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A Preliminary Measure: Retroactive Copyright Term Reduction and the Takings Clause

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INTRODUCTION

When the first American Copyright Act was signed into law in 1790, the duration of a copyright term lasted 14 years with an option to renew the term for an additional 14 years.\(^1\) At the expiration of the 14 (or potentially 28) year term, the author lost all rights in the work and it fell into the public domain. As time progressed, legislative extensions to the term became rather common and were quite beneficial to the publishing, music, and movie industries. The extensions culminated in the Copyright Term Extension Act\(^2\) (CTEA) of 1998, which set the current term to life of the author plus 70 years.\(^3\) Each extension applied retroactively—it increased the term in future works as well as in works already published.\(^4\) This meant that the duration of protection initially promised to an author grew with each extension, giving the author a longer period of exclusive control. Similarly, the date that a given work would enter the public domain was pushed forward, robbing the public of the unrestricted access that they were promised. The term has never been reduced, only extended.

In *Eldred v. Ashcroft*, the Supreme Court upheld retroactive extensions in copyright term.\(^5\) The majority said nothing about the constitutionality of reducing the term. Thus, if Congress one day considered a Copyright Term Reduction Act (CTRA) that retroactively reduced copyright term duration, it would be unclear whether the Court would view that in the same light as the CTEA. Indeed, the uncertainty regarding such an act’s constitutionality may translate directly into reluctance on the part of Congress to even approach the question. It is doubtless a daunting task to attempt to pass a piece of

\(^{1}\) Act of May 13, 1790 ch. 15, § 1, 1 Stat. 124.


\(^{3}\) 17 U.S.C. § 302(a).


\(^{5}\) *Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003). (“Accordingly, we cannot conclude that the CTEA—which continues the unbroken congressional practice of treating future and existing copyrights in parity for term extension purposes—is an impermissible exercise of Congress’ power under the copyright Clause”).
legislation with the spectre of constitutional impermissibility reaching out from the shadows. Even debating the merits of such an act may be chilled by this same uncertainty.

Thus, to facilitate the legislative process, it may be helpful to dispel some of that uncertainty. My focus here is on one constitutional objection to the permissibility of a hypothetical CTRA: the Takings Clause. It is certainly possible that a reduction apply only prospectively, leaving existing copyright terms unaffected and avoiding any Fifth Amendment concerns. But the more interesting question is whether it could apply retroactively, affecting new and existing terms alike. Indeed, given the history of changes to the copyright term, it is likely that a CTRA will continue to uphold the “...unbroken Congressional practice...” of applying term changes retroactively. Such an application will cause the protection of privately held copyrights to expire sooner than was promised. In fact, a retroactive term reduction would cause some works to fall into the public domain immediately upon passage. Would this be an impermissible taking of private property by the government? Should the act include some kind of just compensation to copyright holders? I take the position that no just compensation is required. I argue that there is no Fifth Amendment Takings Clause violation in a legislatively-enacted retroactive reduction in copyright term.

I begin this paper by explaining the source and purpose of copyright in Section I. An understanding of the policy behind the law is essential in framing the rest of the argument. Section II identifies the possible eminent domain objection to a CTRA. This section provides a brief overview of the Takings Clause and then shows how the clause may be applied to a retroactive term reduction. Section III is the main argument against such an application. In that section, I argue directly that eminent domain does not apply because a retroactive term reduction is neither a taking nor does it concern itself with private property. Section IV investigates the deeper implications of applying property doctrines to copyright. Specifically, that section serves as an indirect argument against the application of eminent

\[6 \text{ Id. at 208}\]
domain by showing how the public trust doctrine could consequently undermine long-standing judicial precedent and policy.

I. THE INNER WORKINGS OF COPYRIGHT

Copyright Law in the United States is rooted in the Copyright and Patent Clause of the Constitution. The Clause vests in Congress the power “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Put in other words, the limited monopoly or “exclusive rights” that copyright law grants to authors may be given only to “promote the progress of Science” and only for “limited times.” The Clause is “both a grant of power and a limitation,” and Congress “may not overreach the restraints imposed by the stated Constitutional purpose.”

A. The Purpose Served by Monopoly

The first relevant limitation pertaining to Congress’ power to enact copyright laws is the requirement that the laws “promote the progress of Science.” By structuring the Clause in this way, the Framers intended to give Congress the power to promote the creation, dissemination, and use of creative works by providing to authors an incentive in the form of a limited monopoly. The Clause allows authors the benefit of a limited monopoly for their creative contributions, yet the ultimate goal is to promote the public good in the form of “...broad public availability of literature, music, and the other

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7 Because patent law and copyright law are rooted in the same Constitutional clause, the policy behind their operation is very similar. Thus, rationale pertaining to one of these fields is often interchangeable with the other.
9 In the 18th Century, during the time in which the Framers wrote the constitution, the term “Science” was generally taken to mean “knowledge and learning.” See Golan v. Holder, 132 S. Ct. 873, 888 (2012); Eldred, 537 U.S. at 243 (Breyer, J., dissenting).
This creates a *quid pro quo* which strikes a balance between the limited rights afforded to the author and the widespread availability ultimately afforded to the public. The grant of rights is only a means by which the public purpose may be achieved—the limited monopoly motivates the creative activity, but the work must fall into the public domain after the limited period of exclusive control has expired.\(^\text{13}\)

The correlating limitation on Congress’ power to create copyright laws is the requirement that the monopolies conferred to authors last only for “limited times.” This further exemplifies how the act strikes a balance between the copyright holder’s private rights and the public’s access to the works. Authors and artists (as well as inventors) must necessarily build on the works of their predecessors. The public domain can be classified as the repository of works and creative goods not subject to the costs and constraints of ownership.\(^\text{14}\) If the works of Shakespeare, Beethoven, or Da Vinci were still subject to copyright, the transactional and other costs inherent in obtaining permission to use them would likely dissuade a great deal of the adaptation and reuse that is prevalent today. Free access to works in the public domain ensures that authors and inventors have unrestricted access to a plentiful bounty of work from which to create new writings and discoveries. Thus, “the copyright term is limited so that the public will not be permanently deprived of the fruits of an artist’s labors.”\(^\text{15}\) Indeed, this is the purpose of the “limited times” provision—enriching the public domain is the means that the Framers chose to “promote the Progress of Science and the useful Arts.”\(^\text{16}\)

