

WINTER V. DC COMICS

69 P.3d 473 (Cal. 2003)

The California Supreme Court held that a comic book containing characters that parodied prominent blues rock musicians Johnny and Edgar Winter was entitled to First Amendment protection that outweighed the plaintiff's right of publicity.

During the 1990s, DC Comics published "Jonah Hex," a five-volume comic book series of which two volumes contained villainous characters named Johnny and Edgar Autumn. The Autumns were depicted as half-worm, half-human brothers with long hair and albino features. One Autumn brother also wore red sunglasses and a stovepipe hat. Plaintiffs Johnny and Edgar Winter are well-known recording artists from Texas. In addition to the similarity in name, the Winters are albino and Johnny Winter often wears a top hat.

Plaintiffs sued under California's right of publicity statute, CAL. CIV. CODE § 3344, which states in part, "[a]ny 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, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof." The trial court granted summary judgment for defendants, and the court of appeal initially affirmed. The California Supreme Court granted review and stayed pending resolution of another § 3344 case, *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001). The California Supreme Court then remanded for reconsideration in line with *Comedy III*, and the court of appeal reversed *Winter* and remanded for trial. The California Supreme Court again granted review.

Noting that the right of publicity generally protects a celebrity's interest in the commercial value of his or her identity, the court explained that *Comedy III* borrowed part of the fair use doctrine from copyright law in identifying the relevant question for assessing the interaction between the right of publicity and the First Amendment as "whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation." In *Winter*, the court further elaborated this test: "[A] 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." Finding the depiction of plaintiffs to be "distorted for purposes of lampoon, parody, or caricature," and the comic books' marketability to be derived from their creative elements rather than appropriation of the Winters' identities, the court held that the First Amendment defense precluded the plaintiffs' right of publicity claim.

