American Journal of Business, Economics and Management
2019; 7(1): 40-43
http://www.openscienceonline.com/journal/ajbem
ISSN: 2381-4462 (Print); ISSN: 2381-4470 (Online)

The Right to Be Forgotten Debate: Pros and Cons

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To cite this article

Peng Xiao, Haoran Lin. The Right to Be Forgotten Debate: Pros and Cons. *American Journal of Business, Economics and Management*. Vol. 7, No. 1, 2019, pp. 40-43.

Received: May 26, 2019; **Accepted**: July 12, 2019; **Published**: August 29, 2019

Abstract

Nowadays, a mass of "right to be forgotten" cases are springing up in various countries around the world. On May 25, 2018, the EU General Data Protection Regulations (GDPR) came into effect. In the meantime, some countries begin to legislate to protect the right to be forgotten. The growing number of cases and legislative attempts give rise to a heated debate over the establishment of this right. This study aims to summarize main arguments for and against the legalization of this right and provide advice for legislators. The nature of this paper dictates the use of a comparative analysis of opposing arguments about the right to be forgotten. Protagonists of the legalization of the right to be forgotten argue that the forgetting mechanism is crucial to the human society; this right originates in human traditions; the right is a logical extension of traditional rights. Antagonists, however, contend that this right violates the freedom of speech and the freedom of the press; it is also in breach of citizens' right to know; the exercise of this right faces great difficulties due to technical limitations; it may even engender counterproductive effects. It can be discovered that there is still great controversy over whether the right to be forgotten should be legally protected, hence it would be imprudent for legislators to write this right in law at this stage. It's recommended that lawmakers from countries where the right to be forgotten hasn't become lawful should examine the aforementioned arguments one by one by taking the national conditions of their countries into consideration and then decide when the time will be ripe for legislation.

Keywords

Right to Be Forgotten, Pros and Cons Debate

1. Introduction

With the advent of the "big data" era, data controllers have gradually collected personal information of a growing number of data subjects and can calculate the subjects' behavior patterns based on these data, which facilitate the prediction of their future actions. The data subjects' information seems to be increasingly difficult to be forgotten. What a future will it be if human beings possess permanent memories?

In Jorge Luis Borges's short story *Funes the Memorious*, the leading character Ireneo Funes acquired an amazing talent of remembering absolutely everything after an accident. He has an immediate intuition of "the stormy mane of a pony, a herd of cattle on a hill, the changing fire and its innumerable ashes, the many faces of a dead man throughout a long wake" [1]. However, Funes is not capable of thought because he can't forget. Just like what Borges remarks in the essay, "to think is to forget differences, generalize, make abstractions. In the teeming world of Funes, there were only details, almost immediate in their presence" [2]. Borges believes that people will only suffer from insomnia every night as they can't break away from the shackles of the past due to a retentive memory and therefore can't look ahead. The Utopian prophecy that this Argentine writer made a century ago will become today's reality.

The Austrian data scientist Viktor Mayer-Schönberger, known as "the father of big data", once said, "forgetting performs an important function in human decision-making… It enables us to accept that humans, like all life, change over time. It thus anchors us to the present, rather than keeping us tethered permanently to an ever more irrelevant past" [3]. He

also pointed out that "digital remembering undermines the important role forgetting performs, and thus threatens us individually and as a society in our capacity to learn, to reason, and to act in time" [4]. In other words, Schönberger believes that the balance of remembering and forgetting has become inverted in the digital age, which would cause profound social changes.

As the EU's General Data Protection Regulation (GDPR) came into force on May 25, 2018, together with other laws that aim to protect data subjects' right to be forgotten, a debate on whether the right to be forgotten should be legalized, namely the pros and cons of this right, has been in full swing.

In this research, the question to be dealt with is what the two opposing opinions on the legalization of the right to be forgotten are, which will offer some suggestions to legislators. And to answer that question, the views of scholars from both home and abroad who either support or oppose this right would be expounded.

2. Reasons for Supporting the Right to Be Forgotten

2.1. The Forgetting Mechanism Is Inseparable from the Society and the Individuals

The attachment to the "forgetting mechanism" and the fear of "permanent memory", to a large extent, give rise to the right to be forgotten, and serve as the most persuasive arguments of those who support the right. As is described in the introduction of this paper, both Borges and Schönberger emphasize that a society can't function well and individuals can't survive without a reasonable forgetting mechanism.

