

“THE WEB NEVER FORGETS!”: ASPECTS OF THE RIGHT TO BE FORGOTTEN

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ABSTRACT

Since the beginning of the digital age, the balance between forgetting and remembering changed as Viktor Mayer-Schönberger mentioned. Before the penetration of digital media into the everyday life forgetting was the norm and remembering the exception. Thus, the power of the society belonged to the interest not to be forgotten. Today in the digital age with all the search engines like google and bing there is a shift in the balance between remembering and forgetting. This article reveals the importance of the right to be forgotten and the difficulties of the legal implementation which is discussed nowadays. In this article, first of all the different kind of privacy should be described in the change of it in the digital age. Afterwards the effect of the change of whoness into a digital whoness and its consequences will be shown.

Keywords: Right to be forgotten, privacy, mediatization, digital age, social media, data protection, personal rights

‘İNTERNET ASLA UNUTMAZ’: UNUTULMA HAKKININ GÖRÜNÜMÜ

ÖZET

Dijital dönemin başladığından beri, Viktor Mayer-Schönberger’in vurguladığı gibi “hatırlama” ve “unutma” arasındaki denge değişmiştir. Dijital medya günlük hayatımızda bu kadar etkili olmadan önce, “unutma” kural, “hatırlama” ise istisnayı. Yani, toplumun genel ilgisi, unutulmamaya yönelikti. Bugün, dijital dünyada google, bing gibi arama motorlarında, “unutma” ve “hatırlama” dengesinde bir değişim olmuştur. Bu makale, son günlerde tartışılan “unutulma hakkı”nın önemine ve yasal uygulamalardaki zorluklara değinmektedir. Makalede öncelikle, dijital dönemde değişerek, farklı bir şekilde bürünen “özel hayatın gizliliği” tarif edilecek, arkasından, kimliğin (“whoness”), dijital kimliğe (“digital whoness”) dönüşümündeki etkisi ve bunların sonuçları belirtilecektir.

Anahtar kelimeler: Unutulma hakkı, özel hayatın gizliliği, sosyal medya, dijital medya, kişisel verilerin korunması, kişilik hakları

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INTRODUCTION

Since several years, smartphones penetrate everybody's information and communication behaviours more and more. As a result of that with the help of their "selfie" mode, it is easy to create spontaneously a self-portrait and to upload this opus on their own social media platform. In this context there are well-known nightmare scenarios, i.e. about a young man who created and uploaded in his youth an unflattering selfie, obviously drunken with a bottle in his hand and acting in a bad way. After many years when he has already forgotten this picture, a potential employer confronts him with this picture in a job interview. A real parade example is the story about a young US American teacher how took a snapshot of herself while she was dressed as a pirate holding a plastic cup in her hand. She uploaded this photo in a social media platform and wrote as a subtitle "drunken pirate". When the public education authority took notice of this picture, it fired her from the career of teaching. All her objections and appeals against this decision were unsuccessful¹. These scenarios and cases demonstrate that beside all bright sides of web applications, there are a lot of problematical characteristics and dark sides of the digital world. Obviously the web never forgets. Hence, Viktor Mayer-Schönberger described the case of the 25-old young teacher mentioned above in the first chapter of his fundamental work "Delete – The Virtue of Forgetting in the Digital Age"². He concludes that this case is not about the stupidity of the university's decision to deny her certificate, but it is rather about the right to be forgotten.

We have to verify that at the latest since the beginning of the mentioned digital age, the balance between forgetting and remembering is changed. Before the penetration of digital media into everyday life, forgetting was the norm and remembering was the exception. Thus, the power of the society belonged to the interest *not* to be forgotten. Many books are written, museums, libraries and their archives are established just to save knowledge about the cultural heritages. Today, in the digital age with all the search engines like google and bing there is a shift in the balance between remembering and forgetting. The norm is remembering and forgetting is the exception³. The consequence is

¹ Cf. Nolte, Norbert (2011): Zum Recht auf Vergessen im Internet. Von digitalen Radiergummies und anderen Instrumenten. Zeitschrift für Rechtspolitik 2011 (8), 236

² Mayer- Schönberger, Viktor (2009): Delete. The Virtue of Forgetting in the Digital Age. Princeton University Press.

