

This Opinion is not a  
Precedent of the TTAB

Mailed: January 25, 2023

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

*Ilsa, LLC*

*v.*

*Molly Ray Fragrance*

Opposition No. 91267802

Jamey A. Thompson for Ilsa, LLC.

Patricia L. Ray of Patricia Ray Consulting for Molly Ray Fragrance.

Before Cataldo, Adlin and Allard,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

On June 11, 2020, Applicant, Molly Ray Fragrance, filed application Serial No. 88960812 seeking registration on the Principal Register of the mark PERFUME WITH A PURPOSE in standard characters, identifying the following goods: “Fragrances and perfumery; Fragrances for personal use; Air fragrancing preparations; Body spray used as a personal deodorant and as fragrance; Room

fragrancing preparations; Sachet-like eye pillows containing fragrances” in International Class 3.<sup>1</sup>

Opposer, Ilsa, LLC, filed a notice of opposition to the registration of Applicant’s mark on the ground of likelihood of confusion pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), relying on its assertion of common law rights in the mark PERFUME WITH A PURPOSE in connection with fragrances and perfumery.<sup>2</sup>

Applicant, in paragraphs 1-4 of its answer, denied the salient allegations in the Notice of Opposition and asserted numerous affirmative defenses as paragraphs 5-17.<sup>3</sup> Applicant’s assertions in paragraphs 5-9 are not true affirmative defenses, but rather amplifications of its denials and are so construed. Paragraphs 10-17 were stricken by the Board during the parties’ discovery conference and will be given no consideration.<sup>4</sup>

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<sup>1</sup> Applicant amended the filing basis of the application to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>2</sup> 1 TTABVUE.

In this decision, citations to the record are to TTABVUE, the Board’s online docketing system. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014); *see also* Trademark Trial and Appeal Board Manual (TBMP) §§ 106.03, 801.01, 801.03 (2022). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any number(s) following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

<sup>3</sup> 4 TTABVUE.

<sup>4</sup> 6 TTABVUE 2-3.

## I. The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), Applicant's application file. In addition, the parties introduced the following testimony affidavits and evidence:

Affidavit of Opposer's founder and owner, Ilsa Manning and Exhibits 1-68 consisting of the affidavit of Jessica Delfino, Opposer's public relations manager, website screenshots and photos of advertisements;<sup>5</sup>

Affidavit of Applicant's owner and President, Molly Ray and Exhibits A-B consisting of website screenshots, correspondence and official records;<sup>6</sup>

Opposer's Notice of Reliance on Exhibits 69-75 consisting of copies of official records and Applicant's discovery responses;<sup>7</sup> and

Applicant's Notice of Reliance on Exhibits A-B consisting of printed screenshots from websites and additional copies of Applicant's discovery responses.<sup>8</sup>

## II. Entitlement to a Statutory Cause of Action

A plaintiff's entitlement to invoke a statutory cause of action for opposition or cancellation is a necessary element in every inter partes case. *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 20201 USPQ2d 1001, at \*10 (TTAB 2021) (citing *Corcamore, LLC v. SFM, LLC*, 978 F.3d 1298, 2020 USPQ2d 11277, at \*6-7 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 2671 (2021)). To establish entitlement to a statutory cause of action under Trademark Act Section 13, 15 U.S.C., § 1063, a plaintiff must demonstrate "an

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<sup>5</sup> 11 TTABUVE.

<sup>6</sup> 14 TTABVUE.

<sup>7</sup> 10 TTABVUE.

<sup>8</sup> 13 TTABVUE.

interest falling within the zone of interests protected by the statute and ... proximate causation.” *Corcamore*, 2020 USPQ2d 11277, at \*4 (citing *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 109 USPQ2d 2061, 2067-70 (2014)).

Stated another way, a plaintiff is entitled to bring a statutory cause of action by demonstrating a real interest in the proceeding and a reasonable belief of damage. *Australian Therapeutic Supplies Pty. Ltd. v. Naked TM, LLC*, 965 F.3d 1370, 2020 USPQ2d 10837, at \*3 (Fed. Cir. 2020), *cert. denied*, 142 S. Ct. 82 (2021); *see also Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014).

