THE RIGHT TO BE FORGOTTEN
UNDER THAI LAW

BY

MISS DAONGOEN CHINPONGSANONT

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS
IN BUSINESS LAWS (ENGLISH PROGRAM)
FACULTY OF LAW
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ABSTRACT

Digital eternity is a problem because privacy matters. Well-known privacy rights in the digital age include free expression and accessing information; the right to be forgotten has also been recognized as a privacy right. It solves the problem of the difficulty of burying an individual's past in the online world.

In May 2014, the right to be forgotten was recognized in the European Union through *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (*2014)*, a decision by the Court of Justice of the European Union *(*CJEU*)*. Thenceforth, search engines were obliged to remove outdated or extremely personal information from search results. Outside the European Union, the right to be forgotten has been rejected and supported. Questions remain about the benefits of this right, seemingly based on the concept of a second chance. It is not an absolute right so it is difficult to balance this right with other related rights, especially rights of free expression and access to information.

The question was addressed whether data should be remembered forever or may be changed by owners in Thailand. European Union rulings were studied, considered among the most effective privacy- protection regulations. Rulings were issued with the objective to protect personal data, offering high protection standards. Yet in the United States, the right to be forgotten confronts the First Amendment, the Communications Decency Act of 1996 (CDA) and privacy tort law. In the United States, the legal right to be forgotten has less weight than other fundamental rights. Recommendations were offered to enhance effectiveness of adopting the right to be forgotten under Thai Law.

Keywords: Right to Be Forgotten, Erasure Right, Personal Information

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Miss Daongoen Chinpongsanont
Thammasat University
Year 2015

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INTRODUCTION

1.1 Backgrounds and problems

At present it could not be denied that we are in the digital age when people do everything via the Internet. Moreover, we are in the world as the center of communications, research, work and entertainments. We can also say that almost all activities in our daily lives are involved with the Internet and a useful tool for doing anything via the Internet is search engines like Google or Bing.

Nowadays, people write more emails than letters and search the information on the Internet approximately twenty billion times each month.[1] The number of people watching YouTube.com is up to forty percent per year.[2] They also more choose to communicate with their friends via Facebook than with those in their real places. The flow of the data in online world spreads quickly with the magnificent volume. Both government and private organizations have spent a lot of their time to monitor the data in this digital world. The huge number of information creates a question whether people have too many speeches.

In the Internet world, search engines are significant tools that people use for searching information or data. In the same time, social media also grow increasingly along with these search engines. The websites keep both good and bad memories so there may be an error that people want to delete it. The collection of online personal data, which are remembered in the websites, can be harmful when the time has elapsed.

As the number of the new data is so great, in particular on Google as appeared on the result pages, there is a long trail of digital footprints left by the Internet

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[1]Jacques Bughin, Laura Corb James Manyika, Olivia Nottebohm, Michael Chui, Borja de Muller Barbat and Remi Said, The impact of Internet technologies: Search, https://www.mckinsey.com/~/media/McKinsey/dotcom/client_service/High%20Tech/PDFs/Impact_of_Internet_technologies_search_final2.ashx, July 2011.

[2]Statistics, https://www.youtube.com/yt/press/statistics.html, accessed May 29, 2016.

users. Some information, which is recognized by Google or other search engines, is often mistaken or misunderstood. For example, Dr. Russo, a plastic surgeon, was sued twenty years ago and finally cleared from the accusation, but when people search his name on the Internet, his lawsuit still appears[3].

In the online world, it is difficult to delete the data and the past still emerges as a reminder of the events that may upset people. Of course, there are good points of the internet, such as history or education views, but it sometimes preserves the incorrect or old links rather than allows such links to be deleted. As you can see in the above-mentioned case, even twenty years of being a successful doctor has passed, one incident is still haunting him.

Another case happened with a Los Angeles restaurant, Tart. A reviewer of this restaurant posted the wrong information online by complaining about the turkey meat loaf. Then, the owner complained the web because his restaurant never sold the turkey, but the web did not remove the review. Thus, the restaurant hired the consultants to fill the information to the web and some information was false with an aim to distract the people from negative information. As a result, the false information was created resulting in a confusion to cover the painful lies. However, when the reputation was controlled by private hands, it was difficult to get the justice.[4]

One of the solutions for solving this problem is to adopt the "*right to be forgotten*" principle, which means "*the right for natural persons to have information about them deleted after a certain period of time*".[5] Eric Posner, who is a professor at the University of Chicago Law School, called the right to be forgotten as "*the most*

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[3]Laidlaw, Emily B., "*Private Power, Public Interest: An Examination of Search Engine Accountability.*" **International Journal of Law and Information Technology**, 14 October, 2014.

[4]Science, Technology, and Society, "*Formulating and Implementing a Right to Be forgotten in the United States: American Approaches to a Law of International Origin*", 3 January, 2015, https://getinspired.mit.edu/sites/default/files/documents/ST118_Report.pdf. (accessed on May 5, 2015).

[5] Boucadair, Mohamed, **Handbook of Research on Redesigning the Future of Internet Architectures,** 37 (2015).

important right you've never heard of."[6] The concept of this right has been continuously expanded around the world with an attempt to protect the privacy on the Internet and serve as a tool of controlling the individual's reputation.

In May 2014, the right to be forgotten was widely recognized in the European Union. In the case of Google in Spain, the court held that Google should begin enforcing this right in member states of European Union. In Spain, Google has an online form of petition for users by asking them whether or not to remove their personal links. However, these users are required to explain the reason as to why their links have to be deleted. If they have a good reason, Google will send the form to the webmaster. The reviewing process is done by the lawyer teams. As of July 2014, Google removed the links over half of the requests.[7]

Regarding the privacy, search engines have to remove outdated or extremely personal information from their search results. "*It's about privacy and dignity*,"[8] Michael Fertik, owner of Reputation.com, said. His company helps cleaning up personal online data. He told the New Yorker that:

"*If Sony or Disney wants fifty thousand videos removed from YouTube, Google removes them with no questions asked. If your daughter is caught kissing someone on a cell-phone home video, you have no option of getting it down. That's wrong. The priorities are backward.*"[9]

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[6] "*Debate Club of U.S. News, should there be a 'Right to be Forgotten' on the internet?*", http://www.usnews.com/debate-club/should-there-be-a-right-to-be-forgotten-on-the-internet, (accessed on October 22, 2015).

[7] "*Google Confronting Spain's "Right To Be Forgotten"*", http://searchengineland.com/google-confronting-spains-right-to-be-forgotten-67440", (accessed on October 22, 2015).

[8] "*Should There Be a 'Right to be Forgotten' on the Internet?*", http://www.usnews.com/debate-club/should-there-be-a-right-to-be-forgotten-on-the-internet., (accessed on 24 October 2015).

[9] *Id.*

Therefore, a ruling of European Union has been established with an objective to protect a personal data. This ruling has a high standard of protection, which can be applied everywhere in the member states of European Union. The individuals can complain and obtain an appropriate redress if his/her data are misused. Moreover, the Data Protection Directive also specifies the rules in case that the owners of data want to move their personal data outside the EU and to ensure the best possible protection of their data when it is exported abroad.

Outside the European Union, the right to be forgotten has been either rejected or supported by the courts in Canada and Argentina. However, besides the civil lawsuits filed by well-known people, the right to be forgotten has not been exercised. As same as the Canadian law, the right to be forgotten was recorded under the "*Freedom of Information and Protection of Privacy Act*". In general, the model of European law seems to have an influence in formulating the right's legal framework.[10]

In the United States, there are questionable issues about the benefits of this right. It seems that the right to be forgotten is based on the concept of a second chance. Also, it is difficult to balance it with other related rights, in particular the rights of free expression and access to information. In practice, it is difficult to exercise this right in the world where the information is usually saved in the Internet all the time. It is even more difficult if the objective of deletion causes a doubtful issue as the right could be mentioned as a deletion of original data or links in the search engines.[11]

For this reason, the users or data owners have to solve the problem by contacting the search engines directly. However, this still depends on the service providers to determine whether such information should be deleted. Otherwise, the data owners or service providers have to file their complaint to the court and the court may or may not order the search engines to remove such information due to no specific legal provisions for such claim.

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[10] *supra* note 4.

[11] *Id.*

1.2 Hypothesis

Due to the problem of having a large number of useless or old data in the online world, Thailand has no adequate legal measure of requesting for the deletion of the data in the online world. For this reason, the Thai law should adopt the right to be forgotten doctrine as a law by determining it in the Draft Data Protection Law.

1.3 Objectives

This study aims to:

1.3.1 Examine the significance and development of the right to be forgotten through relevant international laws and cases,

1.3.2 Analyze the impact of the right to be forgotten to the search engines and the individuals in the countries where this right is recognized as a law,

1.3.3 Examine other countries' solutions through their problems, especially in the European Union and United States, and

1.3.4 Examine the related laws in Thailand whether they can be enforced when the users request for delisting their information.

1.4 Scope of Thesis

Someone may say that the right to be forgotten is considered as the second chance where people can start their new life without the online past to remind them of their former mistakes. This right has a great value to the society in particular in the online world. However, we have to admit that a method of removing the error data is difficult to be implemented. Even though people want to remove their information, the removed data decisions still remain on the data controller. In practice, after the European Union had made a decision on the case, thousands of users submitted their requests to Google to remove their links of personal data.

Nevertheless, when the right to be forgotten was mentioned outside the member countries of the European Union, in particular the United States, under the United States law, it is difficult to accept this right because the idea of removing data seems to violate other privacy rights, especially the right of freedom of expression and the right to access information, which are provided in the First Amendment law.

Moreover, the author will not observe only the American law and European data protection laws, but also consider this matter in the wide deviations through other laws, including current Thai law and the draft Personal Data Protection Act.

1.5 Methodology

At first, the author started by collecting the information about the right to be forgotten and other related rights, such as the right to access information and the freedom of expression right, from various sources, including journals and international laws and most of them came from the internet. The study of legal frameworks, both in the United States and European Union and relevant cases, was for supporting the solution.

1.6 Expected results

At the extensive level, the right to be forgotten warrants that the individuals will have the right to control their fate in the data online. In everyday life, the internet is a primary source when you want to find something. In the same way, while people try to put a lot of data in the online world, there are unwanted data that some individuals may want to delete. In that sense, the right to be forgotten is deemed a very useful principle.

Thailand must interpret the purpose of each country about their perspective towards the right to be forgotten. Normally, the interpretation is done by getting through the context of the literal laws where the right can be exercised. Then, Thailand should

consider modifying the law to apply this right based on the court's decisions and soft laws.

Modifying this right is for finding an adequate solution for its exercise. The individuals are allowed to send their requests for deleting their own data if such unwanted data fit to the definition of "irrelevant" and they have to explain their reason to the court's consideration. However, there should be the organizations controlled by the government, which can decide as to what types of information should be deleted.

Nevertheless, the modification of this right leaves a room for individual countries to adapt their law and harmonize it with their own system. Recently, the European Union's framework proposes a future directive for finding the solutions for the present issues and the greatest benefit is the ability to adjust and improve it based on the context of each country, including Thailand.

CHAPTER 2
GENERAL CONCEPT OF
THE RIGHT TO BE FORGOTTEN

Nowadays, we could not deny that the privacy is a hot topic, especially if we talk about the online data. Only a few people in the online world understand how to use the technology as a tool for collecting the information. Privacy is like an emotional reaction rather than a legal doctrine. Besides, there are different definitions about this matter from each perspective.

Privacy of humankind is considered a natural right, which is one of basic human rights, based on the response of communications and technologies,[12]including the freedom of information. In the Internet age, the concept of this privacy is very important and it represents the human dignity and other values and rights[13]. Normally, there are two well-known rights under the privacy involved with this digital age, i.e. right of free expression and right to access information, but recently the right to be forgotten has been recognized as one of the privacy rights.

