ADVERTISING SELF-REGULATORY COUNCIL/COUNCIL OF BETTER BUSINESS BUREAUS

ONLINE INTEREST-BASED ADVERTISING ACCOUNTABILITY PROGRAM

FORMAL REVIEW
Case Number: 56-2015

COMPANY: Gravity, Inc.

CHALLENGER: Online Interest-Based Advertising Accountability Program

DECISION
DATE: November 4, 2015

SYNOPSIS

A personalized advertisement presented online or on a mobile app in one of the formats defined as “native advertising” must comply with the requirements of the Digital Advertising Alliance (DAA) Self-Regulatory Principles (DAA Principles) if it is based upon inferences about the consumer’s likely interests derived from the consumer’s browsing activity across websites or across mobile apps and over time.

COMPANY STATUS

Gravity, Inc. (Gravity) is a wholly-owned subsidiary of AOL, Inc. Gravity is a recommendation engine which offers digital publishers a “widget” through which they can serve personalized native advertisements.

BACKGROUND

This case arises out of the Online Interest-Based Advertising Accountability Program’s (Accountability Program) scrutiny of a category of ads known as “native advertising.” In the
online context, a native ad “matches the form and function of the platform on which it appears.”

Examples of native advertising found on the Internet include sponsored posts embedded in articles on news websites, and sponsored content in the same format as a post on a social media portal. The goal of native advertising is to blend in with the rest of the content so that the user experience is not disrupted. Like banner ads, skyscraper ads, and ads in other standard formats, native advertising may be served to users on the basis of their perceived interests as derived from their web browsing behavior across sites and over time.

To make clear that interest-based native ads are covered by the DAA Principles, the Accountability Program released its Interest-Based Native Advertising Compliance Warning on December 9, 2014. This compliance warning put the digital advertising industry on notice that the Accountability Program views interest-based native ads as no different from other common, more traditional types of interest-based online ads. Therefore, companies in the ad serving chain involved in interest-based native ads have the same obligations to provide notice, enhanced notice, and choice as other companies engaged in interest-based advertising (IBA) covered by the DAA Principles.

To ensure that companies were implementing its compliance warning, the Accountability Program undertook a systematic review of companies engaged in native advertising on the Internet. Gravity, acquired by AOL on or about January 23, 2014, was among the companies reviewed. Gravity operates a content recommendation service, and through the use of recommendation widgets, allows web publishers to place personalized native ads on their websites. Gravity offers its clients the ability to tailor their ads to consumers’ interests based on their prior web browsing behavior. As described by Gravity in its own marketing materials, “we deliver personalized recommendations to each user based on the topics they engage with most and what’s exciting right now.”

As part of its review, the Accountability Program tested and analyzed the Gravity content recommendation widget on several websites. During testing, the Accountability Program documented that Gravity was setting a number of cookies on the testing device as part of a series of network calls required to load the scripts and other assets that composed the recommendation widget. We also found that these cookies were requested during subsequent calls to Gravity’s servers. One of these cookies in particular, named “vaguid,” appeared to be a unique user ID cookie of the type used in IBA. Thus, it appeared that Gravity collected users’ web browsing

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2 Native Advertising Playbook, at 7-9.


4 See Gravity, Technology, http://www.gravity.com/technology/ (last visited Oct. 6, 2015). See also Gravity, Opt-Out from Personalization, http://www.gravity.com/consumers/ (last visited Oct. 6, 2015). (“We collect and use your reading history and certain browser data (such as which browser or operating system you use) in order to provide you relevant recommendations and experiences through the websites that we work with.”). This discussion, like the privacy policy footer links on the Gravity main website points the reader to the AOL Privacy Policy as the main source of information.

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data for later use in tailoring ads displayed in its content recommendation widget. Based on the traffic monitoring evidence and Gravity’s own statements in its marketing materials, the Accountability Program determined that Gravity was engaged in interest-based native advertising as described in the Native Ads Compliance Warning and, therefore, is subject to the transparency and control responsibilities discussed therein.

