ENNAN R. E.
Ph.D in Law, Associate Professor,
Associate Professor of the Department
of Intellectual Property Law
(National University
"Odesa Law Academy")

UDC 347.152:347.121.2
DOI https://doi.org/10.32842/2078-3736/2023.3.74

THE RIGHT TO BE FORGOTTEN IN THE SYSTEM OF INFORMATION RIGHTS AND PROTECTION OF PERSONAL DATA

Recently, a significant amount of scientific research, both of a purely theoretical and practical nature, has been devoted to the protection of personal data of a person (individual), which as a result of the digital activation of society has become maximally accessible to almost everyone, but at the same time insufficiently researched and minimally protected. The question arises about the development of fundamentally new, modern legal mechanisms to protect human interests in the digital world. One of such mechanisms (legal constructions) is the right to be forgotten, the implementation of which is actively gaining popularity in the world. With the widespread introduction of advanced technologies into our daily lives, more and more new types of individual rights and forms of their implementation appear. At the same time, the implementation of the right to be forgotten from a new angle into our legal life actualizes the need to ensure high standards in the field of the legal status of a person in the context of digitalization and consistent consolidation of human rights also in the Internet space.

The right to be forgotten as one of the informational rights acquires special importance in the digital age. The right to be forgotten corresponds to the right to know, the right to collect and use information. Thus, it can be stated that in addition to the direct development of various forms of digital interaction, thanks to the fundamentally new quality and scale of electronic communications, more and more situations are appearing in our everyday life that are related to the electronic flow of information and therefore can be considered ambiguous in the light of the possibility of attracting legal protection. At the same time, the digital transformation of society involves not only the technological development itself, but also the general improvement of social and legal obligations, complicating the process of realizing human rights and their protection in case of violation, challenge or non-recognition.

Modern challenges that everyone faces on the Internet lead to the formation of information culture of the next level, in which new communicative practices appear, and old ones are modified in such a way as to correspond as much as possible to the updated realities of today. In this context, the right to be forgotten plays the role of a kind of tuning fork for compliance of the declared standards in the field of human rights protection with the real possibilities of the state to ensure their implementation in the online space. In the conditions of the spread of information technologies, the formation and development of the information society, the role and meaning of information as a social good and a legal phenomenon is being rethought.

Key words: *the right to be forgotten, the right to be forgotten, information rights, protection of personal data, the Internet*

Еннан Р. Є. Право бути забутим (право на забуття) в системі інформаційних прав та захисту персональних даних

Останнім часом значна кількість наукових досліджень, як суто теоретичного, так і практичного характеру, присвячується питанням захисту персональних даних людини (фізичної особи), які внаслідок цифрової активізації суспільства стали максимально доступними майже для кожного, але при цьому недостатньо дослідженими і мінімально захищеними. Постає питання про напрацювання принципово нових, сучасних правових механізмів для захисту інтересів людини в цифровому світі. Одним із таких механізмів (правових конструкцій) є право на забуття, реалізація якого активно набуває популярності в світі. З повсякденним широким впровадженням у наше життя передових технологій з'являються дедалі нові види прав особи, а також форми їх реалізації. При цьому імплементація до нашого юридичного побуту права на забуття під новим кутом зору актуалізує необхідність забезпечення високих стандартів у сфері правового статусу особи у контексті діджиталізації та послідовного закріплення людських прав також і в Інтернет-просторі.

Право на забуття як одне з інформаційних прав набуває особливого значення саме в цифрову епоху. Праву на забуття кореспондує право знати, право збирати та використовувати інформацію. Таким чином, можна констатувати, що окрім безпосереднього розвитку різних форм цифрової взаємодії, завдяки принципово новій якості та масштабам електронних комунікацій, у нашому повсякденному житті з'являється все більше ситуацій, які пов'язані з електронним обігом інформації і тому можуть вважатися неоднозначними у світлі можливості залучення правового охорони. При цьому цифрова трансформація суспільства передбачає не лише сам технологічний розвиток, а й загальне вдосконалення соціально-правових зобов'язань, ускладнюючи процес реалізації прав людини та їх захист у разі порушення, оскарження чи невизнання.

