FORMAL REVIEW
Case Number: 59-2016

COMPANY: Varick Media Management, LLC

CHALLENGER: Online Interest-Based Advertising Accountability Program

DECISION
DATE: January 14, 2016

SYNOPSIS

All companies engaged in interest-based advertising (IBA) must comply with the Digital Advertising Alliance’s (DAA) Self-Regulatory Principles (DAA Principles).¹ Because a company’s responsibilities depend on the function it is performing, a company must understand and fulfill the different obligations that apply to it when it is acting as a first or third party or as a service provider. Further, companies must ensure that compliance is maintained once achieved. This case concerns a company’s failure to meet aspects of the Transparency and Consumer Control Principles as set forth in the OBA Principles when it was functioning as both a first and third party.

¹ The DAA 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 DAA Principles), available at http://www.aboutads.info/principles.
COMPANY STATUS

Varick Media Management (Varick) is an agency trading desk that “provide[s] advertisers and brands the tools to establish connections with their customers through programmatic advertising solutions.”

INQUIRY

This case arises from a consumer complaint about Varick’s in-ad enhanced notice solution. Specifically, the complaint alleged that Varick did not provide a working opt-out link from its in-ad enhanced notice. As is its practice, the Accountability Program initiated a full review of Varick’s IBA practices in addition to the conduct about which the consumer complained.

I. Consumer Complaint: Enhanced Notice When an Interest-Based Ad is Served

The Accountability Program began its review of Varick’s IBA practices and compliance with the OBA Principles by investigating whether Varick provided enhanced notice in or around an interest-based ad (in-ad enhanced notice). The Accountability Program found that Varick provided in-ad enhanced notice in the form of the Advertising Option Icon (AdChoices Icon), the familiar blue triangle shown in the heading above. When a consumer clicks on the AdChoices Icon, she will be taken to an explanation of IBA and an easy-to-use consumer choice mechanism. When the Accountability Program clicked the AdChoices Icon in a Varick ad, the enhanced notice expanded to overlay the ad with a box containing a brief disclosure and several links: “VMM,” which took users to Varick’s homepage; “Set Your Ad Preferences >>,” which took users to TRUSTe’s opt-out mechanism; and “Varick Media Privacy Policy,” which linked to http://varickmm.com/optout.html.

The Accountability Program’s testing revealed the following information about each link:

Varick Homepage Link: The Varick homepage link existed at the time of testing but loaded after too long a delay to be considered functional.

TRUSTe Opt-Out Link: The link to TRUSTe’s opt-out mechanism worked correctly when clicked, causing the browser to load TRUSTe’s Preference Manager page. However, the Accountability Program could not locate Varick’s name among the companies listed on the opt-out.

Varick Media Privacy Policy Link: While the hyperlinked text suggested that the link would take users to Varick’s privacy policy, it in fact pointed to a page called “optout.html” on Varick’s domain (www.varickmm.com). This page returned an HTTP 404 error when requested, meaning “optout.html” had been deleted or moved.

For the foregoing reasons, the Accountability Program determined that the consumer complaint was valid.

II. Accountability Program Review of Varick’s Other Compliance Responsibilities

The Accountability Program then reviewed Varick’s other compliance responsibilities under the OBA Principles, starting with Varick’s duties as a first party.

First Party Responsibilities

Under section II.B. of the OBA Principles, when a company allows non-affiliates to collect or use data for IBA on its own website (where it is a first party) it must ensure that an enhanced notice link appears on every page where this collection or use occurs. This link must direct consumers to a disclosure of non-affiliate IBA activity occurring on the website. This disclosure must provide a link to an easy-to-use opt-out mechanism as well as a statement of adherence to the DAA Principles.

While reviewing the Varick website, the Accountability Program observed data collection by third parties known to engage in IBA. Third-party data collection on the Varick website for use in IBA triggered Varick’s obligations as a first party. However, the Accountability Program did not find any of the elements required by § II.B. on the Varick website.

Third Party Responsibilities

The Accountability Program then reviewed Varick’s compliance when acting as a third party. Third parties must fulfill the Transparency and Consumer Control Principles. Duties under the Transparency Principle are twofold, consisting of notice and enhanced notice, as explained below.

A. Notice

In order to achieve compliance with its responsibilities under the OBA Principles, a third party must provide a clear, meaningful and prominent notice of its IBA data collection and use practices, a statement of adherence to the DAA Principles and an easy-to-use mechanism for consumers to exercise choice regarding data collection for IBA.

