

An enthralling FAQ: White Labelling to the rescue!

A hand on the left holds a piece of white, torn-edge paper with the text "#branded" written in a bold, black, sans-serif font. The paper is placed over a brown cardboard box. Another hand on the right is holding a roll of brown packing tape, ready to seal the box. The background is a solid blue color with a white, torn-paper border at the top and bottom.

#branded

Wednesday Wisdom
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Labelling

A. What is White Labelling / White Label Marketing?

Under the concept of “White Labelling / White Label Marketing” the purchaser/retailer purchases products or services in bulk from the manufacturer/ original service provider and sells it to its customers under its own brand and trademark, as if it is his own product/service.

B. What comes under the scope of White Labelling?

The White Label marketing strategies are usually used for production/reselling of groceries, electronic devices, software, beauty products, software services, financial services etc.

C. What are the common examples of White Labelling?

A few common examples of white labelling are:

- **Software:** Many software companies offer white labelling options, allowing other businesses to resell their software under their own branding.
- **Electronics:** Companies that manufacture electronics products often produce white label versions that can be sold by other companies under their own brand.

- **Clothing:** Many fashion retailers offer white label clothing and apparel, where they source products from manufacturers and brand them under their own label.

D. What are the aspects to be remembered while entering into this arrangement?

White Labelling is a conscious engagement amongst two parties and thus parties should meticulously analyze all aspects related to white labelling while drafting the agreement. Carrying out business under the White Label strategy may lead to liabilities and risks, which the parties need to identify and mutually agree. Each Party's roles, timelines, and obligations are to be carefully decided and agreed in writing.

E. What are the important provisions that need to be included in the White Label Agreement?

The document should be detailed and cover all aspects of an agreement like scope, responsibilities, representations, commercials etc. and specifically parties should think through these points:



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| Exclusivity | Whether any territory is determined to be exclusive or there is any exclusive arrangement? |
| Packaging (in case of products) delivery and Location | Who shall be responsible for proper labelling of the product? Whether both the brands shall be listed on the products? Delivery and location are equally important and the same needs to be fixed or informed to the manufacturer from time to time. |
| Order and pricing: | Frequency of orders, commitments if any amongst the parties and commercials |
| Warranties: | Parties should specify warranties of <u>particular product</u> or services to ensure that in case of any claim related to the same may be appropriately addressed by the service provider or manufacturer. |
| Intellectual Property Rights | IPR is always a crucial matter. In case parties intend to co-brand the mark the roles and responsibilities should be clearly determined. Parties should decide the extent of co-branding. It might also be necessary for the manufacturer to grant a license to reseller if the manufacturer chooses to retain all proprietary and/or intellectual property rights in the product/services. Specific non-infringement warranties are also necessary to be incorporated. |
| Liabilities | This clause may capture the liabilities of the respective party, particularly in case the product/services supplied are defective. |
| No conflicting roles | This clause is very important from both the Parties' perspective and considering the business interest of the respective party this clause needs to be drafted. |

F. Who will be responsible for consumer/ end user claims from customers in case of sale of products/ services where manufacturer has entered into a White Label Agreement?

Consumer may invoke its remedies under the provisions Consumer Protection Act, 2019 ("Act") applicable in India irrespective of the arrangement amongst the manufacturer and reseller under their agreement.

This Act specifically defines "Product liability" to mean the responsibility of a product manufacturer or product seller, of any product or service, to compensate for any harm caused to a consumer by such defective product **manufactured or sold or by deficiency in services relating thereto. (Sec. 2(34))**

As per the provisions of the Act the product manufacturer or service provider or **product/service seller shall be liable to compensate to the aggrieved consumer.**



The definition of product manufacturer is vast and means a person who:

- (a) makes any product or parts thereof; or
 - (b) assembles parts thereof made by others; or
 - (c) puts or causes to be put his own mark on any product made by any other person; or
 - (d) makes a product and sells, distributes, leases, installs, prepares, packages, labels, markets, repairs, maintains such product, or is otherwise involved in placing such product for commercial purpose; or
 - (e) designs, produces, fabricates, constructs or re-manufactures any product before its sale; or
 - (f) being a product seller of a product, is also a manufacturer of such product. (Sec. 2(36)).
- In view of this provision, liability shall have to be determined in each case specifically.

