

Price Discrimination: The Emerging Flaw of Digital Labeling

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Surveillance pricing changes fundamental fairness in creating a world where consumers are left in the dark on how much they will have to pay for goods compared to their counterparts. Surveillance pricing defies normal supply and demand and instead uses consumer algorithms and artificial intelligence (AI) to set personalized prices based on a customer's ability or willingness to pay.¹ Surveillance pricing can use data factors such as an individual consumer's location, personal demographics, virtual history, and credit history to then categorize the consumer's data to a set of different targeted prices for products and services.² The goal of surveillance pricing for business users is to set the highest price they think a customer is willing to pay based on their data.³ These advanced methods of profit maximization have the potential to violate the privacy of consumers, but to also be viewed as price discrimination.

Companies violate consumer privacy with surveillance pricing by secretly collecting consumer data and using it for unexpected and out-of-context purposes.⁴ If a company raises the price of a good for a specific consumer this could influence their choice by choosing a product which is cheaper, but that they normally would have not purchased, or extracting more money from an individual than they do from other consumers. Price discrimination, through charging buyers' different prices for the same "commodity" or discriminating in "allowances," is the core function of surveillance pricing, which is prohibited by the Robinson-Patman Act.⁵

Surveillance pricing has been more common online, but controversy has arisen after grocery stores began to consider its use in-store.⁶ For example, Cooler Screens, a tech business with controversial partnerships with Walgreens and Kroger, has shared its recent capability of using facial detection to infer features such as age or gender to best serve consumers targeted ads.⁷

¹ Christopher S. Finnerty, Shaina M. Lefkowitz, Taylor A. Listau. *What Really is Surveillance Pricing? The FTC is Trying to Figure it Out*. K & L GATES (Aug. 2, 2024). <https://www.klgates.com/What-Really-is-Surveillance-Pricing-The-FTC-is-Trying-to-Figure-it-Out-8-2-2024>.

² *Id.*

³ Mayu Tobin-Miyaji, *Kroger's Surveillance Pricing Harms Consumers and Raises Prices, With or Without Facial Recognition*. ELECTRONIC PRIVACY INFORMATION CENTER (Feb. 14, 2025). <https://epic.org/krogers-surveillance-pricing-harms-consumers-and-raises-prices-with-or-without-facial-recognition/#:~:text=Companies%20engaged%20in%20surveillance%20pricing,customer%20ultimately%20pay%20for%20products>.

⁴ *Id.*

⁵ *Price Discrimination: Robinson-Patman Violations*, FED. TRADE COMM'N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations>.

⁶ See, Keith A. Spencer, *Hotel booking sites show higher prices to travelers from Bay Area*, SFGATE (Feb. 3, 2025), <https://www.sfgate.com/travel/article/hotel-booking-sites-overcharge-bay-area-travelers-20025145.php> (Hotel booking sites charging higher prices for consumers browsing in the Bay Area); See also, Daniela Boscan, *New Tech, Better Outcomes: Digital Shelf Labels Are a Win for Customers and Associates*, WALMART (June 6, 2024), <https://corporate.walmart.com/news/2024/06/06/new-tech-better-outcomes-digital-shelf-labels-are-a-win-for-customers-and-associates> (Walmart announces expansion of digital shelf labels to 2,300 stores by 2026).

⁷ See *supra* note 3.

A majority of jurisdictions lack rules to even notify consumers of facial recognition being used on them or to prevent collected biometric data from being used for other purposes.⁸ How jurisdictions approach this emerging invasive technology has the potential to change how we previously protected against price discrimination, and instead wrongly puts consumers at the hands of corporate profits.

⁸ *Id.*