There is “no meaningful, substantive difference between the analytical frameworks expressed in *Lexmark* and *Empresa Cubana*.” *Corcamore*, 2020 USPQ2d 11277, at \*4. Thus, “a party that demonstrates a real interest in [oppos]ing a trademark under [Trademark Act Section 13, 15 U.S.C.] § 106[3] has demonstrated an interest falling within the zone of interests protected by [the Trademark Act] .... Similarly, a party that demonstrates a reasonable belief of damage by the registration of a trademark demonstrates proximate causation within the context of § 106[3].” *See Corcamore*, 2020 USPQ2d 11277, at \*7.

Opposer introduced testimony and evidence that it uses PERFUME WITH A PURPOSE as a trademark for perfumes and fragrances.<sup>9</sup> Opposer thus has established its interest in a mark identical to the mark sought for registration by

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<sup>9</sup> Manning affidavit at paras. 2-7; 11 TTABVUE 2-6; Delfino affidavit at 2-6; 11 TTABVUE 27-8.

Applicant for goods that are in part identical, and thus Opposer's entitlement to bring a colorable claim under Trademark Act Section 2(d). *Cunningham*, 55 USPQ2d at 1844.

Accordingly, Opposer has proven its statutory entitlement to oppose, which extends to its grounds for opposition. *See Enbridge, Inc. v. Excelerate Energy LP*, 92 USPQ2d 1537, 1543 n.10 (TTAB 2009) (citing *Liberty Trouser Co., Inc. v. Liberty & Co.*, 222 USPQ 357, 358 (TTAB 1983)).

### III. Priority

The question of priority is an issue in this case because Opposer has asserted common law rights to PERFUME WITH A PURPOSE and does not own an existing registration upon which it can rely under Section 2(d). *Cf. King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

To establish priority on a likelihood of confusion claim brought under Trademark Act Section 2(d), a party must prove that, vis-à-vis the other party, it owns "a mark or trade name previously used in the United States ... and not abandoned...." Trademark Act § 2, 15 U.S.C. § 1052. A party may establish its own prior proprietary rights in a mark through ownership of a prior registration, technical trademark use, or through use analogous to trademark use, such as use of the term in advertising brochures, trade publications, catalogues, newspaper advertisements and Internet web sites, which create a public awareness of the designation as identifying the party as a source. *See Trademark Act §§ 2(d) and 45, 15 U.S.C. §§ 1052(d) and 1127; T.A.B. Systems v. PacTel Teletrac*, 77 F.3d 1372, 37 USPQ2d 1879 (Fed. Cir. 1996); *Otto Roth*

*& Co. v. Universal Foods Corp.*, 640 F.2d 1317, 209 USPQ 40 (CCPA 1981); *Giersch v. Scripps Network Inc.*, 90 USPQ2d 1020, 1022 (TTAB 2009).

Opposer must prove that it acquired trademark rights prior to Applicant's first use. Thus, Opposer must prove that its trademark is inherently distinctive, or acquired distinctiveness before the date on which applicant can establish its rights. *Otto Roth*, 209 USPQ at 44. ("[I]t is equally clear that if an opposer's alleged means of trade designation is not distinctive -- does not identify source -- then there is no basis upon which to compare such a thing with the applicant's mark to determine whether confusion as to source is likely.").

Under the rule of *Otto Roth*, a party opposing registration of a trademark due to a likelihood of confusion with his own unregistered term cannot prevail unless he shows that his term is distinctive of his goods [or services], whether inherently or through the acquisition of secondary meaning or through "whatever other type of use may have developed a trade identity."

*Towers v. Advent Software, Inc.*, 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990) (quoting *Otto Roth*, 209 USPQ at 43).

There is no question that the mark PERFUME WITH A PURPOSE for fragrances and perfumery is inherently distinctive. Applicant seeks registration of its identical PERFUME WITH A PURPOSE mark on the Principal Register without resort to a claim of acquired distinctiveness; and although the phrase is suggestive of a feature or characteristic of the identified goods, there is no evidence of record tending to establish that the mark in its entirety is merely descriptive for such goods. In its brief,

Applicant argues “the marks are generic words with many meanings.”<sup>10</sup> However, Applicant submits no evidence or further explanation to support its position.

