

Squirm, Wriggle and Roll...
Circumvention of Celebrity Right to Publicity

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INTRODUCTION

When competing legal rights come into conflict, it is often the responsibility of the courts to determine a just method to separate and weigh each set of rights. In the case of *Winter et al., v. DC Comics et al.*,¹ the California Supreme Court was presented with a conflict between two celebrities' right to publicity and a comic book company's right to freedom of speech and expression. The Winter Court had a test already established and available to weigh these two competing rights, -- the '*significant transformative elements*' test -- yet in the Winter case this test led to an unjust result. For decisions regarding competing sets of rights to be decided in a fair and consistent manner, the established tests need to be specific and not overly broad. Justice is rendered when the legal standards are methodical, specific and consistent in their application. The plaintiffs in the Winter case were wronged, yet they did not receive justice because the transformative elements test was open-ended and unspecific in nature.

This paper will present the background facts and legal reasoning of the Winter case along with a discussion of the relevant legal standards. This paper will also examine the application of the same legal standards in another recent California case, ultimately concluding that the courts did not technically misapply the legal standards in either case. However, the analysis section of this paper will go on to explain why the current use of the '*transformative elements*' test led to an unjust result in the Winter case, and the analysis section will therefore propose reform to improve the legal standard.

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¹ *Winter et al. v. DC Comics et al.*, 30 Cal. 4th 881 (Cal. 2003).

BACKGROUND

Johnny and Edgar Winter (plaintiffs) are famous musicians from Texas. They are both albino, have long white hair and red eyes.² One brother often wears a black top-hat in public. DC Comics (defendant) produced a comic book series featuring a character named “Jonah Hex” in the 1990’s; the series “contains an outlandish plot, involving [such things as] giant worm-like creatures [and] singing cowboys.”³

In the fourth volume of the series entitled “The Autumns of Our Discontent,” two new characters are introduced named Johnny Autumn and Edgar Autumn, collectively the Autumn Brothers. These two brothers are the villains of the series and they are both depicted as having pale skin and long white hair; one has red eyes and the other is wearing red sunglasses and a stove-pipe hat.⁴ Johnny and Edgar Autumn are “depicted as villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature.”⁵ The characters’ very conception portrays them as disgusting creatures that are the results of their mother’s horrible rape. The Winter Brothers alleged that the comic books, “falsely portrayed them as ‘vile, depraved, stupid, cowardly, subhuman individuals who engage in wanton acts of violence, murder and bestiality for pleasure and who should be killed.’”⁶ At the end of the series, the Autumn Brothers are shot and killed by Jonah Hex.⁷

The Winter Brothers (plaintiffs) brought suit claiming that the Jonah Hex “Autumn Brothers” were clear copies of their own public personas, thereby used without permission and violating the Winter brothers’ right to control public use of these personas. In addition to choosing the same first names as the Winter Brothers, the plaintiffs alleged that DC Comics

² Definition of an albino: “Animal or plant without the normal pigmentation of its species. The pigment melanin, primary agent of normal human coloration, is absent in the tissues of human albinos because the enzyme tyrosinase, required for its formation, is lacking. As a result, albinos have pale skin, white or light yellow hair, and eyes that, although actually colorless, appear pink because the blood vessels of the retina are visible.” Tormont Webster’s Dictionary (5th Edition, 1990).

³ Winter, 30 Cal. 4th at 886.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

(defendant) used the names Johnny and Edgar Autumn so as to parallel their ‘seasonal’ last name. The characters in the comic book were “drawn with long white hair and albino features,”⁸ which are specific physical characteristics belonging to the Winter Brothers. It is thus suspect that the Autumn Brothers have the same first names as the Winters, a ‘seasonal’ last name and the same distinctive physical characteristics.⁹ The Winter Brothers argue that they did not agree to this commercial use of their economically valuable public personas (a form of carefully cultivated intellectual property referred to as the celebrity right to ‘publicity’).

