April 12, 2002

American Bar Association
Board of Governors
750 North Lake Shore Drive
Chicago, IL 60611

Dear Members of the Board of Governors:

The Intellectual Property Law Section (IPL) has proposed that the Board adopt a new ABA policy supporting the constitutionality of the Copyright Term Extension Act of 1998 ("CTEA"), Pub. L. No. 105-298, 112 Stat. 2827 (1998). We believe that the IPL Section's analysis of this issue implicates matters of regulatory policy on which the Section of Administrative Law and Regulatory Practice has expertise. We write to inform you that the IPL Section's analysis has generated significant discussion amongst the Members of this Section's Leadership Council and that a number of our Members believe the analysis of the IPL Section to be flawed on crucial issues. We currently oppose the IPL Section's request for adoption of the requested ABA policy.

This matter concerns issues falling within our Section's regulatory expertise. Intellectual property rights are a specialized form of regulation of a natural monopoly industry: A time-limited exclusive right is held out as an incentive to make capital investments in a field with high fixed costs (the cost of creating the IP) and essentially zero marginal cost (the cost of replicating it).

The IPL Section argues that retroactive intellectual property rights will "promote the Progress of Science and useful Arts" within the meaning of Article I, section 8, clause 8 of the U.S. Constitution because "extending the copyright term of existing works by 20 years in most cases provides additional income to copyright owners with which to subsidize the creation of new works. Film studios and publishers, in particular, rely on income from enduring works to finance marginal or financially riskier artistic projects." IPL Section Memo to the Board of Governors, at page 6. That theory is viable only if film studios and publishers have poor access to modern capital markets, which seems highly implausible and is not supported by any economic data.

Furthermore, because retroactive extensions produce pure rents (i.e., windfalls) for the right holder, right holders have an incentive to expend resources lobbying Congress for more extensions (i.e., classic rent seeking), rather than creating new intellectual property. This possibility suggests why the framers of the Constitution may have wanted to limit the intellectual property clause to prospective rights only.

We recommend that the Board should not adopt the IPL Section proposed new policy at this time.

Sincerely,

C. Boyden Gray
Chair