Сучасні виклики, з якими в Інтернеті стикається кожен, зумовлюють формування інформаційної культури наступного рівня, в якій з'являються нові комунікативні практики, а старі модифікуються таким чином, щоб максимально відповідати оновленим реаліям сьогодення. Право на забуття у цьому контексті відіграє роль своєрідного камертона відповідності задекларованих стандартів у сфері охорони прав людини реальним можливостям держави забезпечити їх реалізацію в онлайн-просторі. В умовах поширення інформаційних технологій, становлення та розвитку інформаційного суспільства відбувається переосмислення ролі та значення інформації як соціального блага і правового феномену.

Ключові слова: *право на забуття, право бути забутим, інформаційні права, захист персональних даних, Інтернет.*

Introduction. The realities of the modern digital society require a real renewal and transformation of the world's legal systems. It is time to focus on the value of the human being as such and on the importance of human nature amid the growing role of artificial intelligence. The modern digital world manifests itself daily in an online format. The world has moved into a new format of life. At the same time, if the legal mechanisms for the realization and protection of human rights in real life can be considered sufficiently developed, then similar legal instruments for the digital world are at the stage of formation, active discussion and debate. Recently, a significant amount of scientific research, both of a purely theoretical and practical nature, has been devoted to the protection of personal data of a person (individual), which as a result of the digital activation of society has become maximally accessible to almost everyone, but at the same time insufficiently researched and minimally protected. The question arises about the development of fundamentally new, modern legal mechanisms to protect human interests in the digital world. One of such

mechanisms (legal structures) is the right to be forgotten, the implementation of which is actively gaining popularity in the world.

Setting objectives of the study. That is why, at the current stage, attention should be paid not only to the creation, but also to the improvement of legal mechanisms for the protection of Internet relations, as well as increasing the level of legal awareness and conscious digital activity of individuals. With the widespread introduction of advanced technologies into our daily lives, more and more new types of individual rights, as well as forms of their implementation, appear. At the same time, the implementation of the right to be forgotten from a new angle into our legal life actualizes the need to ensure high standards in the field of the legal status of a person in the context of digitalization and consistent consolidation of human rights also in the Internet space.

Research results. The concept of the "right to be forgotten" arose in the 1960s and 1980s in the context of the protection of private life from interference by the media in the judicial practice of France and other European countries, as well as freedom of information and justified public interest in the details of private life in USA (right to be forgotten) [1]. The concept of "right to be forgotten" is considered a special case of the right to privacy (Article 17 of the International Covenant on Civil and Political Rights of 1966) and respect for private and family life, home and correspondence (Article 8 of the Convention on the Protection of Human Rights and of fundamental freedoms from 1950), as well as within the right to correction and deletion of data, if they were processed contrary to the requirements of the law (clause "c" of Article 8 of the Convention on the Protection of Individuals in Connection with Automated Processing of Personal Data; hereinafter - Convention No. 108).

Therefore, this concept was interpreted in Europe within the framework of Art. 12 of Directive 95/46/EC, which establishes the right of data subjects to access their data at the disposal of the operator and, in particular, the right to correction, erasure or blocking of data, if their processing is contrary to the provisions of Directive 95/46/EC , especially due to the inaccurate or incomplete nature of such data. In addition, Directive 95/46/EC establishes the obligation of operators to inform third parties to whom the data have been disclosed about their correction, deletion or blocking, if this is possible or does not require disproportionate costs. With the beginning of the wide-ranging reform of personal data protection norms initiated by the European Commission in 2002, a draft Regulation was prepared, in which the right to be forgotten was initially separate, but then included in Section 3 "Correction and deletion of data" in close connection with the right to delete data [2]. Article 16 of the draft Regulation enshrines the data subject's right to change and supplement information about himself. In addition, taking into account the purpose of data processing, based on the subject's request, the data must be deleted. Article 17 of the draft Regulation is devoted to the right to be forgotten and the right to destruction of personal data. The relevant provisions are fixed in a certain way in the current Directive, but it is in the draft Regulation that they are collected together and separated into a separate article.

