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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Alcon Manufacturing, Ltd.

Serial No. 76219409

Jennifer L. Dean of Drinker Biddle & Reath LLP for Alcon Manufacturing, Ltd.

Toni Y. Hickey, Trademark Examining Attorney, Law Office 115 (Tomas V. Vlcek, Managing Attorney).

Before Quinn, Holtzman and Kuhlke, Administrative Trademark Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Alcon Manufacturing, Ltd., (applicant or "Alcon") filed the above-identified application to register the mark BSS on the Principal Register for "intraocular irrigating solutions" in International Class 5. The application was filed March 2, 2001 based on Section 2(f) of the Trademark Act and alleging dates of first use and first use in commerce on October 23, 1959.

The application includes a claim of ownership of Registration No. 1236020 for the mark BSS PLUS for "intraocular

irrigating solution" in International Class 5. The registration issued May 3, 1983 on the Principal Register and asserts dates of first use and first use in commerce on January 15, 1982. The registration was renewed on September 13, 2002.

In addition, applicant states that it was the owner of a now-expired registration (No. 890356) for the mark BSS for "ophthalmic preparations." This registration issued May 5, 1970 on the Principal Register, without a Section 2(f) claim, and asserting dates of first use and first use in commerce on October 23, 1959. The registration expired on May 12, 2001 for failure to file a second renewal under Section 9.

The trademark examining attorney, in her initial Office action, refused registration under Section 2(e)(1) of the Trademark Act on the ground that BSS is merely descriptive of the identified goods and that, in view of the highly descriptive nature of the mark, applicant's evidence is insufficient to show acquired distinctiveness of the mark under Section 2(f) of the Act. In response to applicant's submission of additional evidence of acquired distinctiveness, the examining attorney in her second (nonfinal) Office action stated: "The applicant has submitted sufficient evidence to support a claim of acquired distinctiveness; however, because the mark is generic, this evidence will not alter the determination that the mark is unregistrable." (Office action dated October 15, 2002 at 1.)

The examining attorney made no further reference to the alternative issue of acquired distinctiveness either in her final refusal or in her denial of applicant's request for reconsideration. In both actions, the examining attorney took the position only that applicant's 2(f) evidence is irrelevant because the mark is generic. Thus, the examining attorney has conceded that if the mark is not generic, it is registrable under Section 2(f) of the Act.¹

When the refusal was made final, applicant appealed. Briefs have been filed. An oral hearing was not requested.

Turning first to the question of genericness, the examining attorney argues that applicant's intraocular irrigating solution is a "balanced salt solution"; that BSS is a widely used abbreviation for "balanced salt solution" in the ophthalmologic research field; and that "the public commonly uses and understands the acronym BSS to refer to a balanced salt solution used for eye irrigation." Brief at 3. In support of her position, the examining attorney has relied on dictionary

¹ The examining attorney for the first time in her appeal brief argues that, assuming the mark is not generic, the evidence is insufficient to show that the mark has acquired distinctiveness, and maintains that her statement in the October 15, 2002 action accepting the 2(f) evidence was a typographical error. Applicant, however, in its reply brief, insists that the examining attorney's initial position should stand. We agree with applicant and believe that it would be prejudicial to applicant to decide the alternative issue of acquired distinctiveness on the merits without any prior notice to applicant that this matter was in issue.

definitions of "balanced salt solution" and "BSS"; Nexis excerpts of technical articles and medical studies obtained from the Nexis database containing references to BSS; references to BSS on third-party websites; and use of BSS on applicant's specimen and promotional materials.

Applicant has requested that certain evidence submitted by the examining attorney be excluded from consideration. Specifically, applicant seeks to exclude printouts from certain websites because they contain no URL addresses for locating the materials on the Internet and/or no indication as to the date on which the materials were obtained by the examining attorney. This objection is overruled as to the printouts from *www.mtdesk.com*, *www.stlukeseye.com*, *www.ophtec.com*, *www.med.unc.edu*. The URLs and dates for these websites have been sufficiently identified.

