

Guidance for NAI Members: Viewed Content Advertising

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INTRODUCTION

This “Guidance for NAI Members: Viewed Content Advertising,” announces that the collection and use of Viewed Content Data for Personalized Advertising is covered under the NAI self-regulatory framework. The NAI will begin enforcing the guidance contained in this document at the conclusion of 2018. The Network Advertising Initiative (NAI) self-regulatory framework, through the 2018 NAI Code of Conduct¹ and guidance documents², has long supported the principles of notice, transparency, choice, control, and accountability, and a commitment by member companies to responsible data collection and use practices for customized advertising on browsers and devices. Today, as consumers increasingly access the internet through many internet browsers and applications on different devices, such as smartphones, laptops³, and televisions⁴, member companies have the opportunity to use and integrate data collected across these devices for many purposes, including linking devices for Interest-Based Advertising (IBA)⁵, Retargeting⁶, Cross-App Advertising (CAA)⁷ (collectively Personalized Advertising⁸), and Ad Delivery and Reporting (ADR)⁹. For instance, an advertiser may use a technology provider to orchestrate a coordinated advertising campaign across devices including televisions. This guidance document specifies that NAI member companies should conduct Personalized Advertising on televisions (or with data related to televisions) in a manner that is consistent with the NAI’s self-regulatory framework.

1 2018 NAI Code of Conduct, NAI, 2018. Available: <https://www.networkadvertising.org/code-enforcement/code>.

2 Collectively available at <https://www.networkadvertising.org/code-enforcement/code>.

3 For the purposes of this guidance document, laptops shall also include desktops and workstations.

4 For the purposes of this guidance document, televisions shall include addressable televisions and internet-connected televisions, non-exclusive.

5 Interest-Based Advertising means the collection of data across web domains owned or operated by different entities for the purpose of delivering advertising based on preferences or interests known or inferred from the data collected (2018 NAI Code of Conduct).

6 Retargeting is the practice of collecting data about a browser’s or device’s activity in one unaffiliated web domain or application for the purpose of delivering an advertisement based on that data in a different, unaffiliated web domain or application (2018 NAI Code of Conduct).

7 Cross-App Advertising is the collection of data across applications owned or operated by different entities on a particular device for the purpose of delivering advertising based on preferences or interests known or inferred from the data collected (2018 NAI Code of Conduct).

8 Personalized Advertising is a collective term for Interest-Based Advertising, Cross-App Advertising, and Retargeting, as well as any combination of these practices (2018 NAI Code of Conduct).

9 Ad Delivery and Reporting is separate and distinct from Personalized Advertising, and means the collection or use of data about a browser or device for the purpose of delivering ads or providing advertising-related services, including, but not limited to: providing a specific advertisement based on a particular type of browser, device, or time of day; statistical reporting, traffic analysis, analytics, or optimization of ad placement; ad performance, reach, and frequency metrics (e.g. frequency capping); security and fraud prevention; billing; and logging the number and type of ads served on a particular day to a particular website, application, or device (2018 NAI Code of Conduct).

APPLICATION OF THIS GUIDANCE TO THE NAI CODE OF CONDUCT

This Guidance does not exist in a vacuum; it supplements the NAI Code of Conduct and other guidance documents, such as “Guidance for Members: Cross-Device Linking.”¹⁰ The NAI strives to remain technology-neutral, and as a result most of the NAI’s current guidance is already instructive for the world of television. Nonetheless, the television environment is unique, and presents different challenges from the web-based or mobile app-based advertising technologies, prompting this guidance. NAI members should also consult related legislation, such as the Video Privacy Protection Act¹¹, enforcement and guidance from the Federal Trade Commission (FTC), Federal Communications Commission (FCC), the Children’s Online Privacy Protection Act (COPPA), and state statutes that may apply to their business model.

While consistent with the NAI Code and other NAI Guidance documents, this Guidance discusses only certain requirements of the NAI Code that are particularly relevant. The NAI recognizes that the digital advertising ecosystem is rapidly evolving and companies may be in the process of developing new technologies and business models. Any questions about compliance should be directed to the NAI compliance staff who will evaluate member compliance with the requirements of the NAI Code whether or not addressed in this Guidance, and irrespective of the technology used.

The television space presents challenges for applying good policy to difficult situations. Unlike the mobile environment, there are many television operating systems on the market with varying features and degrees of interoperability. A television is often viewed by multiple people simultaneously, unlike personal computers and mobile phones. Television viewing is generally passive. Once a show is selected, consumers typically have limited interaction with the television—adjusting the volume, changing channels or programming—unlike browsing the web which is active by comparison. As companies develop novel user interfaces and the space matures, the NAI expects privacy controls to improve in tandem.

