ADVERTISING SELF-REGULATORY COUNCIL/COUNCIL OF BETTER BUSINESS BUREAUS

ONLINE INTEREST-BASED ADVERTISING ACCOUNTABILITY PROGRAM

FORMAL REVIEW
Case Number: 97-2019

COMPANY:
Kargo Global, Inc.

CHALLENGER:
Online Interest-Based Advertising Accountability Program

DECISION
DATE: May 22, 2019

SYNOPSIS

The Digital Advertising Alliance’s (DAA) Self-Regulatory Principles (DAA Principles)¹ cover entities engaged in interest-based advertising (IBA) across websites and mobile applications (apps). Third-party companies² that engage in IBA across unaffiliated websites must provide a

¹ The DAA’s interest-based advertising Principles consist of a suite of four documents: the Self-Regulatory Principles for Online Behavioral Advertising (OBA Principles), the Self-Regulatory Principles for Multi-Site Data (MSD Principles), the Application of Self-Regulatory Principles to the Mobile Environment (Mobile Guidance) and the Application of the Self-Regulatory Principles of Transparency and Control to Data Used Across Devices (Cross-Device Guidance) (collectively, the Principles). The DAA also maintains a set of self-regulatory principles dedicated to political advertising which is not at issue in this case. The full text of the Principles can be found at http://www.aboutads.info/principles. Unless otherwise noted, cited case names in this document refer to prior Accountability Program decisions, which may be found at http://www.asrcreviews.org/accountability-program-decisions/.

² The term “third party” can refer to entities that collect data for IBA both through non-affiliate mobile apps, 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.”), or from non-affiliate websites or entities, OBA Principles Definition J at 11 (“An entity is a Third Party to the extent that it engages in Online Behavioral Advertising on a non-Affiliate’s Web site.”).
functioning opt-out mechanism, as required by the OBA Principles. Entities engaged in IBA must also abide by the material changes provision of the OBA Principles. Third-party companies that collect cross-app data\(^3\) through mobile devices for IBA must provide notice of these practices and an easy-to-use opt-out mechanism to meet the requirements of the Mobile Guidance. Companies that collect precise location data\(^4\) through mobile apps for IBA must comply with the relevant third-party provisions of the Mobile Guidance.

**COMPANY STATUS**

Kargo Global, Inc. (Kargo) is an advertising technology company headquartered in New York, New York.

**INQUIRY**

This case arises from a number of consumer complaints alleging that Kargo’s opt-out mechanism on the DAA’s WebChoices page (www.aboutads.info/choices) did not function.\(^5\) In response to these consumer complaints, the Accountability Program examined the WebChoices page and located the opt-out mechanism for Kargo. Upon testing this mechanism, we found that the opt-out for Kargo did not complete. Analysis of the website’s network traffic also demonstrated that the opt-out failed to perform correctly.

Following its review of the WebChoices page, the Accountability Program went on to review Kargo’s website and privacy disclosures for compliance with all applicable provisions of the DAA Principles.

I. Multi-site data review

After examining Kargo’s opt-out mechanism on the WebChoices page, the Accountability Program then went on to look for other methods to opt out of Kargo’s IBA practices. We found the company’s privacy policy page (http://www.kargo.com/privacy/) through a link in its website footer. In this privacy policy, we located a description of Kargo’s IBA practices as a third party, a statement of adherence to the DAA Principles, and a link to the Network Advertising Initiative’s (NAI) opt-out page. When we followed this link, we attempted to opt out from Kargo’s IBA practices using the NAI opt-out mechanism, but the Kargo opt out did not function.

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\(^3\) *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.”).

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

A review of the network traffic generated by our opt-out attempt supported our finding that the opt out failed to perform correctly.