In theory, the occurrence of this right addresses the problem in the digital age, [14]and in particular it represents the biggest threat to the right of the free speech on the Internet. Search engines like Google have to establish a department for deleting the photos or contents that people posted on the Internet. This is not included the question as to how to set the balance between the right to be forgotten and the right of free speech.

One of the essential parts in human dignity is reputation, and nowadays the too-much speech can tear down the individual's privacy. The right to be forgotten has provoked the tension between the empowerment of new technologies with more speech

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[12]"*Right to privacy*", http://law2.umkc.edu/faculty/projects/ftrials/conlaw/rightofprivacy.html., (accessed on October 24, 2015).

[13] Global Internet Liberty Campaign, "Privacy and Human Rights", "http://gilc.org/privacy/survey/intro.html", (accessed January 2, 2016).

[14] Jeffrey Rosen, Symposium Issue, "The Right to be Forgotten", February 13, 2012.

opportunities and the disempowerment by ceding the control over the data that may last forever when the individuals posted them.[15]

2.1 Definition of the Right to be Forgotten

For the past few years, this right was debated in Europe Union, and finally has been considered part of a newly proposed data protection regulation. In the coming decade, the free speech on the online world will become a biggest threat. People share their personal data on the Internet. Up to now, there are over a million of data on the Internet, photos, news, blogs, which include personal data, and these data sometimes cause a misunderstanding or are expired data. Thus, this right occurs to give the power to the individuals to control their own personal data. Professor Jasmine McNealy, American Bar Association, describes the right to be forgotten as follows:

"*The right to be forgotten is an amorphous privilege that will allow individuals more control over their personal information, particularly that information collected and connected with new technology.*"[16]

According to this definition, the right to be forgotten takes three forms:

- After a certain period of time, the information has to be deleted.
- The right to have a "clean slate"
- The right to be connected with the present information

Technically, the right occurs to solve a problem in the digital age because it is very difficult to bury the individual's past in the online world. In practice, people post or update their personal data online where every photo, status update or tweet lasts

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[15]Jeffrey Abramson, "**Searching for Reputation**: **Reconciling Free Speech And the "Right to be Forgotten**", October 1, 2015.

[16]"*Right to be Forgotten definition*" , http://www.duhaime.org/LegalDictionary/R/RighhttobeForgotten.aspx., (accessed on November 30, 2015)

forever in the cloud. Accordingly, the problem will occur, and when people want to erase this kind of data, they will use this right.

In Europe, we can find the intellectual root of the right in the French law, which provides a right that allows a criminal who has convicted, served his time, and been rehabilitated to object the publication of the facts regarding his conviction and incarceration.

In contrast with the United States, the publication of the criminal's history is protected by the First Amendment law.[17]In the famous case between Wikipedia and the convicted murderers in 1990, a Bavarian actor, Walter Sedlmayr, was inhumanely murdered by his German business associates. Wikipedia mentioned the case and the names of the murderers in its result page when searching the name "Walter Sedlmayr". One of these convicted murderers requested that their names should be taken off from the Sedlmayr article page. The conflict between the First Amendment law and the Germen law then occurred. Even though the German law intends to protect the private person, the act of the murderers who killed the famous actor was hardly to be protected. So, their names still appeared on the page.[18]

2.2 Development of the right to be forgotten

The right to be forgotten has slowly appeared to the world in the latest decades when new technological devices have been invented. It seems that the humankind has created a lot of data on the Internet so some people think that they also have a right to delete useless data or data that are related to them.[19] This right is reflected in various areas in the European; for example, the intellectual root of this right can be

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[17] *Id.*

[18] Jennifer Granick, "*Convicted Murderer To Wikipedia: Shhh!*", https://www.eff.org/deeplinks/2009/11/murderer-wikipedia-shhh, (accessed January 2, 2016).

[19]Ioana Stupariu, "Defining the Right to be Forgotten. A Comparative Analysis between the EU and the US", March 27, 2015.

found in the French criminal law as *le droit à l'oubli*—or the "*right of oblivion*"[20]. The idea is that "once persons serve their time, they deserve a chance to start a new life without their criminal past coming back to haunt them."

The doctrine of this right is derived from the theory of personality right. The personality or original right is the right that the individuals can assure the use of their names, pictures and other human's identities. The right is born with the existing person that is different from the rights of estate or debt because it is not affected by human actions[21]. Generally, this right is considered a property right and some jurisdictions propose that the right can survive until the death of the individuals. This right was created to serve the privacy of the individuals.

The Romanian Civil Code (articles 71 and 74) emphasizes the private life by providing that the private life refers to everyday life, including personal, family, friendship and other private aspects, which is opposite to the public life. Therefore, it may conclude that the content of the right to privacy includes also the right to personal data protection.[22]

After a long period, the concept of privacy right has passed through the European Union and the beginning of the concept of "*acquis communautaire*" or "EU acquis" has arisen.[23]

In Switzerland, the right to be forgotten has been applied for the criminal offences under the Swiss Civil Code based on a concept that when the time has elapsed,

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[20] "*Schuette v. Coalition to Defend Affirmative Action and the Forgotten Oath*". February 13, 2012, http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten, (accessed on 10 November, 2015).

[21] Ph. D. EugenChelaru, professor, "*Right to be forgotten*" http://journals.uab.ro/index.php/auaj/article/viewFile/53/73. (accessed on May 20, 2015)

[22] *Id.*

[23] "*European Union Conditionality and the Acquis Communautaire*", http://www.cesruc.org/uploads/soft/130221/1-130221113Z4.pdf?pldezynhfkbcvomf, (accessed on June 23, 2016).

an offender's interest of being forgotten and the chance of rehabilitation will take place. The Swiss calls it "personality right."

However, this right is not an absolute right; namely, it needs to be balanced with other rights, such as right of free speech or right to access information. The court in Google Spain case held that:

"if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question."[24]

2.3 Famous case: Court of Justice of the European Union: Google Inc. v. Gonzalez[25]

Back to 2011, Mr. Gonzalez filed a complaint with the "*Spanish Data Protection*" against La Vanguardia Ediciones, the owner of the daily newspaper in Spain. He claimed that when we searched his name on Google, the search result would show the links for two pages of the La Vanguardia's newspaper dated January and March 1988. That news was about a real estate auction for paying his social security debts. He wanted the newspaper to remove the news and Google Spain or Google Inc. to conceal his private data in their search results.

According to his complaint, he argued that the appeared news was already resolved. The Spanish court rejected his complaint to the newspaper in contrast with Google that had to remove the data from its results pages. However, Google denied to remove these data and applied to have the decision dismiss by referring to the argument made by the Court of Justice of the European Union (CJEU).

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[24] "*Case C-131/12 Google Spain: Responsibility of search engine operators for the processing of personal data*", https://eulitigationblog.com/2014/06/07/case-c-13112-google-spain-responsibility-of-search-engine-operators-for-the-processing-of-personal-data/, (accessed on May 5, 2016).

[25] *Id.*

The CJEU held that Google obtained the private data of Mr. Gonzalez that was difficult to be found without search engines like Google, and it was not the right of the search engines to clarify an individual's right by "*merely the economic interest*"[26]

Most importantly, although it was an important thing to process the accurate data at the time when the data were posted to the Internet, it was the controller's duty to update the data that are "inadequate, irrelevant or excessive in relation to their original purposes rather than keeping them up-to-date or keeping them for a longer period than necessary." This is involved with not only the economic interest, but the interest of the public should also be considered.

Then, in May 2013, the CJEU ruled in the case that individuals have the right to request search engines to remove the links of displayed information in their website and the significant rule from this case was the judgment providing that a data controller was included in a search engine. Anyhow, the ability for requesting to remove the displayed information of individuals was under the condition of "*potentially interested in having access to that information*".[27] The balance of the right depends on the data subject's private life and on the public interest in having that information.

The court's decision provides that the individuals can request to delete their information when the links are "inadequate, irrelevant or no longer relevant" and then the data controller shall remove such information. However, such information is not permanently gone from the Internet and the linked pages are still available in the original pages. When people put a keyword of such information, it will not appear in Google's page results. As a result, Google has created a request of erasure for the European user base.[28]

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[26] *Id.*

[27] *Id.*

[28] Lomus Natasha, "*Google Offers WebformTo Comply With Europe's Right To Be Forgotten. Ruling*", https://techcrunch.com/2014/05/30/right-to-be-forgotten-webform/ , (accessed on November 16, 2015).

According to the above-mentioned case, the right to be forgotten can be defined as follows:[29]

- The data owner has a right to request the search engines (Google, Yahoo, etc.) to remove the links appeared on their search results, even they are publicized by the third party;
- The search engines have to make sure that their operation of erasure is under the legal framework and meets the minimum requirements of the law;
- According to the court decision, even though Google or search engines themselves did not post the information of the data owner, it was still their responsibility to take care of the information because the function of their operation was to make access to the links easier for the internet users;
- The information on the search engine results is not eliminated from the online world, but it simply does not appear on the outcome when the users search for the information.

One of important questions from this case is how "to make determinations that balance fundamental rights – freedom of expression versus right to privacy – and to determine where the public interest lies," which is a question that we have to consider from the EU directive However, it is not every case that the right to be forgotten can be applied. There are some exceptions, such as interest of the public or government officials.

[29] "*What are the implications of the right to be forgotten in the Americas?*", https://www.ifex.org/americas/2015/09/22/derecho_olvido/, (accessed on 22 September, 2015).

2.3.1 Effect of the Ruling

According to the decision of Google Spain case, there are two major effects. One is the effect to the other privacy rights and the other is the effect to the search engine, which is normally not considered as a data controller.

2.3.1.1 Effect to other Privacy Rights

The exercise of the right to be forgotten in the digital world may have some obstacles to the right of free expression and right to access the information, which can be explained as follows:

(1) Freedom of Expression Right

Over the past few years, everyone might be familiar with the word "freedom", or freedom of the press, on the social media. It would be good for each single person to freely express their feelings without any obstruction as well as to seek and get further data and thoughts through any networking. The individuals have a freely right to express their thoughts without any intervention or limitation by the government.[30]

However, this essential human right may be habitually confined through strategies that incorporate censorship, prohibitive press legislation, harassment of journalists, bloggers, and additional crackdowns on religious minorities.[31]

The right to be forgotten is not limited only to erase the personality data but also any information relating to such data. This happens when digital contents are no longer important to the public interest or suit their objectives but it is difficult to know their boundaries exactly[32], and that the request for erasure is on a

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[30] Legal Information Institute, "*First Amendment: An Overview*", https://www.law.cornell.edu/wex/first_amendment, (access 21 October, 2015).

[31] "*Freedom of Expression*", https://freedomhouse.org/issues/freedom-expression, (access October 10, 2015).

[32] Muge Fazlioglu, "*Forget me not: the clash of the right to be forgotten and freedom*

case-by-case manner. The court needs to find the balance between the public interest of the users and the individual's fundamental rights. Normally, the balance depends on the nature of the data and the question is that the value of information is actually for public or private interests.[33]For example, Dr. Guidotti Russo, a Spanish plastic surgeon, requested Google to erase the incident about his patient by claiming that it was personal information. When people type his name on Google, this incident appears on the first page of the search results. He claimed that he was cleared from all charges so he wanted Google to delete all related links from its search results. Even though the Spanish law protects the freedom of expression of media, such as newspaper, legal gazettes and other publishers, the court backed up Dr. Guidotti by not regarding Google as one of them.[34] In addition, Google's lawyer said that the court exercised its authority excessively about the removing order and asked that why just Google needed to take down the links while the newspaper was not asked to take down the article.[35]

(2) Right to Access Information

Being accessible to the information is one of the human right norms. The right to access information is regulated by the state in almost all international human rights. It allows a person to have the freedom of opinion and expression as well as the right to seek, receive and impart information and ideas.[36]In

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of expression on the Internet", http://idpl.oxfordjournals.org/content/3/3/149.abstract, (access October 10, 2015).

