

The right to forget

**Maria Bottis, Ass. Professor
Ionian University**

On words

- Right to forget
- Right to be forgotten
- Right to delete/to erasure
- Right to oblivion
- Diritto al oblio/droit al oubli
- The term is not yet set

On concepts

- A right?
- An interest?
- A police goal?
- A value?
- A complex juridical instrument....

Amount of data collected and published

1,97 billion internet users

30 billion pieces of content

(web-pages, newslinks, news stories, blog posts, notes, photo albums etc) shared every month in Facebook

235 websites created every 90 seconds

More than 119 million messages tweeted every day

35 hours of video uploaded to YouTube every minute

1,2 million editors are editing 11 million of articles per month

Some more numbers

- Survey in the Netherlands:
- Every Dutch is included in 250-500 databases
- If one is very active: in 1.000 databases
- In the US: the police only operates 2.000 different databases
- So we are living in the Information Age, the age of Big Data
- Where DATA = the currency used
- Do data stay in the databases e.tc. forever? (maybe!)

Data Protection Directive-an Amendment

- **EU Proposal as an addition/transformation of the data protection Directive**
- **The proposal stresses the importance of strengthening the data subject's CONTROL over data**
- **There have been problems with a data subject's control-illusiveness**
- **In the contours of this CONTROL, we have the right to forget/erasure**
- **This is in line with the CONTROL theories of privacy:**
- **Informational self determination means the individual CONTROLS**
- **Who/when/how etc will have access/may process her personal data**
- **This is also in line with the major pillar named consent to data processing**

Four pillars of the amendments

- The right to forget
- Transparency
- Privacy by default
- Protection regardless of data location

A need:

- To impose the EU data protection regime on
- NON-EU organizations
- Typical example: FACEBOOK
- In general, social networking services
- When these services process data on EU citizens
- REGARDLESS of WHERE such services are based
- And WHERE the processing takes place

The right to forget

- A data subject may ask for the removal/deletion of her data after their publication/uploading
- If there are no legitimate reasons NOT to delete data
- This is the perfect control – control before/control after initial processing
- Italy/France have presented their legislative proposals-
- FRANCE: has a Code of Good Practice on the right to be forgotten on social networks and search engines
- People want it? Yes: survey in Europe in 2011:
- 75% support the right to be forgotten (right to delete)

Do we have similar rules?

- This is not entirely new: in the 'old' data protection law:
- right to correct data/to erase erroneous data
- right to delete data AFTER the purpose of processing has been negated/fulfilled
- CONSENT: you can withdraw consent to data processing (as a rule)
- Council of Europe: Recommendation 2003 (13) principle 18: right to privacy includes the right to people convicted of crimes and have completed their sentences to protect their identity—for rehabilitation reasons

In other laws?

- **France: National Commission of Informatics and Civil Liberties**
- **Decision 2001-057 legal databases: no publication of names of witnesses/accused/convicted in the webpage**
- **Greek criminal procedure code::**
- **20 years after you serve your sentence for a felony**
- **Your criminal record is erased (in 3 years, of you were in prison for up to 6 months).**
- **From the intellectual property domain:**
- **The right of reconsideration or withdrawal of a publication (author changed her mind---compare to full control of the artist over how/when etc to publish a work---centre pillar of a moral right/France-Greece)**

And more generally

- TIME is essential in law
- Statutes of limitations
- Prescriptions
- One cannot file a claim whenever
- So with the right to forget/erase
- We have a reaffirmation of some basic legal rules

So what is it?

- Per Vivian Reding/draft proposal
- If an individual no longer wants his personal data to be processed or stored by a data controller and if there is no legitimate reasons for keeping it, then the data controller should be removed from their system
- PLUS a particular emphasis on children's data
- As in Facebook children/adolescents post photos and later on, regret it

What kind of data?

