

## RESPONSE TO OFFICE ACTION

In an Official Action dated June 8, 2019, the Examining Attorney refused registration of Applicant's Mark, MWAVE ("Mark"), the subject of U.S. Ser. No. 88/350,702 ("Application"), contending that the Mark merely describes Applicant's goods, which are "motion sensor[s] that detect[] vehicles and people for operation of doors and gates." The refusal is based on three assumptions: (1) that "MWAVE" abbreviates the word "microwave"; (2) that Applicant's motion sensors emit microwaves; and (3) that the relevant consumers, who are professional door and gate technicians, would recognize "MWAVE" as the equivalent of "microwave."

Applicant disputes these assumptions, along with the overall conclusion that the Mark is merely descriptive. As argued below, "MWAVE" is an inventive term that combines the first letter of Applicant's trade name ("Miller Edge") with a physics term, "wave," which refers to any disturbance (*i.e.*, change from equilibrium) in one or more electromagnetic fields, such that field values oscillate repeatedly about a stable equilibrium (*i.e.*, resting) value. This concept allows motion sensors to detect movement – and is not synonymous with microwaves. Indeed, there are many wave lengths other than microwaves. Even if "MWAVE" were synonymous with "microwave" (which the below evidence shows it is not), the relevant highly trained/educated class of consumers would not consider "MWAVE" to be the equivalent of "microwave," but instead, would recognize it as a source identifier indicating Applicant.

The Section 2(e)(1) refusal should be withdrawn, and the Application should be published in the *Official Gazette*.

### ARGUMENTS

**Background** - Applicant is Miller Edge, Inc., an industry leader in the design, manufacture, sale, and distribution of commercial and residential door and gate technologies, including the following:



**Sectional Door**



**Rolling Door**



**Swing Gate**

Applicant broadly categorizes these products as "safeguarding products," and specifically, offers door and gate sensing edges, safety mats, photo optics, accessories, custom-made edges/bumpers, signaling strips, and mats/cushions. *See* Applicant's website ([www.milleredge.com](http://www.milleredge.com)) (screenshots attached as evidence); Applicant's Online Product Catalog, available at <http://www.nxtbook.com/nxtbooks/milleredge/catalog/> (true and correct .PDF copy attached as evidence). Within the "accessories" category, Applicant offers motion sensors, which

in simple terms detect movement of objects (such as people and vehicles) by emitting energy pulses (waves) along the electromagnetic spectrum, and then timing the echoes of those pulses when they reflect off objects. MWAVE motion sensors will emit radar.

“MWAVE” does not stand for the physics term “microwave,” but was a term Applicant coined by combining the first letter of Applicant’s trade name, “Miller Edge,” with the physics term “wave,” to identify the motion sensors designed, made, and sold by Applicant. As shown in Applicant’s Product Catalog, Applicant has adopted a convention of using the first-letter of its trade name, “M,” as a source identifier for its safeguarding products, including but not limited to the following examples: MGR20 direct mount sensing edges; MIRF-Z2 Patriot-2 non-contact infrared sensing edge; and MIM-62 The Solution multi-input model.

Against this backdrop, Applicant’s introduction of MWAVE radar motion sensors will most likely be understood by Applicant’s highly technically sophisticated purchasers as an overt reference to Applicant – and not as a mere description of Applicant’s motion sensors. Applicant fully expects that consumers will see the Mark and think of Applicant – not microwaves.

**Legal Standard** - Fanciful, arbitrary, and suggestive words are “inherently distinctive,” and thus, instantly entitled to Principal Register registration, without a showing of secondary meaning. Fanciful word marks are words that were coined for the express purpose of functioning as a trademark. *See* § 11:4. Inherently distinctive marks, 2 McCarthy on Trademarks and Unfair Competition § 11:4 (5th ed.). Such inherently distinctive marks are presumed to identify source, from the very first moment of commercial use.