The objection is well taken as to the pages with the following headings or titles: "Production of gynogenetic diploid fish by early pressure treatment," "EyeSupply USA, Inc.," "bytescribe," and a page depicting bottles with illegible labels, all of which were attached to the examining attorney's final refusal dated July 7, 2003. Applicant noted these deficiencies in its request for reconsideration but the examining attorney, in response, did not supply the missing information for the websites. In fact, with her action denying the request for

reconsideration, the examining attorney introduced additional materials from unidentified websites as well as materials from other unidentified sources. This evidence consists of pages with the following headings or titles: "Ophthalmology Times," "2003 Comprehensive Report on Viscoelastics and Single-Use Cataract Products," "UW-Madison School of Veterinary Medicine," "eMedicine," "What you need to know about" (with the subheading "Experts: Ophthalmology & Optometry"), "Audio Digest Foundation," "Indian Journal of Pharmacology," and "Immunocytometry Systems Cytometry Source Book." Applicant's objection to this evidence is sustained and accordingly, the evidence will not be considered. See *In re White*, 73 USPQ2d 1713, n.5 (TTAB 2004).

Applicant has also challenged the probative value of virtually every piece of remaining evidence submitted by the examining attorney. Applicant's objections will be considered as the evidence is mentioned or discussed.

We turn then to the examining attorney's evidence which is properly of record. The dictionary references introduced by the examining attorney include two publications from the Oxford University Press obtained from www.xrefer.com: *The Dictionary of Medicines* (1998) defines "balanced salt solution" as "A sterile solution of sodium chloride, sodium acetate sodium citrate, calcium chloride, and magnesium chloride, used to wash out the eyes to remove foreign bodies or harmful substances. It is also

used for irrigating the eyes during surgery." The *Concise Medical Dictionary* (1998) contains an entry for "balanced salt solution (BSS)," and defines it as "a solution made to a physiological pH and having physiological concentrations of salts, including sodium, potassium, calcium, magnesium, and chloride. Such fluids are used during intraocular surgery and to replace intraocular fluids."

The examining attorney also included pages from the websites of "Acronym Finder" (www.acronymfinder.com) and "The MT Desk Weekly" (www.mtdesk.com). The "Acronym Finder" contains a listing for BSS as, inter alia, "Balanced Salt Solution." "The MT Desk Weekly" contains three entries for BSS. The following entry appears in under the heading "OPHTHALMOLOGIC TERMS":

BSS (balanced salt solution)

The listing under the heading "SURGICAL/MEDICAL/NEW TERMS GLOSSARY" includes the following:

Balanced salt solution (BSS)
Ophthalmic irrigating solution.

BSS (balanced salt solution)
Ophthalmic irrigating solution.

As to the examining attorney's Nexis evidence, after eliminating duplicate and irrelevant excerpts, excerpts with unclear contexts or ambiguous usage, excerpts of no probative value (such as wire service reports), and excerpts which show

proprietary use of BSS, the excerpts of articles and studies that most strongly support the examining attorney's position are reproduced below (emphasis added). All of the journal extracts identified below were obtained by the examining attorney via the Nexis database from the National Library of Medicine's Medline database.

- ABST: We investigated the effect of topical betaxolol on impaired choroidal blood flow (CBF) induced by endothelin-1 (ET-1) injection into the vitreous of albino rabbits. Betaxolol (n=7) or balanced salt solution (**BSS**) (n=6) was instilled in the right eyes before and 12 hrs after the intravitreal injection of ET-1..., and **BSS** was instilled in the right eyes before and 12 hrs after the intravitreal injection of **BSS** (n=6). *J Ocul Pharmacol Ther* [2002 Jun; 18(3): 203-9].
- ABST: PURPOSE: To evaluate the efficacy of dextran in balanced salt solution (**BSS**) as a preparation of eye bank corneas for experimental surgeries. METHODS: We used 12 eye bank eyes that were unsuitable for transplant. The corneas were removed from the globe. ... Four concentrations of dextran-BSS...were used to dehydrate the corneas, ...CONCLUSIONS: A solution of 20% dextran in **BSS** is effective for dehydrating eye bank corneas... *Cornea* [2001 Apr; 20(3): 317-20].
- ABST: ... This outbreak followed the introduction in July 1983 of a new brand of balanced salt solution (**BSS**) used as an intraoperative ophthalmic irrigation solution. This product was subsequently recalled because of intrinsic fungal contamination. A retrospective cohort study including 704 ophthalmology patients at risk for exposure to this brand of **BSS** revealed that definite exposure to that product was significant risk factor for C. Parapsilosis

