

THE RIGHT TO BE FORGOTTEN UNDER THAI LAW*

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ABSTRACT

One of the essential parts in human dignity is reputation, and nowadays the too-much speech can tear down the individual's privacy. 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. 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 May 2014, the right to be forgotten was recognized in the European Union through, *Google Inc. v Agencia Española de Protección de Datos, Google Spain case*, 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 Thenceforth, search engines were obliged to remove outdated or extremely personal information from search results. In some countries, the right to be forgotten has been rejected. 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.

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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

บทคัดย่อ

ในปัจจุบันจำนวนข้อมูลส่วนบุคคลที่เผยแพร่ในโลกออนไลน์นั้นมีเป็นจำนวนมากและบ่อยครั้งที่เมื่อเวลาผ่านไปข้อมูลส่วนบุคคลที่ถูกเผยแพร่นั้นกลับส่งผลกระทบต่อสิทธิส่วนบุคคลของเจ้าของข้อมูลโดยทั่วไปแล้วสิทธิส่วนบุคคล

ที่เราเรารู้จักกันดีนั้น ได้แก่ สิทธิที่จะแสดงความคิดเห็นและสิทธิในการเข้าถึงข้อมูล แต่ไม่นานมานี้สิทธิที่จะถูกลืมได้ถูกหยิบยกขึ้นมาเพื่อเป็นมาตรการในการคุ้มครองความเป็นส่วนตัวของเจ้าของข้อมูล โดยให้เจ้าของข้อมูลสามารถขอลบข้อมูลส่วนบุคคลของตนในโลกออนไลน์ได้

เมื่อเดือนพฤษภาคม 2556 ที่ผ่านมาศาลยุติธรรมยุโรปได้อาศัยหลักของสิทธิที่จะถูกลืมในการตัดสินคดีระหว่าง

ผู้ให้บริการค้นหาข้อมูลบนอินเทอร์เน็ตอย่างกูเกิลในประเทศสเปนและนายมาริโอ กอนซาเลซ ผู้ให้บริการการค้นหาข้อมูล โดยวางหลักให้เจ้าของข้อมูลสามารถร้องขอให้ผู้ให้บริการค้นหาข้อมูลบนอินเทอร์เน็ตลบข้อมูลส่วนบุคคลที่มีความสำคัญจากหน้าแสดงผลการค้นหาได้ ซึ่งภายหลังจากที่มีคำตัดสินดังกล่าวสิทธิที่จะถูกลืมได้ถูกกล่าวถึงอย่างกว้างขวาง ในขณะที่ประเทศในสหภาพยุโรปยอมรับหลักการของสิทธิดังกล่าว ยังมีอีกหลายประเทศที่ไม่เห็นด้วย เนื่องจากหลักของการใช้สิทธิที่จะถูกลืมนั้น ต้องไม่กระทบกับสิทธิขั้นพื้นฐานอื่นๆ จนเกินขอบเขต โดยเฉพาะอย่างยิ่งสิทธิที่จะแสดงความคิดเห็นและสิทธิในการเข้าถึงข้อมูล

ภายหลังจากคำตัดสินของศาลยุติธรรมยุโรป สหภาพยุโรปได้มีการบัญญัติถึงสิทธิดังกล่าวขึ้นอย่างชัดเจนและเป็นรูปธรรมภายใต้กรอบทางกฎหมายด้านการคุ้มครองข้อมูลส่วนบุคคล เพื่อให้การคุ้มครองส่วนบุคคลมีประสิทธิภาพมากยิ่งขึ้น อย่างไรก็ตามเมื่อพิจารณาหลักกฎหมายของประเทศสหรัฐอเมริกาที่ใช้บังคับในปัจจุบัน ทั้งรัฐธรรมนูญ กฎหมายว่าด้วยการสื่อสารที่เหมาะสม และกฎหมายลักษณะละเมิด พบว่าสิทธิที่จะถูกลืมนั้นได้รับการสนับสนุนน้อยกว่าสิทธิขั้นพื้นฐานที่มีกฎหมายรองรับไว้ ทั้งนี้ สำหรับประเทศไทย กฎหมายที่มีอยู่ในปัจจุบันไม่ได้กำหนดหลักเกณฑ์ที่รองรับสิทธิที่จะถูกลืมไว้อย่างมีประสิทธิภาพและครอบคลุม จึงเห็นควรเสนอให้มีบทบัญญัติเฉพาะที่เกี่ยวกับสิทธิดังกล่าว ซึ่ง

รวมถึงการใช้สิทธิ ข้อยกเว้นและบทลงโทษหากมีการฝ่าฝืน เพื่อลดปัญหาการไม่มีกฎหมายรองรับใน การขอลบข้อมูลส่วนบุคคลในโลกออนไลน์

คำสำคัญ: สิทธิที่จะถูกลืม, สิทธิในการขอลบข้อมูล, ข้อมูลส่วนบุคคล

1. Introduction

At present it could not be denied that, people write more emails than letters and search the information on the Internet approximately twenty billion times each month.[†] The huge number of information creates a question whether people have too many speeches. 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 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[‡].