[33]" European Commission, Factsheet on the "*Right to be Forgotten*" ruling, 2014, http://ec.europa.eu/justice/dataprotection/files/factsheets/factsheet_data_protection_en.pdf, (accessed on 20 October, 2015).

[34]"*Plastic Surgeon and Net's Memory Figure in Google Face-Off in spain*", http://www.wsj.com/articles/SB10001424052748703921504576094130793996412, (accessed on 20 October, 2015).

[35]"*Google Confronting Spain's Right To Be Forgotten*", http://searchengineland.com/google-confronting-spains-right-to-be-forgotten-67440, (accessed on October 30, 2015).

[36]"*Access to Information: An Instrumental Right for Empowerment*", https://www.article19.org/data/files/pdfs/publications/ati-empowerment-right.pdf, (accessed on December 30, 2015)

practice, it is a useful right for the republican system of the government and seems that the information can be used as a tool for controlling the state's institutions.

The right to access information is recognized as a fundamental right of human. At present, people are interested in this right due to the Internet edge and this right has taken part by serving as an obligation on the part of government to provide information accessibility. This is why the citizen will have an ability to make a choice.

In November 2014, President Obama expressed his opinion for supporting the net neutrality on the election campaign that *"An open Internet is essential to the American economy, and increasingly to our very way of life."*[37]

The right to access information is important to the "essential" since the open Internet is the foundation of the citizen's discussion as a critical part of the democracy. When people can have access to the information, in addition to their knowledge, they could share their opinions, and this is related to the right of free expression. Furthermore, this access right encourages the people to be a better decision-maker.

Some may say that this privilege right to open and search for data is an absolutely negative right because, in real life, the government still takes control over media or other supporting systems.[38]

In case that the information is harmful, some may say that the individuals should not be able to access it at the first time. Rather, this kind of information may be blocked for being accessed. For example, someone has written a blog about an international affair and this information is blocked, and in this case the user is required to provide evidence that he or she needs to access such information.

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[37]Michael Winship, "*President Obama Tells FCC: Reclassifying the Internet Is 'Essential'*",http://billmoyers.com/2014/11/10/president-obama-tells-fcc-reclassifying-internet-essential/, (accessed on November 10, 2015).

[38]Roberts, Alasdair. "*Structural Pluralism and the Right to Information in The Right to Know, The Right to Live: Access to Information and Socio-Economic Justice*", 2002.

This contrasts with a human right to know the fact and therefore slows the spread of factual information throughout the world.[39]

The searching function of Google or any search engine was under the European ruling, "the right to access information". They possess a duty as a data controller who is required to provide a tool for accessing the information. Some people may see that these two rights are conflicted by their own concepts. It seems that we have to answer the question whether the data should be remembered forever or can be changed by their owner.

The Court of Justice of European Union provides that the balance between two rights depends on each situation of the individuals. For example, if the nature of the data is concerned with the data owner's private life, an interest to the public will be only a little, so it can be assumed that in such case the right to be forgotten has more weight than the right to access information.

Clearly, the public interest also depends on the individual's life. If he or she is a public person, the information of their right should be considered as a public interest. However, it must still be considered on a case-by-case manner.

2.3.1.2 Effect to Search Engines

In landmark judgment in *Google Spain case*, the CJEU found that Google is a data controller and engaged in processing a personal data. The decision has a huge implications, not only Google, but also other operators providing web based personal data search services because based on their function, they are not considered as a data controller.

(1) Function of Search Engines

Basically, the functions of all search engines are almost the same. The slight difference of the functions in each search engine is the equation that each company has created. Since Google plays a big role in the online world, the explanation of the search engine' function will be based on its. These functions can be divided into three parts as follows:

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[39] Liza Owings, "*The right to be forgotten*", 2015.

Part 1 Crawling and indexing

Just like other functions, crawling refers to the ability of a search engine to traverse the billions of interlinked pages on the websites. With massive amounts of pages being generated on an hourly basis, it is impossible for us to visit, record, and organize them on our own. Instead, automated search crawlers or "bots" conduct regular searches to save us the agony of finding relevant contents ourselves.

After that, a web page or document is detected by crawlers. All accessible data are stored (cached) on search engine's servers so they can be retrieved when a user performs a search query. Indexing serves two purposes:

- Return the results related to a search engine user's query.
- Rank those results in order based on their importance and relevance.

The order of ranking depends on each search engine's ranking algorithm. These algorithms are highly complex formulas and they can be made even more advanced by a relationship your website has with external sites and on-page SEO factors. To sum up, this indexing exists to ensure that user's questions are promptly answered as quickly as possible.

Part 2 Algorithm

Google has its own programs and formulas and sorts the websites by searching the related contents with the keywords and using these factors:[40]

- Site and page quality
- Freshness
- Safe search
- User context
- Universal search

[40] "*How Search Works*", http://www.google.com/insidesearch/howsearchworks/thestory/, (accessed on March 29,2016).

Part 3 Fighting spam

Web spam is a badly written, plagiarized, keyword-stuffed, advertising-packed nonsense that no one wants to see in search results. Google always investigates the websites for taking down the unwanted or unusual websites from its result pages, as a Google's representative said:

"*We thoroughly investigate every report of deceptive practices and take appropriate action when we uncover genuine abuse. In especially egregious cases, we will remove spammers from our index immediately, so they don't show up in search results at all. At a minimum, we'll use the data from each spam report to improve our site ranking and filtering algorithms, which, over time, should increase the quality of our results*."[41]

As for content farms, Google has recently retooled its web spam algorithm to deal with poor and syndicated contents.

"*You can expect sites with shallow or poorly written content, content that's copied from other websites, or information that people frankly don't find that useful will be demoted as a result of our recent algorithm changes*," stated by the representative. "*On the other hand, high quality pages — pages with original contents and information, such as research, in depth reports or thoughtful analysis — will get a boost.*"[42]

According to the above-mentioned functions of the search engines, it is not involved with the original sources of the information. The search engines serve only as a tool for gathering the web links that are related to the keywords the users have put in the box. Thus, the decision of the court that ordered Google to delete the links was criticized by a lot of people.

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[41] *Id.*

[42] Jolie O'Dell, "*How the Search Engines Are Fighting Spam*", http://mashable.com/2011/03/09/google-bing-search-spam/#p3kE7FRCEkq3, (accessed on November 10, 2015).

(2) Implementation and Problem to Search Engines

The ruling of the case brought up the question whether Google and other companies are the proper entities responsible for the processing of data removal.

As a result, since May of 2014, Google has received over 427,000 removal requests to take down over 1,495,000 links from its result pages. Google reported that the company removed about forty percent of the requested links.[43]Since the Court of Justice's ruling has affected all search engines in Europe, especially Google that holds over ninety percent of the Internet business in France and Germany, there is a high proportion of the requested links in these countries.[44]This situation brought up the question whether Google is appropriately evaluating the requests and protecting the right of free speech.

Google receives the requests via its online form on the legal section of the main page. The requesters have to fill in only the name of the data subject, name of the requester, URL they want to remove, reason why the URL should be removed, and the proof of their identity.[45]

Then, Google will examine whether such URL or link contains "outdated or inaccurate". Google also mentions that it will weigh whether there is a public interest in such information, such as "financial scams, professional malpractice, or criminal convictions, or public conduct."[46] Additionally, Google considers about the source of URL whether it comes from the media or government websites and about the nature of information whether, for example, it is published by an individual who is related to the information or is a political speech. The reaction of

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[43] "*European privacy requests for search removals*", https://www.google.com/transparencyreport/removals/europeprivacy/, (accessed on May 14, 2016).

[44] *Id.*

[45] "*Search removal request under European data protection law*", https://support.google.com/legal/contact/lr_eudpa?hl=en&product=websearch, (accessed on May 14, 2016)

[46] *Id.*

Google is close to the Court of Justice's ruling. However, there is a little clarity as to how Google makes the final decision and why it does not mention who actually conducts the weighing practice. However, if that person is not satisfied with the decision, they can appeal it to a local data protection authority.[47]

Recently, Google has placed an indication at the bottom in every European version of its search engine saying that "*Some results may have been removed under data protection law in Europe*."[48] Thus, when people search for the removal links, the links will not be appeared in the result pages and the above sentence will be appeared instead.

According to the transparency report, Google already removed the links that contained the women's name whose husband was murdered. In Germany, Google also removed the links that contain the name of the raped victim. However, when Google removes the links from its result pages, it does not remove the wholesale links from the Internet[49]. For example, in the case of *"Telegraph content*"[50], which has been removed, when users search for the removed links in google.co.uk, they will see the text: "Some results may have been removed under data protection law in Europe". Nevertheless, the users who search for the telegraph content in United State via Google.com will be unaffected, although they reside in the UK.[51]

According to all examples mentioned above, there are some cases that Google rejected to remove its links. For example, in Italy, there was a request

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[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Telegraph content is a list of the links which have been removed from Google search results. For example, Tim Blackstone, a former porn star and brother of Baroness Blackstone, was found guilty of two counts of insider trading in 2003. or a homosexual vicar fled his parish after a campaign of blackmail and intimidation in 2000 etc., "*Telegraph stories affected by EU 'right to be forgotten'*", http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html, (accessed May 15, 2015)

[51] Ibid

for removal of the financial crimes in a professional setting and Google rejected. In addition, Google rejected the requests in the UK about a clergyman who got a sexual abuse charge or about the doctor who wanted to delete his stories about hidden negligence.[52]

Type of requests	% of URLs
Invasion of privacy	62.1%
Damage to reputation	9.6%
Damage to image	4.2%
Legal proceedings	3.0%
Identity theft	2.9%
Violation of the presumption of innocence	1.3%
Deceased persons	1.1%
Homonyms	0.8%
Other	14.9%
Total	100%

Consumer rationale for removal

Type of refusal	% of URLs
Concerns your professional activity	29.7%
You are at the origin of this content	19.9%
The information is about another person	9.4%
No name on page	8.4%
Your profile on a social network	7.6%
Topical and in the public's interest	7.4%
Relevant, topical and in the public's interest	6.3%
Does not refer to a physical person	5.8%
You are a public personality	3.5%
Government data	1.6%
Others	0.5%
Total	100%

Basis of refusal to remove

Figure 1: The Reason of Request for removal and the Refusal to remove[53]

The chart shows that Google refuses the requests based on the effect to the individual privacy and public interest. These rejected cases show that Google has tried to preserve the links that contain newsworthy contents by collecting "financial scams, professional malpractice, criminal convictions or public conducts by a government official (elected or unelected). The highly subjective question is that what a public interest actually is, what remains relevant and for how long? Google relies on the reports that are filled in by the data subject in its request form. Of course, people

[52] " *European privacy requests for search removals*" , https://www.google.com/transparencyreport/removals/europeprivacy/, (accessed on May 14, 2016)

[53] "*Search Engine Land*", http://searchengineland.com/report-2-years-75-percent-right-forgotten-asks-denied-google-249424, (accessed on May 12, 2016).

will bring up a lot of reasons just for deleting their embarrassing past. How can Google rely on it? Google tries to maintain its transparency policy by deleting the requested links and the media and journalists can simply post the stories again. Likewise, Robert Peston posted the article "Why Has Google Cast Me into Oblivion?" In it, Peston even posted the removed links in the article and expressed his opinion about the impact of the Google Spain ruling.

