

AdChoices? Compliance with Online Behavioral Advertising Notice and Choice Requirements

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Abstract. Online behavioral advertisers track users across websites, often without their knowledge. Over the last twelve years, the online behavioral advertising industry has responded to privacy concerns and pressure from the FTC by creating private self-regulatory bodies. These include the Network Advertising Initiative (NAI) and an umbrella organization known as the Digital Advertising Alliance (DAA). In this paper, we enumerate the DAA and NAI notice and choice requirements and check for compliance with those requirements by examining NAI members' privacy policies and reviewing ads on the top 100 websites. We also test DAA and NAI opt-out mechanisms and categorize how their members define opting out. Our results show that most members are in compliance with some of the notice and choice requirements, but two years after the DAA published its Self-Regulatory Principles, there are still numerous instances of non-compliance. Most examples of non-compliance are related to the "enhanced notice" requirement, which requires advertisers to mark behavioral ads with a link to further information and a means of opting out.

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I. INTRODUCTION

The Federal Trade Commission (FTC) defines online behavioral advertising (OBA) as “the practice of tracking consumers' activities online to target advertising.”¹ The FTC has been examining ways to reduce the privacy concerns associated with OBA for over a decade.

In 1999, a group of companies engaging in OBA announced the launch of a self-regulatory organization called the Network Advertising Initiative (NAI) and proposed a set of principles to the FTC. In a July 2000 report, the FTC acknowledged that “the NAI principles present a solid self-regulatory scheme,” but nonetheless recommended legislation to provide a basic level of privacy protection.² This legislation was never enacted.³ The NAI published its principles in 2001 and revised them in 2008.⁴ Today, the NAI has seventy-four member companies⁵ and offers a consumer opt-out service⁶ that allows consumers “to ‘opt out’ of the behavioral advertising delivered by our member companies.”⁷

As the FTC began examining OBA again in 2009, several industry organizations with an interest in OBA (including the NAI) formed the

¹ FED. TRADE COMM’N, ONLINE BEHAVIORAL ADVERTISING: MOVING THE DISCUSSION FORWARD TO POSSIBLE SELF-REGULATORY PRINCIPLES (2011), *available at* <http://www.ftc.gov/os/2007/12/P85990ostmt.pdf>.

² FED. TRADE COMM’N, ONLINE PROFILING: REPORT TO CONGRESS PART 2: RECOMMENDATIONS 9–10 (2000) [hereinafter FTC, ONLINE PROFILING REPORT], *available at* <http://www.ftc.gov/os/2000/07/onlineprofiling.pdf>.

³ FED. TRADE COMM’N, STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 7 (2009), *available at* <http://www.ftc.gov/os/2009/02/P085400behavadreport.pdf>.

⁴ NETWORK ADVER. INITIATIVE, 2008 NAI PRINCIPLES: THE NETWORK ADVERTISING INITIATIVE’S SELF-REGULATORY CODE OF CONDUCT (2008) [hereinafter 2008 NAI PRINCIPLES], *available at* http://www.networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf.

⁵ The full NAI membership list is available online at <http://www.networkadvertising.org/participating> (last visited Jan. 16, 2012).

⁶ *Opt Out of Behavioral Advertising*, NETWORK ADVER. INITIATIVE, http://www.networkadvertising.org/managing/opt_out.asp (last visited Jan. 16, 2012).

⁷ *Id.*

Digital Advertising Alliance (DAA).⁸ One of the member organizations of the DAA is the Interactive Advertising Bureau (IAB), which lists as one of its “core objectives” to “[f]end off adverse legislation and regulation.”⁹ In July 2009, the DAA published its own set of requirements, the “Self-Regulatory Principles for Online Behavioral Advertising,”¹⁰ in an effort to avoid an FTC push for new legislation.¹¹ The self-regulatory program based on the DAA Principles document was announced in October 2010. According to a Better Business Bureau announcement, “the Principles and practices represent the industry’s response to the Federal Trade Commission’s call for more robust and effective self-regulation of online behavioral advertising practices that would foster transparency, knowledge and choice for consumers.”¹²

As the FTC determines what to do next, it is useful to evaluate the effectiveness of industry self-regulation to date. In this paper, we focus on the effectiveness of notice and opt-out and quantify DAA and NAI member compliance with these self-regulatory requirements. We check for compliance by examining websites showing advertisements, advertising network websites, and the cookies produced by the DAA and NAI opt-out mechanisms.

The remainder of our paper is organized as follows: We present background material and related work in Part II. In Part III we discuss

⁸ For a list of affiliated organizations, see <http://www.aboutads.info/associations> (last visited Jan. 16, 2012).

⁹ *About the IAB*, INTERACTIVE ADVER. BUREAU, http://www.iab.net/about_the_iab (last visited Mar. 13, 2012).

¹⁰ DAA ET AL., SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING (2009) [hereinafter DAA SELF-REGULATORY PRINCIPLES], *available at* <http://www.aboutads.info/resource/download/seven-principles-07-01-09.pdf>.

¹¹ DAVIS & GILBERT LLP, NEWLY FORMED DIGITAL ADVERTISING ALLIANCE ANNOUNCES SELF-REGULATORY PROGRAM FOR ONLINE BEHAVIORAL ADVERTISING (2010), *available at* http://www.dglaw.com/images_user/newsalerts/AdvMktngPromo_Behavioral-Advertising-Self-Regulatory-Program.pdf.

¹² Press Release, Better Bus. Bureau, Major Marketing/Media Trade Groups Launch Program to Give Consumers Enhanced Control Over Collection and Use of Web Viewing Data for Online Behavioral Advertising (Oct. 21, 2010), *available at* <http://www.newyork.bbb.org/article/major-marketing/media-trade-groups-launch-program-to-give-consumers-enhanced-control-over-collection-and-use-of-web-viewing-data-for-online-behavioral-advertising-22618>.

the DAA and NAI requirements that we have investigated. We outline our methodology in Part IV and present our findings in Part V. Finally, in Part VI, we discuss our conclusions on the matter.

II. BACKGROUND AND RELATED WORK

Online behavioral advertising is a form of advertising in which advertising networks construct profiles of users as they navigate various websites.¹³ The purpose of this tracking is to present each user with advertisements related to his or her interests.¹⁴ HTTP cookies are the primary mechanism for executing this tracking, though it is possible to do so using other technologies, such as JavaScript cookies or Flash Local Shared Objects (LSOs).

While OBA practitioners claim that behavioral advertising benefits consumers,¹⁵ by funding website content, for example, the FTC notes that it raises privacy concerns among consumers, including:

[T]he invisibility of the data collection to consumers; the shortcomings of current disclosures about the practice; the potential to develop and store detailed profiles about consumers; and the risk that data collected for behavioral advertising -- including sensitive data regarding health, finances, or children -- could fall into the wrong hands or be used for unanticipated purposes.¹⁶

In a 2009 study, Turow et al. found that the majority of American adults did not want advertisements to be targeted toward their

¹³ PAM DIXON, WORLD PRIVACY FORUM, THE NETWORK ADVERTISING INITIATIVE: FAILING AT CONSUMER PROTECTION AND AT SELF-REGULATION 5 (2007), *available at* http://www.worldprivacyforum.org/pdf/WPF_NAI_report_Nov2_2007fs.pdf.

¹⁴ *How Interest Based Ads Work*, ABOUTADS, <http://www.aboutads.info/how-interest-based-ads-work> (last visited Jan. 16, 2012).

¹⁵ FED. TRADE COMM'N, ONLINE BEHAVIORAL ADVERTISING: MOVING THE DISCUSSION FORWARD TO POSSIBLE SELF-REGULATORY PRINCIPLES, PROJECT NO. P859900 (comments of Randall Rothenberg et al. on behalf of the Interactive Advertising Bureau, Apr. 11, 2008), *available at* <http://www.ftc.gov/os/comments/behavioraladprinciples/o8o411interactiveadbureau.pdf>.

¹⁶ FTC, ONLINE PROFILING REPORT, *supra* note 2, at i–ii.

interests, even if done anonymously.¹⁷ They also found that most Americans believe a law should require advertisers “to immediately delete information about their internet activity.”¹⁸ In a 2010 study by McDonald et al., over 60% of more than 300 participants saw online behavioral advertising as “invasive.”¹⁹

Google counsel Pablo Chavez reported on Google's OBA opt-out mechanism, which also allows users to modify their interest categories:

[F]or every user that has opted out, about four change their interest categories and remain opted in, and about ten do nothing. We take from this that online users appreciate transparency and control, and become more comfortable with data collection and use when they feel it happens on their terms and in full view.²⁰

Other research has examined online self-regulatory mechanisms. McDonald et al. have explored the cost of reading online privacy policies. They discovered that, despite being a self-regulatory mechanism designed to provide users with notice, website privacy policies were so verbose and densely written that it would be unreasonable for a typical user to read the privacy policy of each website visited.²¹

The Platform for Privacy Preferences (P3P) is a self-regulatory mechanism for websites to communicate their privacy policies to user agents so users do not have to read them.²² Leon et al. discovered that

¹⁷ JOSEPH TUROW ET AL., AMERICANS REJECT TAILORED ADVERTISING AND THREE ACTIVITIES THAT ENABLE IT (2009), available at http://repository.upenn.edu/asc_papers/137.