Regarding the destruction of personal data, in some cases, the operator, instead of erasing personal data, can simply limit their processing: 1) for a period that allows the operator to check the accuracy of the data, if the subject of the personal data disputes its accuracy; 2) if the operator of personal data no longer needs them to perform his tasks, however, these data are stored as evidence; 3) if the processing of personal data is carried out illegally and the subject of personal data objects to their destruction, demanding instead the limitation of their use; 4) if the subject of personal data requests to transfer his data to another authorized processing system.

The draft Regulation also introduces the right to move personal data (data portability, Article 18): "the subject of personal data must have the right, if his personal data is processed by electronic means and stored in a structured and publicly available format, to receive a copy from the operator in an electronic structured format of personal data to be processed, further use of such data by their subject is allowed." In addition, the provided right of the subject of personal data - in the case of data processing with consent or under a contract in electronic form - to demand the transfer of personal data to another system of another operator. It is also worth paying attention to the report of the ENISA agency "The right to be forgotten - between expectations and practice" [3].

It complements two previous ENISA publications: the results of studies on the state of affairs in the storage and collection of personal data in Europe [4] and the document on the privacy implications of tracking people's online behavior [5]. The following are the key recommendations of the report: 1) politicians and authorities for the protection of personal data should work together to clarify the definitions that will facilitate the realization of this right (for example, it is necessary to be clear about who can request the destruction of general personal data, under what conditions). In addition, together with such definitions, it is necessary to estimate the corresponding costs of innovation; 2) in the open Internet, a purely technically impossible solution that fully realizes the right to be forgotten; an interdisciplinary approach is needed here, and politicians and legislators must realize this fact; 3) a possible pragmatic approach that would facilitate the realization of this right could be a requirement for operators of search engines and data exchange services within the EU to filter links to "forgotten" information stored both inside and outside the EU; 4) special attention must be paid to the destruction of personal data stored on removable and autonomous data storage devices.

According to paragraph "c" of Convention No. 108, any person is given the right to demand the destruction or destruction of data, in particular, if they are processed in violation of the norms of national law implementing the principles set forth in Art. 5 and 6 of the Convention. Recommendation CM/Rec(2012)3 of the Committee of Ministers to Member States on the Protection of Human Rights - Regarding Search Engines - details the provisions of Convention No. 108. In para. 8 point 2 of the Annex to Recommendation CM/Rec(2012)3 states that, by combining different types of information about a person, search engines can create an image of a person that does not necessarily correspond to reality. The combination of search results poses a much higher risk than if the data associated with that person were scattered across the Internet. Even forgotten personal data can be found using a search engine. As an element of media literacy, users should be informed of their right to have incorrect or excessively personal data removed from the original web pages, with due respect for the right to freedom of expression. Search engines must promptly respond to user requests to delete their data, copies of web pages, cache, etc.

The current wording allows us to reduce the reasons for deletion to two: the storage or processing of data is carried out in violation of legal grounds (general provisions or without the consent of the data subject) or the data no longer meet the requirements of completeness and reliability [6]. In general, the normative right to be forgotten is interpreted in a narrow sense as part of the right to delete personal data in the Internet environment. In addition, court practice has been formed on this issue in the EU. It is worth mentioning the so-called "Google Spain case" [7]. According to the decision of the European Court of Justice in 2014, any citizen can “in certain cases” request the removal of references to documents that do not correspond to reality or contain outdated information from the search results made under his name.

To do this, a citizen must submit a request to a search engine (Google, Yahoo, Bing or any other), and the latter is obliged to find out the validity of the request. The highest court of the EU issued its decision in connection with the proceedings in Spain of the case of Mario Costeja González against the popular newspaper La Vanguardia and the search engine Google. In 2010, a citizen discovered that a Google search for his first and last name led to a newspaper website with an ad from 1998 that mentioned an auction for his debts and the foreclosure of his home. So he turned to Spain's data protection agency and demanded that the publisher of the newspaper remove the information because it violated his right to privacy and lost relevance, and Google – hid his personal data from search results and removed the link to the newspaper's website. The court found it legal to place the auction announcement on the newspaper's website, but required Google to comply with the plaintiff's request.