One of the media who exposed his frustration over the Google Spain ruling is the New York Times when its five articles were removed from the search results on the European versions by rewriting the articles and mentioning the details of these deleted stories. Three of these articles are personal, two wedding announcement from years ago, and one death notice from 2001. The other two articles are about the reputation. One article is a United States court decision of closing three websites and the government was accused of selling unusable web addresses for about one million dollars. The New York Times even published the name of the complaining companies. The last case is a feature about a 1998 production of "Villa Villa" and the content is about the management of the antic and acrobatic shows, which is hard to tell the reason of the removing.[54]

Lisa Tretikov, executive director of Wikipedia Foundation, also criticized the court's ruling for the processing of link removal that can be done without any decision of the judges.[55]

Google refused to clarify the reason of the removal decisions, but hired the "army paralegals"[56]to get through the 427,000 requests before deciding to

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[54]Noam Cohen and Mark Scott, "*Times Articles Removed From Google Results in Europe*", http://www.nytimes.com/2014/10/04/business/media/times-articles-removed-from-google-results-in-europe.html?_r=0, (accessed on May 12, 2016).

[55] "*Wikipedia swears to fight 'censorship' of 'right to be forgotten' ruling*", https://www.theguardian.com/technology/2014/aug/06/wikipedia-censorship-right-to-be-forgotten-ruling., (accessed on April 12, 2016).

[56] Richard Waters, "*Google U-turn over deleted newspaper links*", http://www.ft.com/cms/s/0/64e37214-02d0-11e4-a68d-00144feab7de.html., (accessed on April 12, 2016).

remove or leave the links. The publishers will be notified if the decision is made to remove the links and it reminds that this step is not required by law. However, the process of sending out the notification seems to get a quite worry since there is no chance for the data subject to argue the removal decisions.[57]This does not include the answer of the question as to how Google weighs the value of the free speech and accessibility in that information.

The last procedure is the appeal when Google rejected the requests. The requesters can appeal such requests to the local data protection agency as same as the route of Gonzalez case in Spain with AEPD. In practice, it is easier for Google to remove the links than having a fight in the court that takes much time and money.

However, an interesting question is that how to ensure that the rights can be exercised by everyone, not just by the rich and powerful people who can hire a reputation management consultant for removing the bad side from the page results.

From all of these problems, it appears that following the EU pathway of respecting the privacy right can affect the search engines and data subjects. The goal should be achieved by considering other instances from the EU and other countries. Moreover, if the duty of making decisions to delete or preserve is in the government hand, people will be satisfied with the correction.

2.4 Level of the Right to be Forgotten

Peter Fleischer, chief privacy counsel of Google, noted that the right can be separated into three categories based on the levels of the threat of free speech.[58]Additionally, these categories can stand alone when users request for the erasure; however, it is not every instance that the websites have to delete the data.[59]

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[57] *Id.*

[58] *supra* note 15.

[59] *supra* note 42.

2.4.1 Removal of Information about Individuals

First is the simplest category. If the information is private, unpleasant and uninteresting to its owners, after they have posted it, do they have a right to delete it? This prong is most inflexible. When it comes to the time that the individuals do not want such information to exist in the online world, it is reasonable that they may want to make an erasure request. It is a straightforward rule and is consistent with the privacy term. Another question is that if the individual information is posted by the third party, do the individual have the right to request for erasure?

In such case, we have to separate the individual information into two types: general private information and sensitive information. Sensitive information is considered a subset of personal or private information, it can make someone have a bad reputation, social standing, or even financial loss. This is different from general private information that is a general fact of the individual, such as when revealing that someone's favorite color is pink and that he or she voted for a political candidate who is unpopular in the area. These examples show why the distinction between personal and sensitive information is important. It can be said that while all sensitive information is personal, all personal information is not sensitive. The right to be forgotten will only protect the sensitive information that can cause damage to the individual life.

This prong can be recognized in the tort of "publication of private fact" in the United States laws.[60]Of all the United States laws, the tort law provides that people can be sued for publishing "private fact." The citizens have the right to remove true information from the online world, which is unlike defamation where people can sue under the circumstance that the publication of information is false. Under the laws, the elements of the tort require: public disclosure, private fact, offensive to a reasonable person, and not newsworthy. Firstly, a public disclosure is an act that "gives publicity". Secondly, a private fact refers to the information that is well-known and is not considered as private fact. For example, in the case of Sipple v. Chronicle Publishing

[60] Berkman Center for Internet & Society, "*Publication of Private Facts*", http://www.dmlp.org/legal-guide/publication-private-facts, (accessed on April 12, 2016).

Co., [61]a man who stopped an assassination of the President Ford sued the newspapers for revealing the fact that he was a homosexual. The court denied his claim because he was well-known in the gay society. Thirdly, being offensive to a reasonable person means that the one who brings the case to the court has to prove that the public disclosure is "highly offensive to a reasonable person of ordinary sensibilities". The question is that what the boundary of the offensive is. The Restatement of Torts has explained that:

"Complete privacy does not exist in this world except in a desert, and anyone who is not a hermit must expect and endure the ordinary incidents of the community life of which he is a part. Thus he must expect the more or less casual observation of his neighbors as to what he does, and that his comings and goings and his ordinary daily activities, will be described in the press as a matter of casual interest to others. The ordinary reasonable man does not take offense at a report in a newspaper that he has returned from a visit, gone camping in the woods or given a party at his house for his friends. Even minor and moderate annoyance, as for example through public disclosure of the fact that the plaintiff has clumsily fallen downstairs and broken his ankle, is not sufficient to give him a cause of action under the rule stated in this Section. It is only when the publicity given to him is such that a reasonable person would feel justified in feeling seriously aggrieved by it, that the cause of action arises."

Thus, when people do not want such private information be shared, the element becomes offensive. It is not important whether the information is private or sensitive, and if it affects a person life when it is disclosed, it could be considered offensive.

Fourthly, being not newsworthy is ordinarily the most important subject in the private fact case. For instances, an affair of Bill Clinton, former president of the United States, between Monica Lewinsky and him was the private fact. When the press disclosed it, it already contained two elements. Of course, it was offensive in

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[61]"*Sipple v. Chronicle Publishing Co. (1984)*", http://law.justia.com/cases/california/ court-of-appeal/3d/154/1040.html, (accessed 4 May, 2016).

particular to Lewinsky. However, if Lewinsky wanted to remove the details of her affair from the online world, the court would still consider that the story was newsworthy.

Nationally, this category is not broadly recognized even not under the tort law, but it may be recognized by the national rights of the citizen. Since Facebook or other social networks already have a deleting function when the users want to delete their post, the creation of the right is most unobjectionable.

2.4.2 Removal of Information about Individual posts

In the case that an individual posts the information or gives an expression about him or her, he or she should be allowed to remove it. It will be easier to remove the content if such person is an owner of the website or has the power of control. However, if that person does not actually have such power over the website, the question is that what that person should do. For example, in the case of Dan Gilbert[62], majority owner of Cleveland Cavaliers (basketball team), in 2010 when LeBron James, one of the players, left the team for Miami Heat, Gilbert posted a letter to encourage the fans of Cleveland Cavaliers. After that, there was news reporting that LeBron James would come back to the team, and the letter was then taken down from the website. However, if this letter still remained on the website, Gilbert wanted to take it down, and he did not have an actual control over the website, what should he do? With this question, Gilbert may have to tell the court that he had the right to remove the letter. Moreover, Gilbert had to prove that the letter was his opinion about LeBron James' leaving.

What if the letter was not from Gilbert, but it came from someone like fans of Cleveland Cavaliers who posted it on their blog? In addition, the team wanted to remove it as well. This category does not extend it further. In this case, other considerations can be used instead, such as defamation.

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[62]Mike Prada, "*Cavs explain why they took down Dan Gilbert's letter to LeBron James*" http://www.sbnation.com/lookit/2014/7/7/5877047/dan-gilbert-letter-Lebron-james-preserved-cavaliers, (accessed on May 1, 2016).

However, the right to delete data becomes more controversial in the event that someone posts something online and a third party then copies or reposts it. The question here is whether the owner of the post has the right to request for the deletion of such third party's post. According to the European directive, the answer would be yes since the regulation provides that, when the owner of the data demands the erasure of the data, except for the reason for keeping the data is "necessary" based on "the right of freedom of expression", the data controller should delete it.

2.4.3 Removal of Outdated or Irrelevant Information

This category is most complicated among all three categories and contains two parts. Firstly, such information must be determined that it is irrelevant or outdated. Secondly, there must be no reason for keeping the publicity of such information.[63] This is necessary because there are very limited situations where the information fits with these two parts. For understanding, the elements should be explained as follows:

Part A: there are two conditions, which could be said that the information is outdated or irrelevant, and it is not required to fall under both factors. Normally, period is an important factor for determining whether the information is relevant. However, this is not necessary for every circumstance. For instance, in the Google Spain case, assuming Google did not index its links from many years earlier and rather it was added on the website two minutes immediately after the newspaper websites posted it, this means that the auction did not happen yet. Similarly, when the newspaper posted the news, it stood in the same spot that it was actual fact and the information was always relevant and timely. This is different from Google or other search engines when the page results showed the links of websites that contain old information of the foreclosure and Mr. Gonzalez's name. The process of foreclosure was done so it was not related to him anymore. To say the information was relevant,

[63] *supra* note 42.

Google needed to find the reason why this was important that people should know the fact about Mr. Gonzalez's past. This would be the function of Part B.

Part B: for proving the reason why the information should be kept as public, as the modified fact, Google may say that it was attempting to find more buyers. If there is a good reason for remaining the information, such information can remain in the public domain. Moreover, Google or other search engines should be able to answer about their function of indexing as to why the information rank was so high in their result pages.[64]

One of the suggestions for Google in this circumstance is that it should argue that the fact about the auction appears only in local media as it appears only in Spain as the local base of the fact. It can limit the scope of the information. Thus, "Google Local" can be one of the solutions for the right to be forgotten that will be mentioned in the next chapter.

[64] *supra* note 42.

CHAPTER 3

THE RIGHT TO BE FORGOTTEN AND FOREIGN LAWS

While people are sharing a lot of information in the online world, someone may try seeking the methods to remove it. What rule should govern this situation? Currently, the European Union has just mentioned the rule that the individuals can remove the negative data about them from the Internet. However, it may be impossible to destroy the original data and this is not an absolute right. This may result in a questionable issue whether this right is practically non-existent according to the United States' perspective. Thus, this chapter will explore what the perspectives that the European Union and United States have towards the right to be forgotten are. Each aspect of this perspective is described as follows:

3.1 European Union (EU)

The history of European data protection was arisen since the twentieth century when the European Union proposed the right called "*right to be forgotten*" with a purpose that the users would have more power to control their own data by giving them a right to make a request to the "data controller", who, according to Article 29 of the "European Data Protection Directive", shall be responsible for determining the personal data.[65]

The regulators support the concept that people sometimes have to escape from their past where the Internet has "recorded everything and forgotten nothing." In addition, it is difficult to limit the concept of erasure for only the criminal histories. There is a concern that one day the teenagers might reveal their information and after the time has elapsed, they will regret about it. Although the concept of this right arose

[65] *supra* note 35.

by aiming to protect "personal data", its definition is broadly "any information relating to a data subject."[66]

The concept of erasure was first appeared in 1995, "Data Protection Directive (95/46/EC)", for supporting "the right to access data and ensuring the free flow of personal information between member states." The significant development of this right was the "Stockholm Programme in the European Union Data Protection Scheme"[67]. It is a five-year plan for the members, which is involved with children's right, economic crime, corruption, and privacy rights. This program expresses that the users "must be preserved beyond national borders, especially by protecting personal data."[68] The European Parliament, European Council, and Economic and Social Committee also supported by proposing the General Data Protection Directive (GDPD), and the root of the right to be forgotten was appeared in the 1995 Data Protection Directive under the title "*Right of access*"[69].

"*Article 12: Right of access Member States shall guarantee every data subject the right to obtain from the controller: (...)*

b) 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;*

(c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking carried out in compliance with (b), unless this proves impossible or involves a disproportionate effort."[70]

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[66] *supra* note 15.

[67] " *The Stockholm Programme*" http: / / eur- lex. europa. eu/ legal- content/ EN/ TXT /?uri=uriserv:jl0034, (accessed on March 29, 2015).

