

Additionally, third parties that collect precise location data⁴ through non-affiliate mobile apps must provide notice and enhanced notice of this fact, obtain consent prior to collecting or using such data, and provide a mechanism by which consumers may easily withdraw consent at any time.

COMPANY STATUS

Exponential Interactive Inc. (Exponential) is a California-headquartered company that reaches approximately 700 million users monthly across desktop and mobile devices.⁵ Exponential owns and controls a subsidiary named Tribal Fusion, which is a global advertising provider that delivers “audience insights, targeting, and creative solutions” to its customers⁶ Both Exponential and Tribal fusion engage in IBA as part of their operation of an online advertising network.⁷

INQUIRY

This case arises from the Accountability Program’s continued monitoring of websites and mobile apps to ensure compliance with the DAA Principles.

As part of its monitoring work, the Accountability Program has reviewed a number of health care websites, including health exchange websites established under 42 USC section 18031 *et seq.*, to determine whether third parties were collecting data for IBA on those sites and, if so, whether they were doing so in accordance with the OBA Principles. During its review, the Accountability Program examined the website of the Covered California (<http://www.coveredca.com/>), the official health exchange for the state of California.⁸ On this website, the Accountability Program observed Tribal Fusion, a corporate affiliate under the control of Exponential,⁹ collecting data

First Party is the entity that is the owner of an application, or has Control over the application, with which the consumers interacts, and its Affiliates.”)

⁴ *Mobile Guidance* Definition K at 9. (“Precise Location Data is data obtained from a device about the physical location of the device that is sufficiently precise to locate a specific individual or device.”)

⁵ See generally Exponential, *We are Exponential*, <http://exponential.com/about/> (last visited March 27, 2017). (“Exponential delivers innovative advertising experiences that transform the way brands interact with audiences across desktop and mobile.”) See also, Exponential, *Exponential Creates An Augmented Reality Experience With New Face Filter VDX Ad Unit* (Nov. 21, 2016), <http://exponential.com/2016/11/21/exponential-creates-an-augmented-reality-ad-experience-with-new-face-filter-vdx-ad-unit/>. Unless stated otherwise, “Exponential” will refer to both Exponential Interactive Inc. and Tribal Fusion.

⁶ See generally Exponential, *Tribal Fusion Launches New Campaign Optimization Technology to ‘Power Up’ Display Advertising Campaigns*, <http://exponential.com/2014/04/08/tribal-fusion-launches-new-campaign-optimization-technology-power-display-advertising-campaigns/> (last visited May 23, 2016). (“Tribal Fusion, the Exponential-owned performance display advertising provider, today announced the debut of an innovative new campaign optimization algorithm to transform the performance of online campaigns.”)

⁷ See generally Exponential, *We are Exponential*, <http://exponential.com/about/> (last visited March 27, 2017).

⁸ Covered California, *About Covered California*, <http://www.coveredca.com/about> (last visited May 23, 2016). (“Covered California is the place where Californians can get brand-name health insurance under the Patient Protection and Affordable Care Act.”)

⁹ See *OBA Principles* Definition E at 10 (“Control of an entity means that one entity (1) is under significant common ownership or operational control of the other entity, or (2) has the power to exercise a controlling influence over the management or policies of the other entity....”) Based on its research, the Accountability Program found that Exponential had sufficient control over Tribal Fusion for it to conduct a full review of Exponential’s IBA practices. See generally Exponential, *Tribal Fusion Launches New Campaign Optimization Technology to ‘Power Up’ Display Advertising Campaigns*, <http://exponential.com/2014/04/08/tribal-fusion-launches-new-campaign->

likely for IBA but did not find an enhanced notice link that would take the user to a disclosure of these IBA practices and to an opt-out mechanism, as required by the Transparency Principle.¹⁰

As part of its review, the Accountability Program also examined Exponential's privacy policy. In that document, Exponential stated that it collects "GPS location provided by Digital Content Providers with mobile properties."¹¹ This statement gave the Accountability Program reason to believe that Exponential may have been collecting precise location data without satisfying the requirements of the Mobile Guidance.