- One can 'forget' everything-Data is a very wide concept in data protection laws
- Usually it is embarrassing data (a conviction, an embarrassing photo etc)
- **BUT: ALL** kinds of **DATA**
- **DATA**
given by **CONSENT**
- **Uploaded BY** the data subject
- **COPIED** from another site
- **POSTS** made by **THIRD** parties on the data subject
- **WHATEVER**

Some initial criticism

- **Fleischer Peter---Chief Privacy Counsel for Google**
- **An article ‘foggy thinking about the right to oblivion’**
- **The regulation violates FREE SPEECH**
- **Data the data subject posted: she may delete-no problem**
- **(“this right is symbolic and unobjectionable”)**
- **This is already in the system as a possibility/this is how the system works---BUT data *your friend* copied/others posted by themselves, on you?**
- **This possibility, to delete, impedes free speech in the internet**
- **Of course: what good is the right to forget if you can forget ONLY what you yourself has posted-irrespective of whether this has been copied a thousand times?**

Sue whom?

- **Your friend copied a photo---uploads it.**
- **Can you sue your friend if he refuses to download?**
- **Can you sue Facebook to download it?**
- **As it is now, YES: you can sue the data controller--**
- **As we know, the friend can be a data controller along with Facebook—the host**
- **Fleischer Peter: should Facebook be forced to delete the photo from the friends' album even without the owners' consent?**
- **But the word OWNER is problematic here**
- **The friend does NOT own the photo she uploads---**
- **There is in fact no OWNER of a photo:**

Owner of a photo?

- The photographer has the copyright
- People in the photo have their personality rights that their photos **NOT BE** published without their consent (EU)
- Privacy rights/publicity rights over photos **EVEN** of public persona's:
- (*Douglas v Hello!*, UK/*Caroline of Monaco* case, European Court for Human Rights)
- And the uploading of a photo without the consent of the person in the photo **IS** processing of personal data (Bodil Lindqvist case, ECJ)
- **BUT** we don't have **PROPERTY** rights over a photo—of our friends
- The EU proposal treats data as a sort of property, as is based on **CONTROL** theories

CONTROL theories of data protection

- **Data is mine: I do what I want with them**
- **I control their use in time**
- **Informational self determination**
- **But data cannot become property**
- **Data is not like a house---property rights *erga omnes***
- **Information has other traits: non excludable/non rivalrous...**
- **AND yes, we have free speech interests against treating**
- **Blackacre the same way as the Black Beauty....**

So personal information is not property

- ...and this is why, one of the reasons, we have exceptions in the right to forget:
- ----Freedom of speech/expression/art
- --- public interest-especially in the area of public health
- ----historical/statistical scientific research purposes
- -----compliance of a legal obligation to retain data/an objective of public interest

- These exceptions carve a NON absolute right to forget
- It may lead to censorship if left without exceptions

BURDEN OF PROOF

- **The burden of proof lies with the controller**
- **Why should data NOT be deleted? Must prove a legitimate interest NOT to delete**
- **Criticism here:**
- **A HEAVY ADMINISTRATIVE BURDEN**
- **Also, fines are threatened against the data controlled who will not comply**
- **STILL:**
- **Legally, always: when someone is based upon and exception to the rule: this is the party bearing the burden of proof of this exception.**

WHAT HAS HAPPENED?

- **Examples of why we need the right to forget:**
- **Kimberly Hester teacher in Minneapolis**
- **A parent sees a photo in her Facebook**
- **The school demands access to her Facebook-she refuses**
- **She is fired---arbitration in 2012.**
- **Swiss cases:**
- **1939 a criminal sentenced to death, executed**
- **1989: a documentary on his life to be broadcasted**
- **Sources: public sources memoirs of survivors. Judicial proceedings.**

- **The son of the criminal sues: do NOT broadcast**
- **COURT yes he is right: right to a criminal to be forgotten**
- **The son has a right that his feelings are protected**
- **It has been 50 years....**
- **After a case is over: society does not have an interest in names**
- **If we leave names published, this hampers the rehabilitation process**
- **Another case in Swiss:**
- **A convict for an armed robbery finishes his sentences**
- **Learns computer skills in jail**
- **Finds a job and then...**

- **A story in the press about his ex accomplice robbing a bank**
- **Includes his name**
- **He leaves his job**
- **He is now sick**
- **Sues for economic and mental harm:**
- **Court: YES---the NAME should not have been published**
- **There is no newsworthiness here**

