Case Study #3: Bad Privacy Clause

START HERE

Original Contract Language:

Licensor will adhere to the privacy policies posted on the websites for each of the Publications. Without limiting the foregoing, it is acknowledged that Licensor may use the personal data the Member Organization and/or the Members provide online to send the Members information about offers that Licensor feels may be of interest to the Members and Licensor may provide aggregated data about use of the Publications to other persons.

Library: Please replace with the following:

"Licensor agrees to maintain the confidentiality of any personal identification data relating to the usage of the Licensed Materials. Such data may be used solely in a manner that fully protects the anonymity of individual users and the confidentiality of their searches, and solely for purposes directly related to the Licensed Materials. Raw usage data, including but not limited to information relating to the identity of specific users and/or uses, shall not be provided to any third party."

Vendor: Please add the below:

"To the extent that Licensor processes personal data, it shall do so in accordance with all applicable laws and regulations. For the avoidance of doubt, Licensor is and shall remain the controller of personal data processed under this Agreement.
Licensor will use reasonable and appropriate technical, organizational, and administrative security measures designed to prevent loss, misuse, corruption, or disclosure of and/or unauthorized access, alteration or destruction to personal data held in its custody under this Agreement."

Library: We can agree, with the addition of the following:

"Unless expressly allowed by individual users, direct marketing to Authorized Users is prohibited."

Vendor: We do send periodic updates on open access product offerings. Will the library agree to instead include language that all messages would allow for opt out?

Library: Yes, with the addition of the clause below:

"Authorized Users have the option to unsubscribe from email communications from Licensor, allowing them to opt out of marketing from Licensor."

END HERE

Final Contract Language:

Licensor agrees to maintain the confidentiality of any personal identification data relating to the usage of the Licensed Materials. Such data may be used solely in a manner that fully protects the anonymity of individual users and the confidentiality of their searches, and solely for purposes directly related to the Licensed Materials. Raw usage data, including but not limited to information relating to the identity of specific users and/or uses, shall not be provided to any third party. To the extent that Licensor processes personal data, it shall do so in accordance with all applicable laws and regulations. For the avoidance of doubt, Licensor is and shall remain the controller of personal data processed under this Agreement.
Licensor will use reasonable and appropriate technical, organizational, and administrative security measures designed to prevent loss, misuse, corruption, or disclosure of and/or unauthorized access, alteration or destruction to personal data held in its custody under this Agreement. Unless expressly allowed by individual users, direct marketing to Authorized Users is prohibited. Authorized Users have the option to unsubscribe from email communications from Licensor, allowing them to opt out of marketing from Licensor.

COMING TO TERMS WITH COMPROMISE

As you've seen from these case studies, it's still possible to end up with a less-than-ideal privacy clause, like the one shown here, even after negotiation. Some common reasons for such an outcome include:

Stakeholder needs: Internal pressure, from administration, faculty, or other stakeholders, to get the license finished can make this improved but imperfect language the best outcome for the time being.

Vendor reputation: If the vendor in question has a reputation for poor negotiation or privacy protection practices, a clause such as this one can actually represent a huge win over a clause that explicitly allows marketing to users.

Other concessions: Although we argue that strong privacy terms are essential, we recognize that depending on the situation, other concessions like significantly lowered pricing or expanded access may lessen your library's resolve to insist on your desired privacy terms.

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Licensor will use reasonable and appropriate technical, organizational, and administrative security measures designed to prevent loss, misuse, corruption, or disclosure of and/or unauthorized access, alteration or destruction to personal data held in its custody under this Agreement. Unless expressly allowed by individual users, direct marketing to Authorized Users is prohibited. Authorized Users have the option to unsubscribe from email communications from Licensor, allowing them to opt out of marketing from Licensor.

Keep in mind, there can still be benefits down the road to negotiating privacy terms, even when it doesn't pay off in the short term:

Persistent reminders: Arguing for better privacy terms each and every time reminds vendors of its importance. Small nudges from all directions many times a year add up.

Paving the way: Any improvements to the contract this time could make it easier next time. If you compromise in order to secure better pricing or access, you may be in a position to go to the mats on privacy terms the next time around.

What are some other ways to build on this type of "small win" in future negotiations?