



hosting their own websites or publishing their own apps, also be first parties. Website publishers that allow the collection of data for IBA by third parties on their websites must provide a clear, meaningful, and prominent link to a disclosure of the IBA activity occurring on its website. This disclosure should also provide consumers with a means to opt out of this IBA activity and state the website's adherence to the DAA Principles. Third-party companies that collect cross-app data<sup>4</sup> through mobile devices for IBA must provide notice and an easy-to-use opt-out mechanism to meet the requirements of the Mobile Guidance.

## COMPANY STATUS

Adbrain is a digital marketing company that provides a number of services for advertisers to deliver targeted ads to consumers.<sup>5</sup>

## INQUIRY

This case arises from a consumer complaint that Adbrain's website ([www.adbrain.com/](http://www.adbrain.com/)) allowed third parties to collect users' data for IBA without providing notice and choice to these users as required under the OBA Principles. In response to the complaint, the Accountability Program reviewed Adbrain's website where we observed data collection by at least one third-party company known to engage in IBA. This prompted an examination of Adbrain's compliance with all applicable requirements in the DAA Principles.

### I. Review of Adbrain's Compliance with First-Party Requirements of OBA Principles

The Accountability Program first looked for an enhanced notice link on the Adbrain website. We examined links labelled "Privacy Policy" and "Opt Out" located on the website's footer to see if either of them took users to an IBA disclosure. However, neither link took us directly to a disclosure of the third-party IBA activity occurring on the Adbrain website, as required by the OBA Principles. We next located a "Cookie Policy" link, but this link, too failed to direct us to a compliant IBA disclosure. Since none of these links took us **directly to** Adbrain's discussion of third-party data collection for IBA **on its own website**, they did not serve as compliant enhanced notice links. We located no other links that could constitute enhanced notice under the OBA Principles.<sup>6</sup>

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Advertising on a non-Affiliate's Web site.") *Mobile Guidance* Definition N at 12. ("An entity is a Third Party to the extent that it collects Cross-App or Precise Location Data from or through a non-Affiliate's application, or collects Personal Directory Data from a device.")

<sup>4</sup> *Mobile Guidance* Definition D at 5. ("Cross-App Data is data collected from a particular device regarding application use over time and across non Affiliate applications. Cross-App Data does not include Precise Location Data or Personal Directory Data.")

<sup>5</sup> See generally Adbrain, *About Adbrain*, <http://www.adbrain.com/about#about-us> (last visited Mar. 16, 2017).

<sup>6</sup> See *In re: Gravity (56-2015)*, Nov. 4, 2015, at 5 available at <https://www.bbb.org/globalassets/local-bbbs/council-113/media/asrc-documents/gravity-decision.pdf>. ("The enhanced notice link, which commonly is represented by the Advertising Option Icon (AdChoices Icon or Icon) and often also uses the phrase "AdChoices," should take consumers directly to the place on the third party's own website where the third party explains its IBA activities, including the types of data collected, how it uses that data, whether it transfers the data to other, unaffiliated companies, and how the consumer can opt out of IBA from the disclosing company's IBA practices.")

We then manually searched the Adbrain website for the presence of a compliant IBA disclosure. We located a description of third-party IBA taking place on the Adbrain website on Adbrain’s “Cookie Policy” page ([www.adbrain.com/legals/cookie-policy](http://www.adbrain.com/legals/cookie-policy)). We also found statements of adherence to the “Interactive Advertising Bureau principles”<sup>7</sup> and the “European Advertising Standards Alliance Best Practise Recommendations for Online Behavioural Advertising” on Adbrain’s “Privacy Policy” page (<http://www.adbrain.com/legals/privacy-policy>). Finally, we located a link to the European Interactive Digital Advertising Alliance (EDAA) website (<http://www.edaa.eu/edaa-for-users/>). However, we found no statement of adherence to the DAA Principles.

## II. Review of Adbrain’s Compliance with Third-Party Requirements of Mobile Guidance

While on the Adbrain website, the Accountability Program noted that Adbrain stated that it conducts IBA on mobile devices as a third party. Seeing this, the Accountability Program expanded its review of Adbrain to check for potential compliance issues under the Mobile Guidance.