While browsing the Varick website, the Accountability Program was unable to locate Varick’s disclosure of its own IBA data collection and use practices as required by § II.A.(1) of the OBA Principles. The Accountability Program did find a “Privacy” link in Varick’s website footer, but

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3 OBA Principles at 13-14.
4 Id.
5 Id. First parties may either link to an industry-developed opt-out website (e.g., http://aboutads.info/choices) or list each third party engaged in IBA on its website and provide links to each company’s opt-out tool.
6 Id. at 12, 14.
7 Id. at 12-14; See also Id. at 30-31.
8 OBA Principles § II.A.(1) at 12.
9 Id.
it returned an error when clicked. Therefore, the Accountability Program determined that at the
time of its review, Varick did not provide users with a compliant § II.A.(1) disclosure. In
addition, Varick did not provide a statement of adherence to the OBA Principles. As discussed in
Section I of this decision, there was also no working link to an easy-to-use opt-out mechanism on
the Varick website.

B. Enhanced Notice

Third parties have enhanced notice responsibilities under § II.A.(2) of the OBA Principles when
collecting or using data for IBA on a non-affiliate website.\textsuperscript{10} Section II.A. gives third parties four
choices for fulfilling this enhanced notice obligation. Under § II.A.(2)(a)(i), third parties may
provide enhanced notice in or around an advertisement that has a functional link directly to the
place on their website where they discuss their IBA practices (as described in Section I above)
and link to an easy-to-use opt-out mechanism.\textsuperscript{11} Alternatively, under § II.A.(2)(a)(ii), they may
arrange with the first party to provide that notice.\textsuperscript{12} In addition, under § II.A.(2)(b)(i) and § II.B.,
third parties may be listed on an industry-developed website, as long as the first party is
providing a clear, meaningful and prominent link to a disclosure that points to an industry-
developed website.\textsuperscript{13} Finally, under § II.A.(2)(b)(ii) and § II.B., a third party may communicate
with a first party who chooses to list all third parties engaged in IBA on its website to ensure the
third party is included in the first party’s list along with a link to the third party’s opt out.\textsuperscript{14}

Because Varick did not provide an enhanced notice link using any of the four options provided
under § II.A.(2), the Accountability Program concluded that Varick failed to comply with its
enhanced notice obligations.

C. Consumer Control

Section III.A. of the OBA Principles explains companies’ responsibilities for providing
consumers with an easy-to-use way of expressing whether they wish to participate in IBA.\textsuperscript{15} This
choice should be available from a link in or around the advertisement, from the industry-
developed consumer choice page or from a first party’s enhanced notice link.\textsuperscript{16}

The Accountability Program investigated whether Varick satisfied the Consumer Control
Principle by any of the means permitted under this principle. As discussed above in Section I,
Varick did not provide a working opt-out link in or around the advertisement about which the
consumer complained. The Accountability Program investigated whether it could locate any
other functional opt out from Varick’s IBA practices. The Accountability Program began by
performing an Internet search for the string “Varick opt out.” The first result linked to
http://www.varickmm.com/about/opt-out/, which yielded an error message. The second result,
http://www.varickmm.com/about/opt-out-information, loaded a page with links to the DAA

\textsuperscript{10} Id. at 13.
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} OBA Principles §§ II.A(2) and II.B. at 13-14.
\textsuperscript{14} Id. at 13-14.
\textsuperscript{15} Id. at 14.
\textsuperscript{16} Id.
consumer choice page and to Ghostery, Inc.’s (Ghostery) homepage. This page stated that consumers could opt out from Varick’s IBA by clicking either the DAA or the Ghostery link provided. However, Varick’s opt out was not present on either of those pages.

The Accountability Program also visited Varick’s homepage to see if it could locate a working link to an opt out there. However, the Accountability Program was unable to find such a link during its search. Therefore, the Accountability Program determined that at the time of its review, Varick did not provide users with a functional opt out.

COMPANY’S POSITION

In response to the Accountability Program’s inquiry, Varick acknowledged the problems that had been discovered during the compliance review. Varick further stated that it had begun to address the concerns raised by the inquiry. Both in forming and executing its compliance plan, Varick worked with the Accountability Program to ensure that its changes brought it fully into compliance with the OBA Principles.

DECISION

A company can function as a first party, third party or service provider. This requires each company to undertake an analysis of all the ways it functions in the advertising ecosystem and fulfill the obligations that apply in every instance. Moreover, because first and third parties have an independent responsibility to meet the enhanced notice and opt-out requirements of the OBA Principles, they should communicate to ensure that one of the parties is fulfilling the responsibility in question. In this case, Varick has duties as both a first and a third party under the OBA Principles. In order to meet its obligations in both its capacities, Varick made the following changes.