Copyright can thus be understood as a cyclical engine of progress. The act fosters the creation of expressive works by motivating authors with the promise of a private monopoly. But the act provides this incentive not to reward the creative labors of the authors, but to facilitate the dissemination of

\(^\text{12}\) Aiken, 422 U.S. at 156.
\(^\text{16}\) See Sony, 464 U.S. at 429.
those works to the public. Just as it promises the author a reward for the creation of a work, it promises
the public the reward of free access after the limited monopoly expires. This free access subsequently
serves as a resource with which future authors can then create their own expressive works, motivated
by the same reward promised to their predecessors. And inherent in the cycle is balance: a longer term
presumably encourages authors to create more works, while a shorter term gives the public earlier
access and thereby a head start in creating new works. The ideal duration of the copyright monopoly
should therefore be just long enough to encourage the maximum amount of creation on the part of
authors while being just short enough to allow the public the maximum amount of unrestricted access.

B. Considering a Reduction in the Copyright Term

I am not alone in holding the position that the current copyright term is far too long. In light of
the principles behind the law, it may be said that the current term is not adequately meeting policy
goals. A term duration lasting for the life of the author plus an additional 70 years assures the author
that she, her children, and possibly even her grandchildren will retain control over her work. However,
this same term length is strangling the access to which the public should be entitled. The long period of
protection may be motivating new authors to create, but it ultimately retards progress by making it
more difficult for them to access material with which to create. Indeed, one study shows that the public
availability of books declines sharply every successive decade, “suggesting that copyright owners are not
as interested in making new editions of books from the 1930’s to 1980’s available to the public and
[that] their legal rights as copyright owners prevents others from satisfying the market....” When the
books fall into the public domain however, “they become much more available to the public despite

L.J. 1175 (2010). (The CPP is a group of roughly 20 individuals with various kinds of expertise in the field. Members
include law professors, private practice lawyers, and lawyers from firms). See also generally Brief of George A.
Akerlof et al. as Amici Curiae Supporting Petitioners, Eldred v. Ashcroft, 2002 WL 1041846 (S.Ct. May 20, 2002);
James Boyle, The Public Domain (Caravan 2008); Heald, supra note 14; Rufus Pollock, Forever Minus a Day?
Calculating Optimal Copyright Term, 6 Rev. of Econ. Research on Copy. Issues 35 (2009).
18 Heald, supra note 14, at 11.
their age.” Additionally, shortening the term does not necessarily entail less creation. A 1960 Copyright Office study concluded that when U.S. copyright required renewal after 28 years, about 85% of all copyright holders did not renew—allowing their works to fall into the public domain. This suggests that a 28 year copyright term is sufficient motivation for at least 85% of created works.

But this paper is not about convincing Congress to reduce the copyright term. Neither is this paper about dealing with the myriad of complicated issues that follow. For example, there is a large political barrier. A streak of Congressional inactivity and fracture may follow in the wake of the recent government shutdown of 2013. There is a large lack of support from the lobbying front—the interests of the public are diffuse and not nearly as well-funded as the interests of the copyright industries.

Additionally, there are international concerns. The Berne Convention, TRIPS agreement, and many more international negotiations place treaty obligations upon the United States regarding the duration of copyright protection. Any nonconforming change to our domestic policy will be met not only with criticism abroad, but also with international dispute resolution measures. I likewise do not have an answer to exactly how long the reduced term should be, or how a reduction in term should be implemented. These are complicated issues that would make passing a Copyright Term Reduction Act very difficult. This is not to say that efforts to reduce the term are completely doomed—deadlocks can be broken, public interest can be marshaled, treaties can be amended, and details can be fleshed out.

21 See Jessica Litman, Real Copyright Reform, 96 Iowa L. Rev. 1, 11-12 (2010). See also generally Jessica D. Litman, Copyright, Compromise and Legislative History, 72 Cornell L. Rev. 857 (1987).
24 See Julie E. Cohen et al., Copyright in a Global Information Economy (3d ed. 2010) at 38.
25 For some ideas of how this question can be addressed, see generally Heald, supra note 14; William M. Landes & Richard A. Posner, The Economic Structure of Intellectual Property Law, (Harvard University Press 2003); Pollock, supra note 17; among others.
These considerations are simply beyond the scope of this paper. I instead turn my attention to dealing with a more preliminary matter—whether an uncompensated retroactive reduction in copyright term is even constitutionally permissible.

If a retroactive reduction of the copyright term was proposed in Congress, there would be an uproar from the entertainment industries. A shorter term means less control, which means less profit for copyright holders. Potentially even more unpleasant to opponents of the bill is the notion that a retroactive reduction would result in a shorter duration of protection on works currently owned by copyright holders, and in some cases those protected works would fall into the public domain immediately upon passage of the act. But on what grounds could opponents challenge a CTRA? Congress certainly has constitutional authority to enact and amend copyright laws. It is unlikely that an argument challenging Congress’s authority within the clause will be successful because the Supreme Court has adopted a policy of substantial deference to Congress’ judgment in determining term length. However, as mentioned above, Congress has never reduced the term duration. There may be something fundamentally different between a retroactive reduction and a retroactive extension in term. Indeed, opponents of a CTRA will assert that there is such a difference. I now turn to an issue that may be raised on behalf of the copyright industries opposing a retroactive reduction of the copyright term: the Fifth Amendment Takings Clause.

27 See Eldred, 537 U.S. at 212 (“[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives.”); Stewart, 495 U.S. at 230 (“Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces... it is not our role to alter the delicate balance Congress has labored to achieve.”); Sony, 464 U.S. at 429 (“it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors...in order to give the public appropriate access to their work product.”); Graham, 383 U.S. at 6 (“Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.”).
II. THE TAKINGS OBJECTION

On a general level, the grievance would be an intuitive one. The Copyright Act as last amended by Congress promises to authors a very specific duration of copyright term: life of the author plus 70 years, or in the case of anonymous works, pseudonymous works, or works made for hire, 120 years from creation or 95 years from first publication—whichever is earlier.\textsuperscript{28} Authors or artists seeking to create a future work are assured that the limited monopoly in that work will last for the entirety of the promised duration. Moreover, authors and artists of currently existing works (or holders of currently existing copyrights) live in secure knowledge that they will retain control over their work until the very last day of the promised monopoly. Shortening the term retroactively would mean reducing the duration of protection on works currently owned by copyright holders. A retroactive term reduction effectively breaks the government promise given to authors and copyright holders by changing the provisions of the agreement mid-deal. If the government promises a right lasting for a definite period of time, should the government not be held to that promise?