In contrast to inherently distinctive marks like MWAVE, non-inherently distinctive marks may not be registered on the Principal Register without a showing of secondary meaning. “Merely descriptive” marks are one category of non-inherently distinctive marks. A word is merely descriptive when it has no function, other than to describe a feature, characteristic, purpose, or function of a trademark applicant’s goods. Trademark Act, Section 2(e)(1), 15 U.S.C. § 1052(e)(1); TMEP §§ 1209.01(b), 1209.03 *et seq.* Abbreviations may be deemed merely descriptive if they are generally understood as “substantially synonymous” with the merely descriptive term. *See In re Thomas Nelson, Inc.*, 97 USPQ2d 1712, 1715 (TTAB 2011); TMEP § 1209.03(h). To apply this designation, the USPTO must produce evidence to satisfy a three-part test: (1) Is the applied-for mark an abbreviation, initialism, or acronym for specific wording?, (2) Does the specific wording merely describe applicant’s goods?, and (3) Would a relevant consumer viewing the abbreviation, initialism, or acronym in connection with applicant’s goods recognize it as the equivalent of the merely descriptive wording it represents? TMEP § 1209.03(h). Failure to establish any one of the three prongs dooms the “substantially synonymous” designation.

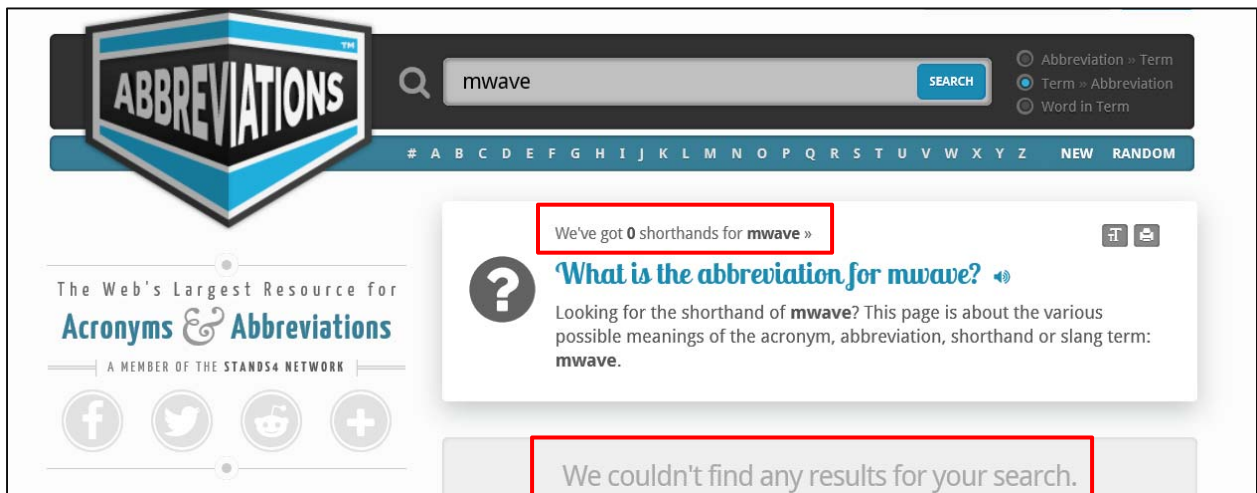
**Argument** - Here, the Trademark Office mistakenly concluded that the Mark abbreviates, or is the acronym for, the word “microwave.” The Trademark Office further mistakenly concluded that Applicant’s highly sophisticated consumers would equate the term “MWAVE” with the word “microwave.” These conclusions are flawed in part because the Mark is a coined term referencing Applicant, and in part because Applicant’s consumers are highly trained/familiar with Applicant’s long-standing convention of using marks beginning with the

letter “M.” Under these circumstances, Applicant’s sophisticated consumers would not understand the Mark as the substantial synonym of “microwave.”

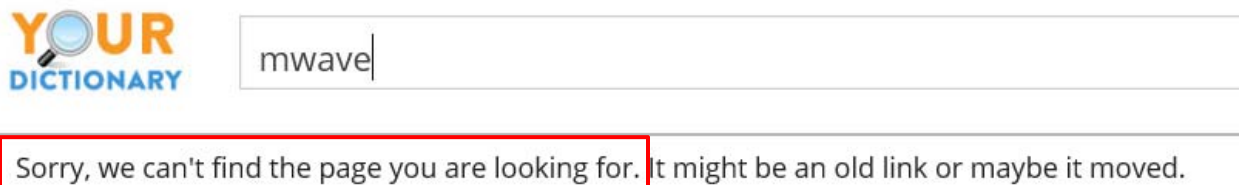
**1. MWAVE does not mean “microwave.”**

First and foremost, the weight of available evidence *does not* establish that “MWAVE” is an acronym, or an abbreviation for, the word “microwave.” The Examining Attorney’s evidence shows only that “MWAVE” may be capable of having multiple meanings, depending on context. Here, context is everything, because Applicant’s consumers are not the general public, a.k.a. lay people, but a group of highly trained, educated, and certified expert door and gate technicians. It is their understanding of “MWAVE” that matters.

