

**CONFIDENTIAL
SETTLEMENT COMMUNICATION**

July 30, 2014

**Via Electronic Mail – Chris@Ashby-Law.com
and First Class Mail**

Chris Ashby, Esq.
Ashby Law
919 Prince Street
Alexandria, VA 22314

Re: *The Invisible Bridge: The Fall of Nixon and the Rise of Reagan*

Dear Mr. Ashby:

We represent Simon & Schuster Inc. and Rick Perlstein, publisher and author respectively of *The Invisible Bridge: The Fall of Nixon and the Rise of Reagan* (“*Invisible Bridge*”). We write in response to your letters of July 25 and 28 concerning Craig Shirley’s book *Reagan’s Revolution: The Untold Story of the Campaign That Started It All* (“*Reagan’s Revolution*”).

Having undertaken an examination of your claims, the passages from the two books at issue cited in your letters and representative examples of the wealth of reporting concerning Ronald Reagan’s 1975-1976 campaign that informed Mr. Perlstein’s book, we write to put you on notice that we see no basis for Mr. Shirley’s claim of copyright infringement. In short, any similarity between facts in non-fiction books – even if first reported by Mr. Shirley – does not support a claim of copyright infringement; nor can a claim be based on quotes from third parties (rather than Mr. Shirley’s own expression) or the use of similar isolated and common phrases. This letter is to set forth our reasons for this conclusion and to respectfully decline your client’s demands.

Mr. Perlstein is an award winning, acclaimed historian and author. *Invisible Bridge*, like his two books that proceed it, uses a kaleidoscopic view of culture and political events, drawing

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astute connections and original insights from these facts. At bottom, your client's claim rests on the misguided notion that chroniclers of history, like Mr. Shirley, somehow acquire ownership and control over the facts and events they may uncover. This premise collides directly with the most basic principles of copyright law and is contrary to the very fundamentals of historical reporting. Each new account of history necessarily draws on and expands from the work that proceeds it. This is not only necessary but the law encourages such transformative growth.

Please be assured that should Mr. Shirley proceed with an action, my clients intend to defend themselves vigorously and will seek all possible remedies upon the action's dismissal, including prevailing parties' attorney fees under the Copyright Act.

Your client's claim reflects such a basic misunderstanding of the relevant facts and the key principles of copyright law, it is perhaps useful to begin by recounting the core facts and law.

The Two Books

Reagan's Revolution is focused exclusively on Ronald Reagan's 1975-1976 campaign to defeat Gerald Ford in the race for the Republican presidential nomination. The book consists largely of straightforward reporting, relying on firsthand interviews with many of the players, as well as journalists and other observers. Its scope is confined to politics – to the events of this one particular campaign and to the effect of one individual – Reagan – on the conservative movement.

Invisible Bridge is far more expansive in scope. Perlstein's book takes on the full breadth of American politics, life and culture during the years 1973-1976. Instead of focusing on any one figure, Perlstein charts the rise of the conservative movement by taking a wide angle view of the country at that time, touching on everything from the movie *The Exorcist* to Hank Aaron to *Saturday Night Live*. *Invisible Bridge* describes Reagan's 1975-1976 campaign as just one part of that larger narrative. Perlstein constructs the story by weaving together facts from myriad sources, including news articles, public records and previously published historical works in support of his analysis.

It is abundantly clear that *Reagan's Revolution* and *Invisible Bridge* are vastly different books in scope and focus. Beyond the inescapable reality that each work addresses Reagan's 1976 quest for the White House, and the necessary facts and events that flow from that topic, the two books are dramatically different.

Attribution

As is evident from Mr. Perlstein's source notes, he included over four thousand citations drawn from hundreds of sources, including Mr. Shirley's book, and properly credited his sources. Your claim that Mr. Perlstein had an "intent to steal and conceal" could not be further from the documented facts. Mr. Shirley is expressly named as a source in the acknowledgements, and on page 810 of *Invisible Bridge*, at the end of his "Note on Sources," readers are directed to Mr. Perlstein's website, rickperlstein.net, where every one of the source citations (including those to *Reagan's Revolution*) is readily available. You are simply wrong when you state that the "address at which those notes are posted appears nowhere in *The Invisible Bridge*."¹

Mr. Perlstein's use of electronic source notes, with links to the actual source materials, is an innovative and dramatic means of full disclosure. As the "Note on Sources" explains, Mr. Perlstein made the sources available electronically, rather than in hard copy form, to make it easier for readers to access the sources directly and engage with them. In the Internet age, readers are far more likely to actually view the source material when it is presented this way than they ever would be to seek it out in paper form at a library. Indeed, Mr. Perlstein's comments about "open sourcing" in his correspondence with your client cannot be twisted as your letter suggests; but instead serve to underscore his ultimate purpose to provide ready access to and openness concerning his sources. To that end, when your client contacted him with a question about how his book was sourced, Mr. Perlstein promptly provided him with a link to his source notes and his Note on Sources, all before publication.