³ Ibid., p. 2

an increasing risk of the infringement of the personality rights and privacy. This article should reveal the importance of the right to be forgotten and the difficulties of the legal implementation which is discussed nowadays. In this article, first of all different kind of privacy should be debated with the changes of it in the digital age. Afterwards the effect of the change of “whoness” into a “digital whoness” and its consequences will be shown.

1. Legal Aspects of Privacy

During the history of human beings, the understanding of privacy as well as its role and threat, had changed in the course of milleniums. Essentially the privacy and intimate space is regarded as a special value in the history of humans. Privacy finds itself in the system of values of the declaration of the basic and human rights of the 20th and 21st Century which is especially linked with the spatial area of home as well as communication⁴. Beate Rössler identified and analyzed three dimensions of privacy, the decisional, informational and local privacy⁵. Decisional privacy deals with the rights of free choices and decision. Informational privacy deals with the protection of personal data. Rössler includes the privacy of thoughts and mental states as well as of feelings and views. Further she mentions that data are able to identify individual persons among other and can be used to understand “preferences, traits and habits”⁶. The dimension of local privacy deals with the private home, which includes family and friends. The distinction of private and public spheres arises with the analysis of the local privacy. In the following parts we are dealing predominantly with informational and local privacy.

Since the beginning of web 2.0 the online communication becomes a central element of the cultural change of privacy. Many signs point to a change of culture, to a media culture combined with a change of privacy. Privacy is protected in many international treaties According to the Universal Declaration of Human Rights (UDHR) dated 10 December 1948, Article 12, “No one shall be subjected to arbitrary interference of his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” In the European Convention on Human Rights (04 November 1950), in article 8, it is stated that everyone has the right to respect for his private and family life, his home and his correspondence.

⁴ Cf. Schmale, Wolfgang; Tinnefeld, Marie-Theres (2014): *Privatheit im digitalen Zeitalter*. Wien/Köln/Weimar: Böhlau.

⁵ Rössler, Beate (2005): *The Value of Privacy*. Cambridge/UK: Polity Press.

⁶ *Ibid.*, 123f.

The protection of privacy often conflicts with the freedom of press and the freedom of expression. In Germany, GG Article 1 guarantees the protection of human dignity and the right to free development of the personality. There is also very high constitutional protection of free expression of opinions in Art. 5 GG. In the three cases below, it is shown that courts decided in favour of the privacy in different ways⁷.

In the famous Caroline von Monaco process the German Federal Supreme Court (Bundesgerichtshof) decided that the newspaper which placed the untruthful factual claim on its cover page, had to place a recall in the same degree of attention for the reader, if the personality right⁸ of the involved person was infringed⁹. The reason of the court decision among other articles was a fictional interview, placed in the newspaper, which was never given by Caroline of Monaco. The importance of this decision was that, the Supreme Court took into consideration the degree of attention of the article which was generated for the readers. Since the fictional interview was placed with a big headline on the cover page of the newspaper, the recall had to be placed nearly in the same way. According to the court, the recall hidden somewhere inside the newspaper, was not sufficient enough.

There is another interesting court decision which deals with the plan of a public German TV channel to broadcast a documentary about the so-called soldier's murder of Lebach¹⁰. Two young men killed four soldiers to steal weapons from a warehouse. Besides these two men, another man assisted them and he took part in this crime, as well. The two murderers were caught and sentenced to lifetime imprisonment, in fact the third man was sentenced to six years imprisonment. After three years, the public German TV channel planned to produce and broadcast a documentary about the criminal act and the social background of the criminals. The third man opened a court against the TV channel not to broadcast this documentary. Generally the public interest in information by the association of the freedom of press outweighs the

⁷ Güneş Peschke, Seldag; Peschke, Lutz (2013): Protection of the Mediatized Privacy in the Social Media: Aspects of the Legal Situation in Turkey and Germany. Gazi University Faculty of Law Review, 17 (1)

⁸ In Germany personality rights are protected under the German Civil Code (BGB) paragraphs 823 and 826. According to paragraph 823 (1), a person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or other right of another person, is liable to make compensation to the other party for the damage arising from his actions.

