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October 15, 1979

ATTORNEY GENERAL OPINION NO. 79- 230

The Honorable Jack H. Brier
Secretary of State
Second Floor, State Capitol
Topeka, Kansas 66612

Re: Trade-marks and Service-marks -- Registration and
Enforcement -- Application for Registration

Synopsis: Where an application for registration of a service-mark is filed with the Secretary of State, and the mark for which registration is sought pursuant to K.S.A. 81-111 et seq. does not uniquely identify the services offered by the applicant and distinguish them from services offered by others, or the mark is merely descriptive of such services, registration should be denied.

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Dear Secretary Brier:

You indicate that you have received an application to register "Rhythm Aerobics" as a service-mark, and you have requested our opinion as to whether the same may be registered.

The registration and enforcement of trade-marks, service-marks and trade names is governed by K.S.A. 81-111 et seq. The definitions applicable thereto are found in K.S.A. 81-111, with "service-mark" being defined in subsection (b) thereof as follows:

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"The term 'service-mark' means anything used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others and includes without limitation the marks, names, symbols, titles, designations, slogans, character names, and distinctive features of radio or other advertising used in commerce." (Emphasis added.)

From the emphasized portion of the foregoing definition, it is apparent that a service-mark must be unique, so as to identify and distinguish the services covered thereby. Furthermore, in order to be susceptible of registration with the Secretary of State, pursuant to K.S.A. 81-113 and 81-114, a service-mark cannot be merely descriptive of the services sought to be protected by registration of the service-mark. Such fact is disclosed by K.S.A. 81-112, which provides in pertinent part:

"A mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others shall not be registered if it . . .

. . . .

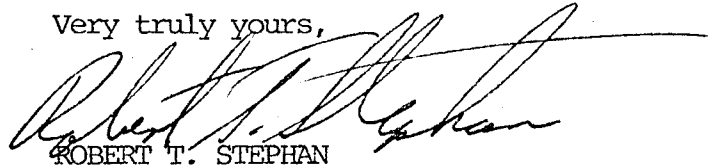
"(e) consists of a mark which, (1) when applied to the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them. . . ." (Emphasis added.)

Based on the foregoing statutory provisions, it is our opinion that "Rhythm Aerobics" is not susceptible of registration as a service-mark in your office. Our research has disclosed that "Rhythm Aerobics" does not uniquely identify and distinguish services provided by the applicant from services provided by others. We have found that Rhythm Aerobics is a description of a particular type of exercise activity, and instructive classes involving the principles employed in rhythm aerobics are offered throughout the state under this name and other similar names, such as Aerobic Dancing. Our limited research has disclosed such classes being offered by YMCA's, YWCA's and colleges and universities. For example, Washburn University of Topeka presently offers a class entitled Rhythm Aerobics.

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Furthermore, the foregoing facts also indicate that "Rhythm Aerobics" is merely descriptive of the services offered by the applicant and, pursuant to K.S.A. 81-112(e), is not susceptible of registration as a service-mark in your office.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



W. Robert Alderson
First Deputy Attorney General

RTS:WRA:may