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# 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