PERFUME WITH A PURPOSE suggests a desirable quality of Opposer’s and Applicant’s fragrances and perfumery, namely, that they serve a function or purpose beyond their scents. Based on this record the mark PERFUME WITH A PURPOSE, while suggestive of a feature or characteristic of the parties’ goods, is inherently distinctive as a mark.

We turn then to Opposer’s claim of priority. In her affidavit, Opposer’s founder Ilsa Manning asserts, inter alia, as follows:

Opposer first used #PERFUMEWITHAPURPOSE on Instagram on August 17, 2016.<sup>11</sup>

Opposer first used #PERFUMEWITHAPURPOSE on Facebook on August 24, 2016.<sup>12</sup>

Opposer advertised the launch of its first perfume, Infinite No. 1, on Instagram and Facebook on August 24, 2016.<sup>13</sup>

Opposer contacted the editor of Uptown Magazine to advertise the launch of a line of fragrances including Infinite No. 1 in connection with PERFUME WITH A PURPOSE on September 1, 2016.<sup>14</sup>

Opposer launched Ilsa Fragrances using the mark PERFUME WITH A PURPOSE on September 15, 2016 on Facebook and Instagram, and at a launch party hosted by Opposer’s freelance social media manager, Jessica Delfino.<sup>15</sup>

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<sup>10</sup> Applicant’s brief; 17 TTABVUE 15.

<sup>11</sup> Manning affidavit at para 5; 11 TTABVUE 5.

<sup>12</sup> *Id.* at para 6; 11 TTABVUE 5.

<sup>13</sup> *Id.* at para 7; 11 TTABVUE 6.

<sup>14</sup> *Id.* at para 9; 11 TTABVUE 6.

<sup>15</sup> *Id.* at para 11; 11 TTABVUE 7.

With her affidavit, Ms. Manning introduced, inter alia, the following exhibits:

Opposer's Exhibit 1 is the affidavit of Jessica Delfino, Opposer's freelance public relations manager, attesting that she and Ms. Manning created the slogan PERFUME WITH A PURPOSE in July 2016; and made first sales of Opposer's perfume under marks including PERFUME WITH A PURPOSE on September 15, 2016.<sup>16</sup>

Opposer's Exhibit 20 is a photograph of Opposer's booth at the October 7-8, 2017 Arizona's Ultimate Women's Expo displaying its Infinite No. 1 perfume with the mark PERFUME WITH A PURPOSE showing continuing use of the mark.<sup>17</sup>

Based on its testimony affidavit and exhibits of record, Opposer has established use of PERFUME WITH A PURPOSE as a trademark in connection with Internet and in-person sales of its goods since at least as early as September 15, 2016.

Applicant does not appear to dispute Opposer's claim of priority. It is well-settled that in the absence of any evidence of earlier use, the earliest date upon which an applicant may rely is the filing date of its challenged application. *See* Trademark Act Section 7(c), 15 U.S.C. § 1057(c). *See also Larami Corp. v. Talk to Me Programs, Inc.*, 36 USPQ2d 1840 (TTAB 1995). In this case, application Serial No. 88960812 was accorded a filing date of June 11, 2020. Applicant's earliest asserted use of its PERFUME WITH A PURPOSE mark is June 1, 2019.<sup>18</sup> Opposer does not dispute this date.

In light of the foregoing, the earliest date of first use we can ascribe to Opposer of its common-law PERFUME WITH A PURPOSE mark is September 15, 2016. The

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<sup>16</sup> 11 TTABVUE 26-28.

<sup>17</sup> 11 TTABVUE 67-68. Opposer introduced numerous other examples of continuing use of its mark. 11 TTABVUE 69-171.

<sup>18</sup> Applicant's response to Opposer Interrogatory No. 6; 10 TTABVUE 12.



earliest date of first use upon which Applicant is entitled to rely is June 1, 2019. On this record, we find that Opposer has met its burden of showing by a preponderance of the evidence that it first used the mark PERFUME WITH A PURPOSE in connection with its goods prior to Applicant's first use or constructive first use. We observe in addition that Applicant had the opportunity to present testimony and evidence to rebut the testimony and evidence submitted by Opposer, or clearly establish a first use date prior to its application filing date, and failed to do so.