- **And an Italian case of 1995**
- **Tribunale Roma**
- **Criminal convicted for murder is granted pardon**
- **He starts a brand new social and family life**
- **After 30 years: a story in the newspaper**
- **Court: this is wrong**
- **NO public interest justification**
- **This sheds FALSE LIGHT in the public eye about who this person IS now**

- **STILL** we understand:
- **Considerable debate over the right to forget**
- **WHO** will judge the legitimacy of an exception **AFTER** the controller?
- **Will we create a SUPER BODY in Europe**
- **A COMMISSION on FORGETTING**
- **And standards are different in EU and the US....**
- **In the same time we want to apply a law in both continents**
- **HOW?**

- **A real right to forget case in Argentina**
- **Super model Virginia da Cunha**
- **Wants her racy photos OFF Yahoo**
- **Sues**
- **Yahoo says: I can only block EVERYTHING on you**
- **Courts: both adjudications (first one accepts, the next one overrules)**
- **Google should take off only if Google knew defamatory sites etc**
- **Many similar cases pend**

- **Argument:**
- **You consented when you uploaded**
- **So now, you can't change your mind**
- **This argument is flawed as we see that**
- **I cannot consent to all uses in the future because**
- **These uses are completely UNFORESEEABLE!**
- **Huge amounts of data collected:**
- **Search histories/location data/browsing habits/reading behavior**
- **And technology allows
data matching/de-anonymization/data mining/digital dossiers**

- **So the WHAT do I consent???**
- **These uses are unforeseeable not only to ME**
- **But also to data controllers!**
- **HOW can I anticipate every future possible harm from publication?**
- **Policies on consent are flawed**
- **Drafted in incomprehensible legalese also to lawyers themselves**
- **You just click yes at the end of a document**
- **Consent to data processing has largely failed---the very triumph of individualism/freedom/control.... A sham?**
- **With the right to forget: your consent is given a new power-**

- **Some notes on US laws**
- **Why do we care of US laws?**
- **Because it is US companies we need to bound with the rules**
- **US colleagues will not agree with us-we know**
- **No privacy laws as in Europe/strong free speech jurisprudence**
- **SUPREME COURT**

Cox Broadcasting v Cohn 1975

Publication of the name of a woman raped and killed by six defendants

Source: the judicial proceedings----a TV mentions name

Court: LEGAL / no privacy issue since the name was already in public record

- ***Smith v Daily Mail Publishing* 1979**
- **Juvenile murder suspect—newspaper prints name by mistake**
- **A statute in Virginia forbids this**
- **Court: LEGAL under First Amendment-source of name is legitimate**
- ***FLORIDA STAR v BJF* 1989**
- **Name of a rape victim: in a newspaper**
- **NOT actionable. The name was obtained legitimately from court record.**
- **Freedom of expression/no press restraints.**
- **Dissent strong: no public interest to learn the NAME!**

- **And it is different to have a name in a book of the court**
- **And different in the TV**
- **Different in the INTERNET from where it will probably never 'leave'**
- **STATES in the US have implemented this privacy of names**
- **SUPREME court always annuls.**
- **FOUR privacy torts in the US:**
- **Public disclosure of private facts**
- **Publicity placing a person in a false light in the public eye**
- **Intrusion upon seclusion**
- **Appropriation of name or likeness BUT:**

- **The privacy torts are often forgotten or deliberately ignored by some privacy advocates**
- **We need to stress HARM from publication more:**
- **Harm in Florida Star:**
- **A week after the rape: name published:**
- **Assailant is FREE still-**
- **Victim receives threatening calls**
- **Mental health counseling**
- **Forced to move from her home**
- **Threatened to be raped AGAIN**

- **WHY this EU/US difference?**
- **A transatlantic schism**
- **US: trust private market MORE, distrust government**
- **EU: trust government more, distrust private market**

- **US: more tolerant of surveillance in private market settings/a condition of a free market/enterprise**

- **IDENTITY**
- **Can we see the right to forget NOT as a control right**
- **Not as a privacy right**
- **But as a right to an IDENTITY?**
- **From the Italian jurisprudence:**
- **“the right everybody has to appear and to be represented in social life especially by mass media in a way that fits with or at least does not falsify or distort her personal identity**
- **A subset of a more general right to personality (Greece/Swiss)**