However, Google resisted and challenged this decision in a Spanish court. In 2011, a Spanish court referred the case, which consolidated almost 180 similar proceedings, to the European Court of Justice. The court considered the collection and storage of information on the Internet as the processing of such information by search engines. So, the search engine must control this entire process. If we talk about the legislation of foreign countries, the EU member states are guided

by the above-mentioned Directive 95/46/EC when determining the right to be forgotten. Yes, the UK Data Protection Act gives individuals the right to access their personal information. A person has the right to control data and receive information about himself, in particular, to know what information has been collected, for what purpose it is processed, who is the recipient and under what conditions the information can be disclosed. In most cases, a response to an individual's request must be provided within 40 calendar days from the moment the request is received. This Act also defines the principle of fair and legal processing of personal data. This principle requires that the subject of personal data be notified of the occurrence of disclosure of his personal data to third parties abroad.

The subject of personal data may request additional information (special information notice). At the same time, the subject of personal data has the right to request changes and deletion of irrelevant or contradictory personal data, and also has the right to withdraw his consent to the processing of personal data, in particular to the storage of personal data. According to § 20 of the German Data Protection Act, personal data must be corrected at the request of the subject if they are incorrect. Data containing assumptions (forecast data) should be specially marked. Personal data must be deleted at the request of the subject, if their retention is not permitted by law. In Argentina, the ability to change and delete data at the initiative of the subject is covered by the right of "Habeas", which allows a person to access any data about himself contained in a database.

The law provides a comprehensive process for exercising this right, in general, everyone has the right to go to court to access data about themselves stored in public or private databases and to request the deletion, updating and updating of the data. If necessary, the data may be corrected if it becomes known that they are completely or partially inaccurate or incomplete. The person responsible for maintaining the database must replace the data. The data must be stored in such a way that the owner (subject) of the data can exercise their right to access and destroy the data as soon as they cease to be necessary or relevant in accordance with the purposes for which they were collected. In China, in accordance with part 8 of the Decision of the Standing Committee of the National People's Congress "On Strengthening the Protection of Network Information", among the rights of the subject of personal data, it is determined that in situations where citizens find out that their personal identification information has been disclosed, information, regarding their private life, is disseminated or any other information violates their legitimate right and interest or they are sent commercial electronic information (advertisement), they have the right to demand from the communication operator to delete such information and to take the necessary measures to stop the said actions.

In the USA, the laws governing certain areas of activity, for example, finance, medicine, education, stated that in cases defined by law, the data subject has the right to request the change or deletion of data (for example, negative data on credit history). However, there is no general rule on the right to delete or change data in the USA. The Personal Data Act of Singapore in Art. 22 provides that the subject of personal data can request from the operator the correction or deletion of inaccurate or incomplete data. Upon receiving the corresponding request, the operator is obliged, firstly, to fulfill the legal request of the data subject, and secondly, to send to all persons to whom this operator has transferred personal data within a year from the moment of receiving the corresponding request, subject to change or deletion upon request user, relevant information on data modification or deletion.

The person who received such a message from the data operator must take all measures to change or delete personal data. The Law on Personal Data specifically clarifies that these requirements do not apply to cases where it is necessary to change an opinion (position) containing personal data, including an expert or professional opinion. In addition, in Art. 25 of the Personal Data Act of Singapore establishes that the operator must delete personal data or anonymize them if the purposes for which the personal data were provided have become irrelevant, in particular, if the data subject has revoked ("withdrawn") his consent to the processing of personal data or the legal or business grounds for processing personal data have changed.

In Japan, data subjects have general rights to the correct processing and storage of their

personal information, including the right to request the controller and further rectification or deletion of the data, if this does not result in excessive costs for the controller or if the data subject's rights are not may be protected by him in another way. In Brazil, the right to correct and delete your personal data is expressly provided for in the Credit Information Act. In other laws of Brazil, where personal data is regulated in a certain way, similar requirements are not specifically established.

In the Netherlands, the data subject has the right to ask the operator about the processing he is carrying out, and the latter is obliged to give an answer within four weeks. The data subject may also request the rectification, deletion, replacement or blocking of incorrect data if he considers them to be incorrect in relation to the stated purposes of the processing or factually erroneous. Also, within four weeks, the subject must receive an answer about the method and scope of the data being corrected, and about the measures taken for this. If the data is recorded on a medium and cannot be changed, then the responsible person (operator) must inform the data subject about it. This legal provision and the 2014 Google Spain case of the EU Court, which substantiated the right to demand the removal of one's personal data (name) from search results, were reflected in Dutch judicial practice [8]. In the case of Arthur van M. (initials in the Netherlands refer to persons who are under investigation), the circumstances are as follows: on television, in a crime program, a recording from a hidden camera was broadcast on which Arthur van M. discussed the plan of the crime.

