Are Sellers Bound by Mistakes in Online Advertisements?

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Is an e-retailer bound by incorrect prices on its website? Can a customer create a binding agreement merely by accepting the offered price? What if the seller acknowledges the customer's order through an automatic email confirmation, and then tries to cancel the sale once it realizes that the advertised price was incorrect?

These issues have existed for decades in the catalog and mail order industry, but courts in the United States have not yet addressed these questions for online commerce. However, the resolution of consumer complaints in Germany and the United Kingdom may provide guidance for U.S. e-retailers seeking to restructure their websites to avoid potential litigation.

German Approach

German courts have recently issued two inconsistent decisions concerning the validity and the voidability of agreements entered into online which involve the acceptance of offers through automatic email confirmations (also known as auto-replies). Although both courts agreed that an auto-reply to a customer's order for goods over the Internet constitutes a valid acceptance, they disagreed on the grounds for voiding such acceptances.

In a case decided by the Higher Regional Court of Frankfurt Main on November 20, 2002, an Internet computer vendor mistakenly displayed on its website a price for its goods that was only one percent of the actual price. A customer ordered a computer and related products at the incorrect low price and received an automatic email acceptance from the seller one minute later. On the following day, the seller became aware of the mistake and asked the customer whether he was willing to pay the correct price, which he refused. The customer then sued the seller for fulfillment of the contract at the displayed price. The court dismissed the claim, finding that the seller's erroneous invitation to make a bid also affected the validity of the customer's offer. Since the seller could not adjust its acceptance, which was sent out automatically, the court allowed the seller to void its acceptance of the customer's order.

In contrast, on April 16, 2003, the Regional Court of Cologne was not willing to void an acceptance based on an auto-reply. In that case, a seller of electronic devices accepted a customer's offer to buy a projector for € 3,001.55 by, once again, sending an auto-reply to the customer. The amount,

however, was incorrectly displayed on the seller's website at half the seller's actual price. The Regional Court of Cologne did not allow the seller to void its acceptance, finding that by choosing to accept offers by means of auto-replies the seller waived its opportunity to review the offer that it accepted. Additionally, the court noted that the seller could have sent an order confirmation to its customer that would have allowed the seller not to accept the customer's offer at the lower price. The Cologne court did not share the Frankfurt court's view that an erroneous invitation to make a bid would affect the validity of the customer's offer. Instead, the Cologne court analogized from a case in which a product in a shop window bears the wrong price. In both situations, if the responsible sales person accepts a customer's offer at the displayed price, the Cologne court concluded that there would not be an error entitling the seller to void its acceptance.

English Approach

In England, similar situations have arisen in online commerce, but no cases have yet been decided in court or settled openly. The first instance involved Argos, a catalogue retailer, who advertised a TV on its website for £2.99, one one-hundredth of its normal price. Argos received orders worth over £1 million, none of which were acknowledged electronically. Argos argued that no contract was formed between it and those placing the orders, because there was no confirmation of the orders from Argos. The few cases brought against Argos were settled confidentially. It is believed that Argos did not fulfill the majority of those orders.

In the second instance, Kodak advertised a digital camera as a special offer for £100, just under one third of the normal price. Kodak's standard terms did not set out explicitly when a binding contract was formed between it and the customer. Kodak refused initially to honor the orders it received, arguing that its standard terms allowed Kodak to change the content of its website, including pricing, at any time. Alternatively, Kodak argued that, if there was a contract formed, that contract could be void by reason of "mistake" (that is—the price of the goods offered was so low that there was obviously a mistake).

Kodak's refusal to fulfill orders was widely reported. The common legal view was that Kodak would lose any actions brought against it because (a) its standard terms were unfair to the consumer; (b) a camera worth £300 being sold as a special offer for £100 was not an obvious mistake; and (c) Kodak's automatic reply not only acknowledged the order, but used the words "this contract." Kodak bowed to pressure and fulfilled the orders, at a loss of millions of pounds.

In addition to English contract law, a number of legislative provisions may provide guidance for the resolution of disputes arising from e-commerce auto-reply purchases:

- The Consumer Protection Act 1982 makes it a criminal offence to falsely describe goods or services in the course of a trade or business and provides the Office of Fair Trading (OFT) with additional powers to combat misleading advertising. The OFT is able to seek a High Court injunction to prevent the continued display or publication of such advertisements. While there is no criminal sanction under this legislation, action can be taken against advertisers who mislead the public.

- The Unfair Terms in Consumer Contracts Regulations provide that a consumer is not bound by a standard term in a contract with a seller or supplier if that term is unfair. Those regulations also give the OFT powers to stop the use of unfair standard terms, if necessary by obtaining a court injunction. Ultimately, only a court can decide whether a term is unfair.

- Under the Control of Misleading Advertisements Regulations 1988, the OFT can apply to the High Court for an injunction preventing the further publication of a misleading advertisement.

- Under the European Union's Distance Selling Regulations, consumers shopping for goods and services via the Internet and other types of distance communication now have a right of withdrawal (see our August 10, 2000 Internet Alert). U.S. Approach Courts in the United States have not yet addressed the enforceability of Internet purchases when the seller discovers, after an automatic email confirmation has been sent, that the wrong price was posted on the website.

