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Panel Session III:

Describe your best defense: trade mark infringement or not?

When accused of trademark infringement, one of the defenses regularly raised is that the allegedly infringing use constitutes descriptive use of a characteristic of the product at issue (to be distinguished from decorative use, or comparative advertising). This Panel Session will address to what extent this defense can be raised in various jurisdictions and what criteria must be met for it to succeed.

In the US, this defense is known as descriptive fair use and it can be argued when the trademark itself is descriptive in nature and the manner of use by the defendant is purely descriptive. In the EU, it is required that the use is "in accordance with honest practices in industrial or commercial matters". In countries where the defense is not provided for in the trademark law, there may be unfair competition issues.

The panelists will discuss what can be defined as "classical descriptive use", showcasing examples to illustrate this. In this respect, also the question in what circumstances use is (and is not) "fair" or "honest" will be addressed.