LEGAL STANDARD

Relevant Legal Standards

The foundational legal concern for both the plaintiffs and defendants is the United States Constitution’s First Amendment, which provides that law should not infringe on the individual right to freedom of speech.¹⁰ Both parties cite to the First Amendment and claim that it protects their rights by: (1) preserving an uninhibited marketplace of ideas, and (2) furthering the individual right of self-expression. The plaintiffs seek protection their right to publicity under California law, whereas the defendants claim that their right of freedom of expression is infringed by the application of such law in this particular case.

The law in question, which provides protection for the celebrity right to publicity, is Civil Code §3344 which states:

- (a) Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, good or services, without such person’s prior consent ... shall

⁸ *Id.*

⁹ *Id.*

¹⁰ *See* U.S. CONST. amend. I.

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be liable for any damages sustained by the person or persons injured as a result thereof.¹¹

This code outlines a celebrity's right to publicity within the state of California. In the Winter case, the two competing protections -- the Winters' right to publicity and DC Comic's freedom of speech -- come into conflict.

(1) The 'Transformative Elements' Test

In order to resolve the conflict between the right to publicity and freedom of speech, the 'transformative elements' test was established in the case of *Comedy III Productions, Inc. v. Gary Saderup, Inc. et al.*¹² This test, created by the California Supreme Court in 2001, is meant to be "a balancing test between the First Amendment and the right to publicity."¹³ The transformative elements test states:

'In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame.'¹⁴

In order for a work that deals with celebrity likeness to be protected by the First Amendment, California courts conclude that the work must contain 'significant transformative elements' to qualify for protection; there needs to be 'something more' added to the original work in order for it to qualify as a 'new' work.

In the Comedy III case, the defendant Saderup made a charcoal drawing of 'The Three Stooges' (now deceased), and used it as the master copy to make lithographs and silk-screened t-shirts.¹⁵ Rather than using the image of The Three Stooges as the inspiration for a new creative and

¹¹ Winter, 30 Cal. 4th at 887 (quoting Cal. Civil Code section 3344).

¹² Comedy III Productions, Inc. v. Gary Saderup, Inc. et al., 25 Cal. 4th 387 (Cal. 2001); *cert. denied*, 2002 U.S. LEXIS 212 (2002).

¹³ *Id.* at 391.

¹⁴ Winter, 30 Cal. 4th at 889 (quoting Comedy III, *infra*, 25 Cal.4th at 407).

¹⁵ Comedy III, 25 Cal. 4th at 393.

transformative work, Saderup depicted The Three Stooges without any additional changes. In order for artists who use celebrity likeness in their work to be protected by the First Amendment, they must make a ‘significant transformative or creative contribution’¹⁶ to that likeness. Since Saderup did not add to The Three Stooges’ likenesses, he thus created ‘literal, conventional depictions of The Three Stooges so as to exploit their fame.’¹⁷ The lack of ‘something more’ meant that Saderup could not be protected by the First Amendment’s freedom of expression because he did not create anything ‘new.’

The Comedy III court sought to determine whether the work was ‘substantially celebrity likeness’ only or ‘celebrity likeness turned into a work which becomes the artist’s own.’ In doing so, the Court asked:

[Do we have] a product containing a celebrity’s likeness [that] is so transformed that it has become primarily the defendant’s own expression rather than the celebrity’s likeness.... [The] artist depicting a celebrity must contribute something more than a ‘merely trivial’ variation [but must create] something recognizably ‘his own.’¹⁸

Similar to the situation in the Winter case, the Comedy III plaintiffs (Comedy III Productions Inc.) raised the issue of The Three Stooges’ right to publicity under §3344.1 which is slightly different (applies to deceased celebrities), but otherwise coincides with §3344. Due to the fact that Saderup merely recreated the likeness of The Three Stooges and did not add make any creative changes or additions, the Comedy court found in favor of the plaintiffs’ right to publicity over Saderup’s freedom of speech rights.

In addition to the required transformative elements from the Comedy III case, the amount of celebrity likeness used in the work as opposed to the amount of new elements is also a significant factor in qualifying for protection. It must be determined:

[whether or not] the celebrity likeness is one of the raw materials from which an original work is synthesized, or

¹⁶ *Id.* at 409.