[68] *Id.*

[69] "*Stuart Winter-Tear, GDPR-The Right to be Forgotten*", http://www.stuartwintertear .net/gdpr-the-right-to-be-forgotten/, (accessed on March 29, 2015).

[70] Article 12 (b) of the Data Protection Directive.

According to this article, the persons can ask the controller to delete any data when such data are no longer needed or deemed "*incomplete or inaccurate nature of the data."* as provided in this Directive.

In 2011, one of the cases, LEXEEK case, was brought up in France. The French Commission Nationale de I'Informatique et des Libertes (CNIL) ordered the association, LEXEEK, to remove the names and addresses of the related parties, including judicial witnesses, from public documents in the online world. The CNIL ruled that the act of LEXEEK was considered as a threat against the individual's right. This ruling showed the strength of the "right to be forgotten."[71]

Under the EU law, the controllers who collect and manage the private information have a duty to protect it from being misused as well as to respect the right of the data owners. However, the right under this law is under strict conditions and for legitimate purposes only.

After the European Parliament adopted the first regulation, there were numerous proposed amendments. Recently, the European Union's framework proposed a future directive for finding the solutions for the present issues and the greatest benefit. On June 15, 2015, the Council has agreed with the new approach of the General Data Protection Regulation.[72] Then in May 2016, the official texts of the Regulation were just launched and enforced. This regulation has intended to replace Directive 95/46/EC. The former principles established by the Court of Justice and the directives from 1995 need to be updated and clarified for these technological days. Therefore, some suggestions to improve the present regulation of the right to be forgotten are as follows:

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[71] **Columbia Journal of Transnational Law**, Forcing Europe to Wear the Rose-Colored Google Glass: The "Right to Be Forgotten" and the Struggle to Manage Compliance Post Google Spain, 2016.

[72] Council of the European Union, "*Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)*", http://www.statewatch.org/news/2015/dec/eu-council-dp-reg-draft-final-compromise-15039-15.pdf, (accessed on December 15, 2015).

Under the new directive, the right to be forgotten is provided under title of "*Right to erasure*" in article 17 paragraph 1 which provides as follow: [73]

"*1. 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 in relation to the purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;

(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

(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 in relation to the offer of information society services referred to in Article 8(1)."

3.1.1 Exercising the Right to be Forgotten

For exercising this right, the individual must have at least one of the following conditions:

- The purpose for processing or collecting the data that no longer exists;

- The owner of the data needs to give consent, and when the period of the consent has expired, there is no legal reason for keeping such data;

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[73] Official L 119/43 Journal of the European Union EN (May 4, 2016), Article 17.

- The data subject objects to the processing of the data

- The individual makes an opposition to the processing of such personal data when this processing is important for:

(a) Protecting the essential interest of the individual, and

(b) It is not involved with the public interest but is involved with the legitimate interest of the operator, except when the interest of the operator is less than the interest or liberal right of the individual.

- The processing of the data is no longer harmonious with the regulation.[74]

Moreover, the new regulation also provides the method of processing the personal data temporarily by moving such data from the websites or making them unavailable.[75]

3.1.2 Exceptions

However, under Article 17 paragraph 3, there are some situations that the controller is exempted from the duty of deleting the data when the individual demands. This happens when the data are necessary in the following cases:

(a) for exercising the right of freedom of expression and information;

(b) for compliance with a legal obligation of 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;

(c) for reasons of public interest;

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes; or

(e) for the establishment, exercise or defense of legal claims.[76]

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[74] *supra* note 76.

[75] *supra* note 76.

[76] *supra* note 76.

Moreover, , it is important to note that the right to be forgotten is legitimate to the data owner against only the data controller and search engines..

3.1.3 Difference between Former and New Rulings

Firstly, the individual requests for data transmission to another automatic processing system and their processing is performed based on their consent. In the past, this right was not expanded to the companies outside Europe and to search engines. In case that the companies outside Europe offered services to European consumers, the cases must be under the European rules.[77]

Secondly, the proposed regulation reverses the burden of proof from the individual to the companies for proving that the data cannot be deleted because it is still useful or needed.

Thirdly, under the proposed regulation, the data controller has an obligation to inform the third parties who are processing the data that the individual wants such data to be deleted and that the individual has the right of erasure if the court or regulatory authority agrees to do accordingly.[78]

Fourthly, this new regulation increases the fine rate up when the companies do not respect the rights of individuals.

Lastly, the reason to keep the data online is for the public interest that includes the right of freedom of expression, public health, and historical, statistical and scientific purposes.

In addition, the new regulation does not expand the duty of delisting the content from search engines. Thus, the "web hosting services" that allow the individuals to create their websites do not have the duty of delisting since they are not deemed a controller as defined by new regulation.

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[77] *supra* note 75.

[78] *supra* note 76.

It seems that the public confidence in using online services will be increased due to the development of the regulation. The right to be forgotten has been well-known and broadly expanded by the EU regulation and by the court's decision in the Google case. There has been a long tradition of declaring the concept of privacy rights, but some opinions said that it fails to be practically enforced. A lot of people are worried about how the proposal trumps fundamental rights and the new regulation may be further refined over the next years. However, Reding mentioned in the announcement that "*This regulation needs to stand for 30 years—it needs to be very clear but imprecise enough that a change in the markets or public opinion can be maneuvered in the regulation.*"[79] Moreover, the European Commission says that the case and the rights are not absolute so the direction of the rights should serve as a long path, which may affect the United States framework in the future.

3.2 The United States of America (United States)

While the right to be forgotten has been taking place worldwide, in United States, there is no literal law providing this right, at least not the same as EU. Nowadays, there is a big question about how to balance the boundary among the right to be forgotten, the right of free expression, and the right to access information.

While Europe considers the personal data as an essential right of person, the United States has a perspective that the right of privacy has less weight than their national matters, such as national security.

Though the United States law does not mention the right to be forgotten, it in fact seems that the United States has had a long experience with the "legal forgiveness". At the end of nineteenth century, there was a case of threat the posted by devices, such as telephone and photography to the individuals. The law that was applied to such case was the "*Restatement of Torts*" providing that:

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[79] *Id.*

"*One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that*

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public."[80]

Privacy law was further supported in the United States from two famous cases where the definition of privacy right was provided. .The first case was Melvin v. Reid (1931) in California and the decision of the court showed that the court also considered whether the right to be forgotten should be applied because the highlighted point of this case was rehabilitation as to whether the person should get the forgiveness. In this case, a prostitute was accused of murder, although she in fact proved that she was not a culprit. After that, she rehabilitated herself and got married. Her new friends did not know her past until her trial was used in a movie and her name was clearly appeared in the movie. In the decision, the court limited the boundary of privacy right by saying that when "a person has become so prominent by his very prominence; it means that he has dedicated his life to the public and thereby waived his privacy right."

In addition, the court also ruled that the privacy right was nonexistent in the news events or "in the discussion of events of the life of a person whom the public has a rightful interest" or when the information would be beneficial to the public. As for the act of using her name directly in the movie, the court considered that it inhibited the process of rehabilitation of the penal system. Although the freedom of expression had more power over the information as mentioned by the court, it still left the argument for debating.[81]

The second case was about a plaintiff who graduated from Harvard College since he was sixteen. He was the most notable child at that time, but when he grew up, he chose to work as an ordinary clerk. The newspaper published his life and he then

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[80] Restatement of the Law, Second Torts 1977 s 652 (B)

[81] "*Melvin v. Reid*", http://itlaw.wikia.com/wiki/Melvin_v._Reid, (accessed on January 17, 2016).

sued the newspaper for threatening his privacy. The court determined that the newspaper did not invade him because he was considered a "public figure".[82] It implied that once the individuals become a public figure, they are always a public figure. The court also provided that the public figure has less privacy than normal individuals.

Nowadays, the United States court still puts on the value of media's attention unless there is an exceptional situation. The criminal law puts the weight on the rehabilitation process. A person who has served their sentence should have a right to move on his or her life. Some may say that we should prohibit employers from denying a hiring of anyone just because of his or her criminal record.

In California, the Eraser Law has been enforced, which is as same as the EU regulation that minor companies are allowed to delete their data in case of "juvenile criminals."

As mentioned above, the United States has been affected by the "forgive and forget" principle for years and in some cases the court even applied it when it fitted to the exceptions. This means that the United States court has already recognized the base of the right to be forgotten.

Moreover, in case that someone posts about a third party, the question is whether such third party has the right to request of erasure. This situation brings up a lot of concerns about the free expression. Under the U.S law, the court says that the states cannot pass a law restricting the media from disseminating truthful but embarrassing information, such as the name of the raped victim, except it is legally acquired.[83]

Nevertheless, nowadays there is no literal law for comparing with the right to be forgotten. When the European Court of Justice gave an emphasized opinion in the *Google Spain Case*, the gap between the American law and the Europe Law was further increased.

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[82] *Sidis v. F.R. Publishing Co. (1940)*", https://lawclassolemiss.wordpress.com/2010/04/08/sidis-v-f-r-publishing-co-1940/, (accessed on May 20, 2016).

[83] *supra* note 15.

3.2.1 The First Amendment of the United States Constitution

In 1776, the Declaration of Rights was passed with the sentence that "*The freedom of the press is one of the greatest bulwarks of indecorum, and can never be restrained but by despotic Governments*." After the time elapsed, on September 25, 2015, the House and Senate passed the First Amendment with no record of arguments.

The First Amendment[84] was created for supporting personal freedom of the American people and protecting the following rights:

- Freedom of religion
- Freedom of speech
- Freedom of press
- Freedom of assembly
- Freedom of petition

According to this First Amendment, an act of free speech is protected and there shall be no any lawsuit against an act of freedom of expression in the Congress or press as well as of filing a petition to the government. Freedom of expression comes along with the freedom of speech right, press, and petition to the government. The protection is extended by the court and this law is used to the federal government. The freedom of exercise clause prevents the government from interfering a person's religious act. However, in general a member of the media has no any special right or privilege over citizens.

The law certifies the freedom of religion in two topics. The first one is the "establishment" clause, which prevents the government from intervening with an official church, and the second one is the "free exercise" clause, which lets persons to have worship towards what they believe in.

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[84] "*About the First Amendment Center*", http://www.firstamendmentcenter.org/about-the-first-amendment, (accessed on June 2, 2016).

The court addresses the freedom of religion by respecting the belief of each religion, such as no rejection of prayers in public schools, or respecting the act of having more than one wife or taking poisonous snakes and drugs in some religions, including no limitation of the right to deny the medical cares for religious purposes.

According to the law, one of the important rights is that the "right of free speech" is one of the most cherished liberties, but it often conflicts with other rights and liberties. The court brought up in one case that we must answer the question as to what the limitation of the word "free" is while we use this right. The question was in the famous case between *"Schenck v. the United States"* during World War I. In this case, Charles Schenck was arrested because he sent flyers to other persons for encouraging them to ignore the draft notice. Although he had the right of free speech, his act needed to be "clear and no danger" to the United States security.

From the consideration of the cases, the court has separated the levels of the right of free speech as follows:

- "Pure speech" is a verbal expression of thoughts and opinions by a voluntary audience. Generally, the court fully protects this level of right.
- "Speech-plus" is involved with actions, such as demonstrating or protesting. This level of right does not receive the same strong protection as the "pure speech", rather it is under the conditions of not being "an obstructing traffic, endangering public safety, or trespassing illegally."
- "Symbolic speech" is mostly involved with no words, but it comes out as a symbol that the court judges it as a form of free expression, such as wearing a black armband in school or burning a draft card. This speech is highly controversial, and sometimes the court considers it beyond the limits.[85]

[85] American Government, "*First Amendment Rights*", http://www.ushistory.org/gov/10b.asp., (accessed on May 20, 2016).

