RIGHT TO BE FORGOTTEN

Begüm Kayum, Esq.

KAYUM & DEMIR
ATTORNEY PARTNERSHIP

How many of us are the social media users?

Who want to be forgetten? Would you?

What is Right to be Forgotten?

We can briefly define the right as:

The right to have control over the personal data and be silent on past events in life that are no longer occurring.

What is Right to be Forgotten?

Personal Data:

Any information relating to an identified or to identifiable natural person such as name, date of birth, gender or religion.

What is Right to be Forgotten?

- The right to be forgotten addresses an crucial problem in the internet age.
- It is very hard to escape your past on the internet now that every photo, status update, and tweet lives forever in the servers.

Internet has everything and never forgets...

Obama: Be Careful with your Selfies!

What is Right to be Forgotten?

- The question of whether the law should require personal information to be delisted or deleted by search engines or servers.

What is Right to be Forgotten?

- What about the rights of:
  - Free Speech
  - Free Media
  - Obtain information
  - Give information
  - Public interest

What is Right to be Forgotten?

Question:

“If I post something on Facebook, do I have the right to delete it again?”

What is Right to be Forgotten?

Question:

“If I post something, and someone else copies it and re-posts it on their own site, do I have the right to delete it?”

Imagine a teenager regrets posting a picture of herself with a bottle of beer on her own site and after deleting it, later discovers that several of her friends have copied and reposted the picture on their own sites. If she asks them to take down the pictures, and her friends refuse or cannot be found, should Facebook be forced to delete the picture from her friends’ albums without the owners’ consent based solely on the teenager’s objection?

What is Right to be Forgotten?

Question:

“If someone else posts something about me, do I have a right to delete it?”

The Roots of Right to be Forgotten

France

- The right to be forgotten is not a new concept.
- For decades, France has been treating the right to oblivion as a fundamental constitutive element of data minimization principle.
- France recognized for the first time implicitly a right to oblivion in 1978 which recognized the right of individuals to demand the erasure of personal data when data is no longer relevant and later included the Criminal Code an effective way to enforce it.
- The French right to oblivion was also used as a way to ensure rehabilitation as a component of justice, giving convicted prisoners who were considered to have been rehabilitated according to the law the right to later object to publication of articles containing information about their crimes and sentences.

The Roots of Right to be Forgotten

Germany

German Federal Constitutional Court's Lebach Decision

- In 1973, the German Federal Constitutional Court had to decide whether the personal rights of a convicted criminal should supersede the general interest of the public good.
- The suspect had been involved in the "soldier murders of Lebach," whereby four German soldiers were killed during the armed robbery of an ammunition dump in 1969.
- During the planning of the attack, the petitioner stated that he did not take part in the attack. The two primary perpetrators were convicted in 1970 and received life sentences, whereas the petitioner was given a sentence of six years for aiding and abetting the crime.
- In 1972, the state-owned German television channel ZDF planned to broadcast a television drama about the Lebach murders. In an introduction to the drama, the broadcasters had planned to broadcast the names and photographs of those involved in the crime along with a documentary in which actors would reconstruct the crime. The petitioner wanted to prevent the airing of the documentary.
- The German Federal Constitutional Court was required to decide which of two constitutional values would take priority: the freedom of the media under Article 5 of the Basic Law or the personality rights of the convicted criminal under Article 2.

The Roots of Right to be Forgotten

Germany

German Federal Constitutional Court's Lebach Decision

- The court ruled that the petitioner's constitutional rights merited priority because the right to freely develop one's personality and the protection of one's dignity guarantees every individual an autonomous space in which to develop and protect one's individualism. The court noted that every person should determine independently and for oneself whether and to what extent one's life and image can be publicized.
- The court also pointed out, that it was not the entire spectrum of one's private life that fell under the protection of personality rights. If, as a member of society at arge, an individual enters into communications with others or impacts them through one's presence or behavior, and therefore impacts the private sphere of others, the individual limits this privacy of life. Where such social interactions are present, the state may take certain measures to protect the public good.
- The court emphasized that, in most cases, freedom of information should receive constitutional priority over the personality rights of a convicted criminal. The court held that the encroachment on the convicted criminal's personality rights should not go any further than required to satisfy what was necessary to serve the public interest and, furthermore, that the disadvantages for the convicted criminal should be weighed against the severity of the crime committed. Using these criteria, the court found that the planned ZDF broadcast violated the petitioner's personality rights because of the way in which it named, pictured, and represented him.
- Applying these factors, the court found that the ZDF broadcast could prevent the resocialization of the complainant in violation of his rights.