⁹ BGH 6. Zivilsenat, 15.11.1994, Az: VI ZR 56/94

¹⁰ „Lebach-Urteil“, BVerfG 1. Senat, 05.06.1973, Az: 1 BvR 536/72

personality rights. But if the reporting is in a subsequent date and does not serve the interest of a up-to-the-minute information, there can be a new weighing of interest. In this case the personality rights of the criminal outweighs, because the documentary jeopardize the process of resocialization of the criminal when he is out of the prison again. This court decision was notable and pioneering insofar that the Federal Constitutional Court (Bundesverfassungsgericht) took into consideration the degree of operation range of the TV channel in the weighing of the freedom of press and the right to personality.

Today the operation range of TV channels are far smaller than the operation range of digital media, especially web sites. Before the beginning of the digital age, informational privacy was almost discussed in contrast of freedom of expression and freedom of press. In the digital age the basic right of privacy is connected with data protection. The reason is, that the archives of online media are always and nearly forever worldwide open with a free access. It shows there is a shift of the understanding of human rights. The matter of protection is no longer the humans, but the data. This illustrates the actual court decision C131/12 of the Court of Justice of the European Union against Google Spain and Google Inc. in favor of Mario Costeja González¹¹. In 2010 González opened a court together with the national Data Protection Agency against a Spanish newspaper and Google. The Spanish citizen realized that the input of his name in Google’s search engine gives as one of the first results; the auction notice of his repossessed home, although the proceeding concerning him had been fully resolved. He complained that the reference to these proceedings are now completely irrelevant and infringes his privacy rights. In the press release on May 13, 2014 the Court of Justice of the European Union published its judgement¹²:

“An internet search engine operator is responsible for the processing that it carries out of personal data which appears on web pages published by third parties. Thus, if, following a search made on the basis of a person’s name, the list of result displays a link to a web page which contains information on the person in question, that data

¹¹ European Commission: Fact sheet on the “Right to be Forgotten” ruling C131/12 of the Court of Justice of the European Union. http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf [last access: 17.02.2015]

¹² Court of Justice of the European Union: Press Release 70/14 (13 May 2014). Judgement in Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González. <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf> [last access: 17.02.2015]

subject may approach the operator directly and, where the operator does not grant his request, bring the matter before the competent authorities in order to obtain, under certain conditions, the removal of that link from the list of results.”

The European Commission mentioned in its fact sheet that the right to be forgotten is located in the 1995 Data Protection Directive. The claims that the Commission had proposed a new right in the Data Protection Regulation, is not true. The right to be forgotten is embedded in the Directive under Article 12, the right of free access to data. But the Commission argues that there is a need for Data Protection Regulation to establish new rights and update existing rights:

“In recognizing that the right to be forgotten exists, the Court of Justice established a general principle. This principle needs to be updated and clarified for the digital age. The Data Protection Regulation strengthens the principle and improves legal certainty” (Article 17 of the proposed Regulation)¹³

2. Prospects: “Digital whoness” – How to Protect Privacy in the cyberspace?

The judgement of the Court of Justice of the European Union mentioned above is taken into consideration only if the personal data¹⁴ are published by third parties. What about data which are uploaded by the user himself/herself? The high level of participation changes not only the net itself, but also the attitude and behaviour of the user: they take advantage of their potential influence to organize themselves collectively as an individual and their interests as well as their knowledge in the virtual space in multiple ways¹⁵. Two main characteristics in media behavior should be considered. The communication of today is a media based communication. We are living in a mediatized

¹³ European Commission, p. 2

¹⁴ According to EU Data Protection Directive 95/46 data which relate to a living individual who can be identified from such data, or other information which is in, or likely to come into, the possession of the data controller. Individuals can be identified by various means including their name and address, telephone number or email address, but anonymous or collective data is not regulated in this Act

¹⁵ Peschke, Lutz; Schröder, Alina (2011): Visualisiertes Lernen im Web 2.0: Audiovisuelle Wissenskommunikation durch Wissensspots. In: ANASTASIADIS, Mario; THIMM, Caja (ed.): Social Media. Theorie und Praxis digitaler Sozialität. Frankfurt a.M./New York: Peter Lang.