#### IV. Likelihood of Confusion

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

##### A. Relatedness of the Goods and Trade Channels

Turning to the second and third *DuPont* factors – relatedness of the goods and channels of trade – we find that Applicant's identified fragrances and perfumery are identical to Opposer's fragrances and perfumes. We further observe that Applicant's

“body spray used as a personal deodorant and as fragrance” appears to be a subset or type of Opposer’s fragrance, and thus is at least closely related thereto.

Applicant argues that the parties’ goods differ “in intention.”<sup>19</sup>

Applicant’s goods for the mark in this matter are for donation only, directly to patients at hospitals. Applicant’s goods are designed to sooth. [sic]

Opposer’s goods are for sale. Opposer’s goods are designed to catch the eye and convince consumers. These are not facts which can [be] disputed by Opposer.

The packaging for each therefore is very different, given their intentions, as above. The internal packaging such as the bottling for each is very different. The scents in each are very different.<sup>20</sup>

Applicant’s arguments are unavailing. The question of likelihood of confusion must be determined based on an analysis of the goods recited in Applicant’s application, rather than what evidence or attorney argument shows the goods might be. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *see also Chicago Corp. v. North Am. Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Nothing in Applicant’s identification of goods restricts its perfumery and fragrances solely to products donated to hospital patients with the intention to soothe. *Octocom Sys., Inc. v. Houston Computers Svs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to

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<sup>19</sup> Applicant’s brief; 17 TTABVUE 10.

<sup>20</sup> *Id.*

the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.").

As the Court of Customs and Patent Appeals, the predecessor of the Federal Circuit, explained in *Tuxedo Monopoly, Inc. v. General Mills Fun Group, Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981):

Here, appellant seeks to register the word MONOPOLY as its mark without any restrictions reflecting the facts in its actual use which it argues on this appeal prevent likelihood of confusion. We cannot take such facts into consideration unless set forth in its application.

Likewise, in this case, we must also analyze the similarity or dissimilarity and nature of the goods based on the description of the goods set forth in the application at issue. We must construe Applicant's perfumery and fragrances identified without limitation as encompassing all types of such goods available to all typical consumers. We similarly are not concerned that the products' scents differ inasmuch as neither party restricts its fragrances or perfumery to a particular scent. Nor are we concerned with differences in the products' packaging, inasmuch as the packaging is not part of the marks at issue, as discussed below.

Applicant's identification of goods is not restricted to any particular channel of trade. Accordingly, we must presume its fragrances and perfumery are offered in any normal trade channel to any usual purchaser for such goods. *See, e.g., Octocom*, 16 USPQ2d at 1787. Opposer's goods are available over the Internet and at displays and booths in third-party retail stores and trade shows.<sup>21</sup> Because Applicant's goods are

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<sup>21</sup> 11 TTABVUE 26-28; 11 TTABVUE 67-171.

not restricted as to any particular trade channel, we must presume they are available over the Internet, and at displays and booths in third-party retail stores and trade shows. *Id.*

As identified, the parties' goods are in part identical and are presumed to be offered in overlapping trade channels to all typical consumers for such goods. The second and third *DuPont* factors thus favor a finding of likelihood of confusion.

#### B. The Marks

Turning to our consideration of the marks at issue, we note initially that, “[w]hen marks would appear on virtually identical ... [goods or] services, the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992); *see also ECI Division of E-Systems, Inc. v. Environmental Commc’ns Inc.*, 207 USPQ 443, 449 (TTAB 1980).

In determining the similarity or dissimilarity of marks, we must consider the marks in their entirety in terms of sound, appearance, meaning and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In this case, the marks PERFUME WITH A PURPOSE are identical in every respect.<sup>22</sup>

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<sup>22</sup> We agree with Applicant (17 TTABVUE 17) that there is no evidence that Opposer’s mark is famous. As discussed above, Opposer’s mark is suggestive and inherently distinctive. Given the absence of evidence on this record of its relative strength or weakness, we find Opposer’s mark to be entitled to an ordinary scope of protection. *See, e.g., Tea Board of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

Applicant argues:

the marks in this matter feature words that can be taken many different ways with many different connotations.