¹⁸ *Id.* at 20.

¹⁹ Aleecia M. McDonald & Lorie F. Cranor, *Americans' Attitudes about Internet Behavioral Advertising Practices*, WPES '10: PROCEEDINGS OF THE 9TH ANN. ACM WORKSHOP ON PRIVACY IN THE ELECTRONIC SOC'Y, at 63, 69 (Oct. 4, 2010), available at <http://dl.acm.org/citation.cfm?id=1866929>.

²⁰ Email from Pablo L. Chavez, Managing Policy Counsel, Google Inc., to Donald S. Clark, Fed. Trade Comm'n, *Re: Privacy Roundtables 4* (Apr. 14, 2010), available at <http://www.ftc.gov/os/comments/privacyroundtable/544506-00134.pdf>.

²¹ Aleecia McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 ISJLP 3 (2008).

²² LORRIE FAITH CRANOR, WEB PRIVACY WITH P3P (2002).

thousands of websites use P3P compact policies to misrepresent their privacy practices.²³ Reay et al. examined P3P policies of websites and compared them with the legal requirements of the websites' jurisdictions. They found that websites often do not claim to follow legal privacy-related requirements.²⁴

Prior research has examined the usability of self-regulatory privacy mechanisms. McDonald et al. found that only 11% of study participants were able to determine the function of the NAI opt-out website.²⁵ Further, the Annenberg Public Policy Center reports that many users misunderstand the purpose of website privacy policies. Their report states that over half of users believe that a website having a privacy policy means the website in question will not share data.²⁶

The NAI expressly recognizes the importance of NAI member adherence to privacy principles:

NAI members believe that self imposed constraints help achieve the balance needed to preserve consumer confidence in the use of this revolutionary medium. Even where there is reduced privacy impact in use of anonymous or anonymized data, the NAI recognizes that consumers will only trust and continue to engage with advertisers online when there is appropriate deference shown to consumers' concerns about the privacy of their websurfing experience.²⁷

The NAI states that they rely in part on consumers to report violations.²⁸

²³ Pedro Giovanni Leon et al., *Token Attempt: The Misrepresentation of Website Privacy Policies Through the Misuse of P3P Compact Policy Tokens* (2010), <http://repository.cmu.edu/cylab/73>.

²⁴ Ian Reay et al., *A Large-Scale Empirical Study of P3P Privacy Policies: Stated Actions vs. Legal Obligations*, 3 *ACM TRANS. ON THE WEB* 1, 1–34 (Apr. 2009).

²⁵ McDonald & Cranor, *supra* note 19.

²⁶ JOSEPH TUROW, *AMERICANS AND ONLINE PRIVACY: THE SYSTEM IS BROKEN, A REPORT FROM THE ANNENBERG PUBLIC POLICY CENTER OF THE UNIVERSITY OF PENNSYLVANIA* 3 (2003).

²⁷ 2008 NAI PRINCIPLES, *supra* note 4.

²⁸ *Network Advertising Initiative FAQ: What do I do if I Think an NAI Member Has Violated the NAI Privacy Principles?*, NETWORK ADVER. INITIATIVE,

The NAI's 2010 Annual Compliance Report examined the thirty-four NAI companies who were members at the start of 2010. The report found that "the vast majority of evaluated member companies met their compliance obligations."²⁹ However, the report also indicated that there were instances of opt-out mechanisms failing and failure of members to observe requirements pertaining to "non-cookie technologies."³⁰ There was also a member using sensitive health-related information to target ads without opt-in consent, which the NAI requires.³¹ The document states that the NAI is working on policy changes to address their findings.³²

The NAI compliance report also indicates that one NAI member withdrew its membership.³³ This highlights one potential problem with self-regulatory organizations: members who do not wish to follow the self-regulation process can simply leave. The FTC expressed this concern in 2000:

For while NAI's current membership constitutes over 90% of the network advertising industry in terms of revenue and ads served, only legislation can compel the remaining 10% of the industry to comply with fair information practice principles. Self-regulation cannot address recalcitrant and bad actors, new entrants to the market, and drop-outs from the self-regulatory program.³⁴

http://www.networkadvertising.org/managing/faqs.asp#question_15 (last visited Mar. 3, 2012).

²⁹ NETWORK ADVERTISING INITIATIVE, 2010 ANNUAL COMPLIANCE REPORT ii (2011), available at http://www.networkadvertising.org/pdfs/2010_NAI_Compliance_Report.pdf.

³⁰ *Id.*

³¹ *Id.* at vi.

³² *Id.*

³³ *Id.* at 2.

³⁴ FTC, ONLINE PROFILING REPORT, *supra* note 2, at 10.

The “do not track” mechanism has been proposed as a mechanism to allow privacy-concerned users to avoid OBA tracking,³⁵ and Jon Leibowitz, chairman of the FTC, has expressed his support.³⁶ A recent release of Mozilla Firefox includes a do not track feature that signals to visited websites that the user does not wish to be tracked.³⁷ Likewise, Microsoft Internet Explorer 9 includes a do not track header as well as a feature called “tracking protection.”³⁸ Google has also introduced a Chrome extension which enables users to retain persistent opt-out cookies.³⁹ The do-not-track and opt-out mechanisms both rely on website operators to honor user preferences.

III. DAA AND NAI REQUIREMENTS INVESTIGATED IN THIS STUDY

In this section we discuss the DAA and NAI principles in more detail and focus on the notice and choice requirements that we investigated in this study. The DAA principles are contained in a forty-eight page document, published in 2009.⁴⁰ This document presents seven principles along with commentary and implementation guidance. The NAI principles are contained in a twelve page document last revised in 2008.⁴¹ This document describes ten principles and does not include the more extensive commentary and implementation details of the DAA principles document. The principles documents are

³⁵ Peter Eckersley, *What Does the “Track” in “Do Not Track” Mean?*, ELECTRONIC FRONTIER FOUNDATION (Feb. 19, 2011), <https://www EFF.ORG/deeplinks/2011/02/what-does-track-do-not-track-mean>.

³⁶ Jon Leibowitz, Chairman, Fed. Trade Comm’n., Remarks as Prepared for Delivery, Preliminary FTC Staff Privacy Report 5-6 (Dec. 1, 2010) (Prepared remarks available at <http://www.ftc.gov/speeches/leibowitz/101201privacyreportremarks.pdf>).

³⁷ *Mozilla Firefox 4 Beta, Now Including “Do Not Track” Capabilities*, MOZILLA BLOG (Feb. 8, 2011), <http://blog.mozilla.com/blog/2011/02/08/mozilla-firefox-4-beta-now-including-do-not-track-capabilities>.

³⁸ Dean Hachamovitch, *IE9 and Privacy: Introducing Tracking Protection*, IEBLOG (Dec. 7, 2010, 10:10AM), <http://blogs.msdn.com/b/ie/archive/2010/12/07/ie9-and-privacy-introducing-tracking-protection-v8.aspx>.

³⁹ Sean Harvey & Rajas Moonka, *Keep Your Opt-Outs*, GOOGLE PUB. POLICY BLOG (Jan. 24, 2010, 12:00 PM), <http://googlepublicpolicy.blogspot.com/2011/01/keep-your-opt-outs.html>.

⁴⁰ See DAA SELF-REGULATORY PRINCIPLES, *supra* note 10.

⁴¹ See 2008 NAI PRINCIPLES, *supra* note 4.

not exhaustive lists of either organization's requirements, as we discuss below.

We examined the DAA principles document to determine which principles lend themselves to compliance checks through inspection of websites, privacy policies, advertisements, and cookies.

- *Education Principle*: The DAA must maintain a central educational website and provide educational ads. The educational website is the DAA website itself.⁴² Checking the educational ad requirement is beyond the scope of this study.
- *Transparency Principle*: Companies must provide certain information on their websites and in ads.⁴³ We check this principle through inspection of websites and advertisements.
- *Consumer Control Principle*: Companies must provide a mechanism for opting out of data collection for online behavioral advertising.⁴⁴ We check this through examination of opt-out cookies.
- *Security Data Principle*: This principle sets forth requirements for data security.⁴⁵ We are unable to check this because it pertains to internal practices.
- *Material Changes Principle*: Companies must obtain consent before making certain changes to their practices.⁴⁶ We are unable to check this

⁴² DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 2, 12.