During its investigation, the Accountability Program did not find an enhanced notice on the interest-based native ads served through its widget, which is the most common way enhanced notice is served when interest-based ads are shown to a consumer. The widgets lacked enhanced notice links in two distinct ways. First, on website content pages with interest-based native advertising, the text “Ads by Gravity” appeared above the recommendation widget near the bottom of the page. Generally, the “by Gravity” portion of the native ad disclosure text was a hyperlink that, when clicked, generated a pop-up dialogue box. The dialogue box explained Gravity’s role in placing sponsored content links via its widget and provided a link to the “Consumers” page of its website. However, the dialogue box did not itself disclose to consumers that the Gravity widget was passively collecting data for use in IBA as required by § II.A.(2) of the Principles. Second, the dialogue box failed to inform visitors the recommendation widget was based on his or her interests and that the “Consumers” page could be referenced for further explanation. In fact, users were given no indication that information or controls relating to Gravity’s IBA practices were located at the “Consumers” page. Without this crucial information regarding Gravity’s collection and use of consumer data for IBA, consumers had no reason to go to the website to learn more about their options regarding IBA. Therefore, the “Ads by Gravity” link and its associated pop-up box did not satisfy the enhanced notice requirement of the Transparency Principle, which is designed to ensure that consumers have just-in-time notice of IBA rather than having to search through a company’s website. Moreover, on several occasions during the testing of various websites, the Accountability Program found that the link embedded in the “by Gravity” text which should have directed consumers to the “Consumers” page of Gravity’s website was broken.

Upon visiting Gravity’s “Consumers” page, the Accountability Program noted that it contained a disclosure to consumers that Gravity uses their “reading history” to help tailor content recommendations to their interests, and provided a prominent link to an opt-out mechanism at the top of the page, as required under the Principles. The “Consumers” page also linked users to the AOL Privacy Policy Highlights page (http://privacy.aol.com/), which contained a statement of adherence to the DAA Principles. However, because Gravity failed to provide any enhanced notice linking to its disclosure of IBA and failed to provide a clear and prominent statement of adherence to the DAA Principles anywhere on the Consumers page, the Accountability Program found that Gravity did not fully comply with the DAA Principles.

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5 See Digital Advertising Alliance, Self-Regulatory Principles for Online Behavioral Advertising, available at http://www.aboutads.info/resource/download/seven-principles-07-01-09.pdf (July 2009) (Principles) (requiring a “clear, meaningful, and prominent” link to a compliant disclosure (enhanced notice link) anywhere on webpages where data is collected for or where an interest-based ad is served. As explained more fully below, the enhanced notice link may be provided in a number of different ways.

6 See id., §§ II(A)(2) and (B), pp.12-13 (requiring an enhanced notice link on every webpage where third parties are collecting data for IBA).
Moreover, as explained more fully below, Gravity’s reliance on its web publishers to provide enhanced notice was not always sufficient to fulfil the Transparency Principle.

COMPANY’S POSITION

Gravity welcomed the Accountability Program’s compliance assessment and responded by immediately remedying the problems that the Accountability Program uncovered. However, Gravity asserted in its formal response to the Accountability Program’s inquiry that, though Gravity was modifying its practices to comport with the Accountability Program’s recommendations for compliance with the Principles, it was not obligated to make these changes because Gravity was already in compliance with the Principles. Specifically, Gravity argued that, on any given website cited by the Accountability Program, one of three exemptions applied and therefore relieved Gravity of any further obligations:

1. The website and Gravity shared a common owner, AOL, rendering collection and use on those sites exempt first-party collection.
2. On non-affiliate websites whose § II.B. first-party responsibilities were fully satisfied, Gravity could rely on the website’s compliance coupled with Gravity’s participation in the DAA website to be considered itself compliant under II.A.(2)(b)(2).
3. On non-affiliate websites whose § II.B. obligations were unmet, the website, not Gravity, is the responsible party, as Gravity’s participation in the DAA opt-out webpage is entirely sufficient to discharge its obligations according to II.A.(2)(b)(2).

DECISION

We approve Gravity’s plan for remedying its widget’s lack of enhanced notice and appreciate the speed of its response. Moreover, we agree with Gravity’s assertions that as a first party on websites that are controlled by Gravity or its owners, it is exempt from providing IBA notice. Indeed, the Accountability Program never suggested otherwise.

The Accountability Program also agrees that Gravity can rely on the enhanced notice and choice provided by a non-affiliate website publisher on webpages where Gravity is providing interest-based native ads. In fact, the website owner on one of the websites where we saw interest-based native ads by Gravity did provide compliant enhanced notice and choice. The Accountability Program has made clear that it does not require duplicative real-time notice of collection or use for IBA. That said, we have also made clear that all parties must work together to ensure that compliant enhanced notice and choice are always provided.