To illustrate why one should not rely solely on lay-person acronym and abbreviation finders, Applicant provides the following screenshots from other, at least equally credible sources, which at the very least demonstrate that debate could exist over whether “MWAVE” is an acronym or abbreviation, for anything:



*"mwave." Abbreviations.com. STANDS4 LLC, 2019. Web. 6 Dec. 2019. <<https://www.abbreviations.com/mwave>>*



*"mwave." YourDictionary.com, Web. 6 Dec. 2019. <<https://abbreviations.yourdictionary.com/search/>>*

Thus, it is far more persuasive to look at industry sources, such as *Microwave Journal*, which is “the leading source of information about RF [radio frequency] and microwave technology” since 1958, and which has published glossaries of acronyms and abbreviations in the relevant field – in which “MWAVE” is conspicuously absent:

- **MTI** moving-target indicator
- **MTTF** mean time to failure
- **MU** minimum stability factor
- **MUNDI** multiplexed network for distributed and interactive services (UK)
- **MUX** multiplexer
- **MVDS** multipoint video distribution system
- **NADC** North American Dual-mode (or Digital-mode) Cellular
- **N-AMPS** narrowband Advanced Mobile Phone System/Service

“Acronyms and Abbreviations Used By The RF/Microwave Industry: Part II,” *MicrowaveJournal.com*, Web. 6 Dec. 2019. <<https://www.microwavejournal.com/articles/2048-acronyms-and-abbreviations-used-by-the-rf-microwave-industry-part-ii>>

Indeed, when one searches *Microwave Journal* content for the search term “MWAVE,” all non-false positive results (as of Dec. 6, 2019), reflect *trade name use*. (Representative samples of relevant results are attached as evidence.) This demonstrates that the primary industry meaning of the term is *source identifying* – not an abbreviation or acronym for “microwave.”

Tellingly, when one searches professional/industry publications, such as Cambridge University Press’s *International Journal of Microwave and Wireless Technologies*, there are *no results* for “MWAVE”:

0 results for **mwave** in International Journal of Microwave and Wireless Technologies

Save search

*Cambridge.org*, Web. 6 Dec. 2019. <[https://www.cambridge.org/core/journals/international-journal-of-microwave-and-wireless-technologies/listing?q=mwave&\\_csrf=MVmKcgpS-RUd2pb7BvIx7PKPPPlsGmIpKOOs&searchWithinIds=41D4DE3D382F488FE22C6DF18948FD1E](https://www.cambridge.org/core/journals/international-journal-of-microwave-and-wireless-technologies/listing?q=mwave&_csrf=MVmKcgpS-RUd2pb7BvIx7PKPPPlsGmIpKOOs&searchWithinIds=41D4DE3D382F488FE22C6DF18948FD1E)>

If Applicant’s Mark were actually the acronym/abbreviation for “microwave,” then the foremost experts on microwave technology would recognize it as such – but they do not. It does not matter if a handful of layperson sources might recognize “MWAVE” as an acronym or abbreviation for “microwave,” if relevant industry participants would not.

Thus, the first prong of the applicable test is not met, and the Mark cannot be deemed the substantial synonym of “microwave” for purposes of determining mere descriptiveness. The Mark should be registered on the Principal Register.

## 2. The relevant consumers would not equate the Mark with “microwave.”

For the same reasons discussed above, Applicant’s highly sophisticated consumers would not equate the Mark with the allegedly descriptive term “microwave.” For purposes of the test, the relevant consumers are professional door and gate technicians, architects, and plant safety managers, who necessarily possess training and education in commercial and residential door/gate design, selection, installation, operation, maintenance, and safety. *See* Applicant’s website, [www.milleredge.com](http://www.milleredge.com). As members of a highly technical industry, in which they are required to understand door and gate technology, they *would not* interpret the Mark as the equivalent of the term “microwave.” Instead, they would interpret the Mark as a fanciful source identifier, combining the first letter of Applicant’s trade name, “M,” with the physics term “WAVE.” The actual non-layperson purchasers of motion sensors understand microwave technology. As such, no conclusion can be made that they would equate “MWAVE” with “microwave,” *i.e.*, that they would imbue the Mark with descriptive, rather than source-identifying significance.