First, there are always matters, serious or trivial, which people don't want to face or disclose to the public. And by exercising the right to be forgotten, the disgraceful part of history can be erased. The "Eraser Act", issued by California in 2013, though applicable only to minors in California who are young, ignorant and lacking of a cyber security awareness [5], ensures that underage data subjects can erase their "black history" written out of impulse or negligence. Another example is the first case pertaining to the right to be forgotten in the European Union, namely Google Spain v. Costeja González, which also attests to the role of the right to be forgotten in helping González remove the black history of his failure in business many years ago. From this perspective, the right to be forgotten is a lock that can seal people's black history.

Second, supporters argue that if people's words and deeds are permanently recorded, people will refrain from thinking, innovating and acting and the entire society will no longer be able to make progress. Therefore, they advocate that people should be granted the right to be forgotten to counter the effects of "permanent memories", which are made possible by the information technology.

2.2. The Right to Be Forgotten Stems from Historical Experience

Supporters contend that the right to be forgotten has existed for a long time, stood the test of history and played an important role in society. For example, the record of an unpaid mortgage will be cleared from the U.S. credit report after 10 years, even if it is authentic.

In addition, certain types of criminal records in the U.S. states will also be deleted from public records, even if there are no errors [6]. They believe that the need to forget is actually rooted in the human society and the practices in all walks of life also vindicate this. This right has been embedded in our historical traditions long before it is legalized. Therefore, they claim that people do not have enough evidence to reject the right to be forgotten or believe that this right is inherently contrary to the freedom of speech.

2.3. The Right to Be Forgotten Is the Logical Extension of Traditional Rights

As early as in 1967, Alan Westin stated in his book *Privacy and Freedom* that privacy should be defined as "the opinion of individuals, groups or institutions about when, how and to what extent their information communicates with others" [7]. In other words, privacy is the control of one's own information.

Over the years, the connotations of the right to privacy have been expanding. For one, the protection scope of privacy in the US has been extended to fertility autonomy, family autonomy, personal autonomy and information privacy [8]. The essence of the right to be forgotten is the control of personal information [9].

In their view, the right to be forgotten is merely a logical extension of the right to privacy, reflecting the expansion of this right from passive right to active right [10]. Since the law can grant citizens the right to privacy, allowing them to control their personal information, it shall also be capable of granting citizens the right to be forgotten to meet the needs of the new era.

3. Reasons Against the Right to Be Forgotten

3.1. The Right to Be Forgotten Breaches the Principles of Freedom of Speech and Freedom of the Press

Once the right to be forgotten is legalized, the principles of freedom of speech and freedom of the press will bear the brunt of the conflict. Anthony Lewis, American law critic and the winner of Pulitzer Prize for Journalism, points out that "the American commitment to freedom of speech and press is the more remarkable because it emerged from legal and political origins that were highly repressive" [11]. Americans are more sensitive and alert to the freedom of speech and the freedom of the press than Europeans who tend to value personal dignity [12]. Therefore, when the right to

be forgotten gives rise to heated discussions, American scholars are so anxious as if they are confronted by a formidable enemy, who would destroy their most staunch guardian of the republican government. The American scholar Jeffrey Rosen predicted in 2012 that in the next few decades, "the right to be forgotten" will become the biggest threat to the online freedom of speech [13]. Scholars such as Steven C. Bennett [14], Rolf H. Weber [15] and Robert Kirk Walker [16] have also expressed their concerns that the right to be forgotten may sharply collide with the First Amendment.

It can be observed from the cases about the right to be forgotten that many disputes are between data subjects who uphold the right to be forgotten and the news media. For instance, in the case of Kurtz v. The California Daily and in the first case of the right to be forgotten in the European Union - Google Spain v. Costeja González, all the reports are the products of journalists' faithful performance of their duties, which are true and reliable, but are bashed by advocates of the right to be forgotten. In the era of new Internet media, traditional paper media have gradually transformed and blended with new digital technologies [17]. The news media entering the digital network domain is bound to confront with the right to be forgotten, suggesting that the soul of the news media, namely freedom of the press, will also be blasted by the right to be forgotten.

In addition to freedom of the press, the right to be forgotten also creates towering barriers around the freedom of speech of citizens. Supporters of the right to be forgotten worry that "permanent digital memories" will prevent people from voicing their opinions, and therefore request data controllers to erase data subjects' disgraceful history and let them be "forgotten" according to their requirements.