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.

[†]Jacques Bughin, Laura Corb James Manyika, Olivia Nottebohm, Michael Chui, Borja de Muller Barbat and Remi Said, *The impact of Internet technologies: Search*, (July 2011), https://www.mckinsey.com/~media/McKinsey/dotcom/client_service/High%20Tech/PDFs/Impact_of_Internet_technologies_search_final2.ashx, (accessed on May 29, 2016).

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

Digital eternity is a problem because of privacy matters. One of the solutions for solving this problem is to adopt the “*right to be forgotten*” principle. 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.

2. Background 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. This right is reflected in various areas in the European; for example, the intellectual root of this right can be found in the French criminal law as *le droit à l’oubli*—or the “*right of oblivion*”⁴. 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.⁵ Recently, in May 2014, the right to be forgotten was widely recognized in the European Union from *Google Inc. v. Gonzalez*.⁶

Court of Justice of the European Union: *Google Inc. v. Gonzalez*

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.

Then, in May 2013, the Court of Justice of the European Union (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”

⁴Jeffrey Rosen, *A Grave New Threat to Free Speech From Europe*, (February 10, 2012), <https://newrepublic.com/article/100664/freedom-forgotten-internet-privacy-facebook>, (accessed 10 November, 2015).

⁵European Union Conditionality and the Acquis Communautaire, <http://www.cesruc.org/uploads/soft/130221/1-130221113Z4.pdf?pldezyhfkbcvomf>, (accessed on June 23, 2016).

⁶Case C-131/12, http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065, (accessed on March 29, 2015).

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 "*inaccurate, 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.*"⁷ This is involved with not only the economic interest, but the interest of the public should also be considered. According the CJEU's decision, the right to be forgotten can be defined as follows;⁸

1. The data owner has a right to request the search engines to remove the links appeared on their search results, even they are publicized by the third party;

2. 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. They have to make sure that their operation of erasure is under the legal framework and meets the minimum requirements of the law;

3. 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.

Anyhow, the right to be forgotten is not an absolute right, the ability for requesting to remove the displayed information of individuals was under the condition of the public interest of such information.⁹ The balance of the right depends on the data subject's private life and on the public interest in having that information.¹⁰

As a result of the case, Google have to establish a department for deleting the photos or contents that people posted on the Internet. To deciding whether the data should be deleted or not, Google relies on the reports that are filled in by the data subject in its request form. Of course, people will bring up a lot of reasons just for deleting their embarrassing past. It brings up the question that how can Google rely on it? 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. The highly subjective question is that what a public interest actually is, what remains relevant and for how long?

⁷ Id.

⁸ Derechos Digitales, *What are the implications of the right to be forgotten in the America*, https://www.ifex.org/americas/2015/09/22/derecho_olvido/, (accessed on September 22, 2015).

⁹ Id.

¹⁰ The Manila Principles on Intermediary Liability Background Paper, Version 1.0, (May 30, 2015).

3. The Right to Be Forgotten in Foreign Laws

3.1 European Union Directive

The 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.¹¹ The root of the right to be forgotten was appeared in the 1995 Data Protection Directive¹² under the title “*Right of access*”.¹³ 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. Moreover, 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.

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.¹⁴ 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. Under the new directive, the right to be forgotten is provided under title of “*Right to erasure*” in article 17.¹⁵

3.2 United States of America law

In United States, there is no literal law providing this right, at least not the same as European Union Directive. One of the reasons that the right to be forgotten is such a difficult concept to define and protect in the United States is that it conflicts with the fundamental human right to free, open and

¹¹European Union, *Protection of Personal Data*, <http://ec.europa.eu/justice/data-protection/>, (accessed on October 24, 2015).

¹²Stuart Winter-Tear, *GDPR-The Right to be Forgotten*, <http://www.stuartwintertear.net/gdpr-the-right-to-be-forgotten/>, (accessed on May 21, 2016).

¹³Article 12 (b) of the Data Protection Directive.

¹⁴Council 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 December 15, 2015).

