

SEARCH

THE WEB CNN.com

SEARCH

- Home Page
- Asia
- Europe
- U.S.
- World
- World Business
- Technology
- Science & Space
- Entertainment
- World Sport
- Travel
- Weather
- Special Reports
- Video
- I-Reports

ONLY ON CNN

- CNN Pipeline
- What's On
- Art of Life
- Business Traveller
- Future Summit
- Inside the Mideast
- Principal Voices
- Quest
- Revealed
- Talk Asia
- Services
- Languages

# LAW CENTER

## FindLaw

### Web sites change prices based on customers' habits

By [Anita Ramasastry](#)  
FindLaw columnist  
Special to CNN.com

Friday, June 24, 2005 Posted: 1914 GMT (0314 HKT)

**According to a recent study, many consumers are unaware that price discrimination occurs over the Internet. But apparently, it does.**

The Internet allows shoppers to easily compare prices across thousands of stores. But it also enables businesses to collect detailed information about a customer's purchasing history, preferences, and financial resources -- and to set prices accordingly

So when you buy an airplane ticket or a DVD online, you may pay a higher -- or lower -- price than another customer buying the very same item from the very same site.

Why? Because the information the site has compiled on you suggests that you may be willing to pay more -- or less -- than others for that item. Or, perhaps, because the company is conducting random price tests to figure out what the ideal price point is for its product.

When the price charged isn't random, though, this practice -- the practice of charging different prices to different consumers based on their profiles -- is often referred to as price customization or "dynamic" pricing. But many consumers, angry about the practice, feel that these are simply euphemisms for unequal and unfair treatment.

Offline, different customers often pay different prices. But when they do, they usually know it; everyone knows the pricing at, say, flea markets or street bazaars can be flexible. And everyone knows that the "sticker" price on a car is not the typical purchase price. It serves, rather, as a starting point for further negotiation.

Offline, the price differentials may be based on different haggling skills. Or they may be based on what the seller, sizing up the customer, thinks she can afford, or is willing to pay. Or they may be based on geography: National brick-and-mortar retailers often charge more to, say, California customers than, say, customers in Missouri.

Online, similar dynamics occur. But it is often less obvious to the customer when, and if, price differences exist, and customers have less control.

The person who walks into a used car dealership in a costly suit and gets offered the most expensive car on the lot, at an exorbitantly inflated price, probably knows exactly what's going on. Also, she might have avoided some of the price inflation by wearing ripped jeans, rather than her best Armani.

Lawyers.com<sup>SM</sup>

Area of Practice

City:

State

FOR THE PUBLIC

Select a topic

[Legal commentary from FindLaw's Writ](#)



LAW DICTIONARY

But the same person, buying a plane ticket online, may not realize that her high wages and pricey lifestyle are translating into pricey plane tickets. Nor may she have any ability to bargain or haggle; instead, it is inter-seller competition that keeps prices competitive. Online, then, her Armani lifestyle may mean she pays an Armani-style price for the very same ticket others are getting at a Target-style discount. She may not even know this is occurring, let alone be able to control the process in any way.

Is this kind of "price customization" legal? Should it be? These are the questions I'll address in this column.

### **The law and Internet pricing**

In early June, the Annenberg Center at the University of Pennsylvania released a new study, "Open to Exploitation," which addressed online price discrimination among other subjects.

The study revealed that nearly two-thirds of adult Internet users surveyed believed incorrectly that it was illegal for online retailers to charge different people different prices. It also noted that two-thirds of people surveyed said they believed online travel sites are required by law to offer the lowest airline prices possible to all customers.

Not only did the survey participants think price customization was illegal, they also strongly believed it ought to be. According to the study, 87 percent of people surveyed strongly objected to the practice of online stores charging people different prices for the same products based on information collected about their shopping habits.

The report was based on results from a telephone poll, conducted in February and early March, of 1,500 adults who said they had used the Internet within the past 30 days. The margin of sampling error was described as plus or minus 2.51 percentage points.