world and our media behavior is a multitasking media behavior. Not only digital natives, but also older generations simultaneously communicate with a friend via Skype, accept a call via voice-over IP and chat with help of an instant messenger while watching a live stream video in a media player at the same time¹⁶. On the other hand this mediated self-representation via social media generates a kind of digital voyeurism. Tweets and re-tweets are posted, articles are commented upon and shared, images uploaded, messages about where they are and what they are doing are posted on pinboards. Social media activists permanently change their roles between a digital exhibitionist and a digital voyeur¹⁷. In this context it seems to be reasonable, that individuals take care of their own privacy while using the web in a more responsible way and don't upload so many files. But actually earlier studies show that it is mostly the opposite case. This phenomenon is called the privacy paradox¹⁸. These phenomena show that there is a shift of privacy to a digital privacy and an identity to a digital identity. Rafael Capurro et al. (2013) subsume it under the term of “digital whoness”. They point out that identity is only possible, where a who finds itself mirrored back from the world¹⁹. According to the authors people living today grow up in which their immersion in the cyberworld is increasingly becoming normality²⁰. Living in a cyberworld means as well as computer-generated communication does not take place exclusively with real names of the users. Some platforms prescribe the selection of a username, some users voluntarily choose a nickname. Nicknames are like masks. They protect the real identity, but create a cyber identity, as well. The consequence is that the people live more and more with a patchwork identity²¹. At that point the question arises about the construction of the privacy in a patchwork

¹⁶ Güneş Peschke, Seldağ; Peschke, Lutz (2013)

¹⁷ Krotz, Friedrich: Mediatisierung: Fallstudien zum Wandel von Kommunikation. VS Verlag, Wiesbaden 2007

¹⁸ Niemann, Julia; Schenk, Michael; Teutsch, Julia; Wlach, Kim; Allgeier, Yvonne (2012): Quantitative Befragung von Jugendlichen und jungen Erwachsenen. In: Schenk, Michael; Niemann, Julia; Reinmann, Gabi; Roßnagel, Alexander (ed.): Digitale Privatsphäre: Heranwachsende und Datenschutz auf Sozialen Netzwerkplattformen. Düsseldorf: Vistas, p. 250.

¹⁹ Capurro, Rafael; Eldred, Michael; Nagel, Daniel (2013): Digital Whoness. Identity, Privacy and Freedom in the Cyberworld. Heusenstamm: Ontos, p. 12.

²⁰ Ibid, p. 128.

²¹ Ackermann, Judith: „Masken und Maskierungsstrategien – Identität und Identifikation im Netz“. Anastasiadis, Mario; Thimm, Caja (ed.): Social Media. Theorie und Praxis digitaler Sozialität. Bonner Beiträge zur Medienwissenschaft vol. 10. Peter Lang, Frankfurt/New York 2011, pp.61-86

identity and its protectability and should be taken into consideration when we discuss “the right to be forgotten”.

CONCLUSION

This paper discussed the shift in the balance between remembering and forgetting in today’s digital age with all the search engines like google and bing. Remembering is the norm and forgetting in the exception. The consequence is an increasing risk of the infringement of the personality rights and privacy. Essentially the privacy and intimate space are regarded as important values in the history of humans. The protection of privacy often conflicts with the freedom of press and the freedom of expression.

Three cases are discussed in this paper where the Court decided in favor of the protection of privacy and personality rights. The Caroline von Monaco process was a suit between the princess of Monaco and a German newspaper. The second case was about the so-called soldier’s murder of Lebach which was taken into action by one of the criminals against a German TV channel. In both cases the Court had to weigh the personality rights and the freedom of press and decides against media, newspaper and TV channel, where older articles and contributions are difficult to find in there archives. Their contributions are be forgotten in a quite short time.

In the last case, there was a new aspect, in the decision of the Court of Justice of the European Union against Google Spain and Google Inc. in favor of Mario Costeja González. It was not only a decision in favor of the personality rights. Rather it was a decision against the lifelong existing memory of online search engines and in favor of the right to be forgotten. The reason was, that the archives of online media are always and nearly forever worldwide open with a free access. The consequence of the decision is that the hitherto existing principle “the web never forgets!” has to give way to the demand of being forgotten. The importance of the right to be forgotten arises from the phenomena of a shift of privacy to a digital privacy. The protection of this right will be one of the biggest challenges on the way from a Data Protection Directive to a Data Protection Regulation of the European Commission.

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