According to the court interpretation, it appears that the United States court has recognized the importance of the right of free expression more than the right to be forgotten. One consequence is that the information in the public domain is free for all. This is why it has been so difficult to find the path towards a type of information between "public" and "private" in the United States

3.2.2 Communication Decency Act (CDA)

There are about 77 million of Internet users and two thousand websites in the online world since 1996 until now. The Communication Decency Act 1966 ("CDA") was passed by the United States Congress to establish the regulations and censorship of pornographic or obscene materials. The CDA was established for shaping the landscape of the Internet by providing the protection of the third persons from the content in the websites and ensuring that the Internet companies will grow with no fear of the litigation from the activities. The purpose of the law is to "*stop, or inhibit, the profusion of pornography, and other obscene materials".* [86]

The CDA was first enforced for responding to the Supreme Court of New York decision on May 24, 1995 in the case between Stratton Oakmont v. Prodigy Service Company. Stratton was a security investment bank and Prodigy was a service company that posted the content of crime committed by Stratton on the computer-based bulletin board.[87]

The decision of the court described that the Prodigy's decision to post the content was conscious to exercise an editorial control over the third party's content and the company. Thus, Prodigy should have liability as a publisher, not distributor.

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[86] Andrew P. Bolson, Esq., **Flawed But Fixable: Section 230 of the Communications Decency Act**, May 20, 2016

[87] Even though, in the end that the court held that such statements that the Prodigy posted about Stratton committed criminal and fraudulent acts in connection with the initial public offering of stock of Solomon-Page Ltd., was eventually came true. *Id.*

The decision of Stratton case is different from the former case, Chubby Inc. v. CompuServe, Inc., in which the court held that the online distributors had a liability as same as "the book stores or news vendors or libraries". In Chubby case, Chubby that was a computer service company was sued for defamation from the statement published on its online services. The court held that distributors had to be liable for defamation when they knew or had a reason to know that such statement was alleged as defamation. Applying this concept, the court held that Chubby did not have to be liable for the statement it posted.[88]

As for Stratton case, Section 230 was established with two proposes of balancing the need to protect the safety of a third person and protecting the Internet companies to grow without fear of civil liability. Section 230 is contrary with the rule of the right to be forgotten providing that:

"(1) no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" and

"(2) no cause of action may be brought and no liability may be imposed under any state or local rule that is inconsistent with this section"[89]

According to the law, an online intermediary is not only a regular Internet service provider, but it also means those whose definition is involved with an "interactive computer service provider" that has a function of hosting or republishing a speech protected from being sued for what others say or do.[90]Section 230 was interpreted by the court that there is a prohibition of suing a lawsuit when a service provider edits the content on the Internet and even deletes it from their services. In *Langdon v. Google case, Inc.,* the court found that "*section 230 provides Google, Yahoo, and Microsoft immunity for their editorial decisions regarding screening and*

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[88] *Id.*

[89] 47 U.S.C. § 230(c)(1), (e)(3) (2012)

[90] Communications Decency Act 1996, section 230

deletion from their network."[91] Moreover, the Pennsylvania court dismissed the similar case against Google based on this law. According to the court's perspective, Google is an information content provider in this act as the court said "*expressly preempts state law insofar as plaintiff could maintain any cause of action against Google based on Google's role as a publisher or speaker of information*."[92]

Regarding to the United States law, the U.S has protected the functions of search engines that provide the information through the Internet. Under the CDA, when a search engine publishes the other party's statement, it is recognized by the high court that such search engine does not have to be liable for the content that it posted.

3.2.3 Privacy Tort

As the privacy right has been developed through the common law tradition, the tort law has slightly adopted the privacy right as part of torts. The rule of torts, which is similar to the right to be forgotten, refers to the "public disclosure of embarrassing private facts."[93]

In some cases[94], Google was also complained by using the tort law, but for this case Google was sued for the suggestions, not search results. The plaintiff, an active genealogist and animal rights activist, claimed that Google violated her right of publicity by "using her name to trigger sponsored links, ads, and related searches to medications, including Levitra, Cialis, and Viagra, all of which are trademarks of nationally advertised oral treatments for male erectile dysfunction." However, the court dismissed her case.

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[91] "*Christopher Langdon v. Google Inc., et al.*", http://www.internetlibrary.com/pdf/langdon.pdf, (accessed on May 20, 2016).

[92] *Id.*

[93] *Supra* note 74.

[94] "*Stayart v. Google, Inc*", http://law.justia.com/cases/federal/appellate-courts/ca7/11-3012/11-3012-2013-03-06.html, (accessed on May 20, 2016).

There was a case regarding a teen killed in a 2006 car crash. When searching his name, the images of the accident appeared in the search results.[95]In this case, the court ordered the search engine to delete the links in its result pages.

Recently, the Gonzalez case was a landmark in ruling the removal of an individual's online private data.

As mentioned earlier, the United States does not have the concept of the right to be forgotten directly, and many scholars expressed their opinions that the United States's trend would not adopt this doctrine. However, a person can file a complaint to the court for requesting an erasure of data, and after obtaining a court order, the request can be submitted to Google or search engines.

Nowadays, privacy law has been developed through the common laws and the individuals always seek their protection. According to the example, it demonstrates that when there is a complaint, it will go through a formal judicial process. Nevertheless, the concept of free speech is more encouraging than the privacy right. While the United States system does not have any data protection directive like the European Union does, the adoption slowly occurs under the judge's supervision.[96]

In the future, the modification of the right to be forgotten will happen in the United States when they can balance this right with "the freedom of expression and the right to access information." The system should adopt each right by considering a root of law in each jurisdiction because each of them has their own prioritization of privacy and other interests.

Although there have been attempts to harmonize these two rights, there is a room for each country to decide how far they would like the right to be forgotten to extend. For instance, in Gonzalez case, the EU regulation set only the minimum standard, but the court offered their citizens a greater privacy right.

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[95]"*Google, the United States and the EU Right to be Forgotten": Strategies for Removing Harmful Google Search Results*", http://www.defamationremovalattorneysblog.com/2015/07/google-the-united-states-and-the-eu-right-to-be-forgotten-strategies-for-removing-harmful-google-search-results/., (accessed on May 20, 2016).

[96]*supra* note 74.

Nowadays, some countries have a strong paparazzi law, such as France[97], especially when the situation is involved with the children.

3.3 Problem of Implementing the Right to be Forgotten

In addition to the problem of the balance between the right to be forgotten and other rights, there is other issue regarding enforcement method across the countries. The argument is that the concept of the right to be forgotten should be globally applied not only in the countries of the searchers, but it should also be extended to all Google's versions.

According to this case, we can see how a European court subjected an American company (Google) to the liability. The court considered that if Google made a profit from Spanish searchers by ads in Google Spain, it was expected that Google could be subjected to the ruling in Spain. This ruling is consistent with the rulings in the United States based on the deal with minimum contacts of subsidiaries to foreign companies.

According to the court decision of Google Spain, it is important to note that when the court ordered the search engine to remove the requested links, it means that such links would not appear on the result pages, but the source content still remained and the offending results were only removed in Europe.[98]

Imaging you are in a London café and want to search the information about Mr. Gonzalez, then you begin to search accordingly by using the google.co.uk as the default URL. According to the decision of Google Spain case, you will not see the

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[97] *Tough Paparazzi Laws in France Could Benefit Brangelina*", http://www.foxnews.com/story/2008/06/11/tough-paparazzi-laws-in-france-could-benefit-brangelina.html, (accessed on May 20, 2016).

[98] Michael Douglas, "Questioning the right to be forgotten", vol 40:2, 2015

removed links on the result pages, but if simply typing the same in google.com, American version, you will see the removed links about Mr. Gonzalez.[99]

The enforcement makes no sense, which was why in November 2014 the European Union issued the guidelines for the implementation of the right to be forgotten as follows:[100]

"In order to give full effect to the data subject's rights as defined in the Court's ruling, de-listing decisions must be implemented in such a way that they guarantee the effective and complete protection of data subjects' rights and that EU law cannot be circumvented. In that sense, limiting de-listing to EU domains on the grounds that users tend to access search engines via their national domains cannot be considered a sufficient means to satisfactorily guarantee the rights of data subjects according to the ruling. In practice, this means that in any case de-listing should also be effective on all relevant domains, including .com."

From above paragraph, the working party wanted to expand the right to be forgotten by applying it worldwide under the domain ".com" that was considered a big call.After the court had made its decision, Google worked so hard by delisting its 600,000 results in order to respond to a large number of requests.[101]Google put the best effort to ensure that no one would see these links on its result pages in the European countries, although the users searched the removed links in other countries. However, in May 2015, the Commission Nationale de l'Informatique et des Libertés (CNIL) considered that it was not enough. CNIL rejected the Google's appeal about global

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[99] "*Google appeals French order for global 'right to be forgotten'*", http://tech.firstpost.com/news-analysis/google-appeals-french-order-for-global-right-to-be-forgotten-315951.html, (accessed on May 20, 2016).

[100] *Press Release WP29 guidelines on the implementation of the CJEU's judgment*", https://www.cnil.fr/en/press-release-wp29-guidelines-implementation-cjeus-judgment, (accessed on December 20, 2015).

[101] "*Google takes right to be forgotten battle to France's highest court*", https://www.theguardian.com/technology/2016/may/19/google-right-to-be-forgotten-fight-france-highest-court, (accessed on May 19, 2016).

enforcement of the "right to be forgotten" and required Google to apply the right in all its domains.

It means that now Google must comply with the order to remove a thousand of requested links from its "google.com" as well as from other non-European domains. A representative of Google said that:

"We've worked hard to implement the 'right to be forgotten' ruling thoughtfully and comprehensively in Europe, and we'll continue to do so. But as a matter of principle, we respectfully disagree with the idea that one national data protection authority can assert global authority to control the content that people can access around the world."[102]

In addition, Dave Price, Google's senior product counsel, said that "*One nation does not make laws for another*".[103]

Google denied the ruling and started a 10-month fight by appealing the ruling to the Conseil d'État. Kent Walker.[104] Google's general counsel noted about the ruling that:

"*We comply with the laws of the countries in which we operate. But if French law applies globally, how long will it be until other countries - perhaps less open and democratic - start demanding that their laws regulating information likewise have global reach*?"

However, there are some situations where Google is bound to apply one country's law across all its domains, no matter whether the law in other countries is different. Under the American copyright law, all Google domains are governed. After receiving numerous requests, more requests were removed due to copyright concerns rather than privacy issues.

In only one month, Google receives about 88 million requests to remove its URLs due to copyright infringement. They are all governed by the American Digital

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[102] *Id.*

[103] *Id.*

[104] *supra* note 109.

Millennium Copyright Act. In contrast, it has assessed 1.5 million requests for removal due to the right to be forgotten in the entire period since May 2014. URLs are globally removed as a result of copyright takedown requests, but the copyright protections are far more internationally accepted than the right to be forgotten. Moreover, there is an international treaty that sets international standards especially for intellectual property protection.

There is a suggestion that Google should show its searching results based on the geography like "Google Local." This may be the best choice for the users like with Google Map or Google Calendar.