¹⁵Official L 119/43 Journal of the European Union EN (May 4, 2016), Article 17.

access the information which provides in the First Amendment of the United States Constitution.¹⁶

Moreover, there is the Communication Decency Act 1966 (“CDA”) which 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.¹⁷ Under section 230, 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.¹⁸ This section was interpreted by the court in *Langdon v. Google case, Inc.*, 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 the court found that “*section 230 provides Google, Yahoo, and Microsoft immunity for their editorial decisions regarding screening and deletion from their network.*”¹⁹

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.²⁰

Even 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 in the Restatement of Torts.²¹

Regarding to the rule of torts, which is similar to the right to be forgotten, refers to the “public disclosure of embarrassing private

¹⁶ American Government, *First Amendment Rights*, <http://www.ushistory.org/gov/10b.asp>, (accessed on May 20, 2016).

¹⁷ Andrew P. Bolson, Esq., “Flawed But Fixable: Section 230 of the Communications Decency Act”, (2013).

¹⁸ CDA 230, <https://www.eff.org/issues/cda230>, (accessed October 13, 2015).

¹⁹ Eric Goldman, *Search Engines Defeat “Must-Carry” Lawsuit—Langdon v. Google.*, http://blog.ericgoldman.org/archives/2007/02/search_engines_3.htm, (accessed on June 1, 2016).

²⁰ Id.

²¹ Restatement of the Law, Second Torts 1977 s 652 (B).

facts.”²² Thus, in the circumstances that the information is useless or no longer serve the purpose of being public, people still do not have the right to request for removal.

4. Legal Problems in Thailand

In Thailand, there are no literal provisions providing the right to be forgotten. According to the current laws, under section 420²³ of Civil and Commercial Code, it can be applied in the situations that data controllers fail to keep the information safe or to protect it from other persons or disclose inaccurate information from the facts, the data owner can sue against them and under section 423²⁴ of Civil and Commercial Code, it can be applied when a person 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. but in circumstances that a person wants to remove the truthful information for example, an embarrassing picture like the face before got a surgery of woman which appears on the search results whenever typing her name, in such case, the data controller and search engine will not be considered as the liable person under this section since the information was deemed true.

Furthermore, under Credit Information Business Act 2012 (B.E. 2545) (Amendment B.E. 2551) which aims to protect the use and disclosure of information but the definition of the “data” under section 3²⁵, the

²²“Forcing Europe to Wear the Rose- Colored Google Glass: The “Right to Be Forgotten” and the Struggle to Manage Compliance Post Google Spain”, *Columbia Journal of Transnational Law*, (2016).

²³ 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.

²⁴ 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.(...)

²⁵ 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. (...)

information 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. So, 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, this law could not be applied.

For this reason, when the users or data owners want to remove the useless or unwanted data, they have no literal legal ground for requesting of removal. In practice, they have to solve the problem by contacting the search engines directly which the decision to remove or maintain such data is depended on the service providers. 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. In that sense, the right to be forgotten is deemed a very useful principle

5. Conclusion and Recommendations

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 European Union Directive set only the minimum standard, but the court offered their citizens a greater privacy right.

The 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. 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. However, on January 6, 2015, the Ministry of Information and Communication Technology just proposed the draft Personal Data Protection Act (B.E. ...) to the cabinet which was already approved by the Cabinet of Thailand.²⁶ The author proposed that the principle of the right to be forgotten should be provide in the Personal Data Protection Bill since the concept of this law aims to protect the information of the individuals which is similar with the concept of the rights.

²⁶ สรุปสาระสำคัญของกฎหมายคุ้มครองข้อมูลส่วนบุคคลและประเด็นที่เกี่ยวข้องกับการคุ้มครองข้อมูลส่วนบุคคลในการทำธุรกรรมทางอิเล็กทรอนิกส์ภาครัฐ, <http://www.etcommission.go.th/article-dp-topic-conclusion-dp.html>, (accessed on 19 July, 2016).

Regarding to the section 5 of the drafted²⁷, the definition of “personal data” means any information or data relating to an identified natural person or can identify a natural person by reference to the facts, data or any other materials about that natural person which 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 which already served the purpose of the right to be forgotten.

In addition to the present definition of the “personal data administrator”²⁸, 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

Moreover, 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. This new principle would be sufficient regulation to solve the existing problems of requesting for the removal of unwanted data.

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, it needs to be balanced with other related rights, such as right to access information and freedom of expression. Of cause, setting a clear boundary for what circumstances where the information should be private or public is

²⁷Drafted of the Personal Data Protection, Section 5, <http://web.krisdika.go.th/data/news/news11804.pdf>, (accessed on July 1, 2016).

²⁸ Id.

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. 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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