⁴³ *Id.* at 12.

⁴⁴ *Id.* at 14.

⁴⁵ *Id.* at 15–16.

⁴⁶ *Id.* at 16.

because we do not know when companies change their practices or what steps they are taking to obtain consent.

- *Sensitive Data Principle*: Companies must take additional steps when handling sensitive data.⁴⁷ We cannot check this because we do not know what data a given company may have or what steps they take to handle it.
- *Accountability Principle*: The industry must develop compliance programs.⁴⁸ The Direct Marketing Association and Council of Better Business Bureaus are developing such programs,⁴⁹ but a review of these programs is beyond the scope of this paper.

The NAI principles document contains similar principles as well as some additional principles that are not relevant to our analysis.

The DAA Transparency Principle requires that companies “give clear, meaningful, and prominent notice on their own Web sites that describes their Online Behavioral Advertising data collection and use practices.”⁵⁰ Companies must indicate “the types of data collected online,” “the uses of such data,” a “mechanism for exercising choice” about data collection and use for online behavioral advertising, and “the fact that they adhere to these principles.”⁵¹ The NAI principles also require the above, except for requiring members’ affirmation that they adhere to the DAA principles. In addition, the NAI principles require that a member disclose what online behavioral advertising activity it performs, and the approximate duration for which it retains data for online behavioral advertising.⁵²

⁴⁷ *Id.* at 16–17.

⁴⁸ DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 17–18.

⁴⁹ Press Release, Better Business Bureau, *supra* note 12.

⁵⁰ DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 12.

⁵¹ *Id.*

⁵² 2008 NAI PRINCIPLES, *supra* note 4, at 7–8.

The DAA's Transparency Principle includes an “enhanced notice” provision, requiring that websites on which behavioral advertising data is collected or used provide a “clear, meaningful and prominent link” to a “disclosure” about online advertising.⁵³ This link must appear on every page “where OBA data is collected or used.”⁵⁴ This disclosure must contain either a list of advertisers collecting data and corresponding links, or “a link to an industry-developed Web site” containing certain information.⁵⁵ A link to the DAA website satisfies this condition.⁵⁶

The DAA principles do not require a specific icon and none is depicted in the document itself; however, it does mention “common wording and a link/icon that consumers will come to recognize.”⁵⁷ In January 2010, the industry introduced the “Power I” icon to denote online behavioral advertising.⁵⁸ This symbol was selected based on the results of a research study commissioned by the Future of Privacy Forum.⁵⁹ Nine months later, the industry announced a new “Advertising Option Icon.”⁶⁰ Both the original and new icons are shown in Figure 1. The Ad Option Icon may be licensed for a fee from the DAA (although web publishers with annual revenues from online behavioral advertising of less than \$2,000,000 are permitted to use it for free).⁶¹

⁵³ DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 13.

⁵⁴ *Id.*

⁵⁵ *Id.* at 6.

⁵⁶ *Id.*

⁵⁷ *Id.* at 5.

⁵⁸ Stephanie Clifford, *A Little ‘i’ to Teach About Online Privacy*, N.Y. TIMES, Jan. 26, 2010, at B3, available at <http://www.nytimes.com/2010/01/27/business/media/27adco.html>.

⁵⁹ MANOJ HASTAK & MARY J. CULNAN, FUTURE OF PRIVACY FORUM: ONLINE BEHAVIORAL ADVERTISING “ICON” STUDY 16 (2009), available at http://futureofprivacy.org/final_report.pdf.

⁶⁰ Tanzina Vega, *Ad Group Unveils Plan to Improve Web Privacy*, N.Y. TIMES, Oct. 4, 2010, at B8, available at <http://www.nytimes.com/2010/10/04/business/media/04privacy.html>.

⁶¹ *Advertising Option Icon Application*, ABOUTADS, <http://www.aboutads.info/participants/icon> (last visited Jan. 14, 2012).

Figure 1:

A Progressive ad (left) and a Geico ad (right) displaying the Power I and Advertising Option Icon, respectively.



The DAA Consumer Control principle requires that companies “provide consumers with the ability to exercise choice with respect to the collection and use of data for Online Behavioral Advertising purposes.”⁶² This must be available from one of a number of locations, including the privacy notice.⁶³ Likewise, the NAI requires that its members using non-personally identifiable information for OBA provide users with an opt-out mechanism, both on the member website and on the NAI website.⁶⁴ Further, while the DAA and NAI principles documents do not mention this, the NAI and DAA both require that opt-out cookies persist for at least five years.⁶⁵

We also note that in 2009, the FTC narrowed its focus to third-party behavioral advertising.⁶⁶ Thus, the DAA considers online behavioral advertising to occur only “across non-affiliate Websites.”⁶⁷ The DAA states that the principles do not cover “[a]ctivities of First

⁶² DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 14.

⁶³ *Id.*

⁶⁴ 2008 NAI PRINCIPLES, *supra* note 4, at 8.

⁶⁵ *NAI Frequently Asked Questions*, NETWORK ADVER. INITIATIVE, <http://www.networkadvertising.org/managing/faqs.asp> (last visited Jan. 14, 2012); *What Are Opt Out Cookies and How Do They Remember Opt Out Preferences?*, <http://www.aboutads.info/how-interest-based-ads-work/what-are-opt-out-cookies-and-how-do-they-remember-opt-out-preferences> (last visited Jan. 14, 2012).

⁶⁶ Press Release, Fed. Trade Comm’n, FTC Staff Revises Online Behavioral Advertising Principles (Feb. 12, 2009), *available at* <http://www.ftc.gov/opa/2009/02/behavad.shtm>.

⁶⁷ DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 19.

Parties (Web site publishers / operators) that are limited to their own sites or affiliated sites over which they exercise direct control.”⁶⁸ The NAI defines online behavioral advertising as “third-party online behavioral advertising.”⁶⁹ Thus, a website can still track and target ads at a user who has opted out if the user is on the ad network's own website.

Based on this analysis, we compiled a set of ten requirements to check for this study. This list of requirements is shown in Table 1.

Table 1:
Summary of requirements checked in this study.

Requirement	Source	How Checked
Privacy notice requirements		
Types of data collected	DAA+NAI	NAI member website
Usage of collected data	DAA+NAI	NAI member website
Presence of opt-out mechanism	DAA+NAI	NAI member website
Adherence to DAA principles	DAA	NAI member website
Behavioral advertising activities	NAI	NAI member website
How long data is retained	NAI	NAI member website
Enhanced notice requirement		
Advertisements contain enhanced notice	DAA	Quantcast top 100
Opt-out cookie requirement		
Cookie present in DAA opt-out mechanism	DAA	DAA mechanism
Cookie present in NAI opt-out mechanism	NAI	NAI mechanism
Cookie duration is at least five years	DAA+NAI	Both mechanisms

The IAB, which is a member organization of the DAA, has its own separate code of conduct.⁷⁰ At the time of this writing, this document contained the DAA principles document verbatim, as well as a section on monitoring and enforcement, with the task of supervision given to

⁶⁸ DAA, SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING IMPLEMENTATION GUIDE: FREQUENTLY ASKED QUESTIONS 1 (2010), <http://www.aboutads.info/resource/download/OBA%20Self-Reg%20Implementation%20Guide%20-%20Frequently%20Asked%20Questions.pdf>.

⁶⁹ 2008 NAI PRINCIPLES, *supra* note 4, at 4.

⁷⁰ See *IAB Member Code of Conduct*, INTERACTIVE ADVER. BUREAU, http://www.iab.net/media/file/IAB_Code_of_Conduct_10282-2.pdf (last visited Jan. 13, 2012).

the Council of Better Business Bureaus.⁷¹ The IAB has also posted a requirement that their members become compliant with this code by August 29, 2011.⁷²

IV. METHODOLOGY

In February and March 2011, we analyzed the sixty-six NAI members listed on the NAI website as of February 2011 for compliance with the requirements in Table 1. To see if NAI member compliance had improved, we examined the seventy-four NAI member websites as of July 2011 in July and August 2011. Because there was a deadline for compliance from the IAB on August 29, 2011,⁷³ we checked member websites again in the week following the deadline to determine whether their privacy policies had been changed since our previous check. We report only the results of the final check for each member.

We examined member websites for the privacy notice requirements by examining the front page of each member's website, their privacy policy, and any relevant links from that policy. We considered the requirement that members state what types of data they collect for behavioral advertising satisfied if the privacy policy provided a general description of what data is collected or an example of what type of data is collected. We considered the requirement that a member disclose how long it retains data for behavioral advertising satisfied even if the member stated that it retains data indefinitely. However, we did not consider the requirement satisfied if a member disclosed only cookie or log file expiration information.

