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Jasmine Godfrey

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Book Review



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Abstract

Restoring Consumer Sovereignty, by Adrian Kuenzler, is a rich text spanning antitrust, intellectual property ("IP"), and consumer law. Kuenzler, an Assistant Professor in the Faculty of Law at the University of Zurich, is in an authoritative position to comment on the law's role in stimulating new economic growth, drawing on his own insights from the behavioural sciences. He attributes the preparation of this book to his studies at Zurich University School of Law, his writing on the history of European Competition Law at the European University Institute in Florence, and his time at Yale Law School. In addition to his book, he has contributed other work to the antitrust, intellectual property, and consumer law fields, such as his article, "Promoting Access over Ownership: Realigning Antitrust and Intellectual Property Law to Usher in an Era of Collaborative Consumption." Parts of chapters two, three, and four of the book also appear in the article, "Dilution Law, Vertical Agreements, and the Construction of Consumption."

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Book Review

Restoring Consumer Sovereignty: How Markets Manipulate Us and What the Law Can Do About It, by Adrian Kuenzler¹

JASMINE GODFREY²

RESTORING CONSUMER SOVEREIGNTY, BY ADRIAN KUENZLER, is a rich text spanning antitrust, intellectual property (“IP”), and consumer law. Kuenzler, an Assistant Professor in the Faculty of Law at the University of Zurich, is in an authoritative position to comment on the law’s role in stimulating new economic growth, drawing on his own insights from the behavioural sciences. He attributes the preparation of this book to his studies at Zurich University School of Law, his writing on the history of European Competition Law at the European University Institute in Florence, and his time at Yale Law School. In addition to his book, he has contributed other work to the antitrust, intellectual property, and consumer law fields, such as his article, “Promoting Access over Ownership: Realigning Antitrust and Intellectual Property Law to Usher in an Era of Collaborative Consumption.”³ Parts of chapters two, three, and four of the book also appear in the article, “Dilution Law, Vertical Agreements, and the Construction of Consumption.”⁴

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1. (New York: Oxford University Press, 2017) [Kuenzler, *Restoring Consumer Sovereignty*].
 2. JD/MBA Candidate (2019), Osgoode Hall Law School and the Schulich School of Business, Toronto, Canada.
 3. Adrian Kuenzler, “Promoting Access over Ownership: Realigning Antitrust and Intellectual Property Law to Usher in an Era of Collaborative Consumption” (2017) 19:3 *Vanderbilt J Ent & Tech L* 473.
 4. Adrian Kuenzler, “Dilution Law, Vertical Agreements, and the Construction of Consumption” (2016) 1:1 *Oxford J of Leg Stud* 75.

Although a previous consensus existed in law and economics scholarship that consumers make decisions in their own best interest by weighing the market's relative prices, quantities and qualities against each other, this consensus is unraveling in light of novel findings from cognitive and social psychology which explain how individuals consume and how their concepts of what they prefer drive the global economy.⁵ Given the existing context of an erosion of consumer sovereignty through the ability of product manufacturers and sellers to systematically take advantage of individuals' psychological weaknesses, Kuenzler sets out to propose "twenty-first-century"⁶ solutions for market regulators and courts to increase market efficiency by providing a more efficient exchange of information about tangible product features, functions, and quality. He sets out to offer market regulatory theory that is mindful of its political economy, its behavioural suppositions, and its distributional consequences.

Kuenzler first addresses how to explain the economic equilibrium that is based on a notion of consumer sovereignty, characterized less by the selling strategies of the group of producers than by the group of consumers' own private decisions. In chapter two, he looks at how advertising can create irrational brand preferences and occasionally mislead consumers, and how consumers are now demanding more information about products beyond just price. In addition, consumer assessment is influenced by factors like the product's subconscious appeal, as well as the actions of peers. In chapter four, Kuenzler proposes that policymakers require regulatory tools to counteract behavioural biases and improve consumer decision-making. As he further develops this argument, Kuenzler urges for a distinction to be made between quantitative expansion and qualitative improvement to advance human prosperity by generating more use value. Finally, in his last chapter he explores various approaches taken by courts to the output/profitability test and the market access doctrine.

Consumer sovereignty is a term first described in 1936 and is a concept fundamental to modern economic theory.⁷ It is the set of societal arrangements that causes the economy to act primarily in response to government directives or the preferences of individual businesses.⁸ Consumer sovereignty is expected to be beneficial to society in a number of concrete ways, as it tends to produce

5. Kuenzler, *Restoring Consumer Sovereignty*, *supra* note 1 at xii.

6. *Ibid* at xiii.

7. Simon Mohun, "Consumer Sovereignty" in Francis Green & Petter Nore, eds, *Economics: An Anti-Text* (London, UK: Palgrave Macmillan, 1977) 57 at 57.

8. Neil W Averitt & Robert H Lande, "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law" (1997) 65:3 Antitrust LJ 713 at 715.

an environment offering the lowest prices, the best product quality and variety, and the highest degree of consumer surplus, as well as all the other benefits of a competitive economy.⁹ The consumer sovereignty literature is extensive. Some articles specifically focus on consumer concerns over food, how care practices and consumer councils can enhance confidence in the food production system, and the way people extract their daily intake from nature.¹⁰ Other work focuses on how marketing influences consumer sovereignty, such as Mark Tadajewski and Douglas Brownlie's book, *Critical Marketing: Contemporary Issues in Marketing*¹¹ as well as Donald F. Dixon's article, "Consumer Sovereignty, Democracy, and the Marketing Concept: A Macromarketing Perspective."¹²

Existing literature has long commented on consumer sovereignty, particularly in an increasingly high-tech world. In their paper, "The Ethics of Consumer Sovereignty in an Age of High Tech," M. Joseph Sirgy and Chenting Su suggest that consumer sovereignty is "more of a fiction than fact."¹³ Clearly, consumer sovereignty is a concern worth addressing, and Kuenzler's work sets out to do so.

