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Introductory Remarks at the 2018 Antitrust Writing Award Ceremony

April 10, 2018

Thank you for inviting me here this evening. I am delighted to be part of the celebration of the talented nominees and winning authors that have contributed to our understanding of antitrust law. It's also wonderful to look out and see so many friends and familiar faces. This is a great way to kick off the week of the Spring meeting.

I am going to start with an apology of sorts: I'm not going to announce any new Antitrust Division policies or enforcement actions. And I'm not going to dive into the hot antitrust topics of the day, such as "so-called" big data or standards-essential patents. I hope that's not a disappointment, but I think you'll hear more than enough of that over the next several days. Instead, I would like to say a few words about good writing and its role in antitrust law.

Many have observed that words are the raw material and tools of the legal profession. Indeed, all that we do as lawyers is work with words: The words of ordinary people—the things they say and emails they write—that can become evidence; the words in contracts and disclosures; the words of witnesses in depositions and at trial; the words in lawyers' memos, briefs and oral arguments; the words in law review articles by learned academics; the words of the judges in their decisions and orders (including some of the best words, such as "affirmed" or "reversed," depending on your case or client); and, not least, the words enacted by Congress.

[1] I would like to thank my Antitrust Division colleagues Daniel Haar and Jennifer Dixton for their help in preparing these remarks.

From the perspective of the legal advocate, words are only the beginning. The words must be strung together in sentences and paragraphs in order to persuade. That brings us to the importance of good writing, which is what we are here to celebrate this evening.

Lawyers worth their salt must be able to write clearly and effectively, but I'd suggest that strong writing is especially important in the domain of antitrust law. I think there are two reasons for that.

First, antitrust law is a common-law field. That presents opportunities for persuasive lawyers and judges to make their case for the proper interpretation or application of a short statutory phrase like "restraint of trade" or "substantially to lessen competition" in light of experience and logic.

Second, modern antitrust law relies heavily on economics. The ability to explain complex and technical economics concepts with clarity and precision has become one of the most important skills in our corner of the legal profession. In that regard I should note that, as the legal profession becomes more and more specialized, effective legal advocacy requires writers to resist an over-reliance on jargon. Indeed, antitrust lawyers can be among the worst offenders in this regard. Too often, we fall back on shorthand terms or phrases to convey meaning: Section 1, Section 2, Section 7, Section 8, HHIs, SSNIP tests, horizontal and vertical, rule of reason and *per se*, quick look, elimination of double marginalization . . . the list goes on.

It is unsurprising that clear and lively writing has been especially influential in antitrust jurisprudence. Antitrust opinions that have been cited time and again are those that instruct and persuade by enlivening abstract or technical concepts with clever prose. Great antitrust opinions often convey complex ideas in memorable ways.

Judge Boudin, who happens to be a former Antitrust Division Deputy, wrote an article explaining how metaphors can be very effective in antitrust writing. He wrote that "[m]etaphors meet the same felt need for graspable ideas in a different way by making the abstractions of antitrust more concrete and often more dramatic."[2]

One memorable example is from *Socony-Vacuum Oil*, where Justice Douglas described competitive pricing as the "central nervous system of the economy."[3] Or who can forget a phrase like "the Magna Carta of free enterprise"?[4] These insightful metaphors capture the essence of antitrust law, and they have left a lasting impression on antitrust jurisprudence.

The sparse text and common-law nature of Section 1 of the Sherman Act provide an especially good opening for the influence of judges that are gifted writers to leave their mark on the development of the law. In the seminal *Chicago Board of Trade* decision 100 years ago, Justice Brandeis described the rule of reason—which the Court had introduced just under seven years before—as follows: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[5] That elegant formulation is the essence of the test we still apply to the vast majority of challenged conduct, weighing procompetitive benefits against anticompetitive effects.

Insightful writing has continued to refine Section 1's categories over the years. For example, we learned from Justice White in the *BMI* decision that "easy labels do not always

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[2] Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 GEO. L.J. 395, 403 (1986).
[3] *Id*. at 407 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); *see also* 401-2, n.54.
[4] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).
[5] Bd. of Trade of City of Chicago v. United States, 246 U.S. 231, 238 (1918).

supply ready answers."[6] That was his succinct way of telling us that antitrust analysis must be sufficiently nuanced to take into account the characteristics of the conduct that is under scrutiny.[7]

The *BMI* decision also announced what may be the most often-quoted test for application of the *per se* rule, asking whether the practice at issue "facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"[8]

Another one of my personal favorites comes from the Supreme Court's 1984 *Copperweld* decision, which used imaginative language to explain why a parent company and its wholly owned subsidiary no longer could be held liable for a conspiracy under Section 1. Chief Justice Burger wrote: "A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver."[9] (I confess that I'm afraid that clever imagery may not withstand the test of time in the coming age of driverless cars.)

As for Section 2, enduring prose that immediately comes to mind is in Judge Learned Hand's *Alcoa* opinion, written in 1945. Although Judge Hand found that Alcoa illegally monopolized the aluminum market, he distinguished illegal monopolization from lawful monopoly with striking clarity when he wrote that "[a] single producer may be the survivor out

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[6] Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8 (1979).
[7] *Id.*
[8] *Id.* at 19–20.
[9] Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 771 (1984).

of a group of active competitors, merely by virtue of his superior skill, foresight and industry. . . . The successful competitor, having been urged to compete, must not be turned upon when he wins."[10]

That's an important lesson that—once learned—you can never quite forget. It continues to teach us not to punish a firm due to its size or natural commercial success, and that phrase is still quoted in antitrust writing today. Indeed, the Supreme Court adopted suspiciously similar language years later in *Grinnell* when it distinguished "the willful acquisition or maintenance of [monopoly] power" from "growth or development as a consequence of a superior product, business acumen, or historic accident."[11]

While we are on the subject of memorable antitrust jurisprudence, I should take a moment to acknowledge one of the best legal writers in American jurisprudence more generally, the late Justice Scalia. Justice Scalia contributed significantly to U.S. antitrust jurisprudence and, perhaps more importantly, to the art of persuasive writing itself.

Former Solicitor General (and Scalia Clerk) Paul Clement said recently that "[t]he best lines in a Scalia opinion were no mere rhetorical flourishes. They were images — usually far removed from the technical legal questions at hand — that perfectly captured the point the Justice was trying to make."[12]

Scalia's last major antitrust opinion, *Trinko*, is often quoted for, among other things, his explanation of why forcing monopolists to share their goods or services with competitors is a bad idea. "Enforced sharing," he wrote, "requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill

[10] United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).
[11] 384 U.S. 563, 571 (1966).
[12] Paul D. Clement, *Why We Read the Scalia Opinion First*, 101 JUDICATURE 53, 53 (2017).

suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion." [13]

I should also note that in *Trinko* Justice Scalia also described the *Aspen Skiing* decision—the "leading case" for imposing liability for refusing to deal under Section 2—as "at or near the outer boundary of § 2 liability."[14] I think there's a clever skiing metaphor buried in there somewhere.

Conclusion

In conclusion, I note that our nation appears to be in the midst of what some have called an "antitrust moment." Antitrust law makes national and global headlines on a weekly—if not daily—basis. Last Friday morning, I saw a puzzled anchor on CNBC ask a guest whether "monopsony" is a real word.

In this environment, good antitrust writing takes on an increased significance. The wide range of topics covered in the works being honored this evening will contribute to this important conversation.

[13] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004).
[14] *Id.* at 409.