While NAI members are not required to provide their own definitions of opting out, we noted whenever a member chose to do so. We categorized these members as defining opting out to mean either not showing targeted ads; collecting less data from opted-out users; no longer tracking opted-out users; or collecting no data from opted-out users. The difference between no longer tracking users and collecting no data from users at all is that in the former case, aggregate data can still be collected. If a company used language such as "we no longer collect data for the purpose of targeting ads," we deemed that

⁷¹ *Id.*

⁷² *IAB Member Code of Conduct*, INTERACTIVE ADVER. BUREAU, http://www.iab.net/public_policy/codeofconduct (last visited Jan. 14, 2012).

⁷³ *Id.*

company as simply not targeting ads for the purposes of our data collection.

We examined the opt-out cookies from the DAA⁷⁴ and NAI⁷⁵ opt-out mechanisms in February and August 2011. We checked that both mechanisms successfully placed opt-out cookies for each NAI member, whether the two mechanisms provided the same cookies, and whether the cookies had a duration of at least five years.

In mid-March 2011, we checked compliance with the enhanced notice requirement of the DAA principles by inspecting advertisements on websites listed on Quantcast's February 2011 top 100 U.S. websites.⁷⁶ We repeated this in summer 2011, checking compliance again on the same websites between July 26 and August 19, 2011. Then, because some websites might have become more compliant on account of the IAB compliance deadline of August 29, 2011,⁷⁷ we reexamined any website which had ads but was not fully compliant during our previous check between August 31 and September 2, 2011.

We navigated first to the root page for each of these websites and then to the first three links (from top to bottom, left to right) pointing to non-search pages in the same domain. To record which advertising networks were associated with each page, we used the Firefox web browser with the TACO add-on,⁷⁸ which enables users to observe the advertising networks on each website. In addition, we also made note of advertising networks that were explicitly mentioned in ad disclosures.

The enhanced notice requirement of the DAA applies only to behavioral advertisements.⁷⁹ It is nearly impossible to determine if a given ad is behavioral by visual inspection and TACO indicates whether an ad network is present on a website but not whether a specific ad is behavioral. In order to remove from consideration ads

⁷⁴ *Opt Out From Online Behavioral Advertising (Beta)*, ABOUTADS, <http://www.aboutads.info/choices> (last visited Jan. 14, 2012).

⁷⁵ *Opt Out of Behavioral Advertising*, *supra* note 6, at 1.

⁷⁶ *Quantcast Site Rankings for United States*, QUANTCAST, <http://www.quantcast.com/top-sites-1> (last visited Jan. 14, 2012).

⁷⁷ *IAB Member Code of conduct*, *supra* note 72, at 1.

⁷⁸ *Block Online Tracking with TACO*, ABINE, <http://www.abine.com/preview/taco.php> (last visited Jan. 14, 2012).

⁷⁹ DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 5.

that were unlikely to be behavioral, we excluded ads on websites where TACO did not recognize an ad network. We also excluded ads that the DAA requirements likely would not cover because they appeared (based on our judgment) to be contextual ads, “based on the content of the Web page being visited, a consumer's current visit to a Web page, or a search query.”⁸⁰ For example, we excluded ads for Comcast products on comcast.com and ads for drugs on webmd.com.

It is not always clear whether a given ad or third-party cookie is actually subject to self-regulatory requirements. Industry estimates suggest that we can reasonably assume that about 80% of advertisements we encounter are behavioral.⁸¹ Omar Tawakol, CEO of BlueKai, stated recently that “eighty percent of online ads rely on third-party cookies for some form of audience targeting.”⁸² Likewise, the IAB stated “[i]n an IAB survey of ad agencies conducted earlier this year, we found that 80% or more of digital advertising campaigns were touched by behavioral targeting in some way.”⁸³ On the other hand, industry representatives distinguish between different types of targeted advertising and Tawakol has stated that “the majority of third-party cookies use [sic] for targeting actually isn't traditionally called behavioral advertising.”⁸⁴

At each website on the Quantcast top 100 list we did the following:

1. Created a new Firefox profile (this clears cookies and the cache) and clear Flash LSOs;
2. Copied and pasted the URL for the given website from the Quantcast list;

⁸⁰ *Id.* at 10–11.

⁸¹ Omar Tawakol, *Forget Targeted Ads – I'd Rather Pay for Content*, ONLINE MEDIA DAILY (Feb. 15, 2011, 12:22 PM), http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=145077.

⁸² *Id.*

⁸³ *IAB Tells Congress Privacy Bills May Harm Business and Consumers*, INTERACTIVE ADVER. BUREAU, http://www.iab.net/public_policy/1296039 (last visited Jan. 14, 2012).

⁸⁴ Omar Tawakol, Remarks at FTC Roundtable Series 1 On: Exploring Privacy (Dec. 7, 2009) (transcript available at http://www.ftc.gov/bcp/workshops/privacyroundtables/PrivacyRoundtable_Dec2009_Transcript.pdf).

3. Checked for the presence of non-contextual ads (ads not related to the visited website or the content of the current page);
4. If there were non-contextual ads, checked them for compliance with the DAA principles and record the tracking websites TACO lists for the page;
5. If there was a privacy notice associated with advertisements, followed the link and recorded its data; and
6. Repeated steps three through five for the first three non-search links on the page.

V. RESULTS

We present the results of this paper in four parts. In Part V.A, we present the evidence of “enhanced notice” we found while visiting Quantcast’s top 100 websites. In Part V.B, we present our findings for compliance with “privacy notice” requirements. We evaluate the DAA and NAI opt-out mechanisms in Part V.C. Finally, in Part V.D we look at how different NAI members define opting out. For all requirements checked, we present rates of compliance and indicate which members were not compliant.

A. ENHANCED NOTICE REQUIREMENT

We looked for non-contextual ads on 400 web pages across 100 websites. In spring 2011, we found 164 pages across fifty websites that contained non-contextual ads and were monitored by NAI members in our first examination. In summer 2011, we found 155 pages across fifty-four websites. We focus on NAI members because they all describe themselves as engaged in OBA and are required to follow both DAA and NAI requirements. Using TACO to determine who monitored each page, we found an average of 2.8 NAI members identified per page in spring and 3.1 in summer.

The “enhanced notice” requirement of the DAA’s Transparency Principle requires that notice be placed on the same page where

behavioral ads appear.⁸⁵ Using the methodology described in Part IV, we searched for evidence of this notice on each of the pages. In the spring, we found enhanced notice on 35% of these pages. In the summer, we found compliance on 50% of pages. In both cases, we only considered pages where we observed non-contextual ads that were tracked by an NAI member. Because we expected that about 80% of advertisements are behavioral, this represents a significant gap in compliance with the enhanced notice requirement.

While we looked for any instance of enhanced notice on a webpage, some pages did not provide this notice for every ad on the page. Specifically, in the spring, we found forty-five pages that provided enhanced notice near at least one advertisement, with twenty-nine of these pages providing enhanced notice near every ad on the page. In addition, twelve pages (on three websites) provided notice with a single link at the bottom of the page. In the summer, we observed fifty-four pages with enhanced notice near at least one advertisement, of which thirty-one pages had enhanced notice near all advertisements. Forty-six pages on fifteen websites provided notice with a single link at the bottom of the page. We are unable to distinguish between those ads that lacked required notice and those that are not behavioral and thus not required to provide notice. Links found at the bottom of websites do not list the advertising providers for each ad on the page and are not very prominent since they may require a large amount of scrolling to find.

Evidence of notice was also inconsistent across pages on a single site. Aside from the sites that provided a single link at the bottom of the page, seven websites displayed enhanced notice on all four pages that we visited, with an additional fifteen websites providing notice on at least one page in the spring. In the summer, aside from websites that provided enhanced notice with a link at the bottom, eleven websites provided enhanced notice on all pages we visited and twenty-eight provided enhanced notice on at least one. We also observed a mixing of notice styles across pages on a single site. Table 2 lists the type of enhanced notice found on each of the top websites where we observed non-contextual ads.

⁸⁵ DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 13.

Table 2:

The top 100 websites for the U.S. audience as ranked by Quantcast⁸⁶ and the level of compliance with the enhanced notice requirement that we observed. Only websites on which we observed non-contextual ads are listed. Note that mybloglog.com (55 in the top 100) is excluded from this table. It did not show non-contextual ads in the spring and in the summer, it pointed to yahoo.com. Some websites appear to have made an effort toward compliance, without being entirely compliant. A website marked “Trying” is making an attempt for all of their ads to be compliant by placing a link at the bottom of the web page, but that page is not entirely compliant.