Scrolling through Kargo’s privacy policy, we found additional instructions for opting out of its third-party IBA practices, which stated:

If you prefer not to see targeted ads via Interest-Based Advertising (IBA) from our platform, you may opt-out of IBA from Kargo by clicking “Click to Opt-Out” below. Kargo will honor your IBA preferences for a period of five (5) years. This opt-out requires that you have cookies enabled and will need to be repeated if cookies are cleared on your browser (which can happen if you clear your browsing history or re-install your browser). [Emphasis added]6

Below these instructions, we did not locate any button labelled “Click to Opt-out,” though we found a button labelled “Getting Opt-out status.”7 When clicked, we were not directed to any page that confirmed that we were opted out from Kargo’s IBA practices. Our examination of the website’s network traffic did not show the placement of any opt-out cookie or evidence that demonstrated the completion of an opt out. Therefore, it appeared that this option for users to exercise choice failed to function correctly. The Accountability Program found that the absence of any functioning third-party opt-out mechanism for Kargo raised a possible compliance issue under the consumer control provision of the OBA Principles.8

II. Mobile Guidance review

The Accountability Program went on to assess Kargo’s compliance with the Mobile Guidance. During our review, we noted that Kargo stated in its privacy disclosures:

…Kargo may from time to time ask you to provide geographic location information. By voluntarily providing such information, you consent to its use in interactive forums, polls and elsewhere. Additionally, Kargo may obtain geographic location information via programming interfaces supplied by your mobile device service provider or from IP lookup services. Such information may also be used for targeted advertising purposes. [Emphasis added]9

7 Id. The Accountability Program noted that it waited for text reading “Click to Opt-Out” to load on this button but it did not do so. We proceeded to test the button labelled “Getting Opt-out status” as we could find no other button labelled “Click to Opt-Out.”
8 OBA Principles § III.A. at 14.
It was not clear from this language whether Kargo was collecting data that is sufficiently precise to trigger the precise location data requirements of the Mobile Guidance, raising an issue under this section of the Mobile Guidance.

Following its review, the Accountability Program sent an inquiry letter to Kargo informing them of our findings and explaining the requirements of the DAA Principles.

III. Additional compliance review

Following Kargo’s receipt of our inquiry letter and during the pendency of our case, the Accountability Program observed additional issues regarding Kargo’s compliance with the DAA Principles. Specifically, the Accountability Program found language in Kargo’s privacy policy implying that a user may not be provided the opportunity to consent to material changes to Kargo’s privacy policy if such changes take place between the time the user’s data is initially collected and the time it is used. Due to this language, the Accountability Program found a possible compliance issue under section V. of the OBA Principles, the material changes provision. The Accountability Program also found a possible issue with the company’s compliance with the third-party cross-app provisions of the Mobile Guidance. After identifying these issues, the Accountability Program contacted Kargo to ensure that the company took them into account during its internal compliance review process.

ISSUES RAISED

I. Requirements under the OBA Principles

The OBA Principles govern the collection of multi-site data across websites for IBA. Under the OBA Principles, a party may be both a first and a third party depending on its function in a particular set of circumstances.11

i. Third-party multi-site data requirements

Third parties must provide transparency (notice and enhanced notice) and consumer control (an easy-to-use opt out from IBA) when collecting or using consumers’ browsing data for IBA on

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10 Mobile Guidance § IV at 21-30.
non-affiliate websites.\textsuperscript{12} With respect to providing consumer control to end users, section III.A. of the OBA Principles establishes companies’ responsibilities for providing consumers with an easy-to-use method of exercising choice with respect to IBA.\textsuperscript{13} This choice mechanism should be available from a link in or around an advertisement, from an industry-developed consumer choice page or from a first party’s enhanced notice link.\textsuperscript{14}

\hspace{10pt} ii. Material changes provision

Under section V. of the OBA Principles, covered entities should acquire users’ consent before making material changes to their IBA data use policies or practices.\textsuperscript{15} Specifically, a company must obtain opt-in consent if (1) it makes a material change to its IBA practices resulting in more expansive uses of data than previously disclosed to the user, \textit{and} (2) the company applies this material change retroactively to data previously collected from the user under an earlier version of its privacy policy. Consent is defined in the OBA Principles as “an individual’s action in response to a clear, meaningful, and prominent notice.”\textsuperscript{16}

\hspace{10pt} II. Requirements under the 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. Third parties may be subject to multiple requirements depending on the types of data they collect.