The Accountability Program first examined Adbrain’s mobile IBA opt out, located on the “Opt Out” page referenced in section I, above. When the Accountability Program visited the Adbrain “Opt Out” page, we found instructions for using Adbrain’s mobile opt out. Adbrain instructed users to enter into a text box the “device ID” of the mobile device they wished to opt out. Once users had completed this step, they were instructed to then click a turquoise button labelled “Opt out” located directly beneath the field to effectuate the opt out. While the Accountability Program appreciated that Adbrain provided a tool for users to opt out from its in-app IBA, we noted a number of difficulties the average consumer would face in attempting to opt out, which we describe below:

- i. Nowhere on the “Opt Out” page did Adbrain provide a definition of the “device ID” requested by its opt-out mechanism. This created the concern that a user may not know what a “device ID” is or may wonder whether “device ID” referred to an Android or iOS operating system ID, the IMEI/MEID of the phone, the IDFA/IFA/AAID, or WiFi radio MAC address, etc. Without telling a user which “device ID” he or she is to enter, the user is unlikely to know what to enter in order to opt out.
- ii. Even if the user manages to select the correct ID from the possible options, he or she must still locate and correctly enter the characters into the “device ID” field. In the case of an Android Advertising ID, for example, this would require a user to locate

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<sup>7</sup> We note that all IAB members are required by the IAB Code of Conduct to comply with the OBA Principles and should reference their adherence to the Principles directly. *See* Interactive Advertising Bureau, *IAB Code of Conduct*, [https://www.iab.com/wp-content/uploads/2015/06/IAB\\_Code\\_of\\_Conduct\\_10282-2.pdf](https://www.iab.com/wp-content/uploads/2015/06/IAB_Code_of_Conduct_10282-2.pdf) (last visited June 26, 2017). (“The IAB participated in the development and the endorsement, with other industry groups, of the Self-Regulatory Principles for Online Behavioral Advertising. In this regard, the IAB Code of Conduct will facilitate and encourage industry adoption not merely by encouraging participation, but by making compliance with the Principles a prerequisite and a hallmark of IAB membership.”)

and key in the 32-character alphanumeric ID (AAID or IFA)<sup>8</sup> from the Google Settings screen, separated correctly by dashes, with no typographical errors. In the case of an iOS Unique Device Identifier (UDID or IDFA),<sup>9</sup> a typical user would be required to search the Internet for how to locate this ID, determine which instructions apply to her device, understand the instructions provided, and, in many cases, download a third-party application in order to extract the ID from her phone.

- iii. Finally, if a user inputs an incorrect string, she receives a message stating that the “Device ID should be a 40 character long alphanumeric string, or an alphanumeric string in “xxxxxxxx-xxxx-xxxx-xxxx-xxxxxxxxxx format where x is an alphanumeric character.” The Accountability Program found that this message did not provide meaningful instructions to users on how to obtain their device ID and was therefore unlikely to assist the average user in opting out.

In sum, Adbrain’s opt-out instructions and mechanism appeared to be so incomplete and cumbersome, respectively, as to present serious issues under the Mobile Guidance.

Finally, looking at Adbrain’s privacy notices, we found a compliant description of the data collection and use practices Adbrain engages in for mobile IBA. However, as discussed in the previous section, we did not locate a statement of adherence to the DAA Principles, which raised a potential compliance issue under the third-party notice provisions of the Mobile Guidance.

Following its review, the Accountability Program sent an inquiry letter to Adbrain detailing these issues in order to bring the company into compliance with the DAA Principles.