- **A re-conceptualization?**
- **The right to be different not only from others**
- **Form ONESELF**
- **The right to RE INVENT yourself in time**
- **The right to a clean slate**
- **Reputation bankruptcy (Zittrain) (reputation brokers: correct mass media projection of oneself)**
- **The right to be YOU at REAL TIME**
- **Violated when the media publishes indicia of one's identity which cannot be reconciled with the identity and social image one wants to convey**

- **Do people NEED to forget?**
- **If you remember EVERYTHING:**
- **You suffer form hyperthymesia (υπερθυμησία)**
- **Piking syndrome**
- **Our MIND is MADE to FORGET**
- **It is NOT like a computer**
- **Defensive mechanisms: repression of memories/recall years after**
- **And: dissociative behaviors/personality disorder**
- **Even: multiple personality disorder**

- **IDENTITY**
- **Right to forget: offers people the opportunity to permanently REEVALUATE the use of their data for ever changing purposes in dynamic contexts**
- **Privacy is seen here as contextual integrity (Nissenbaum)**
- **=C.I.= ties adequate protection for privacy to norms of specific contexts, demanding their information gathering and dissemination be appropriate to that context and obey the government norms of distribution within it**
- **A control not of DATA but of identity**

- **We need to forget information which now is:**
- **De-contextualized**
- **Outdated**
- **No longer truthful**
- **Information which offer an incorrect representation of an individual's identity to the public**
- **As such the right to forget is based on the right to identity**
- **SURPASSES defamation/false information published**
- **SURPASSES interest in seclusion**
- **WIDENS the application domain**

- **Protection of identity in law:**
- **Greek constitution: protection of genetic identity**
- **Right of adopted people to know their genetic parent**
- **Right of a people to an identity**
- **Right to change SEX (in Italy by the Constitutional Court)**
- **Right to change your name**
- **Right to change nationality, profession, domicile etc**
- **IDENTITY IS A SOCIAL CONSTRUCT/A MATTER OF CHOICES**
- **A PROGRESS-**

- **IDENTITY**
- **A continuum**
- **A constant NEGOTIATION with ourselves and others**
- **I need my most recent identity to be recognized by others**
- **My projection in the reality of society TODAY**
- **PAST? If different, should remain in OBLIVION**
- **“....(opposition): this degrades the concept or rights: instead of being something that embodies the relationship between the society and the individual, it pretends that this relationship does not exist. The right to be forgotten is a figment of our imaginations...” (Mayes, 2011)**

- **BUT** the right to forget is much more than the right to **HIDE** form society
- (privacy perspective)
- It is the right to **CORRECT** and **RE-PROJECT** my image to society
- As I do correct myself and I do re-project myself everyday---as I do develop and grow and change everyday.
- The right to forget does **NOT** negate the relationship of an individual with society: it **ASSUMES** it
- It **RE-BALANCES** the way I am projected in society
- And this rebalancing is **NECESSARY** for a free development of personality/identity over time

A last note

- **Not technologically feasible?**
- **“...Europeans have a long tradition of declaring abstract privacy rights in theory that they fail to enforce in practice” (Fleitcher)**
- **Many international laws exist as principles difficult to enforce**
- **(example against wars)**
- **This though does not defeat the argument in principle.**
- **May compromise the objectivity and neutrality of search engines?**
- **Search engines are not necessarily objective/enigmatic, non transparent engine algorithms**
- **We may not deny erasure of not newsworthy data for the sake of a vague collective future memory....(people are not instruments to an end but an end in themselves..)**
- **Search engines have their own private interests in mind against this law**

- **And....**
- **If society would NOT punish people for past behaviors/disabilities/mental and other illnesses/etc**
- **There would be no need to forget at least these embarrassing past acts**
- **We need therefore to train a future society as**
- **More compassionate/accepting/embracing/including rather than punishing/excluding/rejecting/outlawing etc**
- **Our work should then be oriented also towards this direction-**
- **To demolish the very societal *foundation* that necessitates the right to forget in these cases.**