A. Eminent Domain and a CTRA

Eminent domain is a government power limited by the Fifth Amendment to the United States Constitution: “...Nor shall private property be taken for public use, without just compensation.”\textsuperscript{29} The policy behind the limitation is one of equity: “[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.”\textsuperscript{30} The Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\textsuperscript{31}

\textsuperscript{28} 17 U.S.C § 302.
\textsuperscript{29} U.S. Const. amend. V.
\textsuperscript{31} \textit{Armstrong v. United States}, 364 U.S. 40, 49 (1960).
ambiguity of the clause’s application has been sorted out by the courts. “While it confirms the State’s authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a ‘public use’ and ‘just compensation’ must be paid to the owner.”32 Generally, a takings analysis applies if (1) there is a taking by the government and (2) the taking is of private property. Subsequently, there is a violation of the Takings Clause if (3) the taking is not for a public use or (4) just compensation is not given to the owner of the property.

There is no bright-line rule to determine what qualifies as a taking. “In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests... no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking.”33 The Supreme Court acknowledges the existence of a few bright line rules,34 but states that “most takings claims turn on situation-specific factual inquiries.”35 “To aid in this determination, however, [the Supreme Court has] identified three factors which have ‘particular significance’: (1) ‘the economic impact of the regulation on the claimant’; (2) ‘the extent to which the regulation has interfered with distinct investment-backed expectations’; and (3) ‘the character of the governmental action.’”36

Those opposed to a hypothetical CTRA will argue that the taking is inherent in the term reduction itself. By reducing the length of time for which the right is held, the government is effectively taking away the rights of certain private individuals. A CTRA, enacted by the government, would remove from private possession a certain number of years formerly entitled to protection. The duration of time that is removed translates directly into economic loss, as the copyright owner will have less time in

33 Arkansas, 133 S.Ct. at 518.
34 Id. See also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("A permanent physical occupation of property authorized by government is a taking"); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ("So, too, is a regulation that permanently requires a property owner to sacrifice all economically beneficial uses of his or her land").
35 Arkansas, 133 S.Ct. at 518.
which to financially exploit his or her exclusive monopoly. The economic impact on copyright holders will thus be negative. Further, in creating or obtaining the work, the copyright holders presumably have the expectation that the protection will last for the statutorily specified period of time. Movie studios, book publishers, music distributors, and many other entities invest a considerable amount of money and effort into certain kinds of expressive works knowing that they will be free to reap the benefits of that investment for as long as their copyrights last. A retroactive reduction in the copyright term may cause some of these entities to lose a considerable investment in works that they had planned to be able to exploit for years to come. For example, a company could perform a cost-benefit analysis and determine how much production or promotion to invest in a certain expressive work based upon the period of time in which copyright law grants the company exclusive rights over that work. A retroactive reduction thereby destroys that investment-backed expectation by altering the supposedly fixed period of time. Finally, the character of the government action could be labeled as completely one-sided—concerned only with the good of the public while glossing over the interests of copyright holders. The opposition may therefore argue that a retroactive term reduction qualifies as a taking.

The alleged taking by the government must also be a taking of private property. Proponents of the position that intellectual property fully qualifies as private property may point to Lockean Labor Theory.\textsuperscript{37} The theory holds that when an individual mixes his labor with something, what results from that labor becomes the property of the individual. In the context of ideas and expression, an author mixes his mental labor with an idea to create copyrightable expression. Should not this expression likewise become his property? After all, the author or musician is the creator of a story or a composition in just the same way that a carpenter or blacksmith is the creator of a house or a horseshoe. Both groups have mixed their skill and labor with specific kinds of common materials. Why should one group be entitled to a property interest in the fruits of their labor while another is not?

\textsuperscript{37} See John Locke, \textit{Two Treatises of Government} (1690), Peter Laslett ed. (Cambridge Univ. Press 1988) at 287-288 ("The Labour of his Body, and the Work of his Hands, we may say, are properly his.").
This line of thought carries through to the policy behind copyright. The Framers promised a period of exclusive control over the “writings” of authors in order to “promote the Progress of Science...”\(^{38}\) Much in the same way that the creator of tangible property is motivated to continue his work knowing that he shall have a property right in whatever he creates, an artist is motivated to continue her work knowing that she shall have a copyright in whatever she creates. The incentive granted by the Constitution takes the form of a property right: authors have the right to completely exclude all others from their expressions, and they are able to possess, use, and transfer their work as they see fit.\(^{39}\)

Further, the Copyright Act itself recognizes that copyright acts as a property right in certain instances.\(^{40}\) The Second Circuit has likewise stated that an interest in Copyright is a property right.\(^{41}\) Reliance on these principles may justify the position that a copyright is a property right and that therefore any taking by the government of a privately held copyright amounts to a taking of private property. Thus, opponents of a CT RA may posit that, for these reasons, an eminent domain analysis would apply to a retroactive reduction in term.

B. The Lack of Just Compensation

Once the foundation for applying eminent domain has been established, the violation becomes much clearer. The public use requirement is relatively lax.\(^{42}\) The Supreme Court has shown a large amount of deference toward the Legislature regarding “public use” justifications for the taking of

\(^{38}\) U.S. Const., Art. I, § 8, cl. 8.

\(^{39}\) See Ian McClure, Be Careful What You Wish For: Copyright’s Campaign for Property Rights and an Eminent Consequence of Intellectual Monopoly, 10 Chap. L. Rev. 789, 792-793 (2007).

\(^{40}\) 17 U.S.C. § 201(d)(1) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession”).