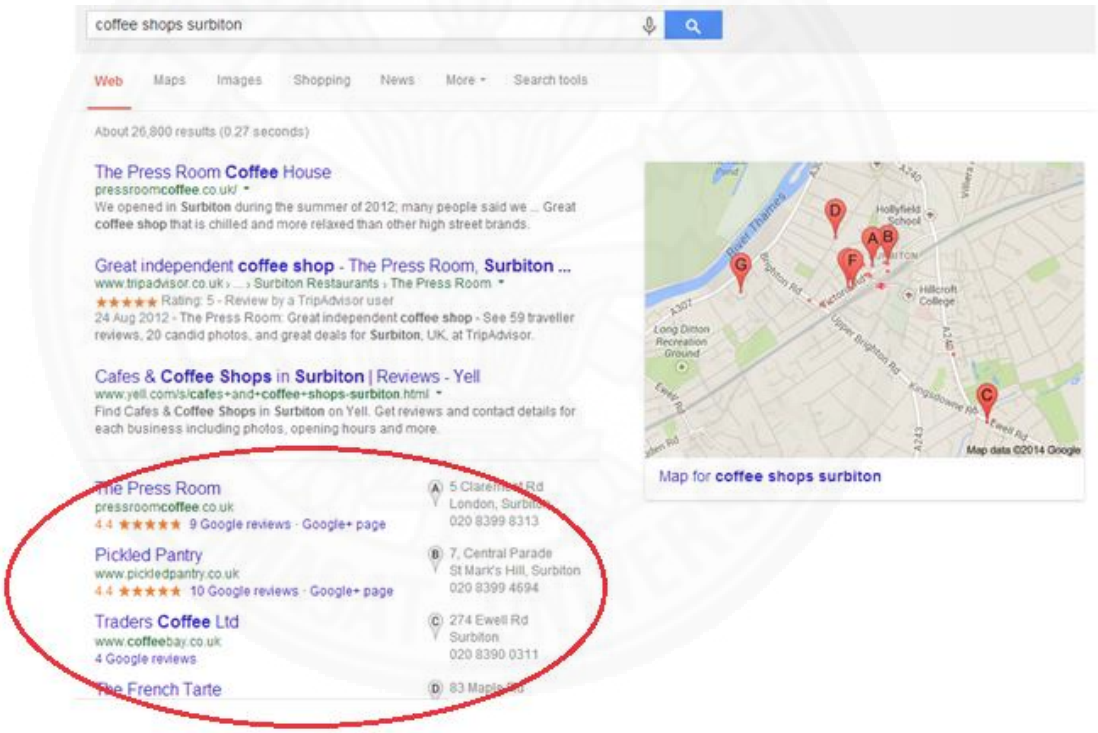

Figure 2: Results of content from Google Local[105]

[105]"*Google Local*" http://www.vervesearch.com/wp-ontent/uploads/ 2014/05/ local1.png, (accessed on May 19, 2016).

The results appear based on the geographic area, which means that such information is related to the users who search the information. For example, the results are limited to a distance of the user's IP address and should be related to those in a particular location.

However, this solution cannot solve all situations because in the end the users may request for delisting when the result links are old and no useful, which is not related to the geography of the information.

Still, on August 18, 2015, the UK's Information Commissioner's Office (ICO) applied the first right to be forgotten action against Google Inc. The ICO ordered Google to remove nine links, which were old news stories about an individual's criminal offence.[106] This means that nowadays a lot of countries have tried to apply this rule accordingly with the European Union directives.

Finally, it can be implied that the right to be forgotten has not expanded around the world yet. The decision of the court can be enforced only in the countries that are members of the European Union, such as France, Germany, Spain, or United Kingdom, because these countries are under the same European ruling that accepts the right to be forgotten. However, as for the countries outside the European Union, it depends on their perspective of the right and not every country respects the right as the European Union does. Regulating the tool and the free-flow information on the Internet is a difficult thing and the infrastructure makes it hard to control. In addition, it will become harder when the domestic laws in such countries are not in the same direction. Even in Europe, the decision of Google Spain case faced a huge criticism and drew more attention. Yet, some may say that "just because it is difficult to enforce, it does not mean that we should not try." For example, if people look back thirty years ago and predict that there will be an intellectual law in the future, everyone will think that it is nonsense. The first step is always the hardest one.

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[106] Sarah Thompson, "*UK's First Ever Right To Be Forgotten Enforcement: Google In the Firing Line Again*", http://www.passwordprotectedlaw.com/2015/08/uks-first-ever-right-to-be-forgotten-enforcement-google-in-the-firing-line-again, (accessed on August 21, 2015).

CHAPTER 4
RIGHT TO BE FORGOTTEN
IN THAILAND

After discussing in the previous chapter, several countries, especially those which are members of the European Union, including Spain and France, have expressed their perspectives towards the right to be forgotten and established a specific law to support such right.

4.1 Current Laws and Regulations

For Thailand, there is currently no statutory law governing the privacy, but the privacy right has been recognized in the Constitution of the Kingdom of Thailand and in some specific subjects, such as financial, telecommunications, and banking businesses. The general rule for applying to this right is Civil and Commercial Code.

4.1.1 Civil and Commercial Code

4.1.1.1 Obligations: Compulsory Performance

The obligation is the principle which occurs from the main object of the engagement between the parties. The Law of obligations is found under Civil and Commercial Code in section 194-353. The element of the Obligations consist of:

(1) Creation of Legal relationship

(2) The status of the creditor and the debtor

(3) Subject of obligation

Section 194[107]provides the right of the creditor to claim for a debtor performance according to the obligation between the parties. Generally

[107] Civil and Commercial Code, section 194 provides that

speaking, the obligor is bound to do or forbear from doing some particular act or pay the price of something.

Section 213[108], if the nature of an obligation does not permit of compulsory performance and the obligation is the doing, the creditor could request for a court' order to order the third parties to do such act instead of the debtors. Then, the debtors deem to pay all expense for providing inadequate relief in the circumstances.

If the users or the data owners want to apply the fact of requesting for removal, they have to have sources of the obligations such as law, contract or an acts or omissions punished by laws.

However, for applying this principle, the parties has to have a legal relation such as the contractual obligation. If there is no obligation between the data owners and the search engines such as *Google Spain Case*. Normally the search engines have a contract to link the websites to the search result with the original websites not with the users. Thus, this principle could not apply to this situation.

[B]y virtue of an obligation the creditor is entitled to claim performance from the debtor. The performance may consist in a forbearance.

[108] Civil and Commercial Code, section 213 provides that

[I]f a debtor fails to perform his obligation, the creditor may make a demand to the Court for compulsory performance, except where the nature of the obligation does not permit it.

When the nature of an obligation does not permit of compulsory performance, if the subject of the obligation is the doing of an act, the creditor may apply to the court to have it done by a third person at the debtor's expense; but if the subject of the obligation is doing of a juristic act, a judgment may be substituted for a declaration of intention by the debtor.

As to an obligation whose subject is the performance from an act, the creditor may demand the removal of what has been done at the expense of the debtor and have proper measures adopted for the future.

The provisions of the foregoing paragraphs do not affect the right to claim damages.

4.1.1.2 Principle of the Liability for Tort

The principle of tort is that when a person causes damage to any other person, he or she has to be liable for his action. Under Section 420, the tort consists of the following four elements:

1) Unlawfulness

Basically, when a person is alleged according to any statute law, his act is considered unlawful. This includes not only the statue laws but also the human rights, such as right of life, right of privacy, right of property, and other similar rights.

2) Willfulness or negligence

Willfulness refers to the act of a person who is conscious when he is committing such act and knows that his act can cause any damage or acknowledges the fact causing such damage.

In contrast with willfulness, the negligence is an unintentional act of a person who acts without due care like ordinary persons. The liability of the doer depends on the level of his due care judged by the determination of a person under the same conditions and circumstance as the doer. It may come from various factors like age, gender, or career. In other words, it occurs on a case-by-case basis.

3) Injury or damage

The liability under the principle of tort will not occur without an injury or damage. Of course, an injury is an absolute right of individuals, which may be referred as personal right, right on property, and other rights that are not limited just in the monetary form.

4) Causation

The final, but important, element is the consequence of an act and the injury or the damage should be caused by the act of the doer.

In particular cases like Google Spain, in addition to Section 420[109], another relevant section for applying is Section 423, defamation law[110]which is an important rule for the protection of a person's reputation.

Under Section 423, a person shall be liable when he makes a false statement and spreads it as a fact and such false statement injures the reputation, credit, earnings or prosperity of the other persons. Then, that person shall be liable for arising damage occurred to the other persons.

According to the principle, there are two specific action within defamation: slander and libel. Slander is the result of the oral statement that against the reputation of the other person. Libel is the use of written communication or the other permanent forms to cause the damage to the reputation of the other person.

(1) Right to be forgotten and Tort

A data controller or search engine has a duty to maintain the accuracy of the information. When they fail to keep the information safe or to protect it from other persons or they disclose inaccurate information from the facts, the data owner can sue against them according to Section 420. However, the data owner has to prove that the data controller or search engine fails on conducting their duty. In this case, the court may consider from four aforementioned elements and the hardest element for proving is the second one because the duty of the data controllers or search engines is to protect a million of information. In practice, it is difficult to keep information accurate and safe. If they can prove that under such circumstance they have

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[109] Civil and Commercial Code, section 420 provides that
[A]person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation therefore.

[110] Civil and Commercial Code, section 423 provides that
[A] person who, contrary to the truth, asserts or circulates as a fact that which injurious to the reputation or the credit of another or his earnings or prosperity in any other manner, shall compensate the other for any damage arising therefrom, even if he does not know of its untruth, provided he ought to know it.(...)

put the best effort in processing such information, they may not have to be liable for the damage to the data owner under Section 420.

In circumstances where the truthful information is requested to be removed; for example, a person who was once held in a prison and his record still remained on the search results whenever typing his name, in such case, under Section 423, the data controller and search engine will not be considered as the liable person since the information was deemed true, but it is just not up-to-date. So, the data owner cannot use this section for requesting the data controller or search engine to erase these search results.

(2) Compensation for Tort

The compensation for tort refers to the damage paid to the injured person in each circumstance. Non-pecuniary loss, such as mental injury, is also one type of the damages that the plaintiff can request, but it is difficult to calculate in the monetary form. Under Section 438[111], the general rule for calculating the amount of the compensation in a court should determine the amount in accordance with the circumstance of wrongful act.

Nevertheless, the process of awarding damage or the order to remove the information has to get through the process of filing a lawsuit and bearing the burden of proof, which takes time and money. Imagining a thousand of complaints are filed, how long can the court get through every case and will the injury be recovered?

4.1.2 Credit Information Business Act 2012 (B.E. 2545) (Amendment B.E. 2551)

The objectives of this law are to protect the accession of financial status and credit record of clients from financial institutions to access the data and to

[111] Civil and Commercial Code, section 438 provides that
[T]he Court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act.

allow them to figure out how many debts the clients already have with other financial institutions and help them assess financial risk of their clients more accurately. The access to this crucial information will not only help limit the probability of new non-performing loans, but it will also strengthen the financial status of financial institutions and overall banking system.[112]Under this Act, the companies that have a duty to obtain a license to carry on their credit information business are called a "Credit Information Company"[113]. Presently, there is only one credit Information Company in Thailand and the Ministry of Finance holds a portion of shares at 51%.[114] It means that the government has a majority vote for determining the policy of the business.

Under Section 3[115], the information kept under this Act is limited to a statistic report about the client's history of paying debts. So, the boundary of the data will be limited and not general.

Among existing laws, this Act has a concept similar to the data protection regulation of the European Union. The credit information company will keep the record of its client's credit terms or other related information for the purpose that its clients may raise a loan or any transaction with the financial institutes in the future.

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[112] "*Bank of Thailand*", https://www.bot.or.th/English/BOTStoryTelling/ Pages/Laws AndRegulations_StoryTelling_Academic_Press_Student_FI.aspx, (accessed on 5 June, 2016).

[113] Credit Information Business Act 2012 (B.E. 2545), Section 3 provides that

(...) "Credit Information Company" means the Company that obtains the License to carry on Credit Information Business. (...)

[114] "*History of National Credit Bureau Co.,Ltd.*", https://www.ncb.co.th/Company_ Profile_en.html, (accessed on June 18,2016).

[115] Credit Information Business Act 2012 (B.E. 2545), Section 3 provides that

(...) "Information" means anything that can bear the meaning of facts pertaining Credit Information or Credit Point, regardless of whether such bearing of the meaning is due to the condition of that thing or due to any other methods, and regardless of whether being prepared in the form of document, file, report, book, map, drawing, picture, film, video or audio record, record made by computer, or any other methods that can disclose the information recorded. (...)

