

# The Invisible Contract

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Laura Aade

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Social media contracts are concluded on a constant basis. Not only do they define the rights and obligations of the parties, but they also establish a legal framework for solving legal disputes that may arise between a platform and its users. Despite the central role played by these contracts, many users do not realize that by creating a social media account, they are entering into a legally binding agreement with the platform.

This contribution argues that such a phenomenon might result from the informal manner in which social media contracts are presented to users, and identifies two trends turning them into meaningless documents: their presentation as clickwrap agreements, and the simplification of the legal language used in the terms of service. Social media platforms adopted these trends based on the principle of informality in contract law. It establishes that a contract does not need to be presented in a specific format to be considered legally valid. However, this lack of formalism has transformed social media contracts into invisible ones, leading many users to enter into a contractual relationship without realizing it.

It might be time to radically rethink the principle of informality on social media platforms. Towards this end, this contribution offers two possible ideas to adopt a more formal and structured approach to presenting social media contracts to users. In doing so, these contracts can regain their importance, and users might become more aware of the contractual implications of clicking on the 'I Agree' button.

## The Principle of Informality in Contract Law

In contract law, the principle of informality refers to the fact that no specific form is required for a contract to be legally valid. It is based on the idea that the intention of the parties to be bound by a contract is enough to create a binding agreement. It is therefore not necessary to write down the terms of the contract, to use formal language, or to involve a notary to have a legally valid contract. However, certain contracts do require a specific form to be valid or to demonstrate their existence. For instance, contracts related to the sale of real estate must be in writing and executed in the form of notarial acts. Interestingly, formalities (e.g., requiring the contract to be put in writing) are on the rise again, due to the desire of legislators to balance the unequal bargaining power between the parties by requiring the stronger party to provide more information to the other. Social media contracts are no exception to this trend.

# Beyond Consent: The Importance of Formalism in Social Media Contracts

Social media contracts already adhere to some formalism in the sense that they are presented to current or potential users in written form. The main function of this formality is to provide information to social media users, as platforms must comply with disclosure duties under European law. For instance, they must provide information about their content moderation practices and internal complaint handling systems to users according to Article 14(1) of the [Digital Services Act](#) (DSA). Such information should be provided in a “clear, plain, intelligible, user-friendly, and unambiguous language”, and should be made publicly available in an “easily accessible and machine-readable format”. Another example can be found in Articles 13 and 14 of the [General Data Protection Regulation](#) (GDPR). They require social media platforms to provide users with specific information about the collection and processing of their personal data. Article 12 GDPR specifies that this information must be presented in a “concise, transparent, intelligible, and easily accessible form, using a clear and plain language” and provided “in writing, or by other means including, where appropriate, by electronic means”.

Besides their information function, formality requirements in social media contracts aim to warn users that they are about to enter into a contractual agreement. Given the power of social media platforms, the European legislator implicitly recognized that the mere agreement between the parties was insufficient for the contract to be legally valid, as it would bind them too easily. As a result, the obligation to put the terms of service in writing also intends to offer users a final opportunity to reflect on their decision to create a social media account. However, the limited formalism in social media contracts is gradually losing its effectiveness. This contribution identifies two trends transforming social media contracts into meaningless documents with little to no visibility.

## Two Alarming Trends

### *Presentation of Social Media Contracts in Clickwrap Agreements*

The first trend refers to the simplistic format of social media contracts. Presented as clickwrap agreements, they are designed to simplify the process of agreeing to the terms of service, allowing users to indicate their consent with a single click. The history of clickwrap agreements can be traced back to the early days of the Internet. At the time, clickwrap agreements were a relatively novel concept, and there was some uncertainty about their legal status. However, as electronic commerce continued to grow, courts began to recognize clickwrap agreements as valid contracts. Their legal validity was first established in the 1996 case [ProCD, Inc. v. Zeidenberg](#), where the court held that a software licence agreement presented to users via a shrinkwrap agreement (i.e., paper-based agreement included with the software packaging) was an enforceable contract. Clickwrap agreements offer several benefits to social media platforms: they simplify the process of agreeing

to the terms of service, they improve user experience, and may potentially attract individuals for whom complex contractual formalities are daunting.

However, this contribution argues that clickwrap agreements may contribute to the idea that social media contracts are mundane and insignificant documents. The ease with which it is possible to enter into a contractual relationship with a social media platform is alarming, given the pivotal role these agreements play in the digital sphere. Users may view ticking a box as a mere banality for accessing platform services, rather than an acknowledgment to enter into a legally binding agreement. This misconception may cause them to underestimate the potential legal consequences of their actions online, or worse, to unknowingly enter into a contract – raising questions about the validity of their consent, as research has extensively discussed. The cautionary objective pursued by imposing formalities in social media contracts is therefore rendered obsolete by the (extra)simplicity of clickwrap agreements. If a social media contract can be concluded with a single click, the purpose of putting the terms of service in writing to warn users that they are about to conclude a binding agreement is undermined. Consequently, presenting social media contracts in clickwrap agreements may not adequately convey their importance and seriousness to users.