Rank	Web	Compliance Spring 2011	Compliance Summer 2011	Enhanced Notice Observed
3	yahoo.com	Fully	Fully	Ad. Opt. Icon, Power I, Link at bottom
4	youtube.com	N/A	Fully	Advertising Option Icon
5	msn.com	Fully	Fully	Ad. Opt. Icon, Power I, Link at bottom
12	aol.com	No	Fully	Advertising Option Icon
14	answers.com	Some	No	Ad. Opt. Icon, Power I, Link at bottom
17	ask.com	Some	Some	Advertising Option Icon
18	ehow.com	No	Fully	Ad. Opt. Icon, Link at bottom
20	about.com	No	Fully	Ad. Opt. Icon, Link at bottom
21	myspace.com	Some	Some	Power I, Ad. Opt. Icon
22	weather.com	No	Some	Advertising Option Icon
23	mapquest.com	Some	No	Advertising Option Icon
26	photobucket.com	No	No	-
27	reference.com	Some	Some	Power I, Ad. Opt. Icon
31	go.com	N/A	Some	Link at bottom
32	huffingtonpost.com	No	No	-
34	break.com	No	Fully	Link at bottom
35	hulu.com	N/A	No	-
36	comcast.net	N/A	Fully	Link near ads
38	imdb.com	Some	None	Advertising Option Icon
39	monster.com	Some	Some	Advertising Option Icon
41	Webmd.com	Some	Fully	Advertising Option Icon

⁸⁶ Quantcast Site Rankings, *supra* note 76.

42	pandora	Some	Some	Advertising
45	whitepages.com	No	Fully	Link at bottom
46	associatedcontent.com	Fully	Fully	Ad. Opt. Icon, Power I, Link at bottom
47	cnn.com	Fully	Fully	Ad. Opt. Icon, Link at bottom
48	flickr.com	Fully	N/A	Link near ads
50	manta.com	Fully	Fully	Advertising Option Icon
54	hubpages.com	N/A	Fully	Power I, Ad. Opt. Icon
56	filmannex.com	No	No	-
57	chinaontv.com	No	N/A	-
58	digg.com	No	Some	Advertising Option Icon
59	cnet.com	Fully	Fully	Link near ads
60	yellowpages.com	Fully	Fully	Power I, Link at bottom
62	washingtonpost.com	Fully	Fully	Ad. Opt. Icon, Link at bottom
64	nytimes.com	Trying	Fully	Ad. Opt. Icon, Link at bottom
66	tripadvisor.com	No	N/A	-
67	legacy.com	Some	Some	Advertising Option Icon
68	evite.com	No	Some	Advertising Option Icon
69	bbc.co.uk	No	Fully	Link at bottom
71	people.com	No	Fully	Link at bottom
72	chacha.com	No	Some	Advertising Option Icon
73	tmz.com	No	Some	Advertising Option Icon
75	drudgereport.com	No	No	-
77	dailymotion.com	N/A	Some	Link near ads
79	accuweather.com	Trying	Fully	Ad. Opt. Icon, Power I, Link at bottom
80	suite101.com	Some	Some	Advertising Option Icon
81	mtv.com	Fully	Fully	Link at bottom
83	yelp.com	No	Some	Advertising Option Icon
86	examiner.com	Some	No	Power I
87	wikia.com	Some	Fully	Advertising Option Icon
89	squidoo.com	Some	Some	Power I, Ad. Opt. Icon
90	merriam-webster.com	Some	Some	Advertising Option Icon
93	weatherbug.com	No	No	-
94	bizrate.com	No	No	-
96	wunderground.com	No	Some	Advertising Option Icon
99	twitpic.com	Some	Fully	Advertising Option Icon
100	candystand.com	No	Fully	Advertising Option Icon

TACO identified trackers from twenty-three NAI members in the spring and twenty-eight in the summer, on the pages we examined. When TACO found NAI members tracking a page that had non-contextual ads, we expected to find at least one enhanced notice. In the spring, we observed four members only on pages with enhanced notice, sixteen on pages with and without enhanced notice, and three only on pages without enhanced notice. In the summer, we found ten members only on pages with enhanced notice, seven members on pages with and without enhanced notice, and eleven members only on pages without enhanced notice. Table 3 presents detailed results for each NAI member.

Table 3:

Analysis of enhanced notice and opt-out cookies for NAI members. Enhanced notice data was derived by examining advertisements on the Quantcast top 100 U.S. websites gathered in spring (March) and summer (late August to early September) 2011. Blank lines indicate no instances of data collection. Opt-out mechanisms were tested in February, March, and August of 2011. A “-” indicates the member was not in the NAI during collection. Websites marked with * are only listed as NAI members for August. Note that Batanga does not have its own opt-out cookies.

Name	Pages where member collects data while non-contextual ad is shown (Spr. / Sum.)	Pages where enhanced notice was found (Spr. / Sum.)	Number cookies set by DAA opt-out (Feb. / Mar. / Aug.)	Number cookies set by NAI opt-out (Feb. / Mar. / Aug.)	Do its DAA and NAI cookies match? (Feb. / Mar. / Aug.)
[x+1]			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
24/7 Real Media	0 / 2	0 / 0	1 / 1 / 1	1 / 1 / 4	Yes / Yes / No
33Across			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Adara Media			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
AdBrite			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
AdChemy			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Adconion Media Group	0 / 5	0 / 5	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
*AddThis	- / 19	- / 8	- / - / 1	- / - / 1	- / - / Yes
Adify	1 / 3	0 / 0	1 / 1 / 1	1 / 1 / 1	Yes / Yes / No
AdMeld	4 / 26	3 / 13	0 / 0 / 1	1 / 1 / 1	No / No / Yes
Aggregate Knowledge			1 / 1 / 2	1 / 1 / 2	Yes / Yes / Yes

Akamai Technologies			2 / 2 / 3	2 / 2 / 3	Yes / Yes / Yes
AOL Advertising	57 / 47	20 / 24	4 / 4 / 7	6 / 7 / 7	No / No / Yes
*Aperature			- / - / 1	- / - / 1	- / - / Yes
Atlas	0 / 5	0 / 5	1 / 1 / 0	2 / 2 / 1	No / No / No
AudienceScience	39 / 48	11 / 25	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Batanga			0 / 0 / 0	0 / 0 / 0	NA / NA / NA
Bizo			4 / 4 / 5	4 / 4 / 5	Yes / Yes / Yes
BlueKai	13 / 17	11 / 11	2 / 2 / 1	2 / 2 / 1	No / No / Yes
*BrightRoll			- / - / 0	- / - / 1	- / - / No
Brilig			1 / 0 / 1	1 / 1 / 1	Yes / No / Yes
Burst Media			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Buysight			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Casale Media	21 / 5	3 / 1	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
*Cognitive Match			- / - / 0	- / - / 4	- / - / No
Collective	20 / 9	9 / 8	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Criteo			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
*Cross Pixel Media			- / - / 1	- / - / 1	- / - / Yes
DataLogix	1 / 0	0 / 0	2 / 2 / 2	2 / 2 / 2	Yes / Yes / Yes
DataXu			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Datonics			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Dedicated Networks	0 / 1	0 / 1	0 / 1 / 1	1 / 1 / 1	No / Yes / Yes
Dotomi	6 / 0	3 / 0	2 / 2 / 1	2 / 2 / 1	Yes / Yes / Yes
Epic Marketplace	2 / 0	2 / 0	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
eXelate			2 / 2 / 2	2 / 2 / 2	Yes / Yes / No
FetchBack			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Glam Media			0 / 1 / 1	1 / 1 / 1	No / Yes / Yes
Google	127 / 148	43 / 74	2 / 1 / 6	1 / 2 / 1	No / No / No
I-Behavior			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
interCLICK	3 / 11	3 / 5	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Invite Media			11 / 11 / 2	11 / 11 / 11	Yes / Yes / No
Lotame	4 / 1	0 / 0	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
MAGNETIC			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
*MaxPoint Interactive			- / - / 0	- / - / 1	- / - / No
*Media Innovation Group	- / 1	- / 1	- / - / 0	- / - / 3	- / - / No
Media6Degrees	7 / 3	1 / 3	1 / 1 / 1	1 / 1 / 1	Yes / No / No
MediaMath			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes

*MediaMind	- / 4	- / 4	- / - / 0	- / - / 1	- / - / No
Mediaplex			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Microsoft	4 / 4	4 / 4	4 / 4 / 1	4 / 4 / 4	Yes / Yes / No
Mindset Media			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Netmining			1 / 1 / 1	1 / 1 / 0	Yes / Yes / No
OwnerIQ			0 / 0 / 1	1 / 1 / 1	No / No / Yes
*Pulse360	- / 4	- / 4	- / - / 1	- / - / 1	- / - / Yes
Quantcast	101 / 89	30 / 38	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
*RadiumOne			- / - / 1	- / - / 1	- / - / Yes
Red Aril			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Rich Relevance			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Rocket Fuel			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
SpecificMEDIA	5 / 0	5 / 0	3 / 3 / 3	3 / 3 / 3	Yes / Yes / Yes
TARGUSinfo			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
The Fox Audience Network	6 / 5	3 / 3	3 / 3 / 5	3 / 3 / 3	Yes / Yes / No
TidalTV			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Tribal Fusion	13 / 12	4 / 2	0 / 0 / 1	1 / 1 / 1	No / No / Yes
*TruEffect			- / - / 0	- / - / 1	- / - / No
Tumri			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Turn	0 / 5	0 / 5	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Undertone Networks			2 / 2 / 2	2 / 2 / 2	Yes / Yes / Yes
ValueClick Media	0 / 1	0 / 1	2 / 2 / 1	2 / 2 / 2	Yes / Yes / No
Vibrant In-Text Solutions	2 / 4	1 / 2	1 / 1 / 1	1 / 1 / 1	Yes / Yes / No
Wall Street on Demand			1 / 1 / 2	1 / 1 / 2	Yes / Yes / No
XGraph	3 / 0	1 / 0	1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes
Yahoo!	28 / 21	8 / 13	2 / 2 / 3	2 / 2 / 5	No / No / No
YuMe			1 / 1 / 1	1 / 1 / 1	Yes / Yes / Yes

In the summer, of the seventy-four instances of enhanced notice that identified the ad provider, we noted seventeen NAI members. We noted Google most often, with forty-one instances. The next most common member was Yahoo!, with seven instances.

As shown in Table 2, we observed a considerable increase in compliance between spring and summer, with many improvements being made right around the IAB's August 29, 2011, deadline. Of the 100 websites we examined, forty-nine had at least one non-contextual ad during both the spring and summer observations. Of these, twenty-

five (51%) retained the same status, while twenty (41%) improved. In the summer, of the fifty-four websites that had ads, forty-four (82%) were at least somewhat compliant with the enhanced notice requirement, and twenty-six (44%) were fully compliant. Much of this new compliance is achieved through putting ad notice links at the bottom of pages; only three websites used this technique in our spring observation, while seventeen did in the summer.

Notably, much of the enhanced notice appeared to be driven by advertisers (i.e., the companies that purchase ads) rather than by NAI members. For example, almost all of the Verizon ads we saw had enhanced notice, even though they came from many different ad providers, including AOL Advertising, Collective, Google, interCLICK, and Traffic Marketplace. This suggests that some online advertising buyers are interested in providing notice and choice to their customers. This also means that a website using symbols on ads for compliance might have a varying level of compliance as a function of the ads being served. On the other hand, a website correctly using a link at the bottom of the page will be consistently compliant, although with a less prominent notice.

B. PRIVACY NOTICE REQUIREMENT

We checked the privacy policies of the sixty-six NAI members for compliance with the privacy notice requirements from Table 1 in February 2011. Audience Science and Rocket Fuel were the only NAI members that stated that they adhere to the DAA principles, and thus the only members fully compliant with the privacy notice requirements we checked. Excluding the requirement to mention adherence to the DAA principles, fifty-five members (83%) were compliant with the privacy notice requirements. We repeated our examination after the August IAB deadline, as described in Part IV. There are now seventy-four NAI members and eighteen state adherents to the DAA principles. Of these, fourteen have changed their privacy policies to indicate adherence and two are new NAI members.

All NAI members mention their OBA activities, describe how collected data is used, and provide an opt-out mechanism. It is worth noting, however, that as of our summer evaluation, both eXelate and Tumri provide dead opt-out links on their privacy policies. All except Fox Audience Network stated what types of data they collect for behavioral advertising during our spring examination. In the summer examination all members stated what types of data they collect for behavioral advertising. Only fifty-six of sixty-six members (85%) in

the spring and fifty-two of seventy-four members (84%) in the summer stated how long they retain their data collected for behavioral advertising. Many members mention cookie or log file expiration, but this does not address the data collected from observing cookies or analyzing log files. Privacy notice requirement compliance for each NAI member is presented in Table 4.

Table 4:

NAI Member Privacy notice compliance for February and August 2011. A “No” indicates that notice was not found in the member's privacy policy. If the value is the same for February and August, it is listed once. If there is a change between February and August, it is listed as FebruaryValue-AugustValue. Websites marked with * are only listed as NAI members for August.

Name	Types of data collected	How data will be used	Adherence to DAA Principles	How long data will be retained
[x+1]	Yes	Yes	No	No ¹
24/7 Real Media	Yes	Yes	No-Yes	Yes
33Across	Yes	Yes	No	Yes
Adara Media	Yes	Yes	No	Yes
AdBrite	Yes	Yes	No	Yes
AdChemy	Yes	Yes	No	Yes
Adconion Media Group	Yes	Yes	No	Yes
*AddThis	Yes	Yes	Yes	Yes
Adify	Yes	Yes	No	Yes
AdMeld	Yes	Yes	No	Yes
Aggregate Knowledge	Yes	Yes	No	Yes
Akamai Technologies	Yes	Yes	No	Yes
AOL Advertising	Yes	Yes	No-Yes	Yes
*Aperature	Yes	Yes	No	No ¹
Atlas	Yes	Yes	No	Yes
AudienceScience	Yes	Yes	Yes	Yes
Batanga	Yes	Yes	No	Yes
Bizo ⁶	Yes	Yes	No-Yes	Yes ¹
BlueKai	Yes	Yes	No-Yes	Yes
*BrightRoll	Yes	Yes	No	No
Brilig	Yes	Yes	No	Yes
Burst Media	Yes	Yes	No	Yes
Buysight	Yes	Yes	No	Yes

Casale Media	Yes	Yes	No-Yes	No ²
*Cognitive Match	Yes	Yes	No	Yes
Collective	Yes	Yes	No-Yes	Yes
Criteo	Yes	Yes	No	Yes
*Cross Pixel Media	Yes	Yes	No	Yes
DataLogix	Yes	Yes	No-Yes	No ³
Datonics	Yes	Yes	No	Yes
DataXu	Yes	Yes	No-Yes	Yes
Dedicated Networks	Yes	Yes	No	No ¹
Dotomi	Yes	Yes	No	Yes
Epic Marketplace	Yes	Yes	No	Yes
eXelate	Yes	Yes	No	Yes
FetchBack	Yes	Yes	No	Yes
Glam Media	Yes	Yes	No	Yes
Google	Yes	Yes	No	No
I-Behavior	Yes	Yes	No	Yes
interCLICK	Yes	Yes	No	Yes
Invite Media	Yes	Yes	No	Yes
Lotame	Yes	Yes	No	Yes
MAGNETIC	Yes	Yes	No	Yes
*MaxPoint Interactive	Yes	Yes	No	Yes
*Media Innovation Group	Yes	Yes	Yes	Yes
Media6Degrees	Yes	Yes	No	Yes
MediaMath	Yes	Yes	No-Yes	Yes
*MediaMind Technologies	Yes	Yes	No	Yes
Mediaplex	Yes	Yes	No	Yes
Microsoft	Yes	Yes	No	No ^{1,4}
Mindset Media	Yes	Yes	No	Yes
Netmining	Yes	Yes	No	Yes
OwnerIQ	Yes	Yes	No	No ¹
*Pulse360	Yes	Yes	No	Yes
Quantcast	Yes	Yes	No-Yes	Yes
*RadiumOne	Yes	Yes	No	Yes
Red Aril	Yes	Yes	No	Yes
Richrelevance	Yes	Yes	No-Yes	Yes
Rocket Fuel	Yes	Yes	No-Yes	Yes
SpecificMEDIA	Yes	Yes	No	Yes

TARGUSinfo	Yes	Yes	No	No ¹
The Fox Audience Network	No ⁵ -Yes	Yes	No-Yes	Yes-No
TidalTV	Yes	Yes	No	Yes
Tribal Fusion	Yes	Yes	No	Yes
*TruEffect	Yes	Yes	No	No
Tumri	Yes	Yes	No	Yes
Turn	Yes	Yes	No	Yes
Undertone Networks	Yes	Yes	No-Yes	Yes
ValueClick Media	Yes	Yes	No	Yes
Vibrant In-Text Solutions	Yes	Yes	No	Yes
Wall Street on Demand	Yes	Yes	No	Yes
Xgraph	Yes	Yes	No	Yes
Yahoo!	Yes	Yes	No-Yes	No ²
YuMe	Yes	Yes	No	Yes

¹ Notice only mentions cookie expiration.

² Notice only mentions log file retention.

³ Notice only mentions cookie expiration and log file retention.

⁴ Retention information found in a blog post, not in a prominent location.