## ISSUES RAISED

A party may be both a first and a third party depending on its function in a set of circumstances.<sup>10</sup> As a website owner and operator, Adbrain is a first party under the OBA Principles, and as a

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<sup>8</sup> Greg Sterling, *Google Replacing “Android ID” with “Advertising ID” Similar to Apple’s IDFA*, Marketing Land, Oct. 31, 2013, <http://marketingland.com/google-replacing-android-id-with-advertising-id-similar-to-apples-idfa-63636>. See also Grace Fletcher, *The Impact of iOS 7 on Mobile Attribution*, Tune.com blog, Aug. 27, 2013, <http://www.tune.com/blog/impact-ios-7-mobile-attribution/>. See also DoubleClick, *Target Mobile Apps With IDFA or AAID*, DoubleClick Ad Exchange Buyer Help, <https://support.google.com/adxbuyer/answer/3221407?hl=en> (last visited Apr. 20, 2016). See also *Mobile Guidance* Definition D at 5. (“Cross-App Data is data collected from a particular device regarding application use over time and across non-Affiliate applications. Cross-App Data does not include Precise Location Data or Personal Directory Data.”)

<sup>9</sup> *Id.*

<sup>10</sup> See *In re: Varick Media Management, LLC (59-2016)*, Jan. 14, 2016, available at <https://www.bbb.org/globalassets/local-bbbs/council-113/media/behaviorial-advertising/varick-decision.pdf>. (“The DAA Principles apply to all actors engaged in IBA online as defined by the DAA Principles, from the third parties whose ad tech helps target ads to the first parties with whose websites consumers interact and which work with third parties to target relevant advertising to consumers. Typically, however, companies do not occupy a single, discrete role when conducting business online. For example, a digital marketing company is generally considered a third party when it conducts IBA on non-affiliate websites. However, that company may maintain a website of its own, in which case it is also a first party. The DAA Principles anticipate the fluidity of the digital marketplace and apply responsibilities to companies based on the actual functions a company is performing.”) See also *In re: BuzzFeed, Inc. (42-2014)*, Oct. 28, 2014, available at <http://www.asrcreviews.org/wp-content/uploads/2014/10/Online-Interest-Based-Advertising-Accountability-Program-Formal-Review-42.20141.pdf>. See also *In re: Yelp, Inc. (40-2014)*, Oct.

collector and user of cross-app data for IBA across non-affiliate applications, it is a third party under the Mobile Guidance. We will treat its responsibilities in each category in turn.

## I. OBA Principles

First-party duties under the OBA Principles are set out in section II.B. According to this section, when first parties allow third parties to collect visitors' browsing data for use in IBA on their websites, or when they transfer such data to third parties for tailoring ads on non-affiliate websites, they must provide consumers with appropriate transparency and an opportunity to exercise control over IBA.<sup>11</sup> A first party must include a disclosure somewhere on its website that describes the IBA activity occurring there.<sup>12</sup> This disclosure must contain either a link to an industry-developed consumer choice page (such as <http://aboutads.info/choices>) or a list of every third party conducting IBA activity on the first-party website.<sup>13</sup> Additionally, a first party must state its adherence to the DAA Principles on its website.<sup>14</sup>

Most significantly, the OBA Principles require first parties to provide consumers with real-time "enhanced notice" when third parties are collecting or using their data for IBA on a first party's website. This real-time indicator must be in the form of a "clear, meaningful, and prominent" link that directs consumers to the first party's IBA disclosure, described above,<sup>15</sup> and not just to the top of a privacy policy.<sup>16</sup> In addition, this link must be distinct from the company's privacy policy link and appear on every page where data collection or use for IBA occurs on the first party's website.

In practice, a website's enhanced notice link can be provided by either the first or the third party. However, both parties are independently responsible for ensuring that enhanced notice is provided. To achieve compliance, companies should work with one another to make sure that this requirement is met. Where third parties are unable to place enhanced notice, the first party must take whatever steps are necessary either to provide the notice itself or to empower third parties to do so. Further, first parties are cautioned that

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28, 2014, available at <http://www.asrcreviews.org/wp-content/uploads/2014/10/Online-Interest-Based-Advertising-Accountability-Program-Formal-Review-40.20141.pdf>.

<sup>11</sup> *OBA Principles* § II.B. at 13-14.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* We note that when first parties choose to list third parties individually, the Commentary to the Consumer Control Principle instructs companies that "choice should be available from the Third Party(s) disclosure linked from the page where the Third Party is individually listed." *OBA Principles* Commentary at 35.