¹⁷ *Id.*

¹⁸ Winter, 30 Cal. 4th at 888.

whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.¹⁹

The foundational basis of the work needs to be something other than a replication of the original image. In order to qualify for protection, the celebrity likeness can serve as the inspiration for the work but it cannot be the foundational basis of the work.

(2) The ‘Economic Significance’ Factor

Celebrity likeness is brought into question regarding its degree of usage within a work, but the concept of being a ‘celebrity’ also plays a significant role. Once an individual is placed in the public eye:

[the] right of publicity cannot, consistent with [the First Amendment], be a right to control the celebrity’s image by censoring disagreeable portrayals.... [It] is not a right to censorship, but a right to prevent others from misappropriating the economic value generated by the celebrity’s fame....”²⁰

Once individuals reach celebrity status, they no longer can identify themselves as regular citizens; thus certain rights must be modified in order to facilitate their changed public status. The right to publicity is meant only to protect the “misappropriation [of] the economic value”²¹ of the celebrity’s persona; it is not meant to be a method by which celebrities may silence commentary that portrays them in an unfavorable light.

In the case of *Zacchini v. Scripps-Howard Broadcasting Co.* an entire performance was broadcast without the consent of the celebrity performer and thus violated the performer’s right to publicity.²² *Zacchini*, a human-cannonballist, sued the broadcasting company that had “videotaped and broadcast [Zacchini’s] entire performance without his consent.”²³ In *Zacchini*, the U.S. Supreme Court explained:

¹⁹ *Id.*

²⁰ *Id.* at 889.

²¹ *Id.*

²² *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1997).

²³ *Comedy III*, 25 Cal. 4th at 401.

[T]he rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get some free aspect of the plaintiff that would have market value and for which he would normally pay.²⁴

The broadcasting company's recording and broadcasting of the Zacchini's performance parallels Saderup's copying and reselling of his depictions of The Three Stooges. Both the broadcasting company and Saderup offered viable substitutes for the original work that the plaintiffs might try to sell, thereby violating the publicity rights of the original performers (Zacchini and The Three Stooges respectively).

Application in the Winter Case

Beginning with the economic significance factor, the Winter Court found differences between the product offered by the Winter Brothers and the defendants' 'new' work (comic book). The Court found that the Autumn Brothers images were "not just conventional depictions of the plaintiffs but contain[ed] significant expressive content other than the plaintiffs' mere likenesses."²⁵ The importance of the Autumns not being "conventional depictions"²⁶ of the Winters is economically significant because the "[p]laintiffs' fans who want to purchase pictures of them would find the drawings of the Autumn brothers unsatisfactory as a substitute for conventional depictions."²⁷ The Court ruled that the defendants' work would not "interfere with the economic interest protected by right to publicity"²⁸ meaning the defendants' work would not detract from the Winters' sales of their own fan memorabilia. In essence, the Court was not convinced that fans of the Winters would choose to purchase the comic over normal depictions of the Brothers, meaning that the comic did not detract from the profitability of the Winters' authorized merchandise.

²⁴ *Id.*

²⁵ Winter, 30 Cal. 4th at 890.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Comedy III, 25 Cal. 4th at 405.

As to the transformative elements issue, the Comedy III test allowed the Winter Court to question whether the defendant created a new work, based on the likeness of the Winter Brothers, that would be protected as free speech by the First Amendment (therefore overriding the Winters' right to publicity). The Winter Court found that the comic book characters were transformed enough to meet the requirements of the transformative elements test and thus gain First Amendment protection.