Even laypeople would not equate “MWAVE” with “microwave.” Applicant posits that an ordinary consumer thinks a microwave is a device present in most U.S. kitchens, and that such consumers do not understand how motion sensors operate. Certainly, they would not expect a motion sensor to use or feature microwaves.

It is also highly significant that not a single competitive product identified in the Trademark Office’s evidence substitutes the term “MWAVE” for the word “microwave,” as might be expected if “MWAVE” was indeed the equivalent of the word “microwave.” The last piece of evidence – a third-party news article – uses “m-wave” to refer to “microwaves,” but only in the rhetorical context of using the term “x-ray.” The author probably used “m-wave” as a literary device to compare microwaves to x-rays – not in recognition that “m-waves” are the commonly accepted abbreviation or acronym for microwaves.

In any event, the Mark is not descriptive, even if the word “microwave” would be.<sup>1</sup>

Because relevant consumers would not equate the Mark with “microwave,” a second prong of the applicable test cannot be satisfied, and the merely descriptive refusal should be withdrawn.

## 3. Doubts must be resolved in Applicant’s favor.

To the extent there remains any doubt in drawing the line between an allegedly inherently distinctive mark, and an allegedly merely descriptive mark, such doubt must be resolved in Applicant’s favor. *In re Atavio*, 25 USPQ 1361 (TTAB 1992); *In re Grand Metropolitan Foodservice, Inc.*, 30 USPQ2d 1974, 1976 (TTAB 1994) (“[A]ny doubt with respect to the issue of descriptiveness should be resolved in applicant’s behalf.”). Here, at a minimum, there is doubt

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<sup>1</sup> For purposes of this Office Action Response, Applicant neither concedes, nor denies, that “microwave” could be a descriptive term for motion sensors. However, Applicant’s Mark is not “microwave,” but MWAVE, and the distinction is critical/outcome determinative.

whether Applicant's Mark is merely descriptive, or fanciful/inherently distinctive. Such doubt must be resolved in Applicant's favor.

**Request for More Information** – In addition, the Examining Attorney requested the following information, which Applicant provides below/attaches as evidence hereto.

1. Produce fact sheets, instruction manuals, brochures, advertisements and pertinent screenshots of applicant's website as it relates to the goods in the application, including any materials using the terms in the applied-for mark.

Screenshots and Product Catalogs available on Applicant's website are attached as evidence hereto. Because the Mark, MWAVE, is not yet in use in commerce, there are no materials using the terms in the applied-for mark.

2. Alternatively, submit similar documentation for goods and services of the same type, explaining how its products or services will differ. Provide detailed factual description of the goods, including how they operate, salient features, and prospective customers and channels of trade.

Applicant attaches specification sheets for other motion sensor products sold on Applicant's website. These are third-party products, whose specification materials reflect emission of microwaves to detect motion. Applicant's branded motion sensors will use radar. In both cases, the prospective customers are professional door and gate technicians, architects, and plant safety managers, all of whom are highly trained and educated. The trade channels are wholesale distribution by equally trained and educated distributors/sales representatives. None of these sophisticated parties would be confused by the term "MWAVE," and think it describes microwave technology. In fact, to Applicant's knowledge, the term "mwave" is never used.

3. Questions:

- a. Do applicant's goods contain or use microwave technology while operating?

Applicant's motion sensors will use radar technology.

- b. Do applicant's competitors use microwave technology to advertise similar goods or features or functions of similar goods?

To the best of Applicant's knowledge, some competitors' motion sensor products emit microwaves to detect motion.

- c. Who is the typical consumer of applicant's goods?

A highly trained and educated professional door or gate technician, an architect, or a plant safety manager.

- d. Where are applicant's goods typically purchased (provide examples of online and brick-and-mortar store venues)?

Applicant's goods are purchased wholesale from equally highly trained and educated distributors/sales representatives. *See* attached evidence from Applicant's website.

### **CONCLUSION**

In view of the above arguments/evidence, the Examining Attorney should deem the Mark a fanciful/inherently distinctive mark/withdraw the Section 2(e)(1) refusal, and should approve the Application for publication in the *Official Gazette*.