¹⁰ *Guidance for Members: Cross-Device Linking*. NAI, available: https://www.networkadvertising.org/pdfs/NAI_Cross_Device_Guidance.pdf.

¹¹ 18 U.S.C. § 2710.

I. Definitions

All capitalized terms not defined herein shall have the meanings set forth in the NAI Code or NAI Guidance documents.¹²

- A. Viewed Content Data: Viewed Content Data is information about the video content viewed on a television.
- B. Viewed Content Advertising: Viewed Content Advertising is the collection of Viewed Content Data, or the use of such data, for the purpose of customizing advertising based on preferences or interests known or inferred from the data collected.

II. Transparency and Notice (NAI Code § II.B)

- A. NAI members engaged in Viewed Content Advertising shall include the following in their website privacy disclosures:
 1. A statement that the member is engaged in the collection or use of Viewed Content Data. If data is directly collected from or used on a television, that statement shall use one of the following words: "Television," "TV."
 2. An easy-to-use Opt-Out Mechanism, or if choice cannot be expressed on the device viewing the website privacy disclosure, a description of how to access and use an Opt-Out Mechanism for Viewed Content Advertising.
- B. Members shall take steps to require those partners with whom they have a contract and engage in Viewed Content Advertising to clearly and conspicuously post notice, or a link to notice, on the screen or most appropriate user interface, when technically possible, as applicable. Such notice shall contain, as applicable:
 1. A statement disclosing the fact that data may be collected for Viewed Content Advertising purposes through the television;
 2. A description of the types of data, including any PII, Viewed Content Data, Precise Location Data, or Personal Directory Data, that are collected for Personalized Advertising purposes through the television;
 3. An explanation of the purposes for which data is collected by, or will be transferred to, third parties, including Cross-Device Linking if applicable; and
 4. A conspicuous link to, or a description of how to access, an Opt-Out Mechanism for Viewed Content Advertising on the screen or most appropriate user interface.
- C. NAI members engaged in Viewed Content Advertising shall take steps to require their Viewed Content Advertising partners to clearly and conspicuously post a conspicuous link to, or a description of how to access, a user choice mechanism for the collection and use of Viewed Content Data on the screen or user interface most appropriate to the context consistent with NAI Code § II.B.3-4.

¹² As of the time of this publication; the 2018 NAI Code of Conduct, Guidance for NAI Members: Cross-Device Linking, Guidance for NAI Members: Use of Non-Cookie Technologies for Interest-Based Advertising Consistent with the NAI Code of Conduct, and Guidance for NAI Members: Determining Whether Location is Imprecise.

III. User Control (NAI Code § II.C.)

- A.** Collection of all or substantially all of the Viewed Content Data from a television for Viewed Content Advertising shall require a user's Opt-In Consent.
- B.** Viewed Content Data collected or used for Personalized Advertising linked to Personally Identifiable Information¹³ shall require a user's Opt-In Consent.
- C.** Viewed Content Data collected or used for Personalized Advertising linked to Device Identifiable Information¹⁴ shall require access to an Opt-Out Mechanism.
- D.** NAI members may rely on the device's operating system's opt-out or opt-in signals, as appropriate.
- E.** NAI members shall contractually require Viewed Content Data providers with whom they have a contractual relationship, to obtain appropriate permission to use and share the Viewed Content Data.

¹³ Personally Identifiable Information (PII) refers to the NAI's definition as amended. For convenience, as of the 2018 NAI Code of Conduct, PII is "any information used, or intended to be used, to identify a particular individual, including name, address, telephone number, email address, financial account number, and government-issued identifier."