\hspace{10pt} i. Cross-app data

\hspace{10pt} A. Third-party notice requirement

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.\textsuperscript{17} 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.\textsuperscript{18}

\hspace{10pt} B. Third-party consumer control requirement

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

\textsuperscript{12} See generally OBA Principles §§ II.A. to III.A. at 12-14.
\textsuperscript{13} OBA Principles § III.A. at 14.
\textsuperscript{14} Id.
\textsuperscript{15} OBA Principles Section V. at 16 (“Entities should obtain Consent before applying any material change to their Online Behavioral Advertising data collection and use policies and practices prior to such material change.”).
\textsuperscript{16} OBA Principles Definition D at 10.
\textsuperscript{17} Mobile Guidance at 14.
\textsuperscript{18} Id.
should be described in the notices required under section III.A. of the Mobile Guidance, described above.\(^\text{19}\)

ii. Precise location data

A. Third-party notice requirement

Under section IV.A.(2) of the Mobile Guidance, a third party must give clear, meaningful, and prominent notice of the collection and use of precise location data for IBA or the transfer of precise location data to it for its use in IBA.\(^\text{20}\) 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.\(^\text{21}\) A third party should provide such notice on its own website or through the first-party application through which it is collecting precise location data.\(^\text{22}\)

B. Third-party consent requirement

Under section IV.B.(2) of the Mobile Guidance, a third party should obtain consent\(^\text{23}\) 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.\(^\text{24}\)

COMPANY RESPONSE AND ANALYSIS

Following receipt of the Accountability Program’s inquiry letter, Kargo expressed its commitment to coming into compliance with the DAA Principles. The company worked with the Accountability Program to meet its compliance requirements and provided detailed descriptions of its data collection practices.

III. Requirements under the OBA Principles

i. Third-party multi-site data requirements

The OBA Principles represent the original industry standards for consumer privacy when companies engage in the practice of collecting data about a user across disparate websites,

\(^\text{19}\) Mobile Guidance at 18-19.
\(^\text{20}\) Mobile Guidance at 22.
\(^\text{21}\) Id. at 22-23.
\(^\text{22}\) Id.
\(^\text{23}\) Mobile Guidance Definition B at 4 (“Consent means an individual’s action in response to a clear, meaningful, and prominent notice regarding the collection and use of data for a specific purpose. Where an entity has a relationship with a consumer through an additional or different medium than the device to which Consent applies, Consent may be obtained through any such medium.”).
\(^\text{24}\) 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….”).
accessed through a web browser, and utilize this data to serve IBA. Though a number of new technologies for retargeting on websites have been developed in recent years, such as canvas fingerprinting and device identification, IBA on desktop devices is most commonly facilitated by the use of HTTP cookies.²⁶

Consequently, when providing users with a consumer choice tool to meet the consumer control provision of the OBA Principles, many companies employ cookie-based opt-out mechanisms. As the Accountability Program has noted in early decisions, an opt-out mechanism that is cookie-based must comport with the industry standard explained in Chitika and have a lifespan of at least five years.²⁷

In this case, the Accountability Program found that Kargo did not provide a functioning opt-out mechanism to users for its desktop-based IBA. After the company received our inquiry letter, Kargo worked with the Accountability Program to resolve its compliance issue under the consumer control provision of the OBA Principles. After evaluating several alternatives, Kargo ultimately chose to work with a third-party vendor to fix its opt-out mechanism. Consulting with the Accountability Program, Kargo fashioned a compliant opt-out mechanism that now sets a 10-year opt-out cookie. Kargo also included new disclosures explaining that opting out using this mechanism would further prevent Kargo from using behavioral data from the company’s vendor for IBA. Finally, the company worked to ensure that its opt-out mechanisms on the DAA’s WebChoices page and the NAI’s opt-out page functioned correctly. These actions resolved Kargo’s compliance issue under the third-party consumer control provision of the OBA Principles.

ii. Material changes provision

Following receipt of the Accountability Program’s inquiry letter, Kargo published a number of revisions to its privacy policy to attempt reach compliance with the DAA Principles. As