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

ISSUES RAISED

I. OBA Principles

A key provision of the Transparency Principle requires that third parties provide an enhanced notice link as a signal to consumers that data collection and use for IBA is occurring.¹² Where third parties are serving interest-based ads in addition to collecting data, they typically provide the enhanced notice link in or around the ads they place. The enhanced notice link, which commonly is represented by the Advertising Option Icon (AdChoices Icon or Icon)  and often uses the phrase "AdChoices," must 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.¹³ The company must also state its adherence to the DAA Principles in its disclosure.¹⁴

Under the OBA Principles, first and third parties share responsibility for providing enhanced notice and each is independently responsible to ensure that enhanced notice is provided to the consumer. To meet this obligation first and third parties should work together to ensure that the

optimization-technology-power-display-advertising-campaigns/ (last visited May 23, 2016). ("Tribal Fusion, the Exponential-owned performance display advertising provider, today announced the debut of an innovative new campaign optimization algorithm to transform the performance of online campaigns."); *see also* Tribal Fusion, *Tribal Fusion® Introduces New Parent Company Exponential™ And Launches New Divisions* (July 31, 2007), <https://www.tribalfusion.com/TribalFusion/tribal-fusion-introduces-parent-company-exponential.html>. ("Online advertising network Tribal Fusion®, today announced the official launch of its corporate umbrella brand Exponential™, a technology-driven media services company that delivers innovative products and services to meet the demands of advertisers and publishers.")

¹⁰ OBA Principles § II. *et seq.* at 12-14.

¹¹ Exponential, *Privacy, Exponential Interactive Privacy Policy*, <http://exponential.com/privacy/> (last visited May 23, 2016). ("In order to improve performance, we augment our click stream data with non-personally-identifiable behavioral and demographic data from Digital Content Providers and other partners. This anonymous data may include such things as postal code, age and gender. It may also include GPS location provided by Digital Content Providers with mobile properties.")

¹² OBA Principles § II.A.(2) at 13.

¹³ OBA Principles § II.A.(1) a 12.

¹⁴ *Id.*

obligation to provide enhanced notice is fulfilled.¹⁵ If it is not possible for a third party to place an enhanced notice link on a website where it collects data for IBA—when, for example, it is collecting data on a non-affiliate webpage but not inserting an ad on that page—the third party must ensure that the website publisher provides an enhanced notice link as described in section II.B. of the OBA Principles.¹⁶ Alternatively, the third party may work with the website publisher to gain access to the website so that the third party is able to directly place an enhanced notice link on each page where it is collecting data for IBA.¹⁷ But whatever the circumstances, it remains the third party’s independent responsibility to ensure that this notice is provided.¹⁸

II. Mobile Guidance

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

Under sections IV.A.(2) and B.(2) of the Mobile Guidance, third parties must give clear, meaningful, and prominent notice of the collection and use of precise location data for IBA or when other parties transfer precise location data to them for their use in IBA.¹⁹ Such notice should include 1) the fact precise location data is collected, 2) the uses of such data, 3) instructions for providing or withdrawing consent for the collection and use of precise location data, **and** 4) the fact the company adheres to the DAA Principles.²⁰ Third parties should provide such notice on their own website or through the first-party application.²¹ Finally, a third party should obtain consent from a user prior to collecting or using precise location data for IBA purposes or get reasonable assurances that the first party has obtained consent for the third party’s collection and use of precise location data for IBA.²²

COMPANY RESPONSE & ANALYSIS

In response to the Accountability Program’s inquiry letter, Exponential immediately conducted a thorough review of its compliance under the DAA Principles. The company provided detailed

¹⁵ See *In re: Gravity (56-2015)*, Nov. 4, 2015, at 6. (“Both first and third parties have the obligation to provide enhanced notice, and they should work together to ensure that consumers receive enhanced notice of collection or use of consumers’ data for IBA. While Gravity may, as it asserts, rely on first parties’ provision of enhanced notice as sufficient to fulfil its own enhanced notice obligation under the Transparency Principle, the first party’s failure to fulfill its shared responsibility to ensure that notice is provided does not excuse the third party from fulfilling its independent obligation to do so.” (Emphasis in original)).