I. First-Party Duties

Varick modified the content of its privacy policy by adding disclosure language explaining that third parties may be collecting visitors’ web browsing information on the Varick website for use in IBA. Varick also amended the page to inform visitors that they can opt out of IBA from these third parties using the opt-out links Varick provides. To conclude its first-party disclosure duties, Varick added a statement of adherence to the DAA Principles to the opt-out information page. Finally, Varick added an enhanced notice link, “Interest-based Ads,” to every page on its website where data collection for IBA occurs. The link takes users directly to the modified opt-out information page and cements Varick’s compliance with § II.B. of the OBA Principles.

17 Id. at 8.
19 Id.
20 Id.
II. Third Party Duties

A. Third Party Notice on Its Own Website

Among the broken links that Varick repaired while updating its website was the “Privacy” footer link that, when examined by the Accountability Program, failed to direct users to Varick’s privacy policy.\(^\text{22}\) While the link was broken, Varick’s privacy policy was effectively inaccessible. The restoration of this link makes the privacy policy page easily accessible to users. The privacy policy page contains a discussion of Varick’s data collection and use practices for IBA and has been modified to include a statement of adherence to the DAA Principles and multiple prominent links to a location where users can opt out of Varick’s IBA.\(^\text{23}\) These changes bring Varick into compliance with its third party duties under § II.A.(1) to give clear, meaningful and prominent notice of its IBA practices on its own website.

B. In-Ad Enhanced Notice

Varick amended the content of the enhanced notice overlay to ensure that the hyperlinks that should take consumers to Varick’s disclosure and opt out were functional and directed consumers to the correct places on the web. Varick changed the “Varick Media Privacy Policy” link in the enhanced notice overlay to point to www.varickmm.com/about/privacy-policy, the location of Varick’s updated privacy policy. The first paragraph of that privacy policy, with a larger font size for emphasis, provides users with information about how to opt out from Varick’s IBA through a link to Varick’s own opt-out page at www.varickmm.com/about/opt-out-information. Varick also worked with its third-party compliance vendor to ensure it was correctly listed on the vendor’s opt-out page. Now, users can click on the TRUSTe link in the enhanced notice overlay and opt out of Varick’s IBA using the vendor’s preference manager page.

C. Varick’s Opt Out

Varick took several steps to ensure consumers would have a functional, easy-to-use means of exercising choice about participating in Varick’s IBA. Varick worked with its in-ad enhanced notice vendor to ensure that Varick’s opt out was listed on the vendor’s preference manager page. Varick contacted each of the organizations linked from its opt-out information page\(^\text{24}\) to make sure Varick’s opt out was correctly listed in each of their opt out tools.

Varick additionally modified its own website to repair existing-but-broken links leading to its opt-out information page and to create additional links to this page in prominent locations. Varick also modified the links on its opt-out information page to take users directly to places where they could opt out of Varick’s IBA.

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\(^{23}\)Id.

\(^{24}\)These organizations were NAI, DAA, Ghostery, and TRUSTe.
CONCLUSION

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.

In addition to the DAA Principles’ recognition that companies may play multiple roles in the online advertising industry, they acknowledge that interdependence between companies is the norm for conducting marketing online. The Accountability Program has repeatedly reminded companies to coordinate with one another at every stage of the IBA process. Whether dealing with a compliance vendor or negotiating to integrate third-party code into a first party’s website, companies must address their shared responsibilities under the DAA Principles.

Further, we must emphasize that compliance with the DAA Principles is an ongoing responsibility, and companies which fail to maintain their compliance over time risk formal action by the Accountability Program. Moreover, consumers must be able to rely on all companies covered by the DAA Principles to implement and maintain their compliance. To build consumer trust, the standards set out in the DAA Principles must be consistently upheld and cannot be treated as a one-time checklist to be forgotten once it has been filled out.

The willingness of companies like Varick to make any and all necessary modifications to reach compliance with the DAA Principles demonstrates industry’s commitment to consumer privacy as embodied in the DAA Principles. The Accountability Program appreciates the support of the online advertising industry in upholding compliance under the DAA Principles.

COMPANY’S STATEMENT

Varick Media Management is pleased to receive confirmation that it is currently in compliance with the DAA Principles. The company is also a member of the Network Advertising Initiative (NAI); the leading self-regulatory association dedicated to responsible data collection and its use for digital advertising. Varick Media Management continues to support such self-regulatory practices.
DISPOSITION OF DECISION

Practices voluntarily corrected.

Genie Barton
Vice President and Director
Online Interest-Based Advertising Accountability Program