\(^{41}\) Roth v. Pritikin, 710 F.2d 934, 939 (2nd Cir. 1983) (“An interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution.”).

property, going so far as to label the legislative determination as “well-nigh conclusive.” To argue that a CTRA violates this requirement would be difficult—especially in this case. Presumably, one of the largest justifications for a CTRA would be the copyright policy considerations that focus on the public’s eventual entitlement to expressive works. A shorter term would easily be deemed a public benefit or “public use” because of its facilitation of greater public access to information. Public benefit will likely be a cornerstone of the hypothetical CTRA, and it is consequently unlikely that opponents of the bill would argue that reducing the term duration violates the public use requirement.

Instead, the opposition will likely take the position that a CTRA would violate the Takings Clause unless it provides just compensation to copyright owners for shortening the period of exclusive control that they retain over their works. I do not dispute that a just compensation provision could be included in a CTRA, but I argue that such a provision is not necessary. Thus, for the purpose of my argument, we assume that our hypothetical CTRA does not contain any compensatory provisions. It follows then that if an uncompensated retroactive reduction of copyright term results in a “taking” of “property,” it would prove unconstitutional under the Fifth Amendment.

III. A DIRECT ATTACK UPON THE TAKINGS OBJECTION

As Section II demonstrated, the Takings Clause is an important preliminary consideration when thinking about a retroactive copyright term reduction. The legislature and the lobbyists may be skeptical about arguing the merits of reducing the term with the foreboding shadow of constitutional impermissibility looming over the merits. My goal here is to dispel that foreboding shadow.

As mentioned in the previous section, the “public use” factor of the Takings Clause analysis will likely be undisputed. It is not a strict requirement, and courts have shown great deference to Congress’

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43 See e.g. *Kelo*, 545 U.S. at 519.
44 See *McClure*, *supra* note 39, at 816.
judgment about what constitutes a public use. Likewise, though the “just compensation” factor may be disputed for political reasons, we are assuming that our CTRA has no “just compensation” provision. Thus, a direct response to this argument requires an attack on the application of the doctrine. This section will show that an eminent domain analysis does not even apply to a CTRA because a retroactive reduction is not a taking and/or is not a taking of property.

A. The Absence of a Regulatory Taking

The Takings Clause cannot be violated if there is no taking to begin with. As mentioned in the previous section, the Supreme Court has held that “most takings claims turn on situation-specific factual inquiries.” The Court, “quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ requires that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.” However, in Penn Central, the Court identified three factors which have “particular significance”: (1) “the economic impact of the regulation on the claimant”; (2) “the extent to which the regulation has interfered with distinct investment-backed expectations”; and (3) “the character of the governmental action.”

Here, the alleged taking does not involve tangible property. The alleged taking does not even involve a direct divestiture or violation of some private right. Instead, the alleged taking involves a congressional amendment to a congressionally granted right in intellectual property. The “situation-specific factual inquiry” therefore must focus on what, if any, changes to government-granted privileges can qualify as regulatory takings. There is no case law on the consequences of reducing the copyright term for the simple reason that the term has never before been reduced. There are, however, a few similar cases illustrative of our predicament.

45 See Nat’l R.R., 503 U.S. at 422.
46 Arkansas, 133 S.Ct. at 518.
47 Penn Central, 438 U.S. at 123.
48 Id. at 124.
In *Brown v. Legal Found. of Wash.*, for example, a group of lawyers challenged a legislative requirement that client funds must be placed into an IOLTA account and that any interest earned therefrom be transferred to a State Foundation. The holding relevant for our purposes considered the *Penn Central* factors and held that the legislative requirement to transfer interest earned did not constitute a taking because there was no adverse economic impact on petitioners and the requirement did not interfere with any investment-backed expectation.

The same argument can be applied to a CTRA. Just as a loss of interest on client funds did not qualify as the requisite kind of interference in *Brown*, a loss of term duration should not qualify as a regulatory taking. After all, the copyright holders would still have benefitted from their copyrights even after a term reduction takes place, much like the lawyers still benefitted from their principle earnings even after they were no longer entitled to the generated interest. *Brown*, however, dealt strictly with money. A CTRA, on the other hand, deals with an intangible right. And indeed, the opposition may urge that perhaps a different analysis is warranted for this different kind of situation.

In *Penn Central*, the Court stated that “a ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” Though the Court was not referring to copyright law in making such a statement, the language fits surprisingly well. A retroactive reduction in copyright term is clearly not a “physical invasion by the government,” and so it follows that a “taking” may not so easily be found here. Instead, a CTRA is more like the latter example because the very effect of the act would be to change the balance of economic burdens and benefits granted by copyright, with the purpose of enriching the public domain and promoting the progress of Science, thereby promoting the public good. Thus, the

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49 *Brown*, 538 U.S. 216.
50 *Id.* at 234.
51 *Penn Central*, 438 U.S. at 123.
effect of a CTRA is far removed from the situation that the Penn Central Court regarded as a regulatory
taking, and instead closely resembles something that the Court thought more acceptable.

Bowen v. Gilliard dealt with an amendment to the federal statutes providing assistance to
families with dependent children. The new requirements provided that in order to be eligible to
receive aid, the applicant family not only had to assign to the state any child support payments they
received, but the family also had to disclose all family members (including dependent children) living in
the same home. In some cases, the net effect of the amendments resulted in a lower financial benefit to
recipients of the aid. A takings challenge followed.

The Court said that “given the unquestioned premise that the Government has a right to reduce
AFDC benefits generally,” a requirement to list all members of a family living in a home “does not even
arguably take anyone’s property.” Thus, the Court recognized as an “unquestioned premise” that the
amount of financial aid granted by a congressionally created program can be lowered by amendment at
any time. “The prospective right to support payments, and the child’s expectations with respect to the
use of such funds, are clearly subject to modification by law, be it through judicial decree, state
legislation, or congressional enactment.”

Further, the Court examined the character of the alleged taking by noting that the law did not
require any family to apply for AFDC benefits in the first place. And in the case that a family did choose
to receive the benefits, the Court essentially deferred to Congress’ policy judgments:

It is obviously necessary for the Government to make hard choices and to balance various
incentives in deciding how to allocate benefits in this type of program. But a decision to include
child support as part of the family income certainly does not implicate the type of concerns that
the Takings Clause protects. This is by no means an enactment that forces “some people alone to
bear public burdens which, in all fairness and justice, should be borne by the public as a
whole.”