endophthalmitis. ... *J Clin Microbiol* 1986 [Oct; 24(4): 625-8].²

- METHODS: ... ADCON-L was applied beneath and over the SR in the right eyes of all rabbits, while the operative fields in the left eyes were irrigated with a balanced salt solution (**BSS**). ... RESULTS: The length of the adjustment was longer and the force of the adjustment was less in the ADCON-L group than in the **BSS** treated group. ... *Br J Ophthalmol* [2001 Jan; 85(1): 80-4].
- HEADLINE: The AIDS frontline: new drugs in research...
BODY: ... CMV retinitis has been reported in up to 30% of AIDS patients in autopsy studies. If left untreated, the retinitis can be rapidly progressive, leading to complete blindness. ... Several clinical studies have reported success rates with repeated IVT ganciclovir injections similar to those for intravenous therapy. ... The 500-mg lyophilized powder of ganciclovir sodium...can be reconstituted with 2.5 ml of **balanced salt solution** to make a concentration of 200 mg/ml. Then 9.9 ml of **BSS** can be added to 0.1 ml of the above solution,... *Drug Topics* [May 7, 1990].³
- BODY: ...three of four patients who had undergone extracapsular cataract extraction (ECCE) and intraocular lens implantation (IOL) in a hospital in Tak Province, Thailand, developed endophthalmitis less than or equal to 30 hours following surgery. ... Risk for endophthalmitis was associated only with cataract surgery with IOL and the use of a **BSS** (three of four versus none of six;...). ... During the year before this outbreak, **BSS** used in this hospital had been prepared in the hospital pharmacy. The contaminated bottles of BSS were from one batch prepared in the pharmacy

² Applicant submitted a copy of a letter to the editor of this journal concerning the alleged misuse of applicant's mark. There is no indication as to what, if any, response to the letter was received. Thus, we reject applicant's contention that this evidence should not be considered.

³ Applicant supplied the full text article for this excerpt in an attempt to show that the article is not directed to the relevant public. For purposes of context, a portion of the full text article has been reproduced here. Applicant's argument regarding the probative value of this evidence is discussed infra.

on September 24... U.S. Department of Health and Human Services; *Morbidity and Mortality Weekly Report* [June 14, 1996].

- BODY: ... Today the IA system, also known as CLEO, is intended to provide the fluid circulation inside the eye during ophthalmic procedures while also keeping the surgical fields free of ablated material. "It provides the infusion and aspiration of the cataract material. It also employs a **BSS** (balanced salt solution) system to allow circulation. ... *Medical Industry Today* [July 29, 1996].⁴

The examining attorney has also made of record pages from the following third-party website:⁵

UNC Hospitals [Department of Pharmacy]
On-Line Drug Formulary
...
Balanced Salt Solution
Drops, ophthalmic (BSS): 15ml
Solution, sterile, ophthalmic (BSS, BSS Plus): 500ml
www.med.unc.edu.⁶

Applicant contends that the Office has failed to meet its burden of showing that BSS is generic for the identified goods;

⁴ Applicant submitted a page from the website of www.medicaldata.com, the publisher of the newsletter *Medical Industry Today*, indicating that the newsletter has been discontinued. However, it is apparent from applicant's printout that existing issues of the newsletter, including the issue containing this article, are still available and accessible on the website.