In order to evaluate the presence of transformative elements in the defendants' work, the Winter Court examined an image of the comic book portraying the characters (see appendix for the cover image of issue 4 of 5, 'Jonah Hex – Riders of the Worm and Such'). The cover image depicts Jonah Hex in the background and the Autumn Brothers in the foreground. This particular image shows only the upper torso of the Autumn Brothers; the half-worm portion of their bodies is not depicted. Upon examining the "Autumn" comic book mini-series as a whole, the Winter Court found that:

[A]lthough the fictional characters Johnny and Edgar Autumn are less-than-subtle evocations of Johnny and Edgar Winter, the books do not depict the plaintiffs literally. Instead, the plaintiffs are merely part of the raw materials from which the comic books were synthesized."²⁹

Based on what the Winter Court stated, it is evident that the Autumns resemble the Winters in a "less-than subtle"³⁰ manner. However, the Court went on to state that:

[T]o the extent that drawings of the Autumn brothers resemble plaintiffs at all, they are distorted for the purposes of lampoon, parody or caricature.³¹

The amount of celebrity likeness used by the defendants was found by the Winter Court to constitute only a small portion of the overall work. The Court thus found that the depictions of the Autumns were adequately 'transformed' versions of the Winters' likeness to constitute a 'new' protected work.

²⁹ Winter, 30 Cal. 4th at 890.

³⁰ *Id.*

³¹ *Id.*

By passing the ‘transformative elements’ test of Comedy III, the defendants were not in violation of Civil Code §3344, the right to publicity. Since the Court found the likeness of the Winter Brothers to be ‘significantly transform[ed]’³² from their conventional or actual appearance, the defendants’ work was a whole new creation of characters and therefore different from the original likeness of the Winters. Regardless of whether the Winters’ consented to releasing their likeness for such use, the defendants’ work contained a likeness that the Court found established did not belong to the Winters’ but instead constituted a new creation which was transformed and created by the defendants. By finding that the defendants did in fact create a ‘new’ work, the defendants’ right to freedom of speech trumped the Winters’ right to publicity.

The Winter Court went on to state that the celebrity status of the Winters subsequently altered their social standing. In regards to the Winters’ fame:

[T]he right of publicity derived from public prominence does not confer a shield to ward off caricature, parody and satire. Rather, prominence invites creative comment.³³

In other words, once the Winters made the choice to step into the limelight as famous musicians they automatically became more susceptible to scrutiny and criticism than private citizens. As mentioned in the Comedy III case, celebrities make up ‘a fair portion of our cultural business and everyday conversation’³⁴ and therefore should expect people to regard them both favorably and unfavorably. The Court stated that the Winter Brothers were being parodied by the defendants as public celebrity figures, which was an acceptable and necessary part of critical social commentary.

Comparison to the Cartoons Case

In the case of *Cartoons v. Major League Baseball Players Association*,³⁵ Cartoons created baseball cards with ‘caricatures of active major league baseball players on the front and humorous commentary about

³² *Id.* at 889.

³³ *Id.* at 887.

³⁴ Comedy III, 25 Cal. 4th at 397.

³⁵ *Cartoons, L.C. v. Major League Baseball Players Association*, 95 F.3d 959 (10th Cir. 1996).

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their careers on the back.”³⁶ The cards did not just show the likeness of the players; they contained humorous made-up comments based on real facts, (such as Barry Bonds’ made-up name of “Treasury Bonds” because of his status as the highest paid baseball player in 1992).³⁷

In *Cardtoons*, the 10th Circuit Court of Appeal applied the transformative elements test and ruled in favor of the defendant. According to the Court:

[N]o one the least bit familiar with the game of baseball would mistake *Cardtoons*’ ‘Treasury Bonds’ for anyone other than the Giants’ Barry Bonds ... [*Cardtoons* used the likeness of Bonds and] added a significant creative component of its own.... [*Cardtoons* did] not merely [hitch] its wagon to a star [such as Bonds].³⁸

The Court believed that *Cardtoons* put thought and effort into the player commentaries which made the cards creative objects and not just mere replications of the players’ likenesses. Thus, *Cardtoons* survived the Comedy III transformative elements test and obtained a First Amendment defense that overrode the players’ publicity rights.