53 Id. at 605.
54 Id. at 607.
55 Id. at 608 (quoting Armstrong, 364 U.S. at 49).
Bowen highlights the “unquestioned premise” that Congress has the right to substantially amend congressionally granted programs without fear of violating the Takings Clause. This provides force to the argument that Congress should have the power to amend the Copyright Act because Congress was the entity that created it. Bowen goes further: just as no family was required to apply for aid, no artist or author is required by the Copyright Act to create an expressive work in the first place. Instead, the Copyright Act provides certain kinds of benefits to creative individuals. Congress had to “make hard choices” to “balance various incentives”\textsuperscript{56} in deciding how to allocate those benefits. Deference to Congress’ judgment about its own program seems like the wise thing to do in light of Bowen. Indeed, deference to Congress on changes to the copyright term has already been well established in Eldred.\textsuperscript{57}

However, it is unclear to what extent such deference should be allowed. The Bowen Court indicates that despite deference to Congress, an act may nevertheless be problematic if it touches upon the kinds of concerns that the Takings Clause is designed to protect. Thus, though there is a strong position in arguing that retroactive reduction of copyright term is not a regulatory taking, the analysis is not complete without considering whether it would be contrary to “fairness and justice” to require private entities to alone “bear public burdens” which ought to be “borne by the public as a whole.”\textsuperscript{58}

This invites a reprise of the policy argument behind the reduction in the first place. It is important to remember that the purpose of copyright law is to “promote the Progress of Science” and not to reward the creative labors of individuals. The very existence of an exclusive right to expressive works is predicated on the assumption that such a right ultimately benefits the public as a whole. Private actors are only temporary beneficiaries, as evidenced by the inclusion of the “limited times” requirement. Seen in the light of constitutional policy, it becomes clear that the public will continue to

\textsuperscript{56} Id.
\textsuperscript{57} See Eldred, 537 U.S. at 212 (“[i]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause’s objectives”).
\textsuperscript{58} See Armstrong, 364 U.S. at 49.
bear its share of the burden of copyright even after a term reduction. The public will continue to suffer from the (now shorter) monopoly because the public will continue to be barred from freely accessing works protected by copyright. A reduction in term does not place this burden upon private entities—that would be a logical impossibility. “Fairness and justice” indeed demands that the public burden of suffering through a monopoly in the name of progress be “borne by the public as a whole”—a reduction in copyright term will not place this burden upon the shoulders of private entities. While a CTRA may lighten the load the public is forced to carry, private entities will not be required to bear even a sliver of this inherently public burden. The act would not give rise to a type of concern that the Takings Clause protects. Consequently, a retroactive reduction in copyright term cannot constitute a regulatory taking under eminent domain.

B. Why Copyright Should Not be Considered a Property Right

Applying a takings analysis to a CTRA may also be attacked on the grounds that the alleged taking is not one of property. Since the Takings Clause only concerns itself with “private property” being taken for a public use, the objection can be avoided with a showing that copyright ought not to be considered “private property.”

An argument asserting that the Copyright Act recognizes the right as property is a bit misplaced. 17 U.S.C. § 201(d)(1) indeed says that copyright is treated as personal property, but only when it is “bequeathed by will” or when it “passes... by the applicable laws of intestate succession.”59 This section never strictly declares that copyright even is personal property—the section merely explains that ownership in copyright is transferable and descendible as though it was personal property. Neither this section nor any other section of the entire act goes any further along the path to claiming that copyright is a property right.

59 17 U.S.C. § 201(d)(1) (“The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession”).
Reliance on case law is likewise misleading. The Second Circuit in *Roth v. Pritkin* did indeed say that “an interest in a copyright is a property right protected by the due process and just compensation clauses of the Constitution.”60 However, the issue presented by *Roth* was one of the proper application of the “work made for hire” doctrine, not the Takings Clause. Consequently, the Second Circuit itself made clear that the comment about property rights was dicta and was being made only to demonstrate the unfavorable effects of the appellant’s position.61 The court said that “in the absence of any clear congressional mandate to the contrary... even the spectre of a constitutional issue concerning the proper application of the ‘takings clause’” is sufficient cause to construe the statute to avoid reaching issues of eminent domain.62 Thus, the Second Circuit in *Roth* was not supporting property rights in copyright. Instead, it cautioned that until Congress explains how to apply the Takings Clause to copyright, courts should avoid wading into that uncertain territory. *Certaiori* was denied for *Roth*,63 and it is prudent to assume that the denial bore upon the relevant “work made for hire” ruling, rather than the dicta regarding the Takings Clause. Of course, if a CTRA takings issue reached the Supreme Court, the Court would not be bound by Second Circuit precedent—especially not by dicta.

The right to property is not discussed in the body of the Constitution, and the Fifth Amendment speaks of private property as though the people were already familiar with the concept.64 “That is because the Constitution was not creating a right to property; it already existed. The Constitution was merely recognizing it, and courts deciding cases under the Fifth Amendment would look to the common

60 *Roth*, 710 F.2d at 939.
61 *Id.* (“Although the language of the Act, its legislative history and rules of statutory interpretation are sufficient answers to Roth’s claim, we note, en passant, adoption of her interpretation of § 301 would, in addition, raise a serious issue concerning the Act’s constitutionality”); (“we do not decide whether retroactive application would, in fact, violate constitutional restrictions”).
62 *Id.*
64 The Constitution forbids that one “be deprived of... property, without due process of law,” and that private property may not be taken without just compensation. *See* U.S. Const. amend. V. There is no accompanying explanation of “property.” This likely implies that the Framers assumed that the readers of the document would already know what the term meant.
law for its definition." Copyright, on the other hand, must be presently considered a product of Congress. “[T]he copyright clause does not recognize an inalienable right to copyright, but instead merely grants to Congress the power to establish copyrights.” An early Supreme Court denied a claim to copyright under common law, reasoning that the language of the Copyright Clause implies that the right stems only from the legislature. “Congress, then, by [the Copyright] act, instead of sanctioning an existing right, as contended for, created it.” Thus, in sharp contrast with the common law foundation of property, the scope of copyright is now subject to the discretion of the legislature.