⁵ Regarding the examining attorney's other website materials, the printout from www.stlukeseye.com is of no probative value as the context of use of BSS on this page is entirely unclear and the examining attorney has not explained its relevance. The page from www.ophtec.com has not been considered. Applicant's associate trademark manager, Catherine Murray, states in a declaration that the relevant page was withdrawn from the website after applicant contacted that company and objected to the manner of use.

⁶ Applicant's contention that this website is no longer available is unsupported by any affidavit or documentary proof. Thus, we have considered this evidence.

and moreover that the term BSS is not generic for the identified goods. To support its position applicant has submitted printouts of medical articles and studies purporting to show proprietary use of BSS; pages from medical dictionaries showing the absence of entries for BSS; pages from other medical dictionaries and reference books which, according to applicant, contain references to BSS as a mark; copies of demand letters to publishers and competitors regarding alleged misuse of BSS; and copies of applicant's prior registrations for BSS and BSS PLUS. Applicant has also relied on the declaration, with exhibits, of Kathleen A. Knight, applicant's vice-president, attesting to length of use of BSS and sales and advertising figures for products sold under BSS; the declaration of T.O. McDonald, Ph.D., vice president, therapeutic research of Alcon Research Ltd., explaining the origin of the term BSS; and declarations from consumers attesting to their perception of BSS as a mark.

Representative excerpts of the numerous articles and studies submitted by applicant are reproduced below (emphasis added).

- ABST: The ultimate soft-shell technique compartmentalizes the anterior chamber using the ultimate low-viscosity fluid-water (as balanced salt solution [**BSS (R)**] or trypan blue [Vision Blue(R)]-in combination with 1 of 2 commercially available viscoadaptive ophthalmic viscosurgical devices: ... *J Cataract Refract Surg* [2002 Sep; 28(9): 1509] as reported on National Library of Medicine's MEDLINE Database
- ABST: ...evaluate the corneal-wetting property of lignocaine 2% jelly. ... Fifty patients having cataract

- surgery were divided into 3 groups. Group 1 comprised 20 patients who had topical eyedrop anesthesia and corneal irrigation with balanced salt solution (**BSS(R)**) during surgery as necessary. ... *J Cataract Refract Surg* [2002 Aug; 28 (8): 1444] as reported in National Library of Medicine's MEDLINE Database.
- ABST: ...human and rabbit corneas were mounted in an in vitro specular microscope for endothelial cell perfusion. One corneal endothelium was perfused with 25 mg ICG dissolved in 0.5 mL aqueous solvent in 4.5 mL balanced salt solution (**BSS(R)**) for 3 minutes followed by washout with a control solution. ... *J Cataract Refract Surg* [2002 Jun; 28 (6): 1027-33].
 - Methods: ... The rabbits were randomly divided into 3 groups to receive 3 wetting solutions: Group 1, Ringer's lactate; Group 2, balanced salt solution (**BSS®**); and Group 3, BSS with glutation (BSS Plus®). ... *Journal of Cataract & Refractive Surgery* [January 2002 Vol. 28, No. 1: 149-151] from www.ascrs.org.
 - Objectives: ... Recent studies suggest that brimonidine may be neuroprotective for retinal ganglion cells (RGCs) following optic nerve crush injury. ...
...
MATERIALS AND METHODS
...
BRIMONIDINE INTRAVITREAL INJECTION
Animals were anesthetized with intraperitoneal injections of pentobarbital sodium. ... A 0.2% brimonidine (3.4mM) ophthalmic solution (Allergan Inc., Irvine, Calif) was serially diluted with balanced salt solution (**BSS; Alcon Labs Inc., Fort Worth, Tex**)... *Arch Ophthalmol* [June 2002; 120:797-803] from <http://archophth.ama-assn.org>.
 - Results: The hydroxyl radical was formed when phacoemulsification was performed in the presence of solutions containing spin trap in double deionized water or balanced salt solution (**BSS®**). ... *Journal of Cataract & Refractive Surgery* [March 2001 Vol. 27, No. 3; 452-456] from www.ascrs.org.