<sup>14</sup> *OBA Principles* § II.B. at 13-14. See, e.g., *In re: Best Buy Co., Inc. (39-2014)*, Oct. 28, 2014, at 4 available at <http://www.asrcreviews.org/wp-content/uploads/2014/10/Online-Interest-Based-Advertising-Accountability-Program-Formal-Review-39.20141.pdf>.

<sup>15</sup> *Id.*

<sup>16</sup> *OBA Principles* Commentary at 32. ("The Principles also state that the Web sites at which Third Parties are collecting data for Online Behavioral Advertising purposes should include a new clear, meaningful, and prominent link on their Web sites when Third Parties do not provide the notice described in II.A.(2)(a). This would link from the Web page where data is collected to specific language in a disclosure. If the disclosure language is in the privacy notice, the link should go directly to the relevant section of the privacy policy where the disclosure is located and not just generally to the privacy policy.")

[u]nless an ad bearing in-ad notice is served on **every** Web page of a publisher’s site where third parties are collecting data for [... IBA] and that notice directs a consumer to the choice mechanisms of all third parties collecting on that Web page or to an industry-developed choice mechanism, the Transparency Principle’s **enhanced notice** requirement for **collection** is not satisfied, and the website operator cannot rely on the third party’s in-ad enhanced notice as provided under Section II.A.2. of the OBA Principles (*Third Party Advertisement Notice*) (Emphasis in original).<sup>17</sup>

Enhanced notice provides consumers with two benefits. One, the enhanced notice informs consumers of the fact that third parties are engaged in IBA on a website. Two, by linking directly to a disclosure that describes the IBA activities occurring on that website and providing a method by which consumers can exercise choice, enhanced notice serves as a bridge to relevant information consumers need at the time of collection or use. By drawing attention to this otherwise invisible background activity in real time, explaining it in plain language, and providing one or more choice mechanisms, enhanced notice helps consumers understand IBA and empowers them to make choices about the use of their data for IBA.

## II. Mobile Guidance

The Mobile Guidance adapts the desktop-oriented rules of the OBA Principles to the mobile world, including the core requirements for third parties to provide transparency and consumer control for IBA.

### 1. Third-Party Responsibilities under the Mobile Guidance for Cross-App Data Collection

#### *Third-Party Notice Requirement for Cross-App Data Collection*

Under section III.A.(1) of the Mobile Guidance, third parties who engage in the collection or use of cross-app data for IBA must provide a clear, meaningful and prominent notice on their websites or accessible from the applications that host them.<sup>18</sup> This notice must include (1) the types of data collected, (2) the uses of such data (3) an easy-to-use mechanism for exercising choice with respect to the collection and use of such data or the transfer of such data to a non-affiliate for IBA and (4) the fact the third party adheres to the DAA Principles.<sup>19</sup>

#### *Third-Party Consumer Control Requirement for Cross-App Data Collection*

Under section III.B.(1) of the Mobile Guidance, third parties must provide users with the ability to exercise choice with respect to their collection and use of cross-app data for IBA. Such choice should be described in the notices required under section III.A. of the Mobile Guidance, described above.<sup>20</sup>

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<sup>17</sup> *First Party Enhanced Notice Compliance Warning* at 3.

<sup>18</sup> *Mobile Guidance* at 14.

<sup>19</sup> *Id.*

<sup>20</sup> *Mobile Guidance* at 18-19.

## COMPANY RESPONSE AND ANALYSIS

In response to the Accountability Program’s inquiry letter, Adbrain immediately conducted a thorough review of its compliance with the DAA Principles. The company provided detailed descriptions of its data collection practices and consulted with the Accountability Program on its plan to come into compliance with the OBA Principles and Mobile Guidance, as explained below.

