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The EU Proposal for a General Data Protection Regulation and the roots of the 'right to be forgotten'

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Abstract. The EU Proposal for a General Data Protection Regulation has caused a wide debate between lawyers and legal scholars and many opinions have been voiced on the issue of the right to be forgotten. In order to analyse the relevance of the new rule provided by Article 17 of the Proposal, this paper considers the original idea of the right to be forgotten, pre-existing in both European and U.S. legal frameworks. This article focuses on the new provisions of Article 17 of the EU Proposal for a General Data Protection Regulation and evaluates its effects on court decisions. The author assumes that the new provisions do not seem to represent a revolutionary change to the existing rules with regard to the right granted to the individual, but instead have an impact on the extension of the protection of the information disseminated on-line.

Keywords: Right to be forgotten, General Data Protection Regulation, Directive 95/46/EC

1. The right to be forgotten in Europe

The European notion of the right to be forgotten draws its origins from *droit à l'oubli*, recognized by different decisions in France and in other European countries.[1] It is

[1] *See* TGI Seine, 14 octobre 1965, *J.C.P.* 1966, II.14482, n. Lyon-Caen; TGI Paris, 20 avril 1983, J.C.P. 1985, II.20434, obs. Lindon; TGI Paris, 25 mars 1987, *Dalloz Sirey*, 1988, p. 198; TGI Paris, 4 novembre 1987, *Dalloz Sirey*, 1988, p. 199; *see also* CA Versailles, 14 sept. 1989, *Gaz. Pal.*, 1990, 1, somm. p. 123; but see Cass. 1re civ., 20 nov. 1990, *J.C.P.* G, 1992, II, p. 21908, note Ravanas. See also COSTAZ, *Le droit à l'oubli*, *Gaz. Pal.* 1995, 2, p. 961 *et seqq.*, at p. 961-963; LETTERON, *Le droit à l'oubli*, *Rev. droit public. science politique* 1996, pp. 385 *et seqq.*; RIGAUX, *La protection de la vie privée et des autres biens de la personnalité*, Bruxelles-Paris, 1990, at p. 463. *See also*, *e.g.*, the following cases decided by Italian courts: Trib. Roma, 20 November 1996, in *Giust. civ.*, 1997, I, pp. 1979 sqq.; Pret. Chieri, 3 January 1990, *Dir. informaz.*

important to underline that in Europe the legal protection of the events of an individual life, both private and public, developed in autonomy, and were not influenced by the North-American experience.[2] Nonetheless, in both Europe and North-America there exists a causal relationship between the development of mass media and the importance of ensuring a certain degree of protection of the privacy of personal life.

The media affects private life in two different ways: by revealing events or information that should remain private, and thus violating the individual right to privacy, or by publicising events whose social or political relevance prevails over their private nature. In the second case, the limitation to the right to privacy is conditioned by time: i.e. once the period of time in which interest in a specific private event is justified by its impact on the community has elapsed, the individual has the right to regain his anonymous life and privacy. From this perspective, the *droit à l'oubli* represents a limit to media activities, forbidding press and TV to make public, once again, aspects of personal life (in many cases with a negative connotation) that were the object of public interest in the past.

This conception of the right to be forgotten is based on the fundamental the need of an individual to determine the development of his life in an autonomous way, without being perpetually or periodically stigmatized as a consequence of a specific action performed in the past, especially when these events occurred many years ago and do not have any relationship with the contemporary context. The *droit à l'oubli* satisfies a specific need of human beings and this has facilitated the diffusion of the concept and the protection of the related right in different legal contexts. Finally, the progressive evolution and diffusion of mass media and their increasing power have affirmed the relevance of the right to be forgotten and justified its protection up to the present and its endorsement in Articles 12(b) and 14(a) of Directive 95/46/CE.

2. The right to be forgotten in the U.S.

Despite the historical movement towards a broader interpretation of the freedom of expression,[3] the right to be forgotten should not be considered a European concept or an

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e informat., 1990, pp. 523 *et sqq*.; Pret. Roma, 25 January 1979, in *Dir. aut.*, 1979, pp. 69 *et sqq*., Pret. Roma, 7 November 1986, *Dir. informaz. e informat.*, 1987, pp. 671 *et sqq*. *See also* MANTELERO, *Il costo della privacy tra valore della persona e ragione d'impresa*, Milano, 2007, at p. 14 *et sqq.*; BESSONE-GIACOBBE (a cura di), *Il diritto alla riservatezza in Italia ed in Francia. Due esperienze a confronto*, Padova, 1988; DOGLIOTTI, *Il diritto alla riservatezza in Italia e in Francia: orientamenti dottrinali e giurisprudenziali*, *Dir. informaz. e informat.*, 1985, pp. 533 *et sqq*; CENDON, *Profili della tutela della vita privata in Francia*, *Riv. dir. civ.*, 1982, I, pp. 76 *et sqq.*; GAMBARO, *Falsa luce agli occhi del pubblico (False Light in the public eye)*, *Riv. dir. civ.*, 1981, I, pp. 84 *et sqq*.