- Consultation Section ... Of particular concern is that in a separate experiment, exposure of rabbit or human endothelial cells to only 3 minutes of distilled water followed by BSS Plus® (balanced salt solution with bicarbonate,...). ...What solution should be chosen to restore the aqueous to its normal physiologic status? The two solutions available to the surgeon would be **BSS®** (balanced salt solution) or BSS Plus. ... *Journal of Cataract & Refractive Surgery* [October 1996, Vol. 22, No. 8] from www.ascrs.org.
- REHYDRATION To investigate the effects of hydration changes that may occur in the corneal stroma during experimental procedures, the postthinned corneas were rehydrated by application of balanced salt solution drops (**BSS, Alcon**) every 5 minutes. *Arch Ophthalmol* [Vol. 114(2); February 1996; 181-185] from <https://owa.dbr.com>.
- ...A published report states that 12 of 19 patients developed corneal edema after exposure to **BSS (Alcon Laboratories, Inc., Fort Worth, TX)** preserved with benzalkonium chloride 0.0001%. ... "Cataract & Refractive Surgery Today" from www.crstoday.com
- MATERIALS AND METHODS ... The left eye corneas were placed into balanced salt solution (**BSS; Alcon laboratories, Fort Worth, TX**). They were kept in this solution for 30 minutes. ... *Cornea* [Vol. 22(7); October 2003; 651-664] from Ovid Technologies, Inc. Email Service.
- During phacoemulsification performed by a single surgeon, a step-by-step, chop in situ, lateral separation technique was used to divide the nucleus. Intraoperatively, hydroxypropyl methylcellulose 2% was used and irrigation was by balanced salt solution (**BSS®**). ... *Journal of Cataract & Refractive Surgery* [November 2001 Vol. 27, No. 11] from www.ascrs.org.
- ABST: PURPOSE: To ascertain whether 0.4 mL of cefotaxime 0.25% applied intracamerally causes toxic alteration of the human corneal endothelium. METHODS:...This was followed by intraocular injection of 0.4 mL of cefotaxime 0.25% or balanced salt solution (**BSS (R)**). ... *J Cataract Refract*

Surg [2001 Feb; 27(2): 250-5] as reported in National Library of Medicine's MEDLINE Database.

- ABST: PURPOSE: To evaluate photorefractive keratectomy (PRK) using a scanning-slit excimer laser combined with removal of the epithelium using a rotary epithelial brush and prebrush and postoperative cooling of the cornea with chilled balanced salt solution (**BSS (R)**). ... *J Cataract Refract Surg* [2000 Nov; 26(11): 1596-604].

The following medical dictionaries purportedly contain no entries for BSS: *Stedman's Medical Dictionary* (25th ed. 1990), *Taber's Cyclopedic Medical Dictionary* (18th ed. 1997), *Black's Medical Dictionary* (33rd ed. 1981), and *Mosby's Medical, Nursing, and Allied Health Dictionary* (4th ed. 1994).

The medical dictionaries and reference books that applicant claims "recognize" BSS as a brand name describe BSS in the following contexts: In the *Dictionary of Eye Terminology* (1984), the definition of "balanced salt solution" is followed by "See also BSS." The term "BSS" is identified on the relevant page as "trade name of balanced salt solution." The *Surgical Pharmacology of the Eye* (1985) lists "BSS + T(84)" along with "Extracellular fluid," "Aqueous humor," "Normal saline solution" and "Ringer's lactate" in a table identifying "composition of selected intraocular irrigating solutions." The note to "(84)" states "Alcon Laboratories, Surgical Products Division, Fort Worth, TX. July 1982." In *Cataract Surgery and its Complications*

(5th ed. 1990), a discussion under the heading "Pathogenesis of Postoperative Corneal Edema" states:

Corneas perfused with commercial balanced salt solution (BSS, Alcon) swell at a rate of 24 to 31 $\mu\text{m}/\text{hour}$; degenerative changes become severe only after 2 hours...

