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Understanding New Restrictions on Advertising GI Bill Benefits

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Lately it seems like every aspect of advertising and marketing targeting the military is ripe for generating positive public relations in the name of consumer protection. In a new and aggressive move, in December, the Department of Veterans Affairs (“VA”) announced it had registered the term “GI Bill” as a trademark or brand with the U.S. Patent and Trademark Office. Advertisers of education opportunities to servicemembers and veterans need to take into account this important development intended to help protect servicemembers and veterans.

According to the VA, “this move goes a long way to enforce accountability to those who would deceive student Veterans for financial gain.” The VA warns “with millions of dollars up for grabs, schools and marketing firms won’t lie down because of the trademark, so we’ll remain vigilant to ensure Veterans aren’t victims of deceptive recruitment.”

Background

The VA’s trademark application was filed pursuant to Executive Order 13607, which President Obama issued in April 2012. The Executive Order focuses on for-profit education issues affecting the military and addresses a range of issues, including enhanced complaint collection and improved information sharing among the various enforcers responsible for oversight of marketing practices by for-profit educational institutions, including the Federal Trade Commission (“FTC”) and Consumer Financial Protection Bureau (“CFPB”).

The Trademark Office raised only minor issues, which the VA quickly resolved, and no third parties attacked the application during a 30-day opposition window. Somewhat anti-climatically, the VA said it would issue terms controlling third-party use of the brand “within the next six months.” It appears the VA was caught by surprise when the registration issued so quickly, despite its rush through the registration process.

A trademark is a “mark” that serves as a source identifier. Although federal registration of a mark is not mandatory, it has several advantages, including a legal presumption, effective nationwide, of ownership and exclusive right to use the mark on or in connection with the goods/services listed in the registration (in this case, education benefits and training).

What Does the Registration Mean?

The VA’s effort is a reminder that U.S. government agencies may obtain trademark registrations. Importantly, the GI Bill registration gives the VA both a sword and shield to use against others: a presumption of nationwide brand rights. But, it’s not clear how the VA may choose to assert its rights against third parties that use the term (or receive GI Bill funding). Moreover, there are four potential weaknesses that may leave the VA vulnerable.

First, the VA’s rights accrue only from the application filing date of March 30, 2012. Critically, the VA’s presumption of rights will not be effective against third parties using competing marks in commerce before March 30, 2012. For those parties, the VA, to the extent it wants to use trademark rights, must rely on its so-called “common law” rights, i.e., rights based on use rather than registration. Such rights must be proven in the geographic area where the rights are asserted. Surprisingly, the VA asserted in its U.S. trademark application that it first used its mark in commerce that may be regulated by Congress on March 30, 2012, though it first used the mark anywhere in 1944. This suggests the use since 1944 was limited, perhaps geographically. Couldn’t Congress have regulated the commerce in which this mark traveled since 1944? While the VA can prove an earlier date of first use than March 30, 2012, one would expect challenged parties to raise that date as ammunition against the VA.

Second, challenged parties could try to rebut the VA’s presumption of rights, and challenge its

registration, on the basis that the GI Bill has lost significance as a brand, or indicator of source, due to decades of the VA failing to police third-party use.

Third, the VA disclaimed all rights to the term “GI” rather than trying to establish that this acronym, while inherently weak, has acquired distinctiveness for the VA in the context of its services by virtue of longstanding use. This may provide an opening for third parties to use GI, but not GI Bill, in a way the VA would like to police but lack the firepower to do so. For example, a non-governmental party recently registered GI Money for related services.

Finally, challenged parties could defend themselves by arguing their use is “fair use” and that they are not engaging in false advertising (e.g., saying they provide GI Bill benefits when they do not). With respect to fair use, trademark law permits use of others’ trademarks, as long as three conditions are met, qualifying for so-called “nominative fair use.”

What to Expect Next?

With the VA saying it will issue guidelines within the next six months, it’s too soon to know for sure what uses of the term GI Bill the VA will permit by third-party advertisers. But expect the VA to issue terms trying to control third-party use. For example, the VA could issue terms that go at least as far as these conditions:

- users’ goods/services are not readily identifiable without use of GI Bill;
- use of GI Bill is not more than is reasonably necessary to identify the parties’ goods/services (i.e., the mark is not used in a prominent or repetitive way); and
- users do not engage in additional conduct that suggests sponsorship or endorsement by the VA (e.g., by using the VA’s name or seal).

In the meantime, the VA, FTC, CFPB, and others are actively engaged in examining issues related to education issues affecting the military. In addition to the working group, the FTC, CFPB, and Department of Justice share information with state Attorneys General that have formed a task force aimed at investigating advertising and marketing practices in the for-profit education space. Moreover, during the economic downturn, government enforcers have focused their efforts on advertising and marketing that targets consumers in financial distress, which have resulted in several nonpublic investigations and enforcement actions.

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Overall, the VA has a new weapon in the fight against third-party use of the phrase GI Bill. On the other hand, every weapon can be vulnerable, and the VA may face battlefield challenges as it tries to assert the registration and control third-party use. For others, a lesson emerges: seek trademark registrations when brands are launched instead of waiting until they are violated, and think strategically during the application process.

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