[2]*See* Trib. civ. Seine, 16 juin 1858, in *D.P.*, 1858.3.62. *See also* HAUCH, *Protecting Private Facts in France: the Warren & Brandeis Torts is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1227 (1994); RIGAUX, *La protection de la vie privée et des autres biens de la personnalité*, Bruxelles-Paris, 1990; CONTAMINE-RAYNAUD, *Le secret de la vie privée*, in Y. LOUSSOUARN, P. LAGARDE (sous la direction de), *L'information en droit privé*, Paris, 1978, pp. 403 *et sqq.*; LINDON, *Dictionnaire juridique des droit de la personnalité*, Paris, 1974, at p. 10 *et sqq.*

unknown one in American law,[4] as demonstrated in different occasions in case law concerning the disclosure of truthful but embarrassing private facts[5] starting from two early fundamental cases regarding public figures.[6]

In *Melvin v. Reid,* the plaintiff was an ex-prostitute who had been involved in a murder, but was acquitted. She had subsequently abandoned her former life, assuming a place in respectable society, and had maintained secrecy on her past until the film "The Red Kimono" revealed her story.[7] With a complex argumentation based on the "right to pursue and obtain happiness", the court argued that this right "by its very nature includes the right to live free from the unwarranted attack of others upon one's liberty, property, and reputation. Any person living a life of rectitude has that right to happiness which includes a freedom from unnecessary attacks on his character, social standing, or reputation".

In *Sidis v. F-R Publishing Corporation*, the plaintiff was a famous child prodigy[8] who decided in his adulthood to spend his life far from the spotlight. Many years later, an article and some references in The New Yorker described the personal story of Mr

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[3]*See* BARBAS, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171 (2010). Free speech in US law is based on the First Amendment, which provides that "Congress shall make no law... abridging the freedom of speech, or of the press"; *see New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). It is worth pointing out that in many cases the right to privacy does not conflict, but supports freedom of speech, such as with the confidentiality of communications.

[4]*See* ROSEN, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (Feb. 13, 2012), http://www.stanfordlawreview.org/sites/default/files/online/topics/64-SLRO-88.pdf.

[5]*See* PROSSER, *Law of Torts*, 4th ed. 1971, pp. 804 et sqq.; see also ID., *Privacy*, 48 CAL. L. REV. 383, 392-398 (1960). The privacy torts in US law originates from WARREN & BRANDEIS, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), one of the most influential law journal articles ever published. Privacy torts are usually described in four distinct torts: intrusion upon seclusion, public disclosure of private fact, false light and appropriation. This subdivision was made by PROSSER, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) and then substantially adopted in the Restatement (Second) of Tort §652D, which considers public disclosure of private fact when "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". Theoretically this tort has a narrower application than the right to be forgotten, since it regards "invasion of his privacy if the intrusion would be highly offensive to a reasonable person" and not any kind of disclosure of past events; *see* PROSSER, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) ("The public disclosure of private facts, and putting the plaintiff in a false light in the public eye, both concern the interest in reputation, and move into the field occupied by defamation"). However, the European case law concerning the *droit à l'oubli* usually refers to episodes of individual life having a negative characterization and, in this sense, the difference between these two models seem to be less relevant. It is also worth pointing out that the requirement of offensiveness has been introduced by Prosser while the original theoretical definition of Warren and Brandeis did not require it, *see* ZIMMERMAN, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 295 (1983).

[6]Melvin v. Reid, 297 P. 91 (Cal. App. 1931); Sidis v. F-R Publishing Corporation 113 F.2d 806 (2d Cir. 1940), *affirming* 34 F. Supp. 19 (S.D.N.Y. 1938).

[7]In this film her maiden name was used without her knowledge or permission.

[8]At the age of eleven, Mr Sidis lectured to distinguished mathematicians on the subject of Four-Dimensional Bodies and when he was sixteen he graduated from Harvard College.

Sidis, from his initial fame to his current ordinary life and work in an office. In this case the right to be forgotten only apparently is not recognized, as it affirms that "the misfortunes and frailties of neighbours and "public figures" are subjects of considerable interest and discussion to the rest of the population". The decision actually contributes to defining the boundaries of this right: it is not absolute and does not allow the generic deletion of information. It represents a balance between the individual right to privacy and the right to be informed of aspects of public interest.[9] From this perspective the same decision underlines that, although Sidis had cloaked himself in obscurity, his subsequent history "was still a matter of public concern", because of the public's legitimate interest in knowing how Sidis' talents developed.

While ordinarily protection against the invasion of privacy is directed toward the prevention of unwarranted publication of intimate details of one's private life, some matters are considered highly newsworthy for the general public thus the press is allowed to report them as news.[10] The aspects concerning the current relevance of interest and the social value of published facts[11] are characterizing elements of the judicial construction of the right to be forgotten and they assume a relevant role in the balance between the opposing interests[12] as well as in other jurisdictions.[13] In this sense the Restatement (Second) of Torts summarizes the case law position: "The fact that there has been a lapse of time, even of considerable length, since the event that has made the plaintiff a public figure, does not of itself defeat the authority to give him publicity or to renew publicity when it has formerly been given. Past events and activities may still be of legitimate interest to the public, and a narrative reviving recollection of what has happened even many years ago may be both interesting and

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[9] *See* WARREN & BRANDEIS, *The Right to Privacy*, 4 HARV. L. REV. 193, 214-216 (1890).

[10] *See Warner v. Times-Mirror Co.* 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961) (involving the invasion of the right to privacy of a public personage).

[11] Courts had set forth criteria for determining whether an incident is newsworthy, considering the following aspects: the social value of the facts published, the depth of the article's intrusion into ostensibly private affairs, and the extent to which the party voluntarily acceded to a position of public notoriety. *See Kapellas v. Kofman* 1 Cal. 3d 20 (1969) (involving the invasion of the privacy of the relatives of a candidate for public office); *Briscoe v. Reader's Digest Association, Inc.* 4 Cal. 3d 529 (1971); *Diaz v. Oakland Tribune, Inc.* 139 Cal. App. 3d 118 (1983) (involving the publication on a newspaper of some information concerning a sex-change operation made by a student elected student body president of a college). *See also* SOLOVE, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967, 1001 (2003).

[12] *See Diaz v. Oakland