In *Principles and Practice of Ophthalmology* (1994), a table with the heading "Currently Available Intraocular Irrigating Solutions" identifies "BSS (Balanced Saline Solution)" as a product manufactured by "Alcon." The *Physicians Desk Reference for Ophthalmology* (1996), under the heading "Ophthalmic Irrigating Solutions" identifies "Alcon's BSS" as among the available intraocular irrigating solutions. *Vitreotomy Techniques for the Anterior Segment Surgeon* (1983) states that "BSS* or lactated Ringer's can be safely used for intraocular fluid replacement," and the footnote to the asterisk states "Alcon, Fort Worth, Texas." In *Medical Abbreviations* (9th ed. 1998), BSS with an "R" superscript is identified as "balanced salt solution."

Kathleen A. Knight attests in her declaration to use of BSS "for over forty years"; sales of BSS product from 1995-2001 totaling over \$90 million and advertising for that period estimated between \$908 thousand to \$1.8 million. The declaration is accompanied by copies of demand letters to various publishers and competitors issued between the years 1985 and 2000 along with responses to some of those letters; and copies of settlement

agreements between Alcon and two competitors, Johnson & Johnson and Storz Instrument Company, each of whom have agreed to discontinue use of BSS and acknowledge BSS as a valid trademark; and copies of a sample product label, a brochure and two print advertisements.

Mr. McDonald states in his declaration that he has been associated with the Alcon group of companies since 1965; that Alcon, in May of 1969, was the first to launch balanced salt solution in a new, stable and sterile formula for ophthalmic use; and that Alcon coined the term BSS as the trademark for its balanced salt solution product.

Applicant's declarations from 18 consumers, 14 of whom are ophthalmic surgeons, each indicate long familiarity "with Alcon's advertising, promotion and sale of goods identified by the mark BSS" (each for at least 10 years); and state that the declarant is not an employee or any affiliate of applicant; that "the term BSS identifies only the ophthalmic irrigating solutions of Alcon, and distinguishes them from the similar solutions of others"; and that "BSS is an inherently distinctive term which uniquely identifies Alcon's ophthalmic irrigating solutions."

DECISION

The test for determining whether a mark is generic involves a two-step inquiry. The first step is to identify the genus

(category or class) of goods at issue. The second step is to determine whether the term sought to be registered is understood by the relevant public primarily to refer to that category or class of goods. See *In re American Fertility Society*, 188 F.3d 1341, 51 USPQ2d 1832 (Fed. Cir. 1999) citing *H. Marvin Ginn Corporation v. International Association of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986).

The general category of goods in this case is intraocular irrigating solutions. See *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) ("...a proper genericness inquiry focuses on the description of services [or goods] set forth in the [application or] certificate of registration").

The question, then, is whether BSS is generic as applied to those goods. The test for making this determination turns upon how the term is perceived by the relevant public, that is, the primary significance of the mark to the relevant public. *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 19 USPQ2d 1551 (Fed. Cir. 1991); and *In re Recorded Books Inc.*, 42 USPQ2d 1275 (TTAB 1997). The relevant public in this case as identified by applicant consists of hospitals, clinics, ophthalmic surgeons and drug wholesalers. (Response dated February 2, 2002 at 7.)

"The burden of showing that a proposed trademark is generic remains with the Patent and Trademark Office." *In re Merrill*

Lynch, Pierce, Fenner & Smith, Inc., 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). Moreover, the examining attorney is required to make a "substantial showing ... that the matter is in fact generic." Merrill Lynch, supra at 1143. This substantial showing "must be based on clear evidence of generic use."

Merrill Lynch, supra at 1143. We also note that any doubt on the issue of genericness must be resolved in favor of applicant. In re Waverly Inc., 27 USPQ2d 1620, 1624 (TTAB 1993).