### **Evidence on differential pricing**

The reality is that Internet price customization does exist -- and, contrary to popular opinion, is typically legal for the reasons I will explain below.

The Annenberg study identified instances of price customization on the Internet. A retail photography Web site, for example, charged different prices for the same digital cameras and related equipment, depending on whether shoppers had previously visited popular price-comparison sites.

Another report indicated that Dell Computer has offered the same model laptop at different prices to different customers: small businesses, health care companies, and state and local businesses were offered different deals.

In September 2000, Amazon.com outraged some customers when its own price discrimination was revealed. One buyer reportedly deleted the cookies on his computer that identified him as a regular Amazon customer. The result? He watched the price of a DVD offered to him for sale drop from \$26.24 to \$22.74.

The company said the difference was the result of a random price test and offered to refund customers who paid the higher prices. And apparently, Amazon had experimented with such random price tests more than once: Consumers also discovered in 2000 that Amazon was using dynamic pricing when customers comparing prices on a "bargain-hunter" Web site discovered that Amazon was randomly offering the Diamond Rio MP3 player for up to \$51 less than its usual \$233.95 price.

### **Justification for customization?**

Are there legitimate differences among customers that might explain why a site might want to offer different customers different prices? In some cases, yes

Stores may try to retain loyal customers. "Cookies" stored on our PCs may alert a retailer to the fact that we have visited a certain site more than once. The retailer may respond to our loyalty by dropping prices for us. After all, we're buying in quantity, over time.

Ironically, stores may specially reward those who don't bargain hunt and thus bring in more revenue. The constant coupon code user may be charged higher initial prices,

while the buyer who never bothers to price-compare (shopping on the favorite site despite a competitor's sale) and never uses coupon codes may get price breaks in return.

Stores may also take account of which customers are demanding when it comes to customer service. Repeat complaints -- or constant returns -- might then lead to a higher price. Or, more innocuously, demanding customers might be offered different deals, such as longer warranties, that fit their habit of asking for frequent service.

Also, even when there are no differences among customers, one might think that random price drops -- such as those Amazon says it uses -- are innocuous, since in theory, every customer is equally likely to benefit from the lower prices, though in fact, only some do. Also, the prices aren't tailored to particular customers' profiles, if they are offered truly randomly, so if it is the tailoring aspect that is troubling, random price drops eliminate it.

### **Is differential pricing illegal?**

Charging different prices to different customers is generally legal.

The practice could be illegal, however, if the reason for the difference were reliance on a "suspect category" such as race, religion, national origin or gender.

The practice could also be legal if it violates antitrust or price-fixing laws.

The federal Robinson-Patman Act requires sellers to treat all competing customers on the same basis, unless there is some recognized legal justification for different treatment. But the act is targeting anticompetitive effects -- which are unlikely to arise in the highly competitive online market.

The very bargain-hunting message boards and comparison sites that have uncovered differential pricing, also discourage monopolies. Online, an Albuquerque, New Mexico, company can undercut a Syracuse, New York, company, and vice-versa; meanwhile, new or gently-used options on Ebay provide still more competition.

Finally, the Federal Trade Commission (FTC) could get involved here if it so chose, but only to a limited extent. The FTC can police against "unfair and deceptive" trade practices. Thus, it probably has the power to regulate the type of information that can be collected online, in order to make decisions about differential prices, and how such information can be used. But I am not aware of any initiative to aggressively do this on the part of the FTC.

### **Challenge to customization**

Some feel that consumers deserve and have more legal protection than the discrimination and antitrust laws afford, however.

Accordingly, in 1996, consumers sued based on allegations that Victoria's Secret distributed different versions of its catalog that offered different prices to different customer groups for the same items. They made the creative legal argument that this practice, if proven, would violate the Racketeer Influenced and Corrupt Organizations Act (RICO).

Originally drafted to combat organized crime, RICO, by its broad language, can also apply when an organization has been involved in a pattern of the commission of certain federal crimes, including mail or wire fraud.

Here, the plaintiffs argued that it was mail fraud to send multiple versions of a mail-order catalogue with different prices for the same goods. But Judge Robert W. Sweet of the U.S. District Court for the Southern District of New York disagreed and dismissed the claims.