In the *Cardtoons* case, the new product distorted both the name and image of famous ballplayers; it is interesting to note that in the *Winter* case the defendants distorted the name of the famous musicians yet did not add any creative elements to the likeness of the Winter Brothers’ upper torso -- those depictions are obviously human men resembling the Winters. Only the lower worm-half of the Autumn Brothers is “distorted”³⁹ but it does not have any effect on the upper torso. The defendants used the Winter Brothers’ likeness from the waist up simply because they liked their ‘look.’ There was no ‘transformation’ of the Winters’ likeness other than they were depicted with sinister expressions and worm ‘legs’ instead of human legs. Unlike *Cardtoons*, which put forth a significant creative effort to create humorous commentaries, the defendants in the *Winter* case directly took the Winters’ likeness and used them as their own villains. The defendants attempted to mask their laziness by

³⁶ *Id.* at 962.

³⁷ *Id.* at 963.

³⁸ *Id.* at 963 and 976.

³⁹ *Winter*, 30 Cal. 4th at 890.

sticking a half-worm portion onto the Winters' likeness yet the Court accepted this action as creative effort.

ANALYSIS

One cannot fail to recognize the ease with which DC Comics appropriated the likenesses of the Winter Brothers for their own use. Currently, the 'significant transformative elements' test from *Comedy III* is all that needs to be satisfied in order to tip the balance between First Amendment freedom of speech rights and a celebrity's right to publicity in favor of freedom of speech. If the work in question is found to qualify for First Amendment protection then the work is not in violation of Civil Code §3344 protecting the celebrity's right to publicity. The Winter Court erred in approving DC Comics' 'transformation' of the Winter Brothers' likeness by incorrectly qualifying DC Comics' work for First Amendment protection.

The First Amendment is intended to grant protection to works that benefit society in some way. Johnny and Edgar Autumn, the defendants' characters, do not benefit society because they are merely Johnny and Edgar Winter in drawn form. Society already has one set of Winter Brothers and the defendant's work is only a drawn replication. In the *Zacchini* case, the company violated *Zacchini's* right to publicity because it recorded and broadcasted *Zacchini's* performance in its entirety without consent. In the same manner, the defendants in the Winter case published the Winter Brothers' likenesses in their comic books without the Winters' consent. When construed in this way, the defendants improperly took the Winters' likeness, replicated it onto paper and did not provide the Winters with financial compensation for what they took. The Winter Court granted the defendants First Amendment protection but they failed to realize that the defendants did not contribute anything new or beneficial to the general public.

The unconventional depiction of the Autumn Brothers should have no bearing on whether their likeness is in fact similar to the Winter Brothers' image. Choosing to depict the Autumns as half-man half-worm does not necessarily mean that the upper torso of the Autumns is also significantly transformed. After close observation of the cover art of issue 4 of 5, "Jonah Hex – Riders of the Worm and Such," it is easy to assume that the Autumn Brothers look like typical human men since the worm-half is not depicted.

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The Winter Court lost sight of what the First Amendment represents. The ‘marketplace of ideas’⁴⁰ and society as a whole do not benefit independently from the Autumns’ depiction since they are merely recreations of the Winters’ in drawn form. This mirrors the way Saderup recreated The Three Stooges’ direct likeness with charcoal and paper. Social commentary protected by the First Amendment can be humorous, serious or even neutral; the tone of the commentary does not matter, ‘[s]peech that entertains, like speech that informs, is protected by the First Amendment because ‘the line between the informing, and the entertaining is too elusive for the protection of that basic right.’⁴¹ However, the defendants did not make social commentary with their depictions. DC Comics chose to use the Winters’ likeness only because they liked their unique appearance. If the defendants meant to say anything with their depictions, it was that albinos make for great villains and that all it takes to convince the courts of a ‘significant transformation’ of a celebrity likeness is to simply replace the celebrities’ legs with worm bodies.

In order for future courts to be able to render just verdicts when rights of publicity and freedom of speech are in conflict, the ‘significant transformative elements’ test from *Comedy III* must be altered. The test is very basic in that the only requirement the work must meet is the need for ‘significant transformative elements’ added to the celebrity’s likeness. The transformative determination is up to the judge presiding over the case and will be heavily subjective depending on what that judge believes.

The Winter Court felt that portraying men as half-worm constituted ‘significantly transform[ing]’⁴² the initial celebrity likeness into something new. The Winter Court immediately focused on the half-worm portion of the depictions without paying enough attention to the upper torso and face. Thus, the transformative elements test must also consider the total ‘amount’ of transformation; exactly how much of the body or face needs to be transformed to qualify for protection.