It should also be noted that Mr. Perlstein's electronic notes serve another purpose that ultimately may well help your client's presumed goal to sell books. As can be seen on Mr. Perlstein's site, a reader who clicks on one of the citations to *Reagan's Revolution* is automatically linked to a Google Books page where he or she can not only read the cited page from Mr. Shirley's book but is also given the opportunity to purchase the book. This is hardly the design of an author's intent to "steal" another's work.²

¹ Your misrepresentation appears to be based on the fact that your client was working from a review copy of the book, rather than the published book, which shipped weeks ago. Indeed, it should not be lost in this analysis that your client had his researcher obtain a review copy of the manuscript under the apparent misrepresentation that Mr. Shirley was going to do a review of Mr. Perlstein's book.

² Your two examples of Mr. Perlstein's supposed failure to credit Mr. Shirley fail. Mr. Perlstein's source for Nancy Reagan's quote on page 631 of his work (and the reason his quote is *different* from Mr. Shirley's) is a book published in 1977, *PR As in President*, by Victor Gold (p. 97):

Copyright Principles

Your claim ignores the most basic principal of copyright law: copyright *only* protects an author's original expression. It is therefore important in any copyright analysis to distinguish between original expression and the unprotected elements of a work. Certain well-settled principles govern that analysis and nothing you have drawn to our attention supports a conclusion that Mr. Perlstein has appropriated Mr. Shirley's protected expression.

First, copyright does not protect facts, ideas or theories. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 347 (1991); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980). This is true even if the author is the first to have discovered the facts or formulated the ideas. Contrary to your assertion in your letter, copyright does not protect "facts and ideas Mr. Shirley first discovered an developed." In *Feist*, the Supreme Court made it clear that there is no copyright protection for the "sweat of the brow" (*i.e.*, for the effort that an author may put in to discovering and developing facts or ideas) and once those facts and ideas are disseminated they are free for all to use. *Hoehling*, 618 F.2d at 979.

As the Second Circuit has stated in the context of examining two works on the last voyage and destruction of the Hindenburg, "[t]o avoid a chilling effect on authors who contemplate tackling an historical issue or event, broad latitude must be granted to subsequent authors who make use of historical subject matter." *Hoehling*, 618 F.2d at 978. *See also Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (rejecting copyright infringement claims concerning two biographies of Howard Hughes and referring to the "public benefit in encouraging the development of historical and biographical works and their public distribution"); *Alexander v. Haley*, 460 F. Supp. 40, 44-45 (S.D.N.Y. 1978) (use of items of "historical or contemporary fact" not infringing, even if defendant "was alerted to the facts" by reading plaintiff's book).

Second, no author may claim copyright in quotations, which necessarily embody the expression of others. *Id.*; *Crane v. Poetic Products Ltd.*, 593 F. Supp. 2d 585, 595 (S.D.N.Y.) ("The author of a factual work may not, without an assignment of copyright, claim copyright in statements by others and reported in the work since the author may not claim originality as to those statements."), *aff'd*, 351 Fed. Appx. 516 (2d Cir. 2009) (quoting *Suid v. Newsweek Magazine*, 503 F. Supp. 146, 148 (D.D.C. 1980).

"'We have to do it,' says Keene,' though, personally, I'd rather sail in and kick the shit out of 'em.'" "'Now that,' exclaims Nancy, eyes gleaming, 'is the kind of talk I like to hear.'"

As for Reagan's comment to Jim Baker that appears on page 794 of *Invisible Bridge*, the same page cites to Mr. Shirley's work three times and Mr. Perlstein can hardly be faulted for not capturing this fourth fact.