Indeed, the judge felt so strongly that the lawsuit was without merit, that he even imposed sanctions on the plaintiff's attorney for filing a frivolous lawsuit. That is a rare measure that requires the judge to find that not only were the plaintiffs' claims not valid within the law, they were not even based on a good-faith argument for the law's extension.

### **Customization disclosure**

Even though we sometimes each pay different prices for goods in the offline world, why are consumers upset about price customization for online sales? Perhaps I should say, more specifically, electronic sales. This can happen offline as well, now that electronic data can be accessed at supermarket checkouts, for example.

I suggested one reason earlier: Unlike in a bazaar or car dealership, online customers are sometimes ignorant of the fact that they may be paying different prices than others in the first place - and they don't like to be in the dark.

Customers may also feel powerless, even when they do have information: Even if I know that a company has offered the same DVD to another consumer for a lower price, I cannot necessarily use this information to haggle the price down; the Web site simply may not let me purchase at the lower price.

Another reason may be the individualization of online pricing. Charging someone a higher price for a car based on his fancy suit is one thing. But charging someone a higher price based on a sophisticated electronic dossier -- one that contains information about his shopping history, spending patterns, credit card accounts, and more -- seems creepily precise and individualized.

Although some don't consider financial data very personal, some do; and price customization has been one major engine for the kind of compilation of dossiers that has gotten privacy advocates up in arms.

**Is disclosure desirable?**

The Annenberg study urged government to require retailers to disclose exactly what information is collected about customers, and how the data is used. This may help consumers to some extent.

But it may also simply create more cumbersome disclosures that no one has time to read: What was the last time you read a Web site's "Terms and Conditions" before clicking to agree to them?

Fortunately, if a disclosure regime is put in place, intermediaries -- from Consumer Reports, to online bargain-shopping sites may be able to make it easier for customers.

Such intermediaries could rank sites as to whether -- and how flagrantly -- they price-customize, driving customers away from the worst offenders if they object to the practice.

It's unrealistic to expect customers will read complex terms and conditions for every site at which they shop online, so even if those terms and conditions briefed us on price customization, the information might go unread

Perhaps we should simply stick to those bargain hunter Web sites and message boards. Consumers can continue to report on the prices they have paid. Surely, this will expose price customization, as was the case with Amazon. If it bothers a consumer, he can choose to shop at a Web site that treats us all the same.

Anita Ramasastry, a [FindLaw](#) columnist, is an associate professor of law at the University of Washington School of Law in Seattle and a director of the Shidler Center for Law, Commerce & Technology.

---

**Story Tools**

[SAVE THIS](#) [E-MAIL THIS](#)

[PRINT THIS](#) [MOST POPULAR](#)

advertisement

[Click Here to try 4 Free Trial Issues of Time!](#)



---

**TOP STORIES**

[Home Page](#)

[Get up-to-the minute news from CNN](#)

**TOP STORIES**

[Home Page](#)

[Get up-to-the minute news from CNN](#)

CNN.com gives you the latest stories and video from the around the world, with in- CNN.com gives you the latest stories and video from the around the world, with in-

depth coverage of U.S. news, politics, entertainment, health, crime, tech and more.

depth coverage of U.S. news, politics, entertainment, health, crime, tech and more.

[CNN U.S.](#)

Languages ▾

[CNN TV](#)

[E-mail Services](#)

[CNN Mobile](#)

[CNNAvantGo](#)

[Ad Info](#)

[About Us](#)

[Preferences](#)

**SEARCH**



THE WEB



CNN.com

SEARCH

© 2007 Cable News Network LP, LLLP.  
A Time Warner Company. All Rights Reserved.  
[Terms](#) under which this service is provided to you.  
Read our [privacy guidelines](#). [Contact us](#). [Site Map](#).

External sites open in new window ; not endorsed by CNN.com

[Pay service with live and archived video.](#) [Learn more](#)

[Download audio news](#) | [Add RSS headlines](#)