As mentioned in Section II, the common law generally borrows its concept of property from John Locke. Indeed, at this point in history, his theory is almost intuitive to us. Of course I should have a right in something if I expend my labor in making it. Whether I apply my labor to iron to make a spade, or to wood to make a house, or to fabric to make a garment, it is a small intuitive leap to declare that I now have a right in that thing and may exclude others from the use of it if I wish. Society, it may be said, is prepared to recognize that right. So how can it be that smiths, builders, and tailors have a property right in their creations while painters, writers, and musicians do not? Indeed, the creative artists among us put just as much effort into their works as laborers put in theirs. Should not the work of the artist then be treated in the same way?

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65 Jerry Brito, Why Conservatives and Libertarians Should Be Skeptical of Congress’s Copyright Regime, Copyright Unbalanced: From Incentive to Excess (Mercatus 2012) at 9.
66 Id.
68 Id. at 661.
70 See Locke, supra note 37, at 287-288.
71 See Boyle, supra note 17, at 28.
There is, admittedly, strength and appeal in that argument. However, the policy behind Locke’s theory serves as a clear way to distinguish the artist’s work from that of the laborer. The utilitarian reason for recognizing property rights in tangible objects is to “facilitate efficient transactional interaction ‘in the context of scarcity.’”

Physical property is a scarce resource, meaning that its use and possession is limited—more than one person cannot possess or use the same thing at the same time. We refer to such goods as rivalrous goods. An apple is a rivalrous good because you and I cannot both eat it at the same time; a house is rivalrous property because my sale of it to a third party interferes with your enjoyment of living in it. Similarly, physical property is an excludible resource. Even if I show you my apple or give you a tour of my home, I can afterward prevent you from enjoying them both.

Recognition of property rights in rivalrous and excludible goods essentially prevents detrimental overuse and maintains civility and efficiency in the marketplace. “Without such property rights, transaction costs would be extremely high because resources such as time and energy would be spent ensuring exclusive possession and protection.” Because there is a finite amount of these scarce, physical resources, society relies on property rights to encourage their use in efficient ways.

Intellectual property is not similarly scarce because it is neither rivalrous nor is it excludible. If you listen to me singing a song, you can sing that same song in the future without interfering with my ability to sing it again. The aesthetic rapture you feel when looking at my painting does not interfere with my own enjoyment of it. The knowledge you gain from reading my book does not detract from the knowledge that I have received from that same book. There is no rivalrousness inherent in expression. You certainly have the ability to steal the rivalrous, physical embodiment of the creative work (the physical copy of the CD, book, or painting), but the expressive ideas contained therein remain

73 Id. at 793.
74 See Boyle, supra note 17, at 3; see McClure, supra note 39, at 793-794.
75 McClure, supra note 39, at 793-794.
nonrivalrous. Similarly, the expressions contained in my songs, paintings, and books are nonexcludible. I can certainly exclude you from these works in the first place, but once I reveal them to you, the information you receive is forever beyond my control. Your new copy of my expressive information may be “limitlessly transferred or duplicated without affecting [my] original copy.” Moreover, unlike physical property, the idea may multiply limitless times without depleting any resources. This complete lack of scarcity cannot justify the same kinds of property rights given to scarce, physical resources. The policy behind property rights in tangible objects is to prevent unnecessary expenditure in the marketplace due to concerns of overuse. The policy behind copyright, as we know, is very different—to promote the Progress of Science.

The right in copyright therefore should not be classified as a property right. Copyright is not granted for rivalrous and excludible resources to limit their use and facilitate their value in trade. Copyright is given only to nonrivalrous and nonexcludible resources for the purpose of encouraging their creation, dissemination, and widespread use. Copyright attempts to artificially instill excludability into expressive works in order to provide an economic incentive for authors to create. But despite this power, copyright does not and cannot instill scarcity into these fundamentally limitless resources—even if you infringe the copyright in my song, you cannot interfere with my knowledge, use, and enjoyment of that song.

This basis for the refusal to apply property rights to expressions is not a new concept. Thomas Jefferson wrote:

That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have

76 Id.
77 Id. at 794.
our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Similarly, the idea to extend a copyright term on the grounds that it is a “natural right” has received strict criticism from thinkers throughout history. Notably, and specifically for our purposes, Locke himself suggested that any right in printed ideas should not reasonably extend past 50 years. A reliance on Lockean ideas to justify long copyright terms is therefore misplaced. A retroactive reduction in copyright term then does not require “just compensation” because such a reduction does not concern a requisite property right. The firmly grounded, common law justification of property rights is in stark contrast with the constitutional justification of intellectual property rights. This fundamental difference in the nature of the rights militates against a finding that copyright is a property right subject to eminent domain.

C. Eminent Domain Would Not Apply to a CTRA

An eminent domain argument against a CTRA therefore has no ground upon which to stand. In the first place, a term reduction is not a taking by the government. Copyright is a congressionally created benefit for those who choose to create expressive works. The Act does not impose any requirements on anyone, only conditions of eligibility. It is “unquestioned” that Congress has the right to amend any such benefit as it sees fit, and the courts will continue to respect Congress’ judgments

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78 As mentioned in Section I, patented inventions and copyrightable expressions are both rooted in the same constitutional clause. Their justifying policy, therefore, is widely regarded as identical.


80 See e.g. Boyle, supra note 17, at 22 (quoting Thomas Babington Macaulay, speech delivered in the House of Commons (February 5, 1841), The Life and Works of Lord Macaulay: Complete in Ten Volumes, vol. VIII, Edinburgh ed. (Longmans 1897) at 198).

81 See Boyle, supra note 17, at 28 (quoting Lord King, The Life of John Locke with Extracts from His Correspondence, Journals and Common-Place Books, vol. I, (Henry Colburn 1830) at 379-380).

82 Given its rich history and evolution, Copyright doubtless has roots in the common law as well. However, as formally recognized by the 1834 Supreme Court in Wheaton, 33 U.S. at 660-662, it now exists only as a statutory right rooted in a Congressional power granted by the Copyright Clause of the Constitution.
regarding the “hard choices” and “balancing of incentives” that underlie such benefits. Further, a reduction of the term does not force “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Indeed, a reduction does not place any public burdens on copyright owners—the private monopolies in expressive works will continue to burden only the public even after a reduction of the duration of those monopolies.