⁵ Notice explains that "non-personally identifiable information obtained from cookies, web beacons, and/or similar monitoring technologies" is collected, but the types of data are not specified.

⁶ We were notified that Bizo's privacy policy became compliant with the data retention requirement on March 16, 2011.

C. CHOICE REQUIREMENT

We evaluated the NAI and DAA opt-out mechanisms in February and March 2011, with twenty-six days between checks. We used Microsoft Windows with Chrome 9.0.597, Internet Explorer 8.0.6001.19019, and Firefox 3.6.13 browsers; the March evaluation used only Chrome 10.0.648. We also conducted the evaluation in August 2011, using Chrome 13.0.782.107, Internet Explorer 8.0.6001.18702, and Firefox 5.0.1. When we tested it in February, the DAA mechanism reported that it failed to set an opt-out cookie for one company with each browser. In all three cases, one company failed, but surprisingly it was not the same company each time. On Chrome and Internet Explorer, the DAA mechanism was unable to set the opt-out cookie for AOL Advertising, the third most pervasive online

advertiser.⁸⁷ On Firefox, the mechanism failed for Audience Science. The NAI mechanism was able to set all opt-out cookies successfully.

In March, we retested the DAA mechanism and found the Invite Media opt-out cookie could not be set on Chrome, but the mechanism worked with the other browsers. In August, we successfully used Chrome to opt-out from NAI members using the DAA mechanism. Firefox failed to opt out of TARGUSinfo and Internet Explorer failed to opt out of Microsoft Advertising. On the NAI website, Chrome and Firefox opted out successfully from all members. Internet Explorer failed for Adconion, Batanga, BrightRoll, Cognitive Match, Collective, Media Innovation Group, MediaMind, Microsoft (Atlas Technology), TARGUSinfo, and TruEffect.

We also observed that the two opt-out mechanisms sometimes set different cookies, and some opt-out cookies changed from February to March to August. Even when both mechanisms set cookies for the same advertiser, they did not always agree on the content of the cookie or the number of cookies that were set. For example, the NAI mechanism set four cookies for the domain adsonar.com, a serving domain of AOL Advertising. These cookies had the following names: TData, TData2, atdemo, and atdemo2. For the same domain, the DAA mechanism set a single cookie with the name oo_flag. This did not change between February and March. Since these mechanisms were not consistent, users might have needed to use both mechanisms to opt out. However, in August, the adsonar cookies for the DAA and NAI now match. Summary results for each NAI member can be found in Table 3.

We also checked opt-out cookies to be sure that they persist for five years, in keeping with the DAA⁸⁸ and NAI⁸⁹ requirements. Since multiple opt-out cookies can be set for a single domain, we considered a domain to be compliant if at least one of the opt-out cookies had a duration of at least five years. Three domains, adsonar.com, advertising.com, and invitemediacom.com, were not compliant when their

⁸⁷ Press Release, comScore, comScore Media Metrix Ranks Top 50 U.S. Web Properties for October 2010 (Nov. 22, 2010), *available at* http://www.comscore.com/content/download/6735/118361/file/comScore%20Media%20Metrix%20Ranks%20Top%2050%20U.S.%20Web%20Properties%20for%20October%202010.pdf://comscore.com/Press_Events/Press_Releases/2010/11/comScore_Media_Metrix_Ranks_Top_50_U.S._Web_Properties_for_October_2010.

⁸⁸ *What Are Opt Out Cookies and how do they remember ort out preferences?*, *supra* note 65.

⁸⁹ *Network Advertising Initiative FAQ*, *supra* note 28.

cookies were set with the NAI mechanism in February. Only invitemedias.com was non-compliant when using the DAA mechanism. This shows another dimension of inconsistency between the two mechanisms. In March, invitemedias.com became compliant with both mechanisms, but adsonar.com and advertising.com were still not compliant. In August, however, all cookies were compliant with the five year requirement.

The DAA and NAI opt-out mechanisms do not function in the Apple Safari browser with default settings. Safari blocks third-party cookies from being set; a cookie for a given domain can be set only when a user navigates there. A user who navigates to an advertising network website may subsequently be tracked by that network across other websites and is unable to use either mechanism to opt out of this tracking. To confirm, we navigated to various websites with Safari 5.0.3 and then attempted to use the NAI opt-out mechanism. Several advertising networks had placed tracking cookies on our computer, but we were unable to opt out from them using the mechanism.

D. DEFINITIONS OF OPTING OUT

The DAA requires that its members provide “users of Web sites at which data is collected and used for Online Behavioral Advertising purposes the ability to choose whether data is collected and used for such purposes.”⁹⁰ The DAA website says that opting out will not stop data collection, but will stop delivery of ads based on preferences.⁹¹ Consistent with the DAA's definition, the NAI defines opting out as follows:

Opt out of OBA means that a consumer is provided an opportunity to exercise a choice to disallow OBA with respect to a particular browser. If a consumer elects to opt out of non-PII OBA, collection of non-PII data regarding that consumer's browser may only continue for non-OBA purposes, such as ad delivery & reporting.⁹²

⁹⁰ DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 33.

⁹¹ *How Does the Consumer Opt Out Page Work?*, ABOUTADS (Oct. 14, 2010), <http://www.aboutads.info/opt-out>.

⁹² 2008 NAI PRINCIPLES, *supra* note 4, at 5.

As of our summer check, sixty-nine of seventy-four NAI members provide their own definitions of opt-out, sometimes going beyond the NAI and DAA requirements.⁹³ For example, AdBrite states that it will delete prior data when a user opts out. Bizo indicates it will stop collecting uniquely identifiable data. AddThis just states that it will no longer target advertisements.

Of those sixty-nine websites that define opting out, forty-two indicate collecting less or no data or no longer tracking the user, and thirty-five of those forty-two indicate collecting no data or not tracking the user. The other twenty-seven members that define opting out indicate only that opting out would entail not seeing targeted ads, which is consistent with the minimum requirements of the DAA and NAI. Three of these members explicitly state that information collection would continue. These findings are detailed in Table 5.

⁹³ The members that did not define opting out are Aggregate Knowledge, Atlas, Dotomi, MediaMath, and The Fox Audience Network.

Table 5:
Categorized definitions of opting out based on NAI members' privacy policies. Only members that defined opting out are included in this table.

NAI Member	Stated Policy
[x+1]	N/A - Stop tracking ⁴
24/7 Real Media	Collect no data ¹ - Don't target ads
33Across	Collect no data
Adara Media	Don't target ads
AdBrite	Collect less data ³
AdChemy	Collect no data
Adconion Media Group	Don't target ads
*AddThis	Collect no data
Adify	Stop tracking
AdMeld	Collect no data
Akamai	Don't target ads ⁵
AOL Advertising	Don't target ads
*Aperture	Collect no data ⁴
AudienceScience	Collect no data
Batanga	Collect no data
Bizo	Stop tracking
BlueKai	Collect less data
*BrightRoll	Don't target ads
Brilig	Collect no data
Burst Media	N/A - Stop tracking
Buysight	Collect no data
Casale Media	Stop tracking
*Cognitive Match	Collect no data
Collective	Collect no data
Criteo	Don't target ads
*Cross Pixel Media	Collect no data
DataLogix	Don't target ads - Collect no data
DataXu	N/A - Don't target ads
Datonics	Collect no data ²
Dedicated Networks	Collect no data
Epic Marketplace	Don't target ads
eXelate	Don't target ads - Collect no data
FetchBack	Don't target ads
Glam Media	Stop tracking ¹ - Don't target ads
Google	Collect less data
I-Behavior	Don't target ads
interCLICK	Stop tracking
Invite Media	Don't target ads ⁴
Lotame	Don't target ads
MAGNETIC	Don't target ads - Collect less data ¹
*MaxPoint Interactive	Don't target ads
*Media Innovation Group	Collect no data
Media6Degrees	Don't target ads

*MediaMind Technologies	Stop tracking
Mediaplex	Stop tracking ⁴
Microsoft	Don't target ads ⁵
Mindset Media	Stop tracking
Netmining	Collect no data - Don't target ads
OwnerIQ	Collect no data
*Pulse360	Don't target ads
Quantcast	Don't target ads - Collect no data
*RadiumOne	Collect no data ³
Red Aril	Collect no data ² - Don't target ads
Richrelevance	Don't target ads
Rocket Fuel	Stop tracking
SpecificMEDIA	Don't target ads
TARGUSinfo	Don't target ads
The Fox Audience Network	Don't target ads ⁵ - N/A
TidalTV	Don't target ads
Tribal Fusion	Stop tracking
*TruEffect	Collect no data
Tumri	Don't target ads - Collect less data
Turn	Don't target ads - Collect less data
Undertone Networks	Collect less data ¹
ValueClick Media	Don't target ads
Vibrant In-Text Solutions	Collect no data
Wall Street on Demand	Stop tracking
XGraph	N/A - Collect no data
Yahoo!	N/A - Don't target ads
YuMe	Don't target ads

¹ Opt-out definition mentions cookies only; we assume other tracking technologies are not used.