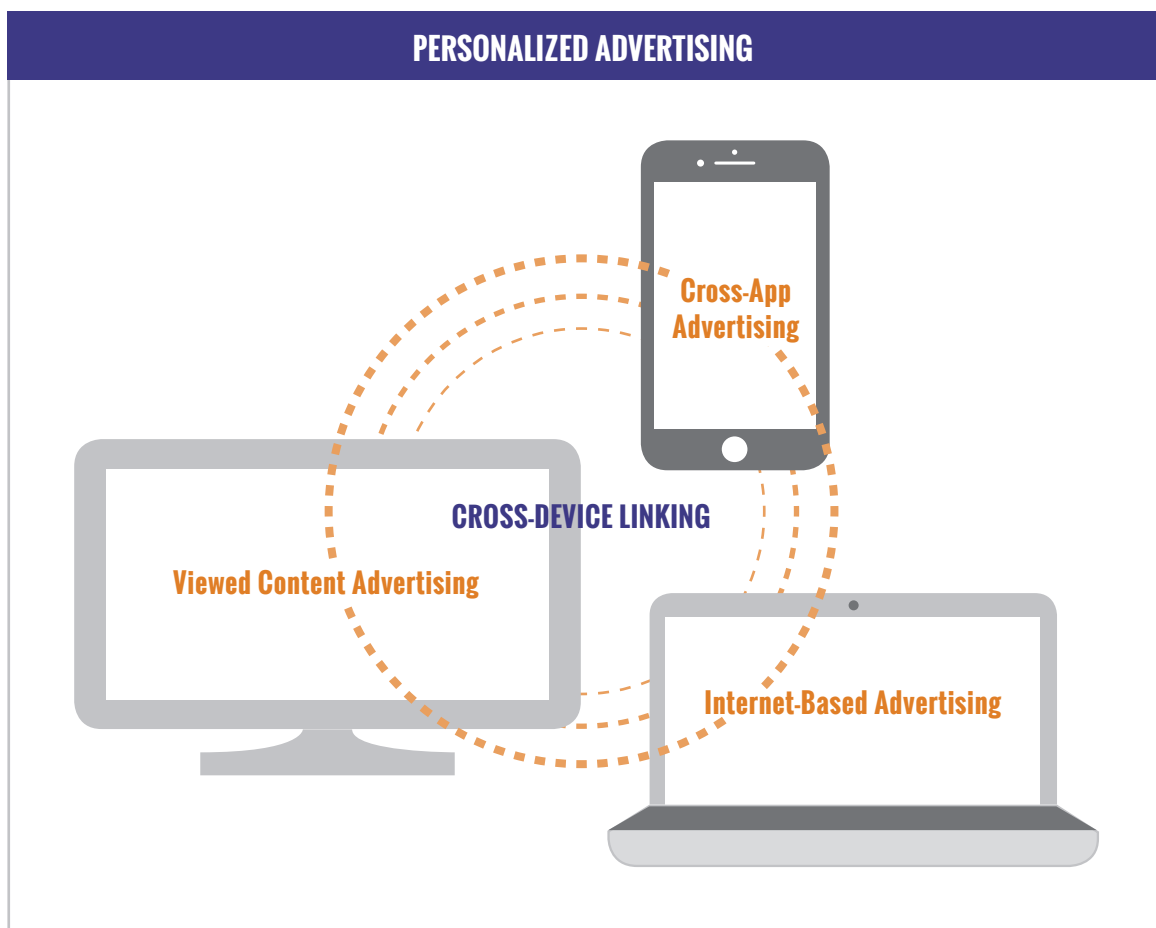
¹⁴ Device Identifiable Information (DII) refers to the NAI's definition as amended. For convenience, as of the 2018 NAI Code of Conduct, DII is "any data that is linked to a particular browser or device if that data is not used, or intended to be used, to identify a particular individual. DII may include, but is not limited to, unique identifiers associated with browsers or devices, such as cookie identifiers or advertising identifiers, and IP addresses, where such data is not linked or intended to be linked to [Personally Identifiable Information]. DII includes data that is linked to a series of browsers or devices linked through Cross-Device Linking, if that data is not used, or intended to be used, to identify a particular individual. DII does not include De-Identified Data."

COMMENTARY

I. Definitions

“Viewed Content Data” is intended to refer to videos, titles, programs, etc. that are viewed on a television. Identifying viewed content based on non-visual information, such as HTTP headers, URLs, or audio, is included in the definition, if it results in identification of the content. Viewed Content Data refers to video (not static images), and does not extend to all internet-connected history. This means Viewed Content Data describes videos, titles, programs, etc. viewed on a TV, but not web-browsing data that happens to be on a TV, similar to how mobile browser activity is more similar to desktop browser activity than to app activity.

“Viewed Content Advertising” is a subset of Personalized Advertising and describes the activity of tailoring advertisements for particular televisions, households, browsers, or devices based on Viewed Content Data. Viewed Content Advertising does not include Ad Delivery and Reporting, unless that data is used for delivering advertising based on interests known or inferred; rendering it no longer ADR.



