organizations with the same clear and reliable rules on choice of court provisions.

We do share the concern, voiced by others at the recent meeting, that the "escape hatches" in the document may be too broad or engender a nonuniform approach to the same issue, as they allow a court to frustrate the parties' agreement as to choice of court where it finds that the agreement is "null and void (Articles 4, 5, and 7(a)) or where "recognition or enforcement would be manifestly incompatible with the public policy of the State addressed" (Article 7(e)). We fully recognize that the courts in this nation and others must have some room to refuse to honor choice of court agreements in extraordinary circumstances, but are concerned that the Working Group Draft specifies no standard for what will render a particular provision "null and void" or "incompatible with the public policy." Without such a standard, there is a risk of inconsistent approaches as to when a "choice of forum" clause is "null and void" between those countries that have detailed and expansive "mandatory laws" (or doctrines of "ordre

publique") and those countries which instead believe more strongly in freedom of contract and generally entrust such matters to the agreement and discretion of the contracting parties. As the Working Group Draft moves forward, we urge you to promote the goal of certainty by making plain that these exceptions should be applied only in rare circumstances.

We would also use this opportunity to raise two more specific but important concerns. One relates to Article 15, which permits a State to declare upon ratification of the Convention that its courts may refuse to determine disputes if there is no connection between that State and the parties or the dispute. Our member companies, like many international corporations, produce and distribute their works on a worldwide basis, with different elements of the work coming from different countries. In such circumstances, the various parties involved in the production of the work (and local subsidiaries may have been formed for various aspects of the work) may have intentionally chosen a court at the outset of the transaction. In a B2B transaction, the choice of the forum should not be so easily second-guessed. We urge you to consider working toward removing or modifying that section.

Our final concern relates to Article 1.3 (k) and 1.4. We understand the distinctions the Working Group Draft seeks to draw between litigation to determine whether a particular patent or trademark is valid or invalid on one hand, and issues of their validity raised in a contract dispute between two parties on the other. The recent discussions by the group, however, suggests that the term "incidental question" in 1.4 is a source of confusion and requires some further explication. That explication may help clarify whether to consider extending the scope of 1.3(k) to copyrights.

Once again, Mr. Kovar, we applaud you and your colleagues for the hard work and excellent progress you have made. We look forward to continuing to work closely with you, and hope that together we can achieve a successful outcome.

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Warmly
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