We are unpersuaded by Gravity’s assertion that merely being listed on the DAA consumer choice webpage without directly or in cooperation with first parties, providing enhanced notice in connection with its interest-based native advertising is sufficient to relieve its obligations under § II.A. of the Principles. That interpretation would exempt third parties from providing enhanced notice and place the entire burden on the first party, a result that flies in the face of the third party enhanced notice requirement under the Transparency Principle.

7 Principles, at 27 (providing a definition of a “Third Party”) (further explaining that “In instances where data is being collected and used solely among Affiliates, then the Third Party obligations would not apply.”).
We explain these different use cases and the obligations each entails more fully below.

I. Gravity has obligations under the Principles

As we made clear in our Native Ads Compliance Warning, third parties engaged in interest-based native advertising have the same duties under the Principles as companies engaged in IBA using traditional (e.g., banner or skyscraper) ad formats:

Companies involved in interest-based native ads are responsible for meeting all the requirements of the OBA Principles, just as they would be with respect to any other IBA. In particular, companies must deliver transparency and control, the cornerstones of the OBA Principles, to consumers.8

The Gravity widget operates on both AOL-controlled and non-affiliate websites. When, as Gravity’s first claim of exemption asserts, a company collects or uses data for IBA only on its own website(s) or the website(s) of its affiliate(s), this does not trigger obligations under the Principles.9 Therefore, since Gravity is a wholly-owned subsidiary of AOL, Gravity’s collection and use of web browsing data for interest-based native advertising on AOL-controlled websites is exempt first-party activity.10

However, Gravity’s collection of data for IBA on non-affiliate websites places it within the definition of a “third party” under the Principles.11 Under the Principles, third parties must provide transparency and consumer control when collecting or using consumers’ browsing data for IBA on non-affiliate websites. Under the Transparency Principle, third parties must provide an enhanced notice link as a signal to consumers that data collection or 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 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.13 The company must also state its adherence to the DAA Principles in its disclosure.14 Finally, a third party must maintain an easy-to-use mechanism by which consumers can opt out of its IBA activity.15

8 Native Ads Compliance Warning, at 1.
9 Principles, at 9 Definition C (as quoted “An Affiliate is an entity that Controls, is Controlled by, or is under common Control with, another entity.”).
10 See supra p. 4, n. 5.
11 Principles, at 11 Definition J.
12 Principles § II.A.(2).
13 Principles § II.A.(1).
14 Id.
15 Principles § III.
In this case, Gravity failed to provide enhanced notice in or around its interest-based native ads.

*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 fulfil its shared responsibility to ensure that notice is provided does not excuse the third party from fulfilling its independent obligation to do so.

**II. Gravity is not generally exempt from providing enhanced notice**

We reject Gravity’s third—and extremely broad—assertion that it should not be held responsible for providing enhanced notice in or around its interest-based native ads. In particular, we disagree with Gravity’s claim that merely being listed on an industry-developed consumer choice page is, by itself, sufficient to discharge a third party’s requirement to provide enhanced notice under § II.A.(2) of the Principles. To the contrary, Gravity’s assertion misconstrues the language of § II.A.(2)(b)(i), to wit:

(b) *Third Party Participation in Industry-Developed Web Site(s)* —
Third Parties should be individually listed either:
(i) On an industry-developed Web site(s) linked from the disclosure described in II.B; (Emphasis added.)

Gravity has simply read out of § II.A.(2)(b)(i) the requirement that the listing on the industry-developed website must be “linked from the disclosure described in II.B,” which is the disclosure that the first party provides. Thus, § II.A.(2)(b)(i) is not an exemption from responsibility. Rather, it is one of the four ways described in § II.A.(2) for third parties to satisfy responsibility under the enhanced notice provision. The language of § II.A.(2)(b)(i) instructs third parties that they can collaborate with first parties to ensure enhanced notice is provided where the third parties are engaged in IBA activity. That is, they can utilize an industry-developed opt-out mechanism on which they are listed *on condition that* the first party’s enhanced notice link includes a link to the industry-developed opt-out mechanism. In practice, doing so requires a third party to work with first parties who host their code to ensure that those first parties provide enhanced notice that directs consumers to a compliant disclosure.

For first parties, § II.B. explains how to satisfy their own obligations as websites that allow third parties to collect or use their visitors’ data for IBA, which may also involve communicating with the third parties they allow on their websites. Neither section erases the responsibility of the other party. These sections work together to allow companies to design flexible, mutually-beneficial solutions for ensuring compliance with the Principles. Depending on the circumstances, either the first or third party may be in a better position than the other to provide enhanced notice. The Principles give them the ability to cooperate to do so rather than provide duplicative notices.