Internet companies, nonetheless, as data controllers, are almost incapable of completing such an enormous task of reviewing information and speeches properly. Faced with ambiguous standards and high fines imposed by the GDPR, companies are inclined to be responsive and indiscriminate in clearing data in order to save manpower and time. Wouldn't this lead to another more horrifying effect?

3.2. The Right to Be Forgotten Violates Citizens' Right to Know

As early as in 1890, two American scholars Wallen and Brandeis made a clear distinction between "private information" and "public information" in the article "On Privacy Rights" [18]. Since then, private information has fallen in the scope of the right to privacy, while public information has been classified as the right to know. Yet, the right to be forgotten blurs the line between private information and public information, exempts the responsibility of information exposure that should be undertaken by the data subject, and forcibly reclaims public information that has entered the public domain and should be covered by the public's right to know. Thus, it establishes an absolute and overbearing personal information right, which in turn squeezes the space of the right to know of the public.

In fact, the right to know and the freedom of the press are inherently inextricably linked. The freedom of the press is a means of guaranteeing the public's full right to know. To enable the public to obtain complete right to know is the purpose of the freedom of the press.

When the freedom of the press is hit by the right to be forgotten severely, the right to know of the public will also face a bad situation. For example, in the "right to be forgotten" case of Google Spain v. Costeja González, González succeeded in making his black history "forgotten", but merchants who will cooperate with González in the future will only be blinded to make their own decisions, which is tantamount to a violation of the right to know of the public. In fact, in today's information society, no one is an isolated island, so the non-private information of data individuals will exert considerable influence on other individuals. Therefore, it is particularly important to draw a line between "private information" and "public information" and respect the right to know of the public, rather than the all-inclusive "personal information right".

3.3. The Realization of the Right to Be Forgotten Faces Great Technical Difficulties

At the technical level, deleting the relevant information of the data subject and making it completely "forgotten" is equivalent to empty talk, because the dissemination and spread of information are irresistible and irreversible. Hence, it seems impossible to set the right to be forgotten to block information spreading.

At the same time, almost all websites provide users with an exit mechanism to delete their posts. For instance, we can remove our previous posts in WeChat moments, Weibo and forums at any time. Nevertheless, once the information released by the publisher begin to spread, all the afterthoughts will be too late because publishers cannot prevent other individuals from copying, taking screenshots, and re-spreading their published contents. The American scholar David Humphries points out that "there is a huge gap between the world seen by lawmakers and the world in which technology is now operating" [19]. The world, in the eyes of the founders of the right to be forgotten, is a place in which people can delete personal information by setting the right to be forgotten and a "Utopia" far away from the real world.

3.4. The Exercise of the Right to Be Forgotten May Lead to Counterproductive Effects

Opponents of the right to be forgotten also propose an interesting idea from a psychological perspective, namely the exercise of the right to be forgotten may stimulate the curiosity and psychological reactance of the public, which will generate counterproductive effects. The most classic example is the "Streisand Effect" as a typical new phenomenon after the emergence of the Internet [20]. The "Streisand Effect" fits the context of the use of the right to be forgotten perfectly. The data subjects who exercise the right

to be forgotten often fail to fulfil their wishes, instead they are self-defeating and placed in the spotlight.

All the protagonists in the aforementioned cases want to erase their disgraceful histories and start all over again, but on the contrary, they would receive even more attention because of the usage of this right. As a counterproductive result, what they want to be "forgotten" have been repeatedly mentioned and become well known to everyone. Whether the right to be forgotten brings about the effect of being "forgotten" or "even more noticeable" remains a question.

4. Conclusion

Having outlined the two parties' viewpoints, it can be noted that proponents of the right to be forgotten have hardly come up with any novel and convincing arguments but keep on emphasizing the importance of "the forgetting mechanism", although in recent years the majority of mainstream scholars have been tolerant towards this new right. By contrast, opponents have put forward more detailed and reliable reasons, though there are still not many scholars who voice doubts about the right. Based on the analysis, it can be indicated that a consensus remains to be reached on the legalization of the right to be forgotten. Therefore, it is the author's contention that the right to be forgotten should not be granted the legal status of a new right for the time being.

Legislatures of states where this right remains illegal should scrutinize the abovementioned assertions based on the practicalities of their own nations and legislate for it only if a consensus about the need for this right has been achieved.

Acknowledgements

This research is supported by "the Fundamental Research Funds for the Central Universities"，Zhongnan University of Economics and Law (Grant Number 2722019JCT018).

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