Commissioner Maureen K. Ohlhausen
Keynote Address for Business Antitrust Writing Awards
On the Occasion of the
Gala Dinner for the Antitrust Writing Awards & Ranking 2013
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Thanks Nicolas for that kind introduction. It is a pleasure to be here with you at the 2013 Antitrust Writing Awards Gala Dinner to help introduce the Business Antitrust Writing Awards.

When I was asked to speak here tonight, I thought back over my twenty-two year career and reflected on how writing – both mine and that of others – has played so central a role. I have either written or reviewed hundreds of reports, white papers, briefs, and articles in those years, from my first days as an attorney at the DC Circuit to my time now as a Commissioner. I like to think I have learned some things about writing and successful advocacy. Let me share a few observations.

First, writing is hard. No question about it. Nathaniel Hawthorne is said by some to have observed, "Easy reading is damn hard writing." It is a craft that takes dedication and patience. We have all had the experience of sitting in front of a blank page, under a deadline, with the burden of dispensing some form of knowledge, wisdom or insight in an artful, but not so-clever-as-to-be-cute, way. We have all heard the clock ticking as if a hammer and wondered – why am at the computer, again, late on Friday night when I could be out doing something,…anything…else? And the answer, inevitably, is that we are all drawn to the law, in part, because we are passionate about writing. We choose each word to have just the right impact; write each sentence to move seamlessly to the next; and structure each paragraph to lead our reader naturally through our argument and inescapably to our conclusion – which, if done right, also becomes theirs. Lawyers, like all writers, understand that well-written work can turn mere words into power: the power to illuminate and to change readers' minds. As a lawyer in a democratic society, your words can bring justice and the force of reason to bear on others, not by direct imposition, but by persuasion.

Great written advocacy is among the highest accomplishments of the Anglo-American legal tradition and is a pillar of our nation – which is precisely why it is not easy. Nor should it be. We all carry this institution in trust for future generations. And, no pressure here, but I want you all to consider that the next time you submit a white paper to my office.

A second observation I can offer tonight is that, despite criticism to the contrary, my experience is that good legal writing abounds. Many jurists have called attention to what they see as a decline in the quality of legal writing – particularly among the younger generations of lawyers. Judge Posner a few years ago said that the communication skills of some lawyers appearing before him "are often quite bad, sometimes awful."[1] While I was working at the DC Circuit, Judge Edwards complained that he had seen "much written work by lawyers that is quite appalling. Many lawyers appear not to understand even the most elementary matters pertaining to style of presentation in legal writing…."[2] I humbly submit that he was not talking about me. At least that's my story. Anyway, these judges, and others in the field, have attributed this perceived deficit in the quality of legal writing to law school. Posner called it "the growing gap between practice and the academy."[3]

I disagree. For the most part, I think good legal advocacy simply means something different today. We have evolved to meet the demands of a new, faster, more technologically oriented era. The pace of technology has increased the velocity of ideas to the point where you pretty much have to blog or follow scholars on Twitter to stay on top of intellectual developments in our field. Clients more and more demand practical and quick solutions, which very often means less densely or artfully written work product and more emails, phone calls, or video conferences. But at the same time – and this is my bottom line response to those critical of modern legal writing – at least within the antitrust world, we are living in a golden age of tremendous analytical change driven by scholarship and written advocacy. We inherited an area of law that forty or so years ago was dominated by rough notions of social justice and we have helped it evolve into a global field of practice grounded in a more scientific understanding of economic effects and consumer welfare.

This new era requires a different type of dedication and patience – one that calls on us to understand and be able to distill and compellingly argue complex economic analyses, whether it be Chicago School, Post-Chicago School, or another. The nature of this advocacy is simply different. And I think the introduction of more theoretical, interdisciplinary coursework in law school – particularly economics – has in part fueled the rapid change of antitrust. This

[1] Interview, *A Conversation with Judge Richard A.6*

cross-fertilization of ideas has yielded ample rewards in our field, leading to ever-greater intellectual ferment. And while some clearly believe these changes may not have translated well into courtroom advocacy, at least in my experience at the Commission, I have been deeply impressed with the vast majority of writing and scholarship brought to my attention, both by staff and outside counsel.

This brings me to my final observation of the night. Great articles, whether by practitioners or scholars, lawyers or economists, can have a major impact in our field – both on the courts and on agencies. You can change the course of antitrust with just one article. I have seen certain singular works of scholarship either identify new issues and spark decades-long debates or offer elegant and innovative solutions to nagging problems in our field. Let me mention a few that have had an impact on me, and I trust, most of you.

At the top of my list, and not by chance the most cited law review article in our field,[4] is Areeda and Turner's 1975 piece on predatory pricing. Before their work, courts and parties were struggling to define and enforce this theory. Their article revolutionized thinking by offering sound empirical support for the notion that even a monopolist offering price reductions to marginal cost should not have its actions necessarily taken as predatory. They also introduced the concept of average variable cost into the discussion, which offered a more practical way to potentially quantify cost benchmarks. While the cost metric for predation is still not entirely settled, their work has moved the ball forward and been cited and debated for decades

taking these incremental measures as better evidence of agency success than merely counting the number of cases filed. His thinking has influenced antitrust officials around the world and continues to resonate with the FTC as we turn 100 next year.

To the nominees and winners, congratulations for carrying on this excellent tradition. You are all moving antitrust forward with powerful writing that has contributed to the vigorous debate we as lawyers engage in daily. The outstanding articles selected this year reflect the immense international scope and substantive range of our practice, from works examining antitrust and competition issues in health care to technology patents, from litigation issues to the implications of sponsored entry on merger analysis, and from the United States to Europe and India.

Let me now introduce this year's Business Antitrust Writing Award winners and the Business Steering Committee Members that will be presenting each award.