#### *Oversimplification of the Legal Language Used in Terms of Service*

The second trend concerns the oversimplification of legal language used in the terms of service. Some social media platforms, such as TikTok or Pinterest, have adopted the practice of summarizing each term of service into basic statements. This practice is in line with Article 14(5) DSA, that is primarily based on the [Unfair Contract Terms Directive](#) (UCTD). It essentially requires very large online platforms to “provide recipients of services with a concise, easily, accessible, and machine-readable summary of the terms and conditions in a clear and unambiguous language”. Recital 48 DSA specifies that such summary should include the main elements of the terms and conditions, including the possibility to opt out from optional clauses.

Translating legal concepts into everyday language may seem like a sensible approach at first. It aims to address the issue of many users ignoring the terms of service, prevent them from agreeing to legally binding clauses they do not fully understand, and make them aware of the contractual implications of their actions online. However, reducing legal concepts to plain language can be a double-edged sword. Contracts are drafted to provide legal clarity to the parties involved in the contractual relationship, outlining their respective rights and obligations. To achieve this level of clarity, legal language is used as it offers a level of detail and specificity that everyday vocabulary cannot match. Each legal term has a particular meaning, shaped by case law and established legal practice. By translating the terms of service into basic statements, the benefits of putting social media contracts in writing and using specific legal vocabulary are threatened. Doing so can create a disconnect between established legal concepts and the language used in these simplified statements, leading to confusion and misinterpretation. Furthermore, essential information that social media users should and must be aware of may be lost in translation. As a result, they may unintentionally violate the terms of service, which can have potential consequences such as content removal or account suspension.

Another important aspect to consider is the legal validity of these simplified clauses. While the original terms of service are legally binding, it remains unclear whether their summarized versions carry the same legal weight. Are they considered an integral part of the contract? Do they fall within the scope of the UCTD for social media users qualifying as consumers? What if a dispute arises between parties: should they refer to the full or simplified version of the terms? Ultimately, social media platforms should be careful when simplifying legally binding terms as to maintain legal certainty and keep a certain level of formality – like in most contracts in the offline world.

## **Now What?**

This contribution identified two alarming trends turning social media contracts into meaningless and invisible documents: their presentation as clickwrap agreements and the oversimplification of the legal language used in the terms of service. Despite some formal requirements imposed by the European legislator, social media platforms still enjoy a wide freedom in the way they present their terms of service to users. This lack of formalism, in turn, poses a threat to the establishment of a fair relationship between platforms and users. To address this issue, this contribution suggests reconsidering the principle of informality in contract law and adopting more structured approaches to presenting social media contracts. Some possible ideas include:

### *Requiring a Written (Electronic) Signature Instead of Ticking a Box*

The first proposal suggests replacing the current method of users ticking a box to express their consent to social media contracts with a written electronic signature. This approach would increase the formality of the acceptance process, provide more certainty about the user's intention, and make social media contracts more visible. Furthermore, it aligns with the cautionary function of formalities, by giving users a final opportunity to consider whether or not they want to create a social media account.

However, using electronic signatures as a means of expressing consent to social media contracts may raise issues regarding identity verification, particularly when users are using pseudonyms. Electronic signatures are typically linked to an individual's legal identity, and the reliability of the signature depends on the level of its verification. If users are allowed to create accounts and sign contracts under pseudonyms, it may be challenging to verify their identity and ensure that they are legally bound by the terms of service they have agreed to. Additionally, requiring users to reveal their legal identity to sign social media contracts may conflict with legitimate interests such as privacy concerns, freedom of expression, or personal branding. Therefore, if electronic signatures are to be used for social media contracts, it is necessary to balance the need for identity verification with the legitimate interests of users who wish to remain pseudonymous. Possible solutions could include offering users the option to verify their legal identity without revealing it to the public or using alternative means of identity verification, such as biometric data or multi-factor authentication.

## *Introducing Chatbots as Digital Notaries*

The second proposal is to introduce chatbots as digital notaries on social media platforms. In civil law jurisdictions, notaries are usually responsible for drafting the contract, establishing the intention to be bound by the parties, and informing them about the legal consequences of their actions. In this proposal, chatbots would not have the same legal status as a traditional notary, and would merely focus on the latter function. They could be programmed to interact with users when they first sign up for a social media account, and guide them through the contractual implications of such action. Rather than social media platforms offering vague summaries of their terms of service, these digital notaries could clarify sophisticated legal concepts, and answer questions users might have about the content of the contract. This proposal aligns with the objective pursued by the information requirements imposed at the European level. Moreover, the use of chatbots as digital notaries would add a degree of formality to social media contracts, increase their visibility to users, and provide the legal certainty that contracts are initially intended to offer.

The ultimate question is who should be responsible for providing legal advice and information to users through the use of chatbots as digital notaries: social media platforms themselves or neutral external parties? The responsibility could potentially be assigned to social media platforms as part of their obligation to provide users with clear and comprehensive information about the terms and conditions of their services. However, it could also be outsourced to neutral parties that have expertise in providing legal information and advice to users. Ultimately, the decision on who should be responsible for providing this information would depend on a range of factors, including legal and regulatory frameworks, industry practices, and user preferences.

## **Conclusion**

None of these suggestions aim to solve the issue of users not reading the terms and conditions, but instead seek to introduce more formalism into social media contracts. The underlying objective is to ensure that users are aware that creating a social media account also involves the creation of a contractual relationship with the platform. Although more research is necessary to determine the effectiveness of these proposals (e.g., understanding the social conception of a contract), this contribution argues that it is crucial to increase the visibility of social media contracts to users.