In the context of off-line purchases, however, the general presumption is that a contract is voidable if the error is substantial and the other party is notified prior to making an irreversible change of position. For example, in *Donovan v. RRL Corp.* (Cal. 2001), the court found that rescission was warranted when the advertised price of an automobile was approximately 32% of the price the seller intended due to a typographical error caused by a local newspaper. Although the advertisement for the sale of a particular vehicle at a specific price constitutes an offer that is accepted when a customer tenders the advertised price, the common law of contract generally permits rescission for a unilateral mistake of fact when: (1) the seller makes a mistake regarding a basic assumption of the contract, i.e. price; (2) the mistake has a material adverse effect on the seller; (3) the seller does not bear the risk of the mistake; and (4) enforcement is unconscionable. A similar result was reached in *O'Keefe v. Lee Calan Imports, Inc.*, finding that a newspaper advertisement that includes an incorrect price through no fault of the advertiser and does not require buyer's performance is only an invitation to make an offer and does not create a binding contract.

Although U.S. courts have not addressed whether an automatic email confirmation to an incorrect price creates a binding contract, disputes similar to those in Germany and the UK have arisen in the United States. In February 1999, during a four-day period, Buy.com mistakenly listed the price for a computer monitor as $164.50, approximately $400 less than its normal list price. The company blamed the glitch on a typographical error and initially agreed to sell only the stock on hand on a first-come, first-served basis. The company canceled the other orders even though, in some cases, customers received purchase confirmations and their credit cards were already charged. A group of customers filed a class-action lawsuit against the e-retailer, seeking damages, "restitution of property," and revenue from the ad banners that appeared on the page advertising the monitor. The company agreed to settle the claim for $575,000, whereby approximately 7,000 affected customers would receive about $50 each. Although it is not clear what the company's terms of use stated at the time of the incident, the e-retailer currently includes a disclaimer that reserves the right to refuse or cancel an order for a product listed at an incorrect price resulting from a typographical error.

In a similar incident, e-retailer Ashford.com mistakenly listed a Gucci watch as costing $0. The company sent customers an order confirmation for the $0 price that included a disclaimer stating that the company is not responsible for, and will not honor, pricing mistakes. In a follow-up email, the company indicated that the price was a mistake and the watches were not in stock. Subsequently, the seller removed the watches from the site and none of the orders were fulfilled.

Despite the lack of litigation dealing with whether an e-retailer's auto-reply constitutes a binding contract, one case indicates that an email confirmation may constitute acceptance of an offer. In *Lim v. The .TV Corp. Int'l.* (Cal. Ct. App. 2002), an e-retailer offered the domain name "Golf.tv" for registration through its Internet website. The customer submitted a bid for the name and authorized the seller to charge his credit card for the amount of his bid. Although the seller sent the customer an email indicating that his bid had been accepted, the seller later argued that the email was sent by a technical error and no contract had been formed. The court found that even if the website announcement for the domain name was not an offer, but rather was an invitation to make an offer, the customer's bid was an offer that was accepted by the email response.

Example of an e-retailer policy

Amazon.com provides an example of an e-retailer who has incorporated a policy into its website to deal with potential pricing mistakes in online purchases. In contrast to Kodak's website terms discussed above, Amazon provides a direct link to its pricing policy from its terms of use. In its pricing statement, Amazon explicitly notes that the price of any item is not confirmed until the customer completes the order. In addition, Amazon indicates that items in the catalog may be mispriced and the price will be verified prior to shipment. If the correct price is lower than the stated price, Amazon will charge the lower price and ship the item. If the correct price is higher, Amazon will, at its discretion, either contact the customer prior to shipment or cancel the order and notify the customer of the cancellation.

Despite these precautions, however, Amazon has been involved in several controversies regarding incorrect pricing on its Internet sites. In the most recent controversy in the U.K., Amazon mistakenly advertised iPaq handheld computers at less than one fiftieth of the retail price. Amazon was able to avoid large losses because its terms of sale stated clearly that a contract for sale was not formed until the goods were dispatched, giving Amazon the right to reject the many orders it received. The contents of Amazon's automatic responses to the orders were consistent with those standard terms. Similarly, in the United States, Amazon mistakenly advertised a memory module at approximately 10% of its normal price and DVDs at approximately 75% of their list price. The company sent email notices to the affected customers, in accordance with their posted pricing policy, asking them to pay the higher price or cancel their order. Nevertheless, several customers filed deceptive advertising complaints with the Federal Trade Commission and the Better Business Bureau. It is unclear how these complaints were resolved.

Conclusion

The litigation of online commerce cases in Germany and the United Kingdom may provide guidance for U.S. e-retailers on how to handle the issuance of auto-reply purchase confirmations. The

English and German cases seem to indicate that the terms of a contract are binding if a seller has made sufficient efforts to bring the terms to the attention of the buyer and if the parties agree to the terms. It is therefore important for a potential online buyer to see and accept the terms before an order is placed. The terms should permit the seller to reject orders at any stage before dispatch. Any automatic response to an order should remind the buyer that a binding contract has not been entered into and the price is subject to change until shipment. In spite of these precautions, however, an e-retailer may still face potential litigation and consumer complaints regarding any incorrect prices confirmed by auto-reply emails.