Additionally, the words in the marks themselves make the consumer want more information – for what purpose? With APPLICANT’S MARK and its goods therewith, the sole purpose is clear, and has been since inception of the program, to help patients in hospitals. There is no likelihood of confusion as to the marks in this matter.<sup>23</sup>

However, there is little, if any, evidence of record to support Applicant’s contention that consumers of its goods will ascribe to Applicant’s PERFUME WITH A PURPOSE mark the meaning or connotation of helping patients in hospitals. That particular meaning is not apparent on the face of the mark, and there is no evidence in the record that consumers will ascribe one meaning to Applicant’s mark and a different meaning to Opposer’s identical mark. To the contrary, Ms. Manning attests that she donates a percentage of each sale of Opposer’s perfumes to a charity empowering to females,<sup>24</sup> and both marks suggest the perfumes offered serve a larger purpose than their scents.

The parties’ PERFUME WITH A PURPOSE marks are identical in appearance, sound and, on this record, meaning, and the marks convey identical commercial impressions. The first *DuPont* factor, similarity of the marks, also weighs heavily in favor of a likelihood of confusion.

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<sup>23</sup> 17 TTABVUE 16.

<sup>24</sup> Manning affidavit at 2-3; 11 TTABVUE 2-3.

C. Conditions of Sale and Sophistication of Consumers

Applicant urges us to consider consumer sophistication. Ms. Manning attests that the price point for Opposer's goods is \$110, and her target market is an urbane, family and career-oriented woman in her 40s with an annual income of at least \$150k.<sup>25</sup> Opposer's goods thus are marketed toward a more sophisticated consumer of perfumes and fragrances. As discussed above, Applicant's goods identified without limitation must be presumed to include perfumes and fragrances at all price points, including more expensive fragrances marketed to more discriminating purchasers.

To the extent we accept that the identical goods may be marketed to more careful purchasers with more discriminating tastes, we expect that with identical marks used on identical goods, even a careful, sophisticated consumer is likely to be confused by identical marks. As stated by the Federal Circuit, "[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) quoting *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). Moreover, the applicable standard of care is that of the least sophisticated consumer. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004).

Therefore, the fact that the purchasers may exercise care before purchasing these goods does not mean there can be no likelihood of confusion. In the present case, the

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<sup>25</sup> Manning affidavit at para 3; 11 TTABVUE 3.

identity between the marks and the identity between some of the goods as identified outweigh any sophisticated purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods.)

This *DuPont* factor is neutral or slightly favors a finding of no likelihood of confusion.

#### D. Actual Confusion

Applicant points out that there is no evidence of actual confusion. However, it has often been recognized that such evidence is very difficult to obtain. *Lebanon Seaboard Corp. v. R&R Turf Supply Inc.*, 101 USPQ2d 1826, 1834 (TTAB 2012). Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion. It is not necessary to show instances of actual confusion to establish likelihood of confusion. *Herbko Int'l. v. Kappa Books*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Weiss Assocs., Inc. v. HRL Assocs., Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1843 (Fed. Cir. 1990).

This *DuPont* factor is neutral.

#### V. Conclusion

We have carefully considered all of the parties' testimony affidavits and other evidence pertaining to standing, priority of use and the relevant *DuPont* factors, as

well as all of the parties' arguments with respect thereto, including any evidence and arguments not specifically discussed in this opinion.

We conclude that Opposer has established its standing, priority of use and that consumers familiar with Opposer's goods under its common law PERFUME WITH A PURPOSE mark would be likely to believe, upon encountering Applicant's identical applied-for mark for its in-part identical goods, that the parties' goods originate with or are associated with or sponsored by the same entity. In making our determination, we have balanced the relevant *DuPont* factors. The factors of the identity of the marks and identity in part of the goods and presumed identity in trade channels and consumers weigh strongly in Opposer's favor. Any consumer sophistication is insufficient to outweigh the *DuPont* factors favoring a finding of likelihood of confusion.

**Decision:** The opposition is sustained on the ground of likelihood of confusion, and registration to Applicant is refused.