II. Transparency and Notice

Viewed Content Advertising is in its infancy, and technical standards for content delivery are rudimentary. This NAI guidance makes it clear, by encouraging disclosures in a relevant context, that data collection and use practices should be transparent to interested consumers. The requirement to “take steps” to ensure that NAI members’ partners provide notice of data collection and use for Viewed Content Advertising can be satisfied by contractual requirements and verification. For example, an NAI member that provides a Software Development Kit (SDK) to other app developers to integrate into their TV apps can contractually require that apps using their SDK provide the proper notice and later verify that app partners are following through on their obligations. The “screen or most appropriate user interface” should generally be interpreted to mean the screen or interface closest to the data collection. For example, an NAI member that controls the entirety of the software on a device is in a better position to provide notice to the end user on the device itself. An NAI member that does not control the physical hardware of a television and must communicate over a defined API has less *technical* capability to provide notice and therefore should lean more heavily on *legal* tools. This requirement is in line with NAI Code II.B.3-4, which requires NAI member companies to contractually require advertising data partners to provide notice on their behalf.

NAI members must also take steps to provide a means for consumers to exercise choice regarding the collection and use of data from televisions. NAI Code II.B.3-4 requires that NAI members take steps to ensure that links to consumer choice mechanisms are made available in contexts appropriate to the data collection across the web and on mobile devices, and with this Guidance, the NAI does the same for the television context.

III. User Control

The collection of all or substantially all Viewed Content Data from a television requires Opt-In Consent from the user. A television manufacturer, or a software provider, that has access to all or nearly all of the content watched on a television is in a qualitatively different position requiring Opt-In Consent. This Opt-In Consent requirement does not apply to a peripheral device, such as a digital media player, that does not detect other video delivery sources and happens to be the primary video delivery source for the television.

The phrase “all or substantially all” is interpreted solely by NAI staff, and is intended to cover the use of technologies such as Automatic Content Recognition (ACR) or network-traffic analysis. To the extent that an app or peripheral device is unable to employ ACR to recognize content that the app or peripheral device is not providing, it is not collecting “all or substantially all.” For example, an external digital media player or gaming console that by circumstance is the only device delivering video to a TV is not required to receive Opt-In Consent.

The collection of Viewed Content Data linked to Personally Identifiable Information for Viewed Content Advertising shall require Opt-In Consent. This Opt-In Consent requirement is consistent with the NAI Code’s respect for the use of Personally Identifiable Information.

The collection of Viewed Content Data linked to Device Identifiable Information, such as an advertising identifier, shall require the provision of an Opt-Out Mechanism.

NAI members that receive Viewed Content Data from another provider or partner, and have a contractual relationship with the data provider, shall include a contractual provision requiring the data provider to obtain the required permission to collect and share the Viewed Content Data for Viewed Content Advertising purposes. For example, an NAI member that collects and uses Viewed Content Data connected to Personally Identifiable Information from a Viewed Content Data provider should require the Viewed Content Data provider to obtain Opt-In Consent. For example, an NAI member working with an app that collects Viewed Content Data from a television per the above requirements should contractually bind the app to obtain the proper consent on its behalf (consistent with the data collected), so that the end user of the app has appropriate privacy choices.

Companies should take care with respect to children’s television shows and shows designed to appeal to children, as the Children’s Online Privacy Protection Act (COPPA) may apply. Because televisions are often shared devices in households, the NAI recommends consulting legal counsel with respect to COPPA compliance.

IMPLEMENTATION GUIDE

NAI members should work with their product managers, opt-out engineers, and legal counsel to ensure compliance.

1. Determine whether your company collects Viewed Content Data for Viewed Content Advertising purposes.
2. Decide whether the Viewed Content Data your company collects for Viewed Content Advertising is “all or substantially all” Viewed Content Data for that television.
 - a. If “all or substantially all,” only collect the data once your company has Opt-In Consent to do so.
 - b. If not “all or substantially all,” proceed to next step.
3. Decide whether the Viewed Content Data your company collects for Viewed Content Advertising purposes is linked to Personally Identifiable Information, or Device Identifiable Information.
 - a. If linked to Personally Identifiable Information, only collect the data when your company has Opt-In Consent to do so, either obtained directly by you or from the initial collector of the data backed by contractual guarantees.
 - b. If linked to Device Identifiable Information, only collect the data when your company has an Opt-Out Mechanism that allows one to opt out of this collection for Viewed Content Advertising on that television or device.
4. Review website privacy disclosures to make sure they note that your company may engage in Viewed Content Advertising if you collect Viewed Content Data and use it for Personalized Advertising.
5. Review and edit your contracts to include a provision covering television data, if applicable.
6. If necessary, review the NAI’s Cross Device Guidance and 2018 NAI Code of Conduct for activities that might be implicated. For example, linking a television to another device is Cross-Device Linking.