Restoring Consumer Sovereignty has a clear appeal to the legal community. Throughout his book, Kuenzler adeptly weaves in legal evidence to support his claim that advertising can mislead consumers and can sometimes create irrational brand preferences. He skillfully uses case law to illustrate this claim. For example, he references *FTC v Levi Strauss & Co.*,¹⁴ a case in which Levi Strauss ("Levi's") sold their jeans at resale prices while consumers still had imperfect information concerning the jeans. This promoted competition in the marketplace, but kept Levi's prices above their market value after the product was well established.

Kuenzler also engages in a compelling review of how different courts have either used or diverged from conventional output/profitability reasoning. In IP law cases, the output/profitability approach refers to the profits that IP rights holders may gain, as well as the incentives that they have to invest in their creations. Kuenzler suggests that several recent court decisions have been apprehensive of this approach, skeptical that conventional output/profitability reasoning will almost always lead to pro-competitive results. In *Ty Inc v*

9. Mohun, *supra* note 6 at 717.

10. Michiel Korthals, "Taking Consumers Seriously: Two Concepts of Consumer Sovereignty" (2001) 14:2 J Agric & Envtl Ethics 201 at 201.

11. Mark Tadajewski & Douglas Brownlie, *Critical Marketing: Contemporary Issues in Marketing* (Chichester: Wiley, 2008).

12. (1992) 9:2 Can J Admin Sci 116.

13. (2000) 28:1 J Bus Ethics 1 at 1.

14. *In the Matter of Levi Strauss & Co*, 92 FTC 171 (1978).

Perryman,¹⁵ the court explicitly considered market access in deciding that the secondary market for Beanie Babies was unlikely to operate efficiently if sellers who specialize in the market cannot use the name “Beanies” to identify their business. He explains that there can be no aftermarket without an original market, and if sellers in a trademarked goods aftermarket are considered to be free riding on the trademark, then almost everyone in business is free riding, according to that definition.¹⁶ Kuenzler also thoroughly explores *Sega Enterprises Ltd v Accolade, Inc*¹⁷ to illustrate how the courts fail to articulate market access considerations clearly, and how their reasoning ends up being indistinguishable from conventional output/profitability reasoning.

Kuenzler’s book is thorough, exploring antitrust and IP law from an economic and psychological perspective. Kuenzler’s book cannot be pinned to a particular category, and its interdisciplinary nature lends itself well to fitting into antitrust law, IP law, and law and economics. Not only does he incorporate case law, but Kuenzler also uses behavioural economics research, referencing Amos Tversky and Daniel Kahneman’s well-known findings that consumer behaviour can be influenced by the cognitive biases of anchoring and adjustment heuristics. He ties this into his assessment of consumer sovereignty by exploring how a product’s subconscious appeal, such as price and packaging, can influence a consumer’s assessment. So too, can even more subtle techniques, such as one study which found that more French wine was purchased at a supermarket with equal number of French and German wine on the days when French music was playing, and more German wine on the days that German music was playing. Bias was clearly operating at the subconscious level, since only one in seven consumers thought that the background music had made an impact on their choice. Kuenzler articulates this significant finding well:

Each time a consumer draws from the history of their own previous choices ... they can no longer be expected to attend to a product’s tangible features, functions, or quality attributes because the most salient product characteristics carry a different type of relevant product information.¹⁸

Another interesting insight that Kuenzler draws from the behavioural sciences, specifically psychology, is the role of dissonance reduction in the market system. Dissonance reduction is the process by which people attempt to produce internal consistency of beliefs. Thus, people are motivated to accept and

15. 306 F (3d) 509 (7th Cir 2002).

16. Kuenzler, *Restoring Consumer Sovereignty*, *supra* note 1 at 232.

17. 977 F (2d) 1510 (9th Cir 1992).

18. Kuenzler, *Restoring Consumer Sovereignty*, *supra* note 1 at 102.

rationalize features of existing socioeconomic arrangements because they seek consistency in their beliefs.¹⁹

Kuenzler's piece contributes a fresh approach to understanding consumers' roles within markets and how antitrust and IP law can regulate these relationships. I was particularly impressed by Kuenzler's deep exploration of the interplay between advertising and consumer psychology, a combination that I have not seen actively explored in the consumer sovereignty literature. Kuenzler's book is particularly timely, as consumers are now beginning to demand more information about products, rather than, as they did in the past, surrender control to product manufacturers and sellers. Consumers are becoming more concerned about the safety of products for humans, animals, and the environment, and also attach more significance to the way each product is being produced and the norms and values involved.²⁰

While the book serves as a comprehensive guide to the economics of consumer-decision making, I think perhaps more focus could have been placed on the regulatory frameworks surrounding consumer decision-making. Although Kuenzler certainly touches upon the law's role in restoring consumer sovereignty, such as his critique of the market access doctrine, the book could have benefitted from a deeper analysis, proposing reform to antitrust and IP law in order to restore control to consumers' own decisions.

Consumer sovereignty is a particularly timely issue given the oversaturation of products in today's marketplace. It is also an important topic for analysis, as people become increasingly skeptical of whether it actually exists. With its in-depth exploration of consumer psychology and its relationship to the selling and marketing of products, *Recognizing Consumer Sovereignty* is deserving of readership both inside and outside the legal realm.

19. *Ibid* at 262.

20. Korthals, *supra* note 10 at 203.