Are domain names Takings Clause “property”?

This article will consider whether domain names should be considered property under state and federal versions of the Takings Clause. This is particularly relevant in light of the late 2008 attempt by the Commonwealth of Kentucky to seize control of the domain names of over 140 gambling websites. In order to regain control of their domains, site owners will either have to implement software to block Kentucky residents, or risk forfeiting their businesses. As property for purposes of the state and federal Takings Clause provisions, a state would often be obligated to recompense an owner whose domain name had been seized. Yet while domain names have been around for over 20 years, there has been little discussion, and no agreement, by courts and scholars as to their legal nature. As domain names are often referred to as a form of “intellectual property”, and clustered together with trademarks, copyrights and patents. Moreover, their use to designate source is quite similar to that of trademarks. Thus, one is tempted to look to the Takings Clause analyses with regard to those other forms of exclusivity. But are there substantive distinctions between domain names and those other forms that lead to a different result? This article intends to provide an analysis of this issue, and to consider the effect if one concludes that domain names are property.