² The opt-out cookie is defined as indicating a preference; we assume this preference will be respected.

³ Prior-held data will be deleted.

⁴ The opt-out cookie will block the placement of other cookies from this advertiser.

⁵ Explicitly stated that data collection will continue.

E. SPECIFIC PRIVACY POLICY NOTES

There are several cases in which an NAI member states in its privacy policy that a previous opt-out effort by a user may have become invalid. According to the privacy policy of Akamai, which purchased aCerno, “[d]ue to technical issues, if you opted out of targeted advertising by acerno, [sic] your choice may not have been properly saved and recognized.”⁹⁴ Likewise, according to the

⁹⁴ *Privacy Statement*, AKAMI.COM (Aug. 26, 2011), http://www.akamai.com/html/policies/privacy_statement.html#policy_opt_out.

Dedicated Networks privacy policy, “[a]s a result, if you opted out of targeted advertising by Dedicated Networks prior to January 2011, your choice may no longer be fully effective.”⁹⁵ According to the privacy policy of Undertone, “[i]f you opted out of targeted advertising between August 2008 and June 2009, you should opt out again to ensure that your choice is saved and recognized by our ad server.”⁹⁶ Further, the privacy policy of [x+1] states “[a]s a result, if you opted out of targeted advertising by [x+1] prior to that time (either through [x+1] or through our opt out listing on the NAI page), your choice is no longer effective.”⁹⁷ In each of these instances, a user who had opted out of online behavioral advertising from one of these companies would have that opt out invalidated even before the opt-out cookie expired.

Further, while NAI members are not required to provide definitions of opting out, we found some instances of ambiguity among those that did. The privacy policies of 24/7 Real Media, Glam Media, MAGNETIC, and Undertone Networks only mention opting out as pertaining to cookies; we assume that they are not using another mechanism for tracking users.

We observed considerable flux and instability among privacy policies. Perhaps because of the August 2011 IAB compliance deadline,⁹⁸ we observed twenty-two NAI members changing their privacy policies in August 2011, including ten that changed their policies in the last week before the deadline. At least twenty-eight NAI members self-reported changing their privacy policies between January 1, 2011, and July 31, 2011; nine of these twenty-eight changed again in August. I-Behavior, interCLICK, Invite Media, Lotame, and Pulse360 explicitly indicate that their privacy policies may change and ask their readers to return for updates.

⁹⁵ *Dedicated Media Service Privacy Policy*, DEDICATED NETWORKS (Feb. 23, 2010), http://www.dedicatednetworks.com/footer_privacy.asp.

⁹⁶ *Privacy Policy for Undertone Advertising Network and Corporate Sites*, UNDERTONE (Oct. 21, 2011), <http://www.undertone.com/privacy>.

⁹⁷ *Privacy Policy for [x+1]*, x+1 (2011), <http://www.xplusone.com/privacy.php>.

⁹⁸ *IAB Member Code of Conduct*, *supra* note 72.

VI. DISCUSSION

A. LIMITATIONS

This paper checks NAI member compliance with the DAA and NAI notice and choice principles through inspection of websites, advertisements, and cookies. However, our approach has some limitations.

We may have overlooked some notices that appear outside a site's privacy policy. Neither the DAA nor the NAI explicitly require their notices to be placed in member privacy policies. However, the DAA principles indicate that notice should be "clear, meaningful, and prominent."⁹⁹ The NAI principles state that notice is to be given "clearly and conspicuously."¹⁰⁰ Therefore, when we are unable to find a required notice on a member privacy policy or linked websites, the site would still be in compliance if it is present on some other prominent page of the website. Nonetheless, a website that provides a notice but does not link to it from its privacy policy is arguably not communicating clearly and conspicuously with its users.

We were unable to make a reliable determination about which observed advertisements were behavioral and which third-party cookies were associated with OBA. We narrowed the scope of our investigation by focusing only on third-party cookies placed by NAI member companies and by eliminating ads that we judged to be contextual. However, it is likely that some of the ads and cookies we eliminated are actually subject to OBA requirements. On the other hand, some of the ads and cookies we included may not actually meet the definition of OBA. Nonetheless, we believe our dataset provides a good estimate of enhanced notice compliance on the most popular websites, and we provide detailed information about our methodology and findings to enable readers to determine the basis for our compliance estimates.

B. PUBLIC POLICY IMPLICATIONS

The results of our study raise a number of public policy concerns. The DAA published its principles in July 2009, over two years before our final round of data collection. The DAA officially launched its self-

⁹⁹ DAA SELF-REGULATORY PRINCIPLES, *supra* note 10, at 12.

¹⁰⁰ 2008 NAI PRINCIPLES, *supra* note 4, at 7.

regulatory program on October 4, 2010.¹⁰¹ Although we have observed an increasing rate of compliance in the weeks leading up to the IAB deadline, overall compliance has been slow. We observe infrequent compliance with the “enhanced notice” requirements, and only eighteen of the seventy-four NAI members indicate DAA membership despite being required to do so.

Beyond shortcomings in notice requirements, the DAA and NAI opt-out mechanisms contain errors. Opt-out cookies fail to be set for some members. The opt-out cookies for others differ between the two mechanisms and some have durations shorter than the required five years.

Even if the opt-out mechanisms did work flawlessly, they do not adapt to changing membership. NAI membership jumped from thirty-four in January 2010¹⁰² to seventy-eight in October 2011.¹⁰³ A user who has opted out of all NAI members six months ago would not be opted out of a dozen members today. Further, we know of at least three NAI members who were acquired and ceased to operate independently during the duration of our study: aCerno, Dapper, and Tacoda. This raises further questions about whether a user who has opted out of a particular company needs to opt out again when such an acquisition occurs.

Given the focus on third-party tracking, users are unable to opt-out of tracking by websites they are currently visiting (e.g., companies that offer both first-party content and third-party behavioral advertising services). This may come as a surprise to consumers who think they have opted out of tracking by a particular company but may not realize it applies only when that company is acting as a third-party behavioral advertising company. The DAA and NAI give users no way to avoid being tracked on the websites of NAI members. The narrow definition of OBA proposed by the FTC and adopted by the DAA and NAI may be insufficient for addressing consumer privacy concerns.

We also observe that two NAI members impose limitations and demands on any user who visits their websites, which is necessary in order to read their privacy policies. Undertone's privacy policy states that “by using the Undertone Site Network, this website or sharing information with us, you give your agreement to this Privacy

¹⁰¹DAVIS & GILBERT LLP, *supra* note 11.

¹⁰² NAI 2010 ANNUAL COMPLIANCE REPORT, *supra* note 29, at 1.

¹⁰³ NAI *Full Compliance Members*, NETWORK ADVER. INITIATIVE, <http://www.networkadvertising.org/participating> (last visited Jan. 14, 2012).

Policy.”¹⁰⁴ Undertone's privacy policy also stipulates limitations of liability.¹⁰⁵ ValueClick Media's privacy policy states, “Please read this Privacy Policy carefully since by visiting this site and sharing information with ValueClick you agree to be bound by the terms and conditions of this Privacy Policy unless you offer different terms which are accepted by ValueClick, Inc. in writing.”¹⁰⁶ ValueClick imposes requirements on its users, including how privacy disputes will be handled. In both of these cases, a user attempting to learn about a company's behavioral advertising practices by reading the notices that the DAA and NAI require will be stuck with limitations on his or her rights.

It is worth highlighting the flurry of compliance improvements we observed in late August, which we believe are in response to the IAB's compliance deadline. The IAB requirements, found in the IAB Code of Conduct, mirror those of the DAA, with an added provision for enforcement. An IAB member found not to be in compliance with the Code of Conduct may be penalized by having its IAB membership suspended.¹⁰⁷ Therefore, in addition to the possible threat of FTC enforcement, the concrete deadlines and enforcement procedures of the IAB Code of Conduct spurred compliance.

Finally, we have seen that a number of NAI members provide their own definitions of opting out, going beyond the minimum bar set by the NAI requirements. This is positive from a privacy perspective, but a common vocabulary for these opt-out variations could be useful for helping consumers understand what will happen when they opt out.

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¹⁰⁴ *Privacy Policy for Undertone Advertising Network and Corporate Sites*, *supra* note 96.

¹⁰⁵ *Id.*

¹⁰⁶ *Privacy Policy*, VALUECLICK (Sept. 9, 2010), <http://www.valueclick.com/privacy>.

¹⁰⁷ *IAB Member Code of Conduct*, *supra* note 70, at 6.