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Brand and Expand

How White Labeling Can Serve Cannabis Entrepreneurs

By Joshua Schneiderman and Helen Goldstein

Certain cannabis brands are on their way to becoming household names, despite marijuana's current status as a federally illegal drug. Along with this popularity, cannabis entrepreneurs who own these successful brands are looking to launch in new markets, scale distribution, or, having turned a profit, exit the day-to-day management of a marijuana business. The word "licensing" in the cannabis sector usually refers to the license that an entity must secure from a state regulator. However, a different type of licensing is gaining significance in this emerging market.

A "white label" licensing agreement is an agreement whereby the owner of a brand allows another entity to distribute products bearing its brand name, usually in return for a portion of the proceeds, otherwise known as a royalty.

Imagine the owner of a (fictitious) popular brand in Oregon, "Marijuana123," is eager to sell her brand in California. She could heavily invest to secure her own state licenses and build out associated operations. Alternatively, she could white label her product to distributors who are already legally operating in California. The California distributor would produce the product, either inhouse or through a contract with a California licensed manufacturer. The California distributor would then distribute products carrying the "Marijuana123" label. Both parties would reap benefits of the arrangement: The California distributor from brand recognition and higher sales and the Oregon brand owner from royalty profits.

For general commercial goods, white label licensing can speed up the time to market, allow a brand owner to leverage existing expertise, and avoid the need to reinvent the wheel in a new market. There is, however, another advantage for cannabis brand owners. With marijuana legalization comes heavy regulation. Those regulations exist on a state level and local municipal level and there is little uniformity. Through white labeling, a non-California brand owner may be able to avoid the bulk of these complex regulations by teaming up with a California entity who has already done the hard work to secure the appropriate

state licenses and city permits.

In California, despite early concern that the wording of certain regulations would prevent white labeling, the Bureau of Cannabis Control (BCC) released guidance stating:

"[Entities with a BCC license] may enter into intellectual property licensing agreements with unlicensed entities. However, the intellectual property holder cannot exert control over the licensee's commercial cannabis operations. If the intellectual property holder is exerting control over the licensee's commercial cannabis operation, then the intellectual property holder must be disclosed as an owner on the license."

This guidance is not a free pass; in California, white labeling agreements may trigger additional reporting. If a cannabis brand owner gets a royalty linked to the profits of the brand, the brand owner will need to be disclosed as a financial interest holder. Also, as stated in the guidance, a brand owner cannot exert "control" over the operation or else the brand owner will need to be disclosed as an owner of the entity that has the BCC license. Currently, there is no case law or examples demonstrating what levels or types of "control" would trigger the requirement to disclose as an owner. Lastly, while we have focused on the regulatory implications of white labeling, licensing agreements, whether for Cannabis or any other product, will be subject to intellectual property law considerations.

Despite this general uncertainty, inherent in every emerging market, white labeling may still be a good alternative for a cannabis entrepreneur who wants to expand her brand while keeping her operations simple and her legal exposure at a minimum. To achieve these objectives, advice from experienced counsel, both from an intellectual property perspective and from a cannabis law perspective, is essential.



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