Third, Mr. Shirley cannot rely on any use by Mr. Perlstein of short, unoriginal phrases that may also appear in his own work. Such “[o]rdinary phrases are not entitled to copyright protection.” *Narell*, 872 F.2d at 911 (defendant’s employment of “commonly-used expressions” such as “rekindle old memories,” “staggering network,” “river wound its way between muddy banks” and others was not infringing). “[C]lichéd language [and] metaphors ... are not subject to copyright protection, nor are phrases and expressions conveying an idea that can only be, or is typically, expressed in a limited number of stereotyped fashions.” *Haley*, 460 F. Supp. at 46.

Finally, having undertaken the above filtering of unprotectible elements, courts routinely dismiss copyright infringement claims if a small amount of substantially similar or even verbatim expression remains, on the grounds that the infringing material is a *de minimis* part of the infringed work as a whole, whether quantitatively or qualitatively, *Tufenkian Import/Export Ventures, Inc. v. Einstein Moonjy, Inc.*, 338 F.3d 127, 131 (2d Cir. 2003) (substantial similarity requires that the amount copied must be more than *de minimis*).

Alleged Takings

The application of these principles to *Reagan’s Revolution* and *Invisible Bridge* makes clear that nothing in Perlstein’s book is actionable. All of the examples you cite consist of historical facts from the life of Ronald Reagan, which are unprotected by copyright. Thus, for example, you cite to page 770 of *Invisible Bridge*, but the historical fact that the manager threatened to cancel the delegation’s reservation derives from *Time* magazine, where Mr. Shirley obtained this information. Mr. Perlstein read the same *Time* article, but nonetheless chose to credit your client’s secondary use of the work. Similarly, Mr. Shirley cannot possibly own a copyright in the fact that the major presidential candidates released their medical records and the information those records contained or that CBS News reported on the number of delegates Ford had accrued. These historical facts were widely reported in contemporaneous news reports. To the extent there can be said to be any similarity of phrasing in the way the two books convey these facts, the similarities consist of commonly-used expressions that cannot be the basis for a claim. *Narell*, 872 F.2d at 911.

Your reference to the passage on page 785 of *Invisible Bridge* serves only to demonstrate that Mr. Perlstein’s work builds on the historical record developed by your client. Presumably based on contemporaneous footage, Mr. Shirley’s work reports that Reagan was laughing while watching the convention on television, but Mr. Perlstein dug deeper and, based on an August 20, 1976 *Atlanta Daily World* report, also included the more revealing fact that Reagan ceased his laughter when he realized it was showing up on television. Indeed, this example reveals a critical flaw in the examples your letter selectively picks from Mr. Perlstein’s more than 800

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page work: Your letter presents the passages it cites in isolation, divorced from the larger context of these two very different books. *E.g.*, compare *Reagan's Revolution* at 198 (Frank Reynolds' discussion of results of North Carolina primary presented as part of chapter on that primary) with *Invisible Bridge* at 648-49 (using same story about North Carolina as a jumping off point for the concept of "born again" Christians that is the subject of the next chapter). As explained above, the books are very different in topic, style and scope, and when they are considered as a whole, it is clear that any superficial similarities are *de minimis*.

Your claim is equally misguided in over and over again claiming ownership of quotations from third parties. *E.g.*, *Reagan's Revolution* at 72³ (Ronald Reagan/Unnamed Woman); 140 (Nancy Reagan); 174 (ABC's Frank Reynolds/Reagan aides); 298 (hotel manager); 326 (Ronald Reagan); 327 (Ronald Reagan/Chuck Tyson); 327 (Ernie Angelo); 328 (Claire Schweiker/Ronald Reagan). As explained above, Mr. Shirley cannot assert a copyright interest in these statements made by others. *Crane*, 593 F. Supp. 2d at 595.

Conclusion

Given the short deadline you gave to respond to this claim, this letter reflects only our preliminary analysis. However, based on this review, it is readily evident that Mr. Shirley does not have a colorable copyright claim against our clients. Further, Mr. Perlstein has not only fully credited Mr. Shirley as a source of certain facts or quotes he uses, but he has given readers an opportunity to engage directly with Mr. Shirley's work and to purchase it. For these reasons, I strongly urge you to advise your client not to proceed with his claim. I would be happy to discuss this further with you, or any copyright counsel retained by Mr. Shirley.

In the meantime, this letter is not a complete description of the relevant facts or defenses, all of which are expressly reserved.

Very truly yours,



Elizabeth A. McNamara

cc: Emily Remes, Esq.
Rick Perlstein

³ Due to the time limitations of responding to your letters, cites herein to *Reagan's Revolution* are to the e-book edition. As such, the page numbering may differ slightly from the pages cited in your letters.