Similarly, there is no divestiture of private property that results from a term reduction. Existing copyrights will certainly be affected by the passage of a CTRA, but copyrights are not property rights subject to the Takings Clause. Whereas the specifics of private property are developed from the common law, the specifics of copyright are enacted by Congress. Private property rights essentially ensure that tangible, rivalrous, and excludible resources will be used efficiently in the context of scarcity. Copyright, on the other hand, focuses on promoting the Progress of Science by encouraging the creation, dissemination, and use of intangible, nonrivalrous, and nonexcludible expressions. A single right cannot cover these two fundamentally different policy goals. Copyright should therefore not be viewed as a property right subject to the Takings Clause.

Consequently, because a CTRA is neither a taking nor is it concerned with private property, a CTRA is immune from the Takings Clause. Congress may freely debate retroactive reduction on the merits without fear of it being held unconstitutional on Fifth Amendment grounds.

IV. AVOIDING THE EVISCERATION OF TRADITION AND PRECEDENT

There also exists an indirect argument supporting the position that the Takings Clause should not apply to a retroactive reduction in copyright term. To illustrate the point, it is crucial to consider what is implicated by raising an eminent domain objection in the first place. The grounds of such an objection necessarily claim that copyright is a property right. Such a position may serve the immediate

83 See Eldred, 537 U.S. 208; Bowen, 483 U.S. at 608.
84 Armstrong, 364 U.S. at 49.
purposes of industries seeking to maintain or even extend the current term duration, but it raises interesting concerns regarding copyright jurisprudence. Specifically, the *Eldred* precedent is at risk of being flipped on its head.

*Eldred* very clearly upheld retroactive extensions of the copyright term by deference to Congress’s judgment on the matter.85 One would think that identical reasoning would apply if Congress decided to reduce the term instead. However, accepting the argument in favor of a Takings Clause violation would run contrary to this position. Finding a takings violation would, in the first place, depart from the tradition of judicial deference to Congress regarding copyright duration. As if this is not enough, finding a takings violation would also invite some equitable concerns. Where *Eldred* holds that it is permissible for Congress to extend the copyright term for the benefit of private entities, this takings objection would assert that it is impermissible to reduce the term for the benefit of the public. If Congress can extend the term, should Congress not then have every right to do the opposite?

A Takings Clause objection to a CTRA essentially wants the goose without the gander. It would be difficult (if not impossible) to maintain the validity of the *Eldred* precedent if a violation of the clause is found in a CTRA. Such a conundrum would purport that Congress can take copyright term away from the public, yet cannot take copyright term away from private entities. This position would attempt to say that Congress is free to alter the term to benefit copyright holders, but is barred from doing so in order to benefit the public. If the Takings Clause forbids term reduction, how can *Eldred* uphold a term extension? Indeed, if the Takings Clause makes it impermissible to transfer the term from private to public entities, should not there be some mirroring doctrine that makes it impermissible to do the opposite?

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85 *Eldred*, 537 U.S. at 204 (“Guided by text, history, and precedent, we cannot agree with petitioners’ submission that extending the duration of existing copyrights is categorically beyond Congress’ authority under the Copyright Clause”); (“...we now turn to whether it is a rational exercise of the legislative authority conferred by the Copyright Clause. On that point, we defer substantially to Congress”).
A. The Public Trust Doctrine and Copyright

The common law doctrine of public trust may serve such a purpose. This doctrine can be traced as far back as ancient Roman law, which maintained that certain resources such as the air, rivers, and sea were incapable of private ownership and thereby dedicated to the public. The doctrine first made its United States appearance in Illinois Central, where the Supreme Court recognized that the waters of the lake are “held in trust for the people” and thereby belong inherently to the public. The public, therefore, “may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.” In so ruling, the Court essentially recognized that “the government could not grant any private parties a proprietary control over” certain resources which would “exclude the public at large from having free and unimpeded access to them.”

The public trust doctrine is not necessarily limited to “navigable waters.” Instead, the doctrine is flexible by its very nature, and is arguably meant to apply to changing circumstances as equity demands. Thus, it may be warranted to consider changes in copyright term duration through the lens of the public trust doctrine. If a Copyright Term Reduction Act violates the Takings Clause because it

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88 Id.
89 Sun, supra note 86, at 8.
takes a right away from copyright holders, perhaps the Copyright Term Extension Act\textsuperscript{91} should thereby violate the public trust because it takes a right away from the public.

Indeed, the original complaint that began the \textit{Eldred} litigation asserted that a retroactive extension of term violated the public trust.\textsuperscript{92} The District Court replied that “insofar as the public trust doctrine applies to navigable waters and not copyrights, the retroactive extension of copyright protection does not violate the public trust doctrine.”\textsuperscript{93} Thus, while declining to apply the doctrine to copyright law, the court did not completely prohibit its application. Unfortunately, the public trust challenge was not pressed for appeal\textsuperscript{94} and the case proceeded on other arguments. It is unclear what the Supreme Court would have had to say had the issue been brought before it, and it is conceivable that the same issue could arise again.

B. Keeping the Lid on Property Doctrines

I must pause to make clear that I do not argue for an absolute extension of public trust to copyright law.\textsuperscript{95} I do not claim that the doctrine applies to the CTEA. I argue only that in raising an eminent domain objection to a CTRA, the opposition necessarily weds itself to the possibility of a corresponding application of public trust to the CTEA. The reason has to do exclusively with the property “status” of copyright. The fact that the question of whether copyright is property is not settled may explain why courts have been hesitant to apply property doctrines to copyright law. But if that status is

\begin{footnotesize}
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\item \textsuperscript{91} CTEA, \textit{supra} note 2.
\item \textsuperscript{92} Plaintiff’s Complaint ¶ 38, \textit{Eldred v. Reno}, 1999 WL 33743484 (January 11, 1999) (“The Public Trust Doctrine holds that government may not transfer the public property of a commons into private hands in the absence of any public benefit in exchange. While this doctrine has traditionally been applied in the context of public lands, the same principle should apply to the reallocation of public rights in intangible property, such as copyright”).
\item \textsuperscript{93} \textit{Eldred v. Reno}, 74 F.Supp.2d 1, 4 (D.D.C. 1999).
\item \textsuperscript{94} See \textit{Brief for the Appellee, Eldred v. Reno}, 2000 WL 35577032 (July 26, 2000).
\item \textsuperscript{95} For a few papers discussing the application of the public trust doctrine to copyright, \textit{see Sun, supra} note 86; Maureen Ryan, \textit{Cyberspace as Public Space: A Public Trust Paradigm for Copyright in a Digital World}, 79 Or. L. Rev. 647, 707 (2000); Margaret Chon, \textit{Postmodern ‘Progress’: Reconsidering the Copyright and Patent Power}, 43 DePaul L. Rev. 97 (1993).
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confirmed, it is conceivable that this door may fly open. A Takings Clause objection to a CTRA, therefore, is loaded with more problems than may be facially apparent.

