Brand Spillovers

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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 ≠ 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
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