The evidence of record clearly shows, and applicant does not dispute, that a "balanced salt solution" is recognized in the medical field as the generic name for a particular formulation of intraocular irrigating solution. It is also clear that the particular intraocular irrigating solution offered by applicant under BSS is a "balanced salt solution." The question is whether the letter combination BSS is itself generic for that product. As a general rule, initials can be considered descriptive or generic if they are so generally understood as representing descriptive or generic words as to be accepted as substantially synonymous therewith. *Modern Optics, Inc. v. Univis Lens Co.*, 234 F.2d 504, 110 USPQ 293, 295 (CCPA 1956).

The definition of BSS from Oxford's *Concise Medical Dictionary* identifying BSS as an abbreviation for balanced salt solution is probative evidence of the understanding of the term by the relevant public. We are not persuaded by applicant's

argument, based on information appearing on the introductory pages to this dictionary, that the dictionary is a foreign publication (British) and therefore not entitled to probative weight. Those same pages state that Oxford's dictionaries and reference works are published "worldwide," indicating to us that the audience for the publication is the worldwide medical community and that the publication would be readily accessible to consumers in the United States.

Applicant questions the reliability and accuracy of the "Acronym Finder" and "The MT Desk Weekly" and their value as reflecting the understanding of the relevant public. We note that the introductory page supplied by applicant for "Acronym Finder" states, "The Acronym Finder is not a glossary of terms or a dictionary" and that "[i]t is only designed to search for and expand acronyms and abbreviations." This statement suggests to us that the entries are included in the database without regard to any possible trademark status of the terms. Furthermore, this is not a technical resource and the examining attorney has not explained how it would represent the views of the medical community.

On the other hand, "The MT Desk Weekly" is entitled to some probative weight. As shown by the web pages submitted by applicant, the website for this publication is maintained by a medical transcriptionist. A medical transcriptionist is "a

health professional who prepares a written record of patient data dictated by a physician."⁷ We see no reason why this source would not be reliable or would not reflect at least to some degree the perception of the medical community at large.

The Nexis evidence submitted by the examining attorney shows use of BSS in the relevant field as a generic abbreviation for "balanced salt solution."⁸ It can be seen from this evidence that abbreviations, such as BSS, are used in medical publications as a convenient way of referring to otherwise unwieldy medical terminology. For example, "choroidal blood flow (CBF)" and "endothelin-1 (ET-1)" appear in the excerpt from *J Ocul Pharmacol Ther* [2002 Jun]; "extracapsular cataract extraction (ECCE)" and "intraocular lens implantation (IOL)" appear in the excerpt from U.S. Department of Health and Human Services; *Morbidity and Mortality Weekly Report* [June 14, 1996]; and "retinal ganglion cells (RGCs)" appears in the excerpt from *Arch Ophthalmol* [June

⁷ We take judicial notice of this definition of "medical transcriptionist" in *Mosby's Medical, Nursing and Allied Health Dictionary* (2002) from www.xrefer.com. As applicant itself has relied on this dictionary, we believe the source is sufficiently reliable to allow judicial notice to be taken.

⁸ Applicant's argument that the article from *Drug Topics* is directed to pharmacists rather than to the relevant public is not well taken. It is apparent that the subject matter of this article, "New drugs in research," would be of interest not just to pharmacists but also to ophthalmologists, drug wholesalers and others identified by applicant as members of the relevant public. Further, contrary to applicant's contention, the newsletter *Medical Industry Today* is clearly directed to the relevant public, which, as shown on the website for that publication, is the healthcare industry.

2002]. Further, there are no generic alternatives to BSS for the full name "balanced salt solution" in these publications. It is also clear from this evidence that the display of BSS in all capital letters does not, as applicant claims, indicate recognition of BSS as a trademark.

Further, contrary to applicant's contention, the fact that some of the medical studies cited by the examining attorney were conducted in foreign countries or reported in foreign journals does not detract from their probative value. Most, if not all, of the cited publications are readily accessible and available to ophthalmologists in the United States over the Internet and, regardless of where the study was conducted or where the journal is published, would clearly be of interest to ophthalmologists in this country. See *In re Remacle*, 66 USPQ2d 1222, 1224, n.5 (TTAB 2002).