In order for the takings objection to stand, as we have seen in Sections II and III, the right in copyright must be regarded as a property right. It then follows that if copyright is a property right, eminent domain is not the only property doctrine that may be applied to copyright. It would be inconsistent and unjust to claim that copyright is “property enough” for the purposes of eminent domain, but not “property enough” for the purposes of other property doctrines such as the public trust. Therefore, if eminent domain applies to copyright, it is conceivable that the public trust doctrine would apply as well.

As hinted above, the application of public trust to this situation would focus on retroactive term extensions. The Illinois holding is based on the notion that public access to certain resources “is so important that [these resources] should be held in a commons for special treatment.” In this way, the doctrine can be seen as a tool of the judiciary to respond to government-granted private interests which “subordinate broad public resource uses.” Some scholars argue that the doctrine recognizes that the highest use of certain resources lays in public ownership, and judicial scrutiny of governmental privatization is justified with respect to those resources.

If we accept that copyright is a property right, then the public domain is not merely a repository for public works, but is itself a public resource. The very purpose of this resource is broad public access to it, and therefore any interference with that public access may potentially invoke the public trust doctrine. The CTEA interfered with the public domain by further restricting public access to it—despite the promise inherent in a fixed term, the act delayed public access to creative works by extending the

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96 Ryan, supra note 95, at 696.
98 See Ryan, supra note 95, at 702 (referencing Araiza, supra note 97, at 433).
99 See id. (referencing Araiza, supra note 97, at 434).
period of time in which private actors retained control over them. Thus, the CTEA reduced the size of
the public domain, even just slightly, by delaying the expiration of copyrighted works. The public interest
in free and unrestricted access to information was thereby sacrificed to benefit the interests of private
actors. Therefore, if copyright is property, the CTEA is a subordination of the use of public resources by
the public and the public trust doctrine could thereby justify judicial interference. *Eldred*, as a
consequence, would be in danger of being overturned.

This very danger militates against a finding that retroactively reducing copyright term violates
the Takings Clause. Finding such a violation would not only end the long tradition of judicial deference to
Congress’ judgment on copyright matters, but it would open a Pandora’s Box of property doctrines
that may work terrors on well-established copyright precedent. Indeed, the reluctance of the courts to
determine the “property-ness” of copyright “in the absence of any clear congressional mandate to the
contrary” exemplifies this concern. The threat of the public trust doctrine interfering with well settled
precedent is therefore a boon to the constitutional permissibility of a CTRA. Because finding a takings
violation would indirectly run contrary to tradition and precedent, a retroactive term reduction should
be upheld.

**CONCLUSION**

Currently, there is no Copyright Term Reduction Act pending before Congress. There is a
plethora of domestic and international difficulties that must be dealt with in constructing such an act.
This paper has targeted a more preliminary concern—the constitutionality of a retroactive term
reduction. I argue that no eminent domain objection can stand, and that Congress may therefore safely
debate the merits.

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100 *See Eldred*, 537 U.S. at 212 (“[I]t is generally for Congress, not the courts, to decide how best to pursue the
Copyright Clause’s objectives.”). *Accord Stewart*, 495 U.S. at 230; *Sony*, 464 U.S. at 429; *Graham*, 383 U.S. at 6.
101 *Roth*, 710 F.2d at 939.
A takings objection seems intuitive on its face. If Congress retroactively applies a reduction to the copyright term, existing copyright holders will suffer a loss. The Copyright Act promises authors and their assignees a set amount of time to exclusively exploit their copyrighted works. A CTRA causes copyright holders to lose some of that promised period of exploitation. This loss can be injurious to the author’s pride or honor—it may cause them to feel as though they are cheated out of their promised term. This loss can perhaps even be measured in economic value by calculating how much money the foregone term would have brought the copyright owner but for the reduction. While these are great arguments to raise regarding the merits of a CTRA, they do not amount to a Takings Clause violation.

Indeed, a CTRA would not give an eminent domain objection ground on which to stand. In the first place, retroactively reducing copyright term does not concern property. Traditional, common law property concerns itself with facilitating transaction in scarce resources. In doing so, property law effectively makes sure that physically limited tangible resources are not overexploited. Intellectual property such as copyright is not similarly scarce. It can be copied with little to no expenditure of resources, and any and every copy does not interfere with the enjoyment of the original (or any other copy). Intellectual property laws simply do not secure the same kinds of rights as laws concerning chattel property or real property.

And even if the courts do not wish to finalize the “property-ness” of copyright at this time, there is another way of disposing of the eminent domain objection. A term reduction is not a taking. Reducing the term is not a “physical invasion by the government” where a taking is much more readily found. Instead, copyright is more akin to a congressionally created privilege. Congress decides how to allocate the benefits granted by copyright law, and it could very well decide that the term is too long. A

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102 See McClure, supra note 39, at 793-794.
103 See Penn Central, 438 U.S. at 123.
retroactive reduction is not a situation where the government forces some people alone to bear public burdens “which, in all fairness and justice, should be borne by the public as a whole.”\textsuperscript{104}

With all this in mind, an eminent domain objection to a CTRA must fail. The legislature need not concern itself with such a challenge, and may safely do what it does best—legislate. More pressing matters regarding a term reduction, such as the political climate or international obligations, can be freely discussed. With a clear mind, parties may begin laying their arguments on the table. Free from the concern of constitutional impermissibility, a discourse may develop and, all else willing, flourish. Policies can be argued and votes can be cast on the merits. With the spectre of the Takings Clause out of the picture, the legislative process can proceed unencumbered by judicial concerns.

\textsuperscript{104} Armstrong, 364 U.S. at 49.