

[REDACTED]

August 30, 2012

The Honorable Frank Maas  
United States Magistrate Judge  
United States Courthouse  
500 Pearl Street  
New York, NY 10007

Dear Judge Maas:

The three of us served as counsel to Shepard Fairey, *pro bono*, in his copyright litigation with the Associated Press (“AP”) after his original counsel withdrew in the aftermath of his spoliation of evidence. Messrs. Stewart and Feder are partners of the law firm Jones Day. Mr. Fisher is the Wilmer Hale Professor of Intellectual Property Law at Harvard Law School. (He served as counsel in his personal capacity, not as an agent of the law school.) Together, we represented Mr. Fairey for over a year and came to know the factual and legal issues intimately. We are writing to urge you to exercise leniency in sentencing Mr. Fairey.

In particular, based on what we learned in representing Mr. Fairey, we wish to share with the Court three reasons why—notwithstanding Mr. Fairey’s conduct in destroying documents and fabricating others—we believe leniency is warranted.

First, during the sixteen months that we worked closely with Mr. Fairey, we found him to be both entirely trustworthy and sincerely remorseful about what he did. He has repeatedly acknowledged how wrong his actions were, offered from the beginning to indemnify the AP for losses that he caused them, and cooperated completely in the government’s investigation. From the outset of our involvement, moreover, he was completely forthcoming—with us and with the AP—not just concerning his spoliation of evidence, but also concerning all other facts related to the case. Even the AP seems to have come to regard Mr. Fairey as trustworthy:

[REDACTED]

Second, we believe it is clear that Mr. Fairey’s offense was motivated by his embarrassment at failing to correct a (legally insignificant) error in his complaint; that the original error was made in good faith; and that neither the error nor the spoliation was aimed at gaining a litigation advantage. The complaint (drafted by his original counsel, but relying on information supplied by Mr. Fairey) identified as the source image for the Hope poster a particular photo of Barack Obama and George Clooney, taken by an AP photographer at a news conference, from which Mr. Fairey believed he had cropped the image he used as a reference. In fact, the correct photo was one containing a nearly identical image of Mr. Obama taken by the same photographer at the same news conference moments apart. Mr. Fairey failed to recognize this mistake until after the complaint was filed, and, rather than admit his error, engaged in a cover-up.

Based on everything we learned over the course of our representation, we are certain that the original error was made in good faith and was not an effort to strengthen his defense of “fair use” by exaggerating the differences between the source image and

the final Hope poster. In fact, there is documentary evidence that Mr. Fairey had made the same mistake long before the AP threatened him with litigation. Just as importantly, Mr. Fairey cannot have believed there was any litigation advantage to be gained, because the difference between the two photos is negligible for purposes of copyright law. Although one photo was a close-up of Mr. Obama and therefore would have required less cropping than the other photo, the fair use doctrine as applied to visual arts places very little weight on the amount of a plaintiff's work appropriated by a defendant—the analysis is not meaningfully affected by whether the source photo is a close-up or a wide angle shot. Rather, cases applying modern fair use doctrine turn primarily—as the AP's case against Mr. Fairey would have turned—on the degree to which the defendant's work is “transformative,” a term courts construe to mean either (a) critical of the plaintiff's work; (b) socially valuable; or (c) motivated by a different purpose. Mr. Fairey, a prominent artist who had been involved in copyright disputes in the past, was well aware of the judicial interpretation of “fair use,” and it is completely implausible that he could have believed misidentification of the source image for the Hope poster would have given him any advantage in the litigation.

Third and finally, it may be helpful to explain why Mr. Fairey was right to continue litigating the copyright case even after he confessed to spoliation, despite his genuine remorse over what he had done. The first reason is that he did not have the ability simply to drop the case. Although Mr. Fairey technically initiated the lawsuit, it was a declaratory judgment action in which the true claims at issue were the AP's counterclaims seeking millions of dollars from Mr. Fairey. After Mr. Fairey admitted his spoliation, he sought to settle the case, but the AP at that time made the decision—an economically rational one under the circumstances—to press its advantage and insist on what we believe were unreasonable settlement terms that Mr. Fairey would have been ill-advised to accept, even though Mr. Fairey was always willing to make the AP whole for its expenses resulting from the spoliation.

The second reason is the importance of the copyright principles at stake in the case. As Judge Hellerstein recognized during the course of the litigation, the issue of the degree to which copyrighted images may be used for the purpose of appropriation art is both important and unsettled. *Tr.* May 28, 2010, at 13 (“[T]he issue of fair use was an extraordinarily important issue about which expert copyright lawyers differ, and their differences mean a great deal in relationship to our economy and the use of intellectual property.”) In fact, a primary reason we agreed to represent Mr. Fairey *pro bono* was that this issue was a matter of substantial public interest and longstanding controversy in copyright law, and we believe Mr. Fairey's legal position is the correct one. Mr. Fairey's willingness to take a principled stand on this question, rather than acquiesce in the AP's demands, certainly should not be counted against him.

Mr. Fairey of course ultimately agreed to a settlement, despite his and our belief that his legal position was correct. An important factor in this decision was that the existence of the criminal investigation limited our ability to litigate on a level playing field against a sophisticated, deep-pocketed and aggressive opponent. In particular, our defense of Mr. Fairey was constrained by the understanding that the Government might scrutinize our efforts to defend Mr. Fairey on the merits of the copyright case for evidence of a lack of sufficient remorse by Mr. Fairey over his spoliation of evidence—or

might even view it as further obstruction—even though it was counsel, and not Mr. Fairey, who made litigation decisions, and Mr. Fairey always gave us full and unsupervised access to his employees and records. Indeed, the AP appeared to be well aware that the criminal investigation was a pressure point that could be used in its favor and to have had ongoing communications with the Government.

In addition, based on the Court’s comments we came to believe that the case—unlike many other fair use cases in this Circuit, and contrary to our original hope—would not be resolved by summary judgment, and Mr. Fairey’s spoliation and the Government’s investigation made it much less likely Mr. Fairey would win a jury trial. Mr. Fairey conceded that he had no defense to criminal charges and cooperated fully in the Government’s investigation; thus, his plea and conviction to any charge were a foregone conclusion. Although Mr. Fairey remained free to explain his conduct to the jury, we determined that the fact of a criminal conviction for obstruction of justice would be extremely difficult to overcome when that evidence was introduced under Fed. R. Evid. 609(a)(2). Given the ruinous personal liability the AP sought to impose upon Mr. Fairey, we concluded that he should settle the case, despite the strength of his copyright arguments on the merits.

In summary, for these three reasons—there are surely others, but we address only those about which we have special knowledge—we respectfully submit that Mr. Fairey should be sentenced with leniency.

Respectfully,

  
William W. Fisher III

  
Geoffrey Stewart

  
Meir Feder