Trademark Adjacency

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Types of Adjacency

- Sight/sound/meaning
- Product class (consumer need served)
  - Same/similar
  - Complementary/conjoint
- Physical/geographical
- Temporal
Physical/Temporal Adjacency

- Can improve social welfare
  - Can reduce search costs
  - Can reduce consumer uncertainty
- Can reduce social welfare
  - Possibility of credibility transference
  - Can increase errors
- Mixed welfare effect
  - Brand spillover
Retailers as Brand (Ab)users

- Proximity as a likelihood of confusion factor
  - Same store
  - Same store section
  - Same store shelf

- Retailers, not TM owners, control proximity
  - Retailer editorial choices
  - Slotting fees
Retailers as Brand (Ab)users

- Retailers regularly take advantage of brand spillover
  - Malls with anchor tenant
  - Retail store clustering
  - Store shelf clustering
  - Loss leaders
  - Post-purchase couponing
  - Advertising adjacent to competitor’s facility
Online Adjacency

1800 Contacts v. WhenU (SDNY 2003)
- Temporal proximity of pop-up ads increases LOC

Playboy v. Netscape (9th Cir. 2004)
- Survey evidence of credibility transference to temporally proximate banner ads
Initial Observations

- Adjacency depends on consumer expectations
  - At best, online adjacency cases reflect early consumer expectations
- Reconciling retailer/online adjacency liability
  - Retailers should be sued more often, or
  - Online providers should be sued less often, or
  - They are legally distinguishable
- Adjacency liability should track welfare effects
  - We must point the finger at the right defendant!
  - Brand spillover ≠ infringement