²⁷ IAB Mobile Marketing Center of Excellence, Mobile Identity Guide for Marketers, June 2017, at 1, https://www.iab.com/wp-content/uploads/2017/06/Mobile-Identity-Guide-for-Marketers-Report.pdf (“Having a consistent consumer identity for marketing activities across a consumer’s multiple mobile devices is intrinsically more difficult than having one on desktop devices. Indeed…desktop advertising has benefitted from having the cookie as its primary identifier to support measurement and interest-based ad delivery.”) Cahn, Aaron, An Empirical Study of Web Cookies (April 11, 2016), http://pages.cs.wisc.edu/~pb/www16_final.pdf (“Our genre-based analysis shows that the majority of 3rd party cookies come from tech/Internet, business/economy, and search engines/portals and that the majority are used for targeted advertising.”)
indicated in section III of the part of this document describing our inquiry, the Accountability Program found language in a version of Kargo’s privacy policy implying that a user may not be provided the opportunity to consent to materially different uses for previously collected data. After identifying this language, the Accountability Program reached out to Kargo for clarification, and Kargo quickly indicated to the Accountability Program that its business practice is not to apply material changes to its IBA activity retroactively to previously-collected data. Kargo amended its disclosures to make clearer to consumers that they may be presented with choices about changes to the company’s data collection and use practices with respect to previously-collected data. These actions resolved Kargo’s compliance issues with section V. of the OBA Principles.

iii. Requirements under the Mobile Guidance

i. Cross-app data

A. Third-party notice requirement

During Kargo’s revisions of its privacy disclosures, the Accountability Program observed that the company had removed references to mobile-opt out mechanisms that had existed in earlier versions of its privacy policy, despite indicating in these revisions that the company collects data about the use of mobile applications for use in IBA. The Accountability Program underscored that third-party compliance with the cross-app provisions of the Mobile Guidance requires that companies provide a notice of cross-app IBA that includes a description of opt-out mechanisms. To resolve these issues, Kargo ensured that the final revision of its privacy policy included instructions on opting out from IBA on Android and iOS devices using operating-system level settings. The company also made clear in its disclosures that it would honor these opt-out choices. These revisions brought Kargo into compliance with this section of the Mobile Guidance.

B. Third-party consumer control requirement

As explained above, Kargo provided users with instructions for opting out of its mobile IBA by accessing device-level opt-out settings. By providing an opt-out mechanism to users, Kargo resolved its compliance issue under the consumer control provision of the Mobile Guidance.

ii. Precise location data

In its discussions with the Accountability Program, Kargo indicated that it did not collect precise location data for IBA purposes, resolving this issue under the Mobile Guidance.

CONCLUSION

Today’s decision again outlines the role of third parties in promoting an online advertising ecosystem that respects consumer privacy. Third parties, as the masters of the technology that

facilitates IBA, cannot neglect their duty to ensure that they provide functional opt-out mechanisms to consumers in the both desktop and mobile environments.

Once Kargo was informed of its broken opt-out mechanism on the DAA’s WebChoices page, the company worked with the Accountability Program to revise the technical problems that had caused this issue. The Accountability Program strongly encourages companies to exercise appropriate technical diligence in maintaining their opt-out tools. Whether relying on a vendor or building a home-brewed opt-out system, it remains true that the more complex a system is, the more points of possible failure it contains. Companies should take care to shore up systems with redundancies, for example, or to perform stress tests or audits on a routine basis, depending on what is commercially reasonable and technologically sensible under a given set of circumstances.

The Accountability Program also notes that it is entering the fourth year of its mobile enforcement efforts. At this stage, we fully expect companies that engage in IBA through mobile apps to make sure that they offer opt-out mechanisms and descriptions about how to utilize these tools for all major mobile operating systems. Generalized advice about “modifying your settings,” and explanations for only one of the two major mobile operating systems are insufficient. Just like in the desktop space, third parties must remember to provide these mobile opt outs and to make them easy for consumers to use.

The Accountability Program thanks Kargo for its efforts to achieve compliance with the DAA Principles.

COMPANY STATEMENT

Kargo Global is pleased that its remediation of certain consumer choice and transparency issues has brought it into full compliance with the OBA Principles. Certain of the issues identified were attributable to practices of industry-standard third-party vendors utilized by Kargo. Kargo is now a member of the Network Advertising Initiative (NAI) and subject to annual compliance reviews under the NAI Code of Conduct. Kargo is fully committed to the OBA Principles.

DISPOSITION OF DECISION

Practices voluntarily corrected.

Jon M. Brescia
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Online Interest-Based Advertising Accountability Program