Thus, the disclosure of the data obtained occurs between the "members"[116], which is limited to financial institutions. The process of obtaining the information is as follows:

4.1.2.1 Source of Data

The data come from the transactions of the clients as a member, which contain consumer (individual) and commercial credit reports (legal entities), such as names, addresses, dates of birth, and credit transactions. However, before obtaining such information, the law provides that the owner of the information must give their consent for the disclosure or provision to the members.

4.1.2.2 Use of Information

Members have an obligation to provide updated information to the credit information company. This information will be used only for analyzing the credit of the clients. The disclosure will be done among the members who provide their information to the credit information company. In other words, they exchange the information of their clients.

4.1.2.3 Condition of Obtaining Information

The credit information company may not store the information of any client, which is related to the non-performance of debt obligations and relevant information. In addition, the performance of debt obligations and related information could be kept no longer than three years in case of consumer credit reports and five years in case of commercial credit reports.

4.1.2.4 Right of Information Owner

Since the purpose of the law is to protect the use and disclosure of information, it provides the right to correct the information for the information owners under section 17, the protection to information owners in Section 25 of Chapter IV, and the process of requesting for correcting such information in Section 26.

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[116] Credit Information Business Act 2012 (B.E. 2545), Section 3 provides that (...) "Member" means Financial Institutions that the Credit Information Company admits as a member. (...)

4.1.2.5 Penalty

In case that a credit information company or information controller fully or negligently fails to obey the provisions, the law provides both civil and criminal liabilities in its sections.[117]

4.1.2.6 Responsible authority

For complying with the provisions under this Act, the Credit Information Protection Committee will consider in announcing the relating rules for internal operations and reports of a credit information company.

However, in case that the kind of information is not involved with the finance or "general data", such as the posts on Facebook or history of persons in the blogs or websites, there are no specifically applicable laws.

From aforementioned reasons, Thailand should have a specific provision as a rule for the circumstances where the data owners want to request a search engine or data controller to remove their information.

4.2 Proposed Solutions

Despite the enactment of laws covering certain areas of personal data protection, there have been no existing rules, mechanisms or measures regulating the personal data protection as general principles. Recently, the Ministry of Information and Communication Technology proposed the draft Personal Data Protection Act (B.E. ...) as of August 2014 to the cabinet and the principle of the law was approved by the Cabinet of Thailand on January 6, 2015. [118]

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[117] Credit Information Business Act B.E. 2545, Chapter VI and VII

[118] สรุปสาระสำคัญของกฎหมายคุ้มครองข้อมูลส่วนบุคคลและประเด็นที่เกี่ยวข้องกับการคุ้มครองข้อมูลส่วนบุคคลในการทำธุรกรรมทางอิเล็กทรอนิกส์ภาครัฐ, http://www.etcommission.go.th/article-dp-topic-conclusion-dp.html, August 14, 2015.(Summary of the drafted of the Personal Data Protection Act and related point with the government, http://www.etcommission.go.th/article-dp-topic-conclusion-dp.html)

The author proposes that the right to be forgotten should be provided under the Personal Data Protection Bill. The new principle is sufficient to solve the existing problems of requesting for the removal of unwanted data. For clarity, the right to be forgotten should come with the details as will be discussed in sections 4.2.1, 4.2.2, 4.2.3, and 4.2.4.

4.2.1 Definition of Data

The concept of "personal data" of almost all countries is similar. It refers to the "information security" and overlaps slightly with "privacy." For instance, the full term "data protection" may encompass more than just the aegis of personal information (but only through protection bar). It may be as same as the protection of confidential or valuable information, swop secrets, know-how, or similar information assets. Thailand should define the term "personal data" clearly and broadly in order to exercise the right to be forgotten and the first step to do so is that such data must be considered as personal data.

However, according to Section 3 of the present draft, the term "personal data" means all data that can identify a person and is similar to the definition of "personal data" under the European Union directive. The law does not limit the form of data so it can be in any form, such as sounds, images, books, letters, or anything that can be recorded not only in computers but also in any kind of documents. This is deemed a broad meaning. The author thinks that this has already served the purpose of the right to be forgotten.

4.2.2 Identification and Duty of Data Controller

According to the definition of Personal Data Administrator provided in Section 3, the draft describes that a person who has a control power over personal data is regarded as a data controller. A personal data administrator has a duty to perform a proper management with security measures for protecting the data, including giving the right of access to the data owner. When the data owner makes a request to correct

or update the data, the personal data administrator also has to do so under Sections 28 and 29.

In addition to the present definition of the personal data administrator, the author would like to include a new party that is a third party who obtains the links or copies or replications of personal data, such as search engines, as one of these personal data administrators. This is as same as the new directive of the European Union that prevents the arguments of the duty of search engines and the right to be forgotten.

4.2.3 Right to be Forgotten

The author would like to include a new party who obtains the links or copies or replications of personal data, such as search engines, as one of these personal data administrators. This is as same as the new directive of the European Union that prevents the arguments of the duty of search engines and the right to be forgotten. However, the exercising of the right to be forgotten should be under the certain conditions as follows:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent;

(c) the data is inaccurate, inadequate, irrelevant or excessive; or

(d) the period of storage has expired

This may encourage the nation to respect the individual's right; however, not every request for the removal should be processed. It is important to note that the right to be forgotten is not an absolute right, there should be an exception of exercising the right as follows:

(a) for exercising the right of freedom of expression and information;

(b) for compliance with a legal obligation; or

(c) for archiving purposes in the public interest.

4.2.4 Responsible Authority

Thailand should establish a supervisory authority for making removal or refusal decisions. This supervisory authority should have the authority to enforce the laws and issue the orders to the data controllers. The officers in this authority should come from the government in order to prevent the problem of double standard of making these decisions by private entities. In addition, it may save time and money from bringing a large number of requests to the courts. Moreover, the supervisory authority can investigate the data controllers, disclose the information, and coordinate with the privacy international organizations like European Union.

CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

In summary, the history of the right to be forgotten has arisen since the Roman Empire, but it was not well-known as today. We may consider that the right to be forgotten is a new privacy right and has been widely expanded around the world due to the *Google Inc. v. Gonzalez case*. The result is that a lot of countries, including Thailand, are considering whether they should adopt this right.

5.1 Conclusion

Mainly, there are two perspectives. One is that they should adopt the right under the European Union framework. The EU always supports the individual privacy right because the situations of the error data in the online world can make a lot of people suffer from false information. So, the solution for solving this problem is to delete them because there is no good cause from such information. However, the difficult part is that it is not false information; rather it is right information that really happened in the past. Should we make it disappeared? According to the decision of the EU's Court of Justice, it should be deleted, but we should recognize that the ruling is for the search engines, not for original information.

Another is that adopting the right may affect other basic rights of humankind, right to access the information, or right of free speech. This perspective comes from the United States and the questions that have been rising mostly are that how we can balance these rights and what the standard is. According to the old cases, the decision to erasure depended on the public interest of data subjects. In case that the information we want to delete is personal data but the data subject is a politician, the court tends to consider other rights rather than the right to be forgotten since such information is important to the public interest.

In United States, there is no specific law providing the right to be forgotten, but in some cases the courts also ordered the search engines to delete the data, but did

not use the word "*right to be forgotten*". Since, the United States's legal system is involved with common law where the *de facto law* can be applied, but Thailand's legal system is based on the civil law, such principle cannot therefore be applied.[119]

What is the best alternative of adopting the ruling of the right to be forgotten? Some may say that it may be better if the courts allow the data subjects to correct or change the information in order to tell the other sides of the story. However, it may actually do more harm than good. When people can have access to the websites and correct the information, they require a huge undertaking and this may interrupt the duty of the webmasters in controlling the content on such websites. In addition, the procedure would be complicated and does not get through the principle of the right to be forgotten on the Google Spain decision.

Actually, the problem of the old or too much data does not come from the function of the search engines, which provide only the ranks of the information, not data themselves. The decision of the court in the *Google Spain case* put the burden on the search engines and also granted the search engines an extraordinary level of First Amendment protection. This may be considered as a poor strategy for dealing with large companies controlling the nearly two-thirds of the United States search market like Google. The better approach is to put the duty of determining whether the information is important to the government organizations where the citizens can rely on.

Although there is a guideline for Google to evaluate the value of the information, it does not serve as a guarantee of the decision of the paralegals in Google. This guideline can be used for deciding the black or white cases. Placing the responsibility with Google or other search engines is not the best solution. There is no reason why Google or other search engines have to do this task instead of the government. The order of erasure should be done by the courts and it may reduce the risk of Google or other search engines. The penalties will exist only for the circumstances where Google or other search engines do not follow the court's order.

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[119] "*US Legal Inc., De Facto Law & Legal Definiton*", http://definitions.uslegal.com/d/de-facto/, (accessed on 5 July, 2016)

However, the process of finding the fact will take time for gathering the evidence. Most essentially, the public will be secured with the decision. People's perspective is that the judgment will pass on for the interest public, not for someone. But, if the aim is to cut down the cost and avoid the burden of the court system, the best alternative is therefore to prepare local data protection organizations for taking care of this issue. The agent in these organizations must have no conflict of interests with the search engines and requesters. It would be truly under-serving of the public attention. It could not deny that people more entrust on the government organization than on the individuals.

5.2 Recommendations

Presently, the corporations, especially search engines, should prepare for getting the requests of erasure because there is no direction that the world will set such organizations soon. Although the United States is hesitating to adopt the right to be forgotten as a law, the search engines can be sued in other countries to delete the links. In addition, search engines like Google should create their "information hot spots" where the search results should be targeted towards a certain locality. The search engines should comply with the laws and consider that the information is relevant only within a certain locality.

The nations should consider the levels of the right to be forgotten mentioned in Chapter Two, which is like a basis for information removal. The first one provides that other individuals should not post private information of other people. Only the data subjects of the information should have the right to choose whether they want to post or remove the information. The second category lets individuals to express their opinions about them and can choose to delete their posts whenever they want. The final category is based on the *Google Spain* case by providing that the information that has been posted but no longer relevant or timely, including there is no compelling reason for the information to remain in the public, should be removed.

In Thailand, a data protection bill has been drafted, and according to the timeline of the current government, the bill should be announced soon. However, according to the present drafted, the right to be forgotten is not specified in the bill

because a lawmaker has an opinion that it is difficult to consider which case where this right should be applied as same as with the United States perspective. Nevertheless, the law systems of the United States and Thailand are not similar. In the United States, the court can make a decision on a case-by-case basis, but in Thailand the court has to apply a written law with the facts so it is barely impossible that the court can use the right to be forgotten doctrine in the cases without specific law. How will people deal with the problem of the online data that will be increasingly expanded?

The final suggestion is that Thailand should follow the European Union framework by recognizing the concept of this right and passing a law that is similar to the European Union directives as mentioned above. This may encourage the nation to respect the individual's right; however, not every request for the removal should be processed. It still depends on the interest of such information towards the public. Of cause, setting a clear boundary for what circumstances where the information should be private or public is also important. With this way, the corporations may get the benefit by having the law as same as the international standard in particular under the European Union regulations as well as may know which laws will be applied. The individuals may also get the benefit from the law since they have the right to remove the information that is no longer within the public interest. In addition, the European Union has already launched an amendment regulation regarding this right, which provides a stronger right to be forgotten for individuals to solve unclear standard. In conclusion, all three entities, i.e. nations, corporations and individuals, will benefit by having the literal laws that are consistent with the international standard.

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4. Other Materials

European Union: Data Protection Directive

European Commission, Factsheet on the “Right to be Forgotten” ruling, 2014

The First Amendment Law

Restatement of the Law, Second Torts 1977

Communications Decency Act 1996

Civil and Commercial Code

Credit Information Business Act B.E. 2545 (2012)

Drafted Personal Data Protection Act (B.E…)

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