On the other hand, the *Comedy III* court and the *Cardtoons* court did not err in their findings. Saderup in *Comedy III* did not add anything to his depictions and thus violated The Three Stooges’ right to publicity. *Cardtoons*

⁴⁰ Winter, 30 Cal. 4th at 887.

⁴¹ *Cardtoons*, 95 F.3d at 969.

⁴² Winter, 30 Cal. 4th at 889.

added significant amounts to their caricatures of the baseball players and Cartoons was granted First Amendment protection for this original expression. The Winter Court had no guidelines to determine how much 'something added' needs to be; just a part of the likeness need to be transformed? Half? The entire body?

Based on the Winter case, we can see that the transformative elements test needs to be clarified in order to take into account the following factors:

- ♣ Does the transformation need to be to the whole body of the celebrity or just a part?
- ♣ How can significance be measured uniformly with a minimal amount of subjectivity?
- ♣ If a defendant asserts that the celebrity likeness is used for the purpose of social commentary, should the defendant be required to state what that commentary is?

All these factors would help to improve the transformative elements, thereby preventing future defendants from finding similar loopholes in the current legal standard.

The Winter Court's decision to grant the defendants First Amendment freedom of speech protection over the Winters' right to publicity creates a new kind of conflict. Future plaintiffs bringing forth cases involving their right to publicity over another party's First Amendment rights are disadvantaged because the Winter case makes it acceptable to take a celebrity likeness, put a worm-body on it, and the result will be considered something 'new' -- i.e., the defendant's intellectual property rather than the plaintiff's. This approach completely overlooks the fact that the original celebrity plaintiff invested a great deal of time, money and energy into creating the economically viable persona in question -- not the defendant.

The Winter case creates a 'slippery slope' for future cases involving a conflict between right to publicity and First Amendment freedom of speech rights because the defendants in the Winter case were able to garner protection with just the slightest bit of effort. The defendants' attempt to circumvent the right to publicity and the Court's legitimization of this attempt demonstrate why the language of the 'significant transformative elements' test needs to be changed and made more specific. Courts must prevent future parties from circumventing a celebrity's right to publicity in this socially unproductive manner -- at least to the extent the celebrity is not allowed to bargain for the

right (and perhaps economic compensation) to do so. The Winter Brothers produced an economically valuable creative persona in this case; DC Comics took financial advantage of that creative effort for free.

CONCLUSION

When a legal standard is overly broad or not specific, it is likely that verdicts will not be rendered in a uniform and consistent manner. Undoubtedly judges will interpret laws in different ways, but the Comedy III ‘significant transformative elements’ test is too open-ended and does not contain guidelines for how to determine if something is transformative. The foundational basis of the defendants’ work was the Winters’ likeness yet they were able to successfully win their case. The defendants took the human upper torsos of the Winters and their specific physical characteristics, (such as their pale skin, white hair, red eyes, and the stove-pipe hat). The defendants also chose to use the ‘seasonal’ last name of Autumn to mirror the Winters’ last name. These characteristics are unique and it is more than mere coincidence that the Autumns possess the same identifiable traits as the Winters. The defendants used more than a small portion of the Winters’ likeness; the defendants used the Winters’ whole upper torso.

The Comedy III test emerged out of a court opinion and thus does not contain overtly specific or detailed information as to the outcome the Comedy III judges actually intended in every possible case. The test must be tightened and modified according to the new knowledge gained from the outcome of the Winter case. The defendants found a loophole for their worm creatures to squirm through which allowed them circumvent the true intention behind balancing celebrity right to publicity with First Amendment freedom of expression. This loophole must be closed to prevent future ‘worms’ from abusing the ‘significant transformative elements’ test. There must be a clear guide that will consistently render fair verdicts in the face of the inherent tension and conflict between creative expression and the right to control a commercially viable interest in celebrity publicity.

See appendix on following page.

Appendix: Cover image

Issue 4 of 5, “Jonah Hex – Riders of the Worm and Such”