¹⁶ *OBA Principles Id.* § II.B. at 13-14.

¹⁷ *OBA Principles Id.* § II.A.(2)(a)(ii) and § II.A.(2)(b) at 13.

¹⁸ *In re: MediaMath (32-2013)*, Nov. 20, 2013, available at <http://www.asrcreviews.org/wp-content/uploads/2013/11/Online-Interest-Based-Advertising-Accountability-Program-Formal-Review-32.2013.pdf>.

¹⁹ *Mobile Guidance* at 22.

²⁰ *Id.* at 22-23.

²¹ *Id.*

²² *Id.* § IV.B.(2) at 29. (“A Third Party obtains reasonable assurances...if the Third party takes measures such as: (1) entering into a contract with the First party under which the First Party agrees to obtain Consent to the Third Party’s data collection and use; (2) obtaining other written assurances from the First Party to the same effect; (3) conducting periodic checks or audits of the First Party’s consent practices (4) verifying that the First Party publicly represents that it obtains Consent to the transfer of Precise Location Data to a Third Party....”)

descriptions of its data collection practices and consulted with the Accountability Program on its plan to come into compliance with the DAA Principles, as explained below.

I. OBA Principles

Addressing the Accountability Program's inquiry regarding the lack of enhanced notice on the Covered California website, Exponential confirmed that it collected data from this website for IBA. Exponential explained to the Accountability Program that Covered California was one of the company's clients, and Exponential collected data on its website in order to provide it with digital advertising services across the web.

Initially, Exponential argued that its client onboarding process addressed the Accountability Program's concerns. This onboarding process included the following steps: one, the company required compliance with applicable laws and regulations in the contractual terms its clients were required to accept in order to engage Exponential's services. Two, Exponential provided guidance and training materials on compliance with European Union privacy regulations to clients based in the European Union. Exponential also explained to the Accountability Program that it was considering expanding its guidance and training program to clients in the United States. In conclusion, Exponential asserted that it was therefore its client's responsibility to provide enhanced notice. We disagree.

As noted above, our prior cases have demonstrated that third parties may not simply foist compliance responsibilities onto first parties, but must communicate with them effectively to ensure that compliance obligations are discharged.²³ The third party may contractually bind the first party to comply with the DAA Principles and provide guidance on how to do so.²⁴ To meet

²³ See *In re: Wayfair Inc. (71-2017)*, Jan. 25, 2017, available at <https://www.bbb.org/globalassets/local-bbbs/council-113/media/behaviorial-advertising/Wayfair-Decision-71-2017.pdf>. (“In practice, this first party 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.”) See also *In re: Anheuser-Busch Companies, Inc. (70-2017)*, Jan. 25, 2017 available at <https://www.bbb.org/globalassets/local-bbbs/council-113/media/behaviorial-advertising/Anheuser-Busch-Decision-70-2017.pdf>. See also *In re: AAA of Northern California, Nevada & Utah (69-2017)*, Jan. 25, 2017, available at <https://www.bbb.org/globalassets/local-bbbs/council-113/media/behaviorial-advertising/AAA-NCNU-Decision-69-2017.pdf>.

