The Inalienability of the Right of Publicity

Publicity rights first developed in the heartland of privacy and tort law as a compensation scheme for injuries to personal dignity through the misappropriation of a person’s identity. Today, however, the right of publicity is most often situated as a robust property right. Some courts and scholars have avoided classifying publicity rights as property-based, but have done so only because they say it does not matter whether publicity rights are tort or property-based. Although in one sense, they are correct -- it does not ultimately matter whether publicity rights are characterized as torts or property -- the doctrinal distinction nevertheless highlights a problematic characteristic of publicity rights. Publicity rights have largely been deemed fully alienable. Tort-based rights, in contrast, are usually personal, non-assignable, and cannot be sold to satisfy court judgments. Property rights, however, are usually assignable and can be sold to satisfy court judgments. The alienability of publicity rights which is often characterized as unfettered is in fact an incomplete alienability. A filing in the on-going civil case for wrongful death against O.J. Simpson highlights a discomfort with truly divesting an individual of control over his or her identity even if the divestment is limited to uses for commercial purposes. The Goldman estate, which prevailed in the civil trial against Simpson, but have not collected on the judgment recently sought to obtain ownership of Simpson’s right of publicity. If publicity rights are alienable property rights, the motion to transfer his right of publicity should have been granted, as it was with the transfer of the copyright to his book, If I Did It. The court, however, swiftly rejected the motion. The unwillingness to transfer Simpson’s right of publicity challenges some of our assumptions about the right of publicity and also lends insight into restrictions on alienability more broadly, especially in the context of sales of organs and patents for cell lines. This article suggests that publicity rights should be inalienable. Such a conclusion resituates publicity rights as dignitary harms arising out our understanding of privacy law and suggests a number of limits on the ever-expanding right of publicity..