G. What liabilities can be imposed on product manufacturers?

A product manufacturer may be subject to various liabilities as per the actual cause of action. However, under the provisions of the Act the manufacturer shall be held liable to the consumer for below mention causes:

- The product contains a manufacturing defect, or a defective design; OR
- There is a deviation from the manufacturing specifications, or
- The product does not conform to an express warranty given by the manufacturer (even when the manufacturer proves that it was not negligent or fraudulent in making the express warranty for the product), or
- The product does not contain adequate instructions or any warning regarding improper or incorrect usage or correct usage to prevent harm.

H. Can a reseller contend that there is no liability on the reseller considering that the products are manufactured by another?

The role of the reseller is to be determined specifically in case as sometimes it is noticed that resellers also may have an active role in manufacturing. The Act specifically states that a reseller may be liable if:

- It has exercised substantial control over the designing, testing, manufacturing, packaging, or labelling of the product, or
- It has altered or modified the product and such alteration or modification was a substantial factor in causing the harm, or
- It has made an express warranty which is independent of the warranty made by a manufacturer and such product failed to conform to such express warranty made by the product seller which caused the harm, or
- The identity of the manufacturer is not known or if known the service of notice or process or warrant cannot be affected on the manufacturer or if the manufacturer is not subject to the law which is force in India, or
- The product seller has failed to exercise reasonable care in assembling, inspecting, or maintaining the product or it did not follow the warnings or instructions for the product provided by the manufacturer while selling such product and such failure was the proximate cause of the harm caused to such product.



I. A recent judgement of the European Court of Justice to understand product liability in cases where the products bear the trademarks of various entities:

Keskinäinen Vakuutusyhtiö Fennia v Koninklijke Philips NV C-264/21 passed by the ECJ (European Court of Justice on 7th July 2022)

Fennia, an insurance company, compensated a consumer for damage caused by fire under a home insurance policy. The day before the fire, the consumer had purchased a Philips coffee machine and the accident report drawn up by the fire department found that the coffee machine at issue caused the fire which broke out.

This Coffee machine was manufactured in Romania by Saeco International Group SpA, a subsidiary of Koninklijke Philips. The Philips and Saeco logos, which are trademarks registered by Koninklijke Philips, were affixed to that coffee machine and to its packaging. In addition, the coffee machine bore a CE marking which included the Saeco logo, an address in Italy and the words 'Made in Romania'.

Considering this situation, Fennia brought an action against Koninklijke Philips seeking compensation on the basis of liability for defective products. Koninklijke Philips contended that that action should be dismissed, maintaining that it was not the producer of the coffee machine at issue.

The parties indulged in multiple rounds of litigation before the District Court, Finland; Court of Appeal- Finland and the Supreme Court of Finland. Ultimately, the matter reached the European Court of Justice (ECJ) and **the main question before the European Court of Justice (ECJ) was,**

whether concept of producer within the meaning of Article 3(1) of Directive 85/374 of the European Union presupposes that a person who puts his name, trademark or other distinguishing feature on the product, or who has allowed them to be put on the product, also presents himself as the producer of the product?

According to the fourth recital of Directive 85/374, protection of the consumer requires that any persons who present themselves as producers by affixing their name, trademark or other distinguishing feature to the product should be made liable in the same way as the actual producer.

The objective of this provision is to ease the burden of having to determine the actual producer of the defective product in question.

The ECJ held that a trademark owner may be held liable in relation to defective products even in the absence of any other indication that presents him as the producer of that product.

Similarly, in India, according to section 2(1)(j) of the Consumer Protection Act, a person who puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer is also considered as a manufacturer. Also, the definition of Product liability under the Consumer Protection Act 2019 clearly holds the manufacturer responsible in this regard.

Conclusion:

Thus, in view of the detailed provisions related to product liability, it should be noted that liability may be fastened by courts on the entities who are only affixing their trademark on the products as well. Thus, there should be proper contractual arrangements amongst the parties wherein appropriate indemnities for issues related to product liability are captured.

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