### I. OBA Principles

Following a review of its data collection practices, Adbrain found that at the time of the Accountability Program’s investigation third parties were not collecting data for IBA on the Adbrain website. In discussions with the Accountability Program, the company acknowledged that some third parties collect data on its website for non-IBA purposes, including analytics and website delivery. Recognizing that it is difficult to state with complete certainty that such entities never collect and use consumer data for IBA, and to comport with industry best practices, Adbrain added a link labelled “AdChoices” to its website footer that includes the DAA’s AdChoices Icon . This link directs users to an updated section of the company’s “Cookie Policy” page which includes a description of possible third-party IBA taking place on the Adbrain site and links to the DAA’s [www.aboutads.info/choices](http://www.aboutads.info/choices) and the EDAA’s Your Online Choices page (<http://www.youronlinechoices.eu/>).<sup>21</sup> The company also updated its privacy policy to include a statement of adherence to the DAA Principles.<sup>22</sup>

### II. Mobile Guidance

In the Accountability Program’s inquiry letter, we raised concerns about Adbrain’s mobile opt-out mechanism, which required users to enter their “device ID” in order to opt out without providing additional instructions on how to obtain such device IDs. Because Adbrain’s description of how to use its opt out was so confusing, the Accountability Program found that Adbrain had not complied with the notice requirement of section III.A.(1),<sup>23</sup> as it failed to effectively disclose how a user could easily opt out of its mobile IBA.

Furthermore, even though this opt-out mechanism functioned correctly, the barriers to effectuating the opt out were so significant that the tool did not serve as an *easy-to-use* means for consumers to exercise choice about Adbrain’s use of their data for IBA.<sup>24</sup> Therefore, the Accountability Program found that the mechanism did not meet the standards set by section III.B.(1) of the Mobile Guidance, which requires that companies engaged in IBA provide consumer control to users.<sup>25</sup>

To resolve these issues under the Mobile Guidance, Adbrain committed to a two-part remedy:

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<sup>21</sup> Adbrain, *Cookie Policy*, <http://www.adbrain.com/legals/cookie-policy> (last visited Mar. 16, 2017).

<sup>22</sup> Adbrain, *Privacy Policy*, [www.adbrain.com/legals/privacy-policy](http://www.adbrain.com/legals/privacy-policy) (last visited Mar. 16, 2017).

<sup>23</sup> *Mobile Guidance* at 14.

<sup>24</sup> *Mobile Guidance* § III.A.(1)(c) at 14. *See also OBA Principles Commentary* at 30, explaining that a third party’s notice should “describe ... an easy to use mechanism for exercising choice” about IBA.

<sup>25</sup> *Mobile Guidance* at 18-19.

- i. Adbrain immediately updated its “Opt out” page to include a link that directs users to instructions on how they can locate device IDs on Android and iOS devices.<sup>26</sup> Adbrain also provided links to apps in the Apple App Store and Google Play Store that assist users in obtaining their device IDs on both major operating systems.<sup>27</sup> These options now allow users to locate their device identifiers for the purpose of correctly inputting them into Adbrain’s mobile opt out. The Accountability Program underscores that while these changes do **not** render Adbrain’s existing opt out sufficiently accessible to average users to bring the company into compliance with section III.B.(1) of the Mobile Guidance, the modified opt-out page is an improvement over the original. The Accountability Program recognizes that these modifications represent a good-faith effort to increase transparency about and consumer control over Adbrain’s IBA, but its interim solution stands in stark contrast with the many consumer-friendly offerings found throughout the industry. For example, the Accountability Program pointed to commonly employed choice mechanisms such as the DAA’s AppChoices one-button “on” and “off” switch for IBA or the device-level “Opt-out of interest-based advertising” and “Limit Ad Tracking” settings available on the Android and iOS operating systems.
- ii. To respond to Accountability Program concerns and achieve full compliance with the Mobile Guidance, Adbrain committed to modifying its opt-out solution further to ensure that it provides an opportunity to easily exercise choice. Adbrain assured the Accountability Program that the existing updates to its opt out represented an interim solution and that the company would work to implement a more user-friendly opt-out mechanism within a commercially reasonable time period. This commitment to achieving full compliance with the Mobile Guidance, paired with interim improvements, was acceptable to the Accountability Program, which informed the company it would retain jurisdiction until a compliant solution was implemented.

As discussed in the previous section, Adbrain also added a statement of adherence to the DAA Principles to its privacy policy, resolving this issue under section III.A.(1) of the Mobile Guidance.