The Recent History of Right to be Forgotten

Legislation in EU

- The right to be forgetten was part of the European Data Protection Directive dated 1995.
- A person can ask for personal data to be deleted once that data is no longer necessary.
- The right to be forgotten is described under Article 12(b) of the Data Protection Directive as:

«*Member States shall guarantee every data subject the right to obtain from the controller as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data*.»

Google Spain SL, Google Inc. V Agencia Española de Protección de Datos, Mario Costeja González

- The most controversial judicial and landmark decision on the right to be forgotten was issued by the Court of Justice of the European Union in May 2014.
- The Court held that Google was obligated by European Union law to remove from its search-engine results links to two newspaper articles referencing a real-estate auction to satisfy public debts owed by a Spanish lawyer and calligrapher named Mario Costeja González.

Google Spain SL, Google Inc. V Agencia Española de Protección de Datos, Mario Costeja González

Facts:

- In 2010, Mario Costeja González, a Spanish lawyer, filed a complaint with the the Spanish Data Protection Agency.
- 12 years before there had been a public auction to sell property attached during proceedings against Costeja's real estate for recovery of social security debts.
- The Ministry of Labour and Social Affairs ordered a Spanish newspaper, *La Vanguardia*, to publish an announcement of the auction to provide "maximum publicity . . . to secure as many bidders as possible."
- The announcement was put online in 2008 when La Vanguardia digitized its files.
- 2 years later, when Costeja's name was entered into Google, the announcement turned up prominently in the results. Costeja complained that the announcement should be erased because it concerned "attachment proceedings . . . that had been fully resolved for a number of years and that reference to them was now entirely irrelevant."

Google Spain SL, Google Inc. V Agencia Española de Protección de Datos, Mario Costeja González

Facts:

- In response to Costeja's complaint, the Spanish Authority held that La Vanguardia should not be required to remove its digitized files because "publication by it of the information in question was legally justified" insofar as it had been compelled by the Ministry.
- Nevertheless the Spanish Authority concluded that the complaint against Google be upheld due to the "derecho al olvido," which is the Spanish form of the right to be forgotten.
- The Spanish Authority held that even if underlying websites like La Vanguardia remain online, search engines can nevertheless be required to take down or block access to data whenever "the fundamental right to data protection and the dignity of persons" is at risk, which could include "the mere wish of the person concerned that such data not be known to third parties."

Google Spain SL, Google Inc. V Agencia Española de Protección de Datos, Mario Costeja González

The Spanish court referred the case to the Court of Justice of the European Union asking:

(a) whether the EU's 1995 Data Protection Directive applied to search engines such as Google;

(b) whether EU law (the Directive) applied to Google Spain, given that the company's data processing server was in the United States;

(c) whether an individual has the right to request that his or her personal data be removed from accessibility via a search engine (the 'right to be forgotten').

Google Spain SL, Google Inc. V Agencia Española de Protección de Datos, Mario Costeja González

In its ruling of 13 May 20141 the EU Court said :

a) On the territoriality of EU rules : Even if the physical server of a company processing data is located outside Europe, EU rules apply to search engine operators if they have a branch or a subsidiary in a Member State;

b) On the applicability of EU data protection rules to a search engine : Search engines are controllers of personal data. Google can therefore not escape its responsibilities before European law when handling personal data by saying it is a search engine. EU data protection law applies and so does the right to be forgotten.

c) On the “Right to be Forgotten” : This applies where the information is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing. At the same time, the Court explicitly clarified that the right to be forgotten is not absolute but will always need to balanced against other fundamental rights, such as the freedom expression and of the media. A case-by-case assessment is needed considering the type of information in question, its sensitivity for the individual’s private and the interest of the public in having access that information.

Consequences of Court of Justice's Ruling

- After the Court of Justice decision, Google published a form for requesting removal of URLs from search results.
- Google receieved 792,046 requests to delist and 3,072,120 URLs requested to be delisted in relation to to Google Search up to date. Google accepted 44.3% of these request and delisted 1,171,804 URLs (https://transparencyreport.google.com/eu-privacy/overview)
- Google, when determining whether content is in the public interest considers many diverse factors, including—but not limited to—whether the content relates to the requester's professional life, a past crime, political office, position in public life, or whether the content is self-authored content, consists of government documents, or is journalistic in nature.
- facebook.com, annuaire.118712.fr, twitter.com, youtube.com, profileengine.com, groups.google.com, plus.google.com, scontent.cdninstagram.com, wherevent.com, badoo.com are the top websites which the applicants requested a removal of URLs from Google search results
- Pursuant to a research paper on this issue, 85% of requested URLs came from private individuals, while minors made up 5% of requesters. (https://elie.net/publication/three-years-of-the-right-to-be-forgotten/)
- Non-government public figures such as celebrities requested the delisting of 41,213 URLs and politicians and government officials another 33,937 URLs.
- It is noted that corporate entities never have content delisted under the right to be forgotten requests.