The recording was then used as evidence in his prosecution. The case received widespread publicity, and Arthur van M. demanded that a number of URLs related to it be removed from search engines. The court refused the plaintiff. In another case, it was about a partner from the firm KPMG, who, while the construction contractor was building his house, lived in the neighboring one, which was expanded due to three modular houses. His subsequent legal dispute with a contractor also caused a stir, and one newspaper printed an article about "a top manager from KPMG who lives in a utility room." The partner asked Google to remove information about the article from search results, first voluntarily and then through court, but was also refused because "the right to remove information is an exception to the right to freedom of information." In the end, Dutch scholars came to the conclusion that the courts of their country show a more balanced approach to the problem of the public right to information and the private right to privacy than the EU Court. Therefore, the development of the concept of "the right to be forgotten" shows that initially it was a constituent part of the right to the inviolability of private life and meant the right to correct or remove factually (unreliable, irrelevant) or legally (obtained in violation of laws) incorrect information from publicly available sources (primarily with mass media). When information began to be duplicated in the digital space, the right to be forgotten actually narrowed to the right to digital forgetting, given its application in the field of telecommunications and information technology. That is why deletion currently involves two components: 1) the right to delete data from a physical medium or the source site (destruction of data); 2) the right to remove links to such data in search engines.

Summary. Thus, it can be stated that in addition to the direct development of various forms of digital interaction, thanks to the fundamentally new quality and scale of electronic communications, more and more situations are appearing in our everyday life that are related to the electronic flow of information and therefore can be considered ambiguous in the light of the possibility of attracting legal protection. At the same time, the digital transformation of society involves not only the technological development itself, but also the general improvement of social and legal obligations, complicating the process of realizing human rights and their protection in case of violation, challenge or non-recognition. Modern challenges that everyone faces on the Internet lead to the formation of information culture of the next level, in which new communicative practices appear, and old ones are modified in such a way as to correspond as much as possible to the updated realities of today. In this context, the right to be forgotten plays the role of a kind of tuning fork for compliance of the declared standards in the field of human rights protection with the real possibilities of the state to ensure their implementation in the online space. In the conditions of the spread of information technologies, the formation and development of the information society, the role and meaning of information as a social good and a legal phenomenon is being rethought.

Bibliography:

1. Mantelero A. The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten'. *Computer Law & Security Review*. June 2013. Vol. 29. Iss. 3. P. 229–231.

2. 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) // COM/2012/011 final – 2012/0011 (COD). URL: http://eur-lex.europa.eu/legal-content/en/ALL/ ?uri=CELEX:52012PC0011.

3. The right to be forgotten – between expectations and practice. URL: https:// www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/the-right-to-be- forgotten/at_download/fullReport.

4. Privacy and fundamental right between economics and practice. URL: http://enisa.europa.eu/media/press-releases/privacy-a-ftmdamental-right-between-economics-and-practice.

5. Identity and trust library deliverables privacy considerations of online behawioural tracking. URL: https://enisa.europa.eu/activities/identity-and-trust/library/deliverables/privacy-considerations-of-online-behavioural tracking/at_download/ fullReport.

6. Mantelero A. The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten'. *Computer Law & Security Review*. June 2013. Vol. 29. Iss. 3. P. 233.

7. Case C-131/12 Google Spain SLand Google Inc. v Agenda Espanola de Proteccibn de Datos (AEPD) and Mario Costeja Gonzdlez (2014) // URL: http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30ddaddc0876251740c6aeeed8760d3e60ec.e34KaxiLc3qMb40Rch0SaxuRaxb0?text=&docid=163494&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part= 1 &cid=887626.

8. Kulk S., Zuiderveen Borgesius F. Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain. *European Data Protection Law Review*. 2015. Vol. 1. Iss. 2. P. 113–124. URL: http://edpl.lexxion.eu/article/EDPL/2015/2/5.