²⁴ *In re: MediaMath (32-2013)*, Nov. 20, 2013, available at <http://www.ascreviews.org/wp-content/uploads/2013/11/Online-Interest-Based-Advertising-Accountability-Program-Formal-Review-32.2013.pdf>. (“The Accountability Program recognizes that MediaMath had already made efforts to educate its clients about the OBA Principles prior to receiving our letter of inquiry. However, this education, without more, was insufficient to guide MediaMath's self-serve clients. MediaMath now also provides clear instructions to its clients using its self-serve platform on how to access and enable the functionality that will automatically serve the AdChoices Icon with the client's interest-based ads. MediaMath has also made changes to its master services agreement and onboarding process to further explain the OBA Principles and how to implement them. The Accountability Program believes that these changes are critical and should serve as a baseline for providers of self-service OBA offerings.”) See also *In re: 3Q Digital (31-2013)*, Nov. 20, 2013, available at <http://www.ascreviews.org/wp-content/uploads/2013/11/Online-Interest-Based-Advertising-Accountability-Program-Formal-Review-31.2013.pdf>. (“Upon receiving our formal letter of inquiry, 3Q Digital stated that it had recently been contacted by MediaMath and instructed on how to enable the option on its MediaMath account to automatically include the AdChoices Icon on all interest-based ads delivered through the platform. 3Q Digital immediately did so. The company further stated that it promptly undertook a review of all its OBA campaigns managed through other platforms and services to ensure that the AdChoices Icon was being provided. In addition to addressing the compliance issues at the center of

this standard, a third party such as Exponential would have to provide evidence of its interactions with the first party.

Here, Exponential was taking actions analogous to those necessary to comply with the DAA Principles. For example, at the time of our inquiry, it was Exponential's practice to contractually bind all of its clients to comply with all applicable law and regulations. In addition, Exponential was providing training to some of its clients who operate in the EU about their legal obligations.

Exponential also recognized the value of self-regulation. At the time of the inquiry, Exponential was a member of the Network Advertising Initiative (NAI), which operates a self-regulatory program with similar requirements to the DAA Principles.²⁵ As part of the company's work to comply with the NAI code, Exponential informed its own publisher network—the parties on whose properties Exponential places its ads—that they needed to provide transparency and control for IBA, just as the DAA Principles require.²⁶ In addition, Exponential performed random compliance checks of publisher sites.

However, Exponential's efforts, while commendable, were not sufficient for compliance with the OBA Principles. First, Exponential's contractual language did not bind any of its clients to comply with the DAA Principles, instead generally referencing "laws and regulations." Second, Exponential provided privacy training materials only to one subset of its clients—those on whose websites its ads were served—rather than *all* of those companies on whose websites Exponential was collecting or using data for IBA. This practice left out the brands on whose websites Exponential was not serving ads but still collecting data about consumers for later use in IBA (e.g., for retargeting campaigns). Under the DAA Principles, companies from whose website a third party collects data or on whose website a third party places an advertisement are considered first parties under the DAA Principles. Third, only companies located in EU jurisdictions

the Accountability Program inquiry, 3Q Digital committed to educating current and future clients about the benefits of complying with the OBA Principles and detailed guidance on how to do so.")

²⁵ The NAI (<https://www.networkadvertising.org/>) is a membership organization largely focused on third-party responsibilities, while the DAA Principles cover all parties in the advertising supply chain. The NAI and DAA work closely together. Most recently the organizations have worked together to update their opt-out pages for IBA taking place on websites, located at <http://optout.networkadvertising.org/#/> and aboutads.info/choices.

²⁶ See Network Advertising Initiative, *2015 Update to the NAI Code of Conduct*, (2015) § II.B.(1) and § C.(1) at 6-7, available at https://www.networkadvertising.org/sites/default/files/NAI_Code15encr.pdf. ("Each member company shall provide clear, meaningful, and prominent notice on its website that describes its data collection, transfer, and use practices for Interest-Based Advertising Such notice shall include a general description of the following, as applicable: a. The Interest-Based Advertising... activities undertaken by the member company; b. The types of data collected or used for Interest-Based Advertising purposes, and Ad Delivery and Reporting purposes, including any PII; c. How such data will be used, including transfer, if any to a third party; d. The technologies used by the member company for Interest-Based Advertising, ...; and e. The approximate length of times that Interest-Based Advertising ... data will be retained by the member company; f. A statement that the company is a member of the NAI and adheres to the Code; and g. A link to an Opt-Out Mechanism for Interest-Based Advertising.") See also *OBA Principles* § II.A. (1) at 12. ("Third Parties... should give clear, meaningful, and prominent notice on their own Web sites that describes their Online Behavioral Advertising data collection and use practices. Such notice should include clear descriptions of the following: (a) The types of data collected online, including any PII for Online Behavioral Advertising purposes; (b) The uses of such data, including whether the data will be transferred to a non-Affiliate for Online Behavioral Advertising purposes; (c) An easy to use mechanism for exercising choice with respect to the collection and use of the data for Online Behavioral Advertising purposes or to the transfer of such data to a non-Affiliate for such purpose; and **(d) The fact that the entity adheres to these Principles.**")

