

## **GENERAL TERMS OF SALE ON INTERNET: TO COPY OR NOT TO COPY, THAT IS THE QUESTION!**

It can be tempting for an online merchant to download the general terms of sale (GTS) available on a competitor's website.

Indeed, GTS seem to be all the same, especially when it comes to online commerce. So, instead of making some bad adjustment of existing GTS, why not simply copy and paste existing ones?

This was the reasoning of a company named KALYPSO when it prepared to launch its online selling activities of children's wear. This company found that the GTS of the well known website VentePrivée.com were fit for its activities and therefore purely and simply copied them on its own website.

VentePrivée.com did not appreciate the move and sued KALYPSO for infringement, unfair competition and economic passing off.

The Court of appeal of Paris ruled in favour of the plaintiff (4<sup>th</sup> Chamber, 24 September 2008). The Court judged that the GTS were not protected under a copyright, and that the facts which the KALYPSO was blamed for did not constitute a case of unfair competition because there was no risk of confusion for the customers.

Nevertheless, the Court judged that copying the VentePrivée.com GTS constituted an "economic passing off", characterized when a company "*draws its inspiration from or copies another company's economic asset, which is individualized and provides a competition advantage, as a result of know-how, intellectual work and investments*".

The Court of appeal considered that the drafting by VentePrivée.com of its GTS was part of the various investments that this company had to make when it launched its activity, whose purpose was to provide its customers with legal security, thus participating to the success of the website.

The Court decided that the fact that KALYPSO merely appropriated this investment, without any financial consideration, constituted a case of economic passing off.

The fault of KALYPSO being therefore established, the court had to set the appropriate compensation which VentePrivée.com could be entitled to.

VentePrivée.com claimed a compensation of 25,000 euros, as well as an advertising measure.

The Court of appeal awarded him 10,000 euros for the damage suffered, and 3,000 euros for lawyers' fees, but rejected the advertising measure because KALYPSO had promptly removed the litigious GTS when VentePrivée.com asked the latter to do so.

This sentence was not symbolic: on top of the amount of the damages, KALYPSO had to defend itself in court, so that at the end of the day, copying VentePrivée.com' GTS cost the company around 30,000 euros.

In these conditions, it is wiser – and much cheaper - to refrain oneself from copying a

competitor's GTS and rather ask a professional to draft tailor-made GTS...

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*Ichay & Mullenex Avocats is a French law firm focusing on all legal issues related to the new technologies in France and abroad. They are considered experts in intellectual property and Internet law, e-commerce, online gaming, data protection. Ichay & Mullenex Avocats also assists its clients on all issues related to financing, mergers & acquisitions, restructuring, etc. and advises them on their litigation and arbitration procedures.*

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