In support of its reading of the enhanced notice requirement, Gravity cites a portion of the Commentary to the Principles:
Likewise, where a Third Party engaged in Online Behavioral Advertising is in compliance with the Transparency and Choice Principles and is listed on the industry-developed Web site(s), failure of a Web site where data is collected for use for Online Behavioral Advertising to include the link on its Web site as required under II.B. would be a violation of the Principles by the Web site and not a violation by the Third Party.\textsuperscript{16}

However, this portion of the Commentary actually undermines Gravity’s argument. In this illustration, a third party must both be in compliance with the Transparency and Choice Principles \textit{and} be listed on an industry-developed opt-out website in order to establish that responsibility lies solely with the first party for omitting an enhanced notice link. Since compliance with the Transparency Principle requires a third party to—indeed, independently or in cooperation with a first party—provide enhanced notice when it is collecting or using data for IBA, the quoted text does not provide absolution from its own responsibility for fulfilling the enhanced notice requirement. Rather, the quoted section is focused on the independent responsibility of the first party to comply with its obligation under section II.B. to provide enhanced notice of third-party collection that links to a compliant disclosure.

Practically speaking, accepting Gravity’s argument would have the effect of voiding the third party enhanced notice requirement—the most innovative, privacy-enhancing component of the Principles—and collapsing the Transparency Principle into a mere notice requirement. Under that interpretation of the Principles, a third party would never have to provide enhanced notice so long as it was listed on an industry-developed consumer choice website. When contacted by the Accountability Program, such a third party that failed to provide enhanced notice in or around an interest-based ad could always take refuge under the first party’s failure to satisfy its obligations. It would be able to give a figurative shrug of its shoulders and walk away from its responsibilities.

For the foregoing reasons, 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.

\textbf{III. Once apprised of non-compliance, Gravity came into compliance quickly}

To Gravity’s great credit, despite arguing that it is not duty-bound to provide enhanced notice in or around its interest-based native ads, it nonetheless modified its content recommendation widget to meet the Accountability Program’s recommendations for compliance with the enhanced notice requirement of the Principles, even when it did not believe it was obligated by the Principles to do so. We commend Gravity for acting with great speed and good grace.

\textsuperscript{16} Principles, Commentary at 33.
CONCLUSION

Whether or not Gravity’s interpretation of the Principles was mistaken is of far less significance than Gravity’s actions in response to the Accountability Program’s inquiry. What is important is that Gravity demonstrated that it is unquestionably committed to self-regulation and willing to go beyond its own interpretation of its obligations to ensure that it is providing consumers with the knowledge and power they need to make reasoned decisions about their privacy on the Internet.

It is because of industry’s commitment to accountability that self-regulation can work so well for the benefit of all—both industry and consumers. Industry benefits because it is free to develop innovative advertising models such as native advertising which brings information about products and services to consumers in new ways. Consumers benefit because self-regulation can swiftly adapt to these innovations by flexibly applying the underlying requirements set out in the self-regulatory principles to ensure that consumers receive the same protections even when the business models under which they were originally developed have changed and grown.

COMPANY’S STATEMENT

Gravity appreciates the Accountability Program’s efforts to ensure compliance with the DAA Principles. Gravity is committed to maintaining responsible online advertising practices consistent with legal and self-regulatory requirements, and is working to include the Advertising Option Icon in or around interest-based native ads across the Gravity platform.

We value the Accountability Program’s clarification that a Third Party who chooses to provide enhanced notice by being listed on the DAA’s website is responsible if a website operator fails to provide notice linking to this industry-developed site. We agree with the Accountability Program that all parties in the online advertising ecosystem should work together to protect users’ privacy as a best practice.

Due to the “decentralized nature of the Internet,” Third Parties have limited visibility into every website where data is collected for Online Behavioral Advertising and cannot guarantee that each of these websites properly links to the DAA’s webpage, however. DAA Principles Commentary, at 33. Consequently, further guidance is needed to clarify what specific “cooperation with first parties” is required under Section II.A.2(b)(i) of the DAA Principles. Where a Third Party engages in such cooperation, it should not be held strictly liable if a First Party fails to comply with the First Party’s own obligations under Section II.B of the DAA Principles. This guidance would help more clearly define the roles and responsibilities of First Parties and Third Parties and encourage further coordination throughout the online advertising ecosystem.

DISPOSITION OF DECISION

Practices voluntarily corrected.
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Online Interest-Based Advertising Accountability Program