received Exponential’s privacy training materials, and those materials covered only compliance with EU laws and regulations. Exponential did not provide materials about self-regulatory compliance. Fourth, Exponential provided no alternative method of ensuring compliance beyond these documents. In short, the Accountability Program found that Exponential needed to extend its existing contractual and educational practices 1) to address industry self-regulation and 2) to reach all of its clients who are first parties, regardless of their location, in order to discharge its obligations under the Transparency Principle.

This approach falls squarely under the guidance we have provided in the line of cases discussed in the previous section. In Gravity, we rejected an argument from the purveyor of native advertising widgets which argued that the first parties which displayed its widgets, not it, would be solely responsible for providing enhanced notice so long as Gravity was on the industry opt-out page.²⁷ And in the MediaMath case, in which a third-party advertising technology company provided a self-service ad platform for other companies to operate directly, we explained the path by which a company could reach compliance even when it was not able to place enhanced notice directly.²⁸ To reach full compliance, MediaMath amended its contractual terms to explicitly require companies to follow the DAA Principles, and it improved its existing onboarding and instructional documents to ensure that companies using its platform knew how to insert enhanced notice links into interest-based ads served using its technology.²⁹

To come into compliance with the DAA Principles, Exponential committed to revising its contractual terms. Working with the Accountability Program, the company quickly updated its terms and conditions documents to bind clients to compliance with the DAA Principles. Exponential also agreed to develop additional training documents to advise clients on how to achieve compliance with the DAA Principles. The Accountability Program confirmed that these documents were sufficient to fulfil the requirement of third parties to communicate with first parties about their mutual responsibilities under the DAA Principles per the standard established in its MediaMath and Gravity decisions.³⁰ Exponential notified the Accountability Program that

²⁷ *In re: Gravity (56-2015)*, Nov. 4, 2015, available at <http://www.bbb.org/globalassets/local-bbbs/council-113/media/asrc-documents/gravity-decision.pdf>. (“...we must reject Gravity’s assertion that mere presence on an industry-developed consumer choice page, absent effectively collaborating with web publishers to ensure enhanced notice links are in fact provided, is sufficient to satisfy its obligation to provide enhanced notice when engaged in IBA on non-affiliate websites. We cannot accept an interpretation of the Principles that allows third parties to avoid their most important responsibility.”)

²⁸ *In re: MediaMath (32-2013)*, Nov. 20, 2013, available at <http://www.asrcreviews.org/wp-content/uploads/2013/11/Online-Interest-Based-Advertising-Accountability-Program-Formal-Review-32.2013.pdf>. (“The Accountability Program recognizes that MediaMath had already made efforts to educate its clients about the OBA Principles prior to receiving our letter of inquiry. However, this education, without more, was insufficient to guide MediaMath’s self-serve clients. MediaMath now also provides clear instructions to its clients using its self-serve platform on how to access and enable the functionality that will automatically serve the AdChoices Icon with the client’s interest-based ads. MediaMath has also made changes to its master services agreement and onboarding process to further explain the OBA Principles and how to implement them. The Accountability Program believes that these changes are critical and should serve as a baseline for providers of self-service OBA offerings.”)

