

# Santa Clara University

## Brand Spillovers

Eric Goldman

Director, High Tech Law Institute

<http://www.ericgoldman.org> • <http://hightechlaw.scu.edu>  
[egoldman@gmail.com](mailto:egoldman@gmail.com)

# Brand Spillovers Defined

- Brand spillover = actor gets uninternalized economic benefit from third party trademark
- Brand spillovers are ubiquitous
  - Loss leaders
  - Shelf space adjacency
  - Pre-/post-sale merchandising
  - Store clustering
  - Keyword ad sales

# Regulation of Brand Spillovers

- Regulatory divergence
  - Retail brand spillovers  $\neq$  TM infringement
  - Keyword ad sales = TM infringement (?), may violate Alaska/Utah law
- Hypotheses to explain divergence
  - No actual spillovers
  - Spillovers in every direction
  - Manufacturers don't like to sue retailers
  - Legally significant differences between retailers and online intermediaries
    - First sale doctrine
    - No "use in commerce"
  - Cyberspace exceptionalism

# Regulatory Solutions

- Option #1: retain dichotomous treatment
- Option #2: internalize brand spillovers
- Option #3: ignore brand spillovers
  - Intermediaries compete on search cost management
  - Intermediaries can use brand spillovers to reduce search costs