The examining attorney has also submitted at least one example of generic use of BSS by a third party. The pages from www.med.unc.edu indicate that UNC Hospitals Department of Pharmacy is an online drug formulary that produces or prepares its own formulation of balanced salt solution or "BSS." Applicant contends that a pharmacy is not the relevant public for applicant's balanced salt solution but it is obvious that the solution would be prepared by the pharmacy for use by the hospital, clearly a member of the relevant public.

Applicant's product label and at least one of the two examples of advertising submitted by applicant show use of "BSS" and "balanced salt solution" in the manner of equivalent terms. On both items, the abbreviation BSS is followed by the generic name "balanced salt solution" in parentheses. In contrast, another generic descriptor for BSS, "Sterile Irrigating Solution," which appears directly above "balanced salt solution" on the label, is not enclosed in parentheses.

We find that while the examining attorney's evidence shows generic usage of BSS, applicant has submitted sufficient evidence reflecting recognition of BSS as a trademark for applicant's goods.

Applicant has presented examples of numerous journal articles and studies showing use of BSS in the manner of a proprietary term rather than a generic term.⁹ Applicant has also submitted at least one medical dictionary acknowledging BSS as a

⁹ However, any references in the literature to other possible marks of applicant such as BSS PLUS, BSS-T, or BSS ALCON, are not relevant to the question of whether BSS alone is recognized as a mark. Further, references to BSS that are ambiguous, that is, those that arguably identify applicant as merely the supplier of the "BSS" solution, are not persuasive evidence of recognition of BSS as a mark. Examples of ambiguous usage include such references as "balanced salt solution (BSS; Alcon Labs Inc., Fort Worth, Tex)" in *Arch Ophthalmol* (June 2002); and "balanced salt solution drops (BSS, Alcon)" from *Arch Ophthalmol* (February 1996). We also point out that neither applicant's prior registration for BSS PLUS nor its expired registration for BSS is relevant to this determination.

trademark.¹⁰ In addition, applicant has provided direct evidence of recognition of BSS as a mark. Applicant has shown that its policing efforts have resulted in acknowledgement by a number of publishers and competitors of applicant's trademark rights in BSS. Applicant has also demonstrated that medical professionals view BSS as a mark indicating "balanced salt solution" emanating solely from applicant.

We cannot conclude from the evidence of genericness presented by the examining attorney, which consists essentially of a single dictionary listing, a handful of Nexis excerpts, and no unchallenged use by competitors, in the face of applicant's more substantial showing that the mark is not generic, that BSS would be perceived primarily as a generic term for applicant's goods.

We have serious concerns regarding the generic nature of BSS for a balanced salt solution. However, we emphasize that we have made our determination that the mark is not generic based on the

¹⁰ The absence of entries for BSS in the other dictionaries cited by applicant is not persuasive without evidence that the admittedly generic term "balanced salt solution" is included in those dictionaries without reference to BSS. Applicant has not submitted the relevant pages for "balanced salt solution." Moreover, the definition in *Dictionary of Eye Terminology* which only identifies BSS as a "trade name" of a balanced salt solution is not evidence of recognition or perception of BSS as a trademark. The materials that refer to BSS merely as an available product, such as *Principles and Practice of Ophthalmology*, *Physicians Desk Reference for Ophthalmology*, and *Vitreotomy Techniques for the Anterior Segment Surgeon*, do not reflect acknowledgement of trademark rights in BSS or perception of BSS as a mark.

record before us and keeping in mind that any doubt on the issue of genericness should be resolved in applicant's favor. A different and more complete record, perhaps presented in the context of an inter partes proceeding, may produce a different result.

Having found that the term has not been shown to be generic, and in view of the examining attorney's acceptance of applicant's claim of acquired distinctiveness, the application will proceed to publication under Section 2(f).

Decision: The refusal to register under Section 2(e)(1) is reversed.