²⁹ *Id.*

³⁰ *See In re: MediaMath (32-2013)*, Nov. 20, 2013, available at <http://www.asrcreviews.org/wp-content/uploads/2013/11/Online-Interest-Based-Advertising-Accountability-Program-Formal-Review-32.2013.pdf>. *See also In re: Gravity (56-2015)*, Nov. 4, 2015, available at <http://www.bbb.org/globalassets/local-bbbs/council-113/media/asrc-documents/gravity-decision.pdf>.

the new documents were distributed to its client-facing sales teams. These actions resolved Exponential's third-party compliance issues under the OBA Principles.

II. Mobile Guidance

During its consultation with the Accountability Program, Exponential confirmed that at the time of the inquiry it was not using precise location data for IBA. Exponential explained that it had included language in its privacy policy about geolocation because it anticipated collecting and using precise location information for IBA in the future. Exponential pledged to work with the Accountability Program to ensure that any precise location collection and use for IBA going forward would comply with the Mobile Guidance.

CONCLUSION

This case adds another chapter to the Accountability Program's examination of the shared responsibilities of first and third parties. As we have noted in prior cases, the DAA Principles anticipate that first and third parties will communicate with one another to ensure that compliance does not fall through the cracks.³¹ Self-regulation is strongest when an entire industry commits to compliance and to mutually reinforcing communication, particularly one as complex and quick-moving as the online ad system. When companies communicate openly and bind one another to comply with agreed-upon industry standards, the resultant system is much stronger than one operated by each company in isolation. The Accountability Program, as an independent enforcement agent, checks to ensure that the bonds of this system are tight and that companies are living up to the promises they make both to the public and to one another.

Exponential clearly understood the importance of self-regulation and the need to communicate with its clients about their compliance obligations. Where Exponential fell short was that it did not do so broadly enough, not realizing that the DAA Principles have broadened the scope of advertising self-regulation significantly. Before the DAA Principles, third parties bore the entire burden of providing transparency and control to consumers, and self-regulation was the purview of membership organizations. The DAA Principles have extended the enforcement of self-regulation to an entire industry and require first and third parties alike to work together.

By revising its contractual terms and training manuals, it now reaches all of the first parties with whom it works, both binding them to and educating them about compliance with the DAA Principles. The Accountability Program appreciates the care and seriousness Exponential showed

³¹ See *In re: Wayfair Inc. (71-2017)*, Jan. 25, 2017, available at <https://www.bbb.org/globalassets/local-bbbs/council-113/media/behaviorial-advertising/Wayfair-Decision-71-2017.pdf>. ("In practice, this first party 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.") See also *In re: Anheuser-Busch Companies, Inc. (70-2017)*, Jan. 25, 2017 available at <https://www.bbb.org/globalassets/local-bbbs/council-113/media/behaviorial-advertising/Anheuser-Busch-Decision-70-2017.pdf>. See also *In re: AAA of Northern California, Nevada & Utah (69-2017)*, Jan. 25, 2017, available at <https://www.bbb.org/globalassets/local-bbbs/council-113/media/behaviorial-advertising/AAA-NCNU-Decision-69-2017.pdf>.

during the pendency of this case, and we are pleased to say that the company is now compliant with the DAA Principles.

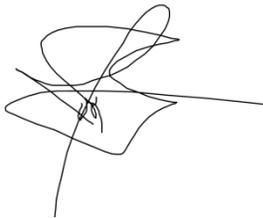
COMPANY'S STATEMENT

Exponential Interactive believes in advertising that respects consumers, works for brands, and rewards media providers for great content. As an independent company, we value the ability to practice what we preach. This includes following the DAA Principles and respecting for the privacy of all consumers.

Exponential deeply appreciates this collaborative process with the Accountability Program to ensure our compliance with all legal and self-regulatory requirements, including the DAA Principles. Based on the Accountability's Program constructive feedback, we have made strides to improve our internal processes and training materials to better protect consumer privacy. We look forward to our continued partnership with the Accountability Program and the Better Business Bureau.

DISPOSITION OF DECISION

Practices voluntarily corrected; jurisdiction retained pending implementation of compliance plan.

A handwritten signature in black ink, appearing to read 'Jon M. Brescia', with a long horizontal line extending to the right.

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