## CONCLUSION

The DAA Principles call on companies to provide consumers with a baseline level of transparency about and control over IBA. In articulating these standards, the Principles use terms such as “clear,” “meaningful,” “prominent,” and “easy to use.” These terms indicate that bare offerings of transparency and control—inscrutable disclosures or labyrinthine opt-out tools—fall short of industry best practices.

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<sup>26</sup> Adbrain, *Opt Out*, <http://www.adbrain.com/legals/opt-out> (last visited Mar. 16, 2017).

<sup>27</sup> For each link to the third-party apps, Adbrain provides a pop-up notification informing users that some apps themselves also collect data from users. In its discussions with Adbrain, the Accountability Program pointed out that these options for locating a device ID could trouble privacy-sensitive users. As discussed in this decision, Adbrain emphasized to the Accountability Program that its updates were an interim solution that would be replaced by a more user-friendly opt out. The Accountability Program will monitor to ensure that this change is made within a commercially-reasonable time frame as promised by Adbrain.

Adbrain was clearly aware of the need to address privacy concerns and to follow industry practices surrounding IBA as its membership in IAB and its efforts to disclose its practices and provide a means to opt out IBA attest. However, Adbrain's mobile opt out, while technically functional, exposed a substantial flaw in the company's approach to compliance. The company failed to consider the accessibility of its disclosures or the usability of its opt-out mechanism by an ordinary consumer. The DAA Principles are designed to benefit consumers and specifically require that opt-outs be clear, meaningful, and easy to use. Adbrain's opt-out solution was easy for the company, not for the consumer.

When designing an opt-out mechanism, companies must be sure to give users access to *real* choice. This means that companies should make opting out easy, and they should ensure that any relevant instructions are complete, correct, and comprehensible to the typical consumer. Arcane instructions, confusing forms, and requests for information only sophisticated users or developers might know are not sufficient to assist typical consumers in opting out. In a market that is composed of consumers with a range of technical skills, an opt-out mechanism whose functionality relies on an admixture of specialized technical knowledge and trial and error on the part of its users is no opt out at all.

To its credit, Adbrain quickly committed to achieving compliance with the DAA Principles and took promising first steps to provide typical users with meaningful choice. Though the company must make additional modifications to fully meet the requirements of the Mobile Guidance, the Accountability Program applauds Adbrain for recognizing the deficiencies in its current opt-out solution and crafting a plan to remedy them. Adbrain's recognition of consumers' needs and its commitment to a plan of action to reach compliance demonstrates that industry self-regulation works.

We take a moment to note that industry members have gone to considerable effort and expense and continue to do so to develop ways to educate consumers about IBA and to make choice more accessible in the desktop, mobile, and cross-device environment. The new DAA/NAI choice mechanism meets the challenge of providing choice in an increasingly technologically complex world of identifiers that go beyond cookies. We encourage industry's work to develop user-friendly approaches to providing understanding, transparency and choice about these complex technologies. As this work goes on, the Accountability Program will continue to enforce the standards the DAA Principles have put in place to give consumers transparency and control about IBA.

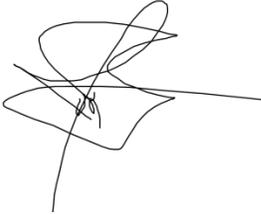
## **COMPANY'S STATEMENT**

Adbrain regards online privacy and the responsible collection of consumer data as critical and fundamental to our business. While Adbrain was not participating in IBA on our site -the primary purpose of which is to serve as a marketing site for our commercial clients - we appreciate the notification of the potential risks to customers who may look at our site for the ability to elect not to have their data used by some of our marketing partnerships that the Accountability Program highlighted. Self Regulation is essential to protecting consumer data and

we welcome the guidance from the Council of Better Business Bureaus on how to make it easier for consumers to manage their privacy.

**DISPOSITION OF DECISION**

Practices voluntarily corrected; jurisdiction retained pending website updates.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

**Jon M. Brescia**  
**Director, Adjudications and Technology**  
**Online Interest-Based Advertising Accountability Program**