Consequences of Court of Justice's Ruling

- The initial implementation of the right to be forgotten was limited in several ways.
- First, it was limited in geographical scope to European domains of search engines. Google limited delisting to its European domains (e.g. Google.es and Google.de) and refrained from implementing such delisting within its global search. While Google has sought from the outset to limit the geographical scope of the decision, European data regulators have repeatedly insisted upon the expansion of the geographical reach of the decision, to render the delisting mandate applicable globally to all of Google's domains.
- In France, the National Commission on Computing and Liberty (CNIL) interpreted the Court of Justice's decision to mean that Google should remove requested information from all of its various country search engines, not just those designated for Europe. Google objected, saying that such an extension of the rule was beyond the National Commission's power because it would extend the Court of Justice's opinion to the entire world.
- On January 10, 2019, Advocate General Szpunar of the Court of Justice, released his opinion. In his opinion, Advocate General Szpunar disagrees with the CNIL's view on a worldwide application of the "right to be forgotten." These rights must be applied with a territorial link to the EU, and cannot be broadly interpreted to apply across the whole world. Spuznar emphasizes that EU regulators cannot reasonably be expected to make this balancing test for the entire world. Moreover, a worldwide application of the de-referencing obligation would send a "fatal signal" to third countries eager to limit access to information. It could lead to a race to the bottom at the expense of freedom of information in the EU and worldwide. This does not mean that EU data protection law can never have an extra-territorial dimension, but not in this case.
- The opinion of the Advocate General will now be considered by the CJEU, who is expected to render a decision in a couple of months.

European Court of Human Rights Ruling 60798/10 and 65599/10 Judgment 28.6.2018 M.L. and W.W. v. Germany

Facts

- In 1993 the applicants were convicted of the murder of a well-known actor and sentenced to life imprisonment.
- In 2007, with the date of their release from prison approaching, they brought proceedings against several media organisations, requesting that they anonymise archive documents which were accessible on their Internet sites and dated from the time of the trial (an article, a file and the transcription of an audio report).
- In 2009 and 2010, while acknowledging that the applicants had a considerable interest in no longer being confronted with their conviction, the Federal Court of Justice ruled in favour of the media organisations, on the grounds that:

– the crime and the trial had attracted considerable media attention at the time; the public had an interest in being informed, which included the possibility of carrying out research into past events; it was part of the media's role to participate in forming democratic opinion by making their archives available;

–The applicants considered that this approach failed to take account of the power of search engines and this constitues and infringement of the applicants' private life.

M.L. and W.W. v. Germany

- the Court, unanimously concluded to that there had not been in breach of the German State's positive obligations to protect the applicants' private lives on the grounds that:
- the rights of a person who had been the subject of a publication available on the Internet had also to be balanced against the public's interest, in being informed about past events and contemporary history through the press's public digital archives.
- with the passage of time, the public's interest in the crime in question had declined. However, the applicants had returned to the public eye when they attempted to have their criminal trial reopened and had contacted the press in this regard. Thus, they were not simply private individuals who were unknown to the public.

GDPR – Article 17

- General Data Protection Regulation which become fully effective as of May 25, 2018(«GDPR»), regulates the right to be forgotten under Article 17 (*the right of erasure*).
- The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

a) the personal data are no longer necessary regarding the purposes for which they were collected or otherwise processed;

b) the data subject withdraws the consent on which the processing is based and there is no other legal ground for the processing;

c) the data subject objects to the processing and there are no overriding legitimate grounds for the processing;

d) the personal data have been unlawfully processed;

e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

f) the personal data have been collected concerning the offer of information society services to children pursuant to Article 8 of the GDPR.

GDPR – Article 17

- The GDPR defines exceptions to the right to be forgotten, including where the processing of personal data is necessary for:

- exercising the right of freedom of expression and information;

- compliance with a legal obligation which requires processing by Union or Member

- State law to which the controller is subject, or for the performance of a task

- carried out in the public interest or in the exercise of official authority vested in the controller;

- reasons of public interest in the area of public health;

- archiving purposes in the public interest, scientific or historical research purposes or statistical purposes;

- the establishment, exercise or defence of legal claims

GDPR – Article 17

- The burden of proof that the data processing is legitimate will fall on the data controllers.
- Where the controller has made personal data public and is required to delete the information, the data controller is obliged and must take ‘reasonable’ steps to inform other controllers who process the same data, about the data subject’s request for erasure. The controller’s activities must take into account available technologies and the cost of implementation.

Right to Be Forgetten under U.S. Law

- It cannot be easily contested that US does not have a right to be forgotten at least not in the same way European countries define it.
- US does not have a coherent and homogenous federal legal system of data and privacy protection.
- US privacy protection is spread across a variety of states. This inevitably leads to differences from state to state and field to field, in terms of how the same legal problem may be solved.
- Despite this lack of consistency, it is not a complete stranger to some variations of this right to be forgotten.
- US law has in fact a long-lasting experience with «legal forgiveness» such as potential tort claim for the invasion of private life or in bankruptcy law which individual debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for the future effort.

Right to Be Forgetten under U.S. Law

Can the EU approach to the right to be forgotten have a place in the US?

- We should analyze two essential aspects. Firstly, whether the legal structure currently in place would allow the implementation of a right to be forgotten.
- This would entail the analysis of

➢the *First Amendment* and

➢the *Communication Decency Act*.

Right to Be Forgetten under U.S. Law

First Amendment

- The inclusion of everything that is posted online under the «free speech» safe harbor, which is under the protection of the First Amendment.
- On the contrary, EU sees online posting of information as processing of data which makes it subject to several restriction under GDPR.
- Contrary to US system where the premise is that individuals have a right to express themselves, and restrictions can be applied only in specific circumstances, the EU system is built on the premise that gathering and publishing of information can only be done under specific conditions.
- However, the free speech under the First Amendment is not an absolute right, certain types of speech may be prohibited.

Right to Be Forgetten under U.S. Law

Communication Deceny Act

- It offers a blanket immunity to Internet service providers from being held liable from the content posted by websites.
- Significant amount case law has been developed and provide a strong protection for interactive computer services such as search engines, as well as companies running websites that allow external posting content.

Right to Forgotten under Turkish Law

- Data Protection Law in Turkey was regulated under the Law No. 6698 named the Protection of Personal Data Law (the “Data Protection Law”) on April 7, 2016.
- Data Protection Law does not explicity regulate the right to be forgotten.
- Supreme Court Assembly of Civil Chambers- recognized the right to be forgotten in 2015.

Case Law in Turkey – Supreme Court Assembly of Civil Chambers

- The case was about a victim of sexual abuse whose name was fully cited without her consent and without any codification in a criminal law book while exemplifying the relevant criminal suit. The plaintiff asked for the book to be withdrawn from the market and also claimed for damages because of the stress caused due to the recurring of the incident by the citation of her name in the book.
- At the court of first instance; the Court upheld the plaintiff ’s claim on the ground that the full citation of the plaintiff ’s name violated her personal rights and her reputation got damaged. Upon appeal; the higher court reversed the judgement by stating that the book was a scientific work and the decisions rendered by the Supreme Court -concerning the decision regarding the sexual abuse case- are public. The case was appealed before the Supreme Court Assembly of Civil Chambers.
- The Court identified the dispute as a conflict of of the ‘right to be forgotten’, protection of personal data, personal rights and the freedom of science and art; emphasizing that a fair balance should be redressed in between them. The Court determined that the name of the plaintiff would constitute personal data as per the definition provided in the Directive 95/46/EC.
- The Court ruled in favor of the plaintiff on the grounds that the full citation of her name without any codification in the book violated her ‘right to be forgotten’ and her right of privacy.
- The Court decided on this ruling without the existance of the Data Protection Law.

Arguements

- The European Union Committee of the British House of Lords responded to Google Spain by concluding (in bold-faced type) that "the 'right to be forgotten' . . . must go. It is misguided in principle and unworkable in practice.
- Jimmy Wales, the cofounder of Wikipedia, condemned the right to be forgotten as "deeply immoral" because "history is a human right."
- The American legal scholar Jeffrey Rosen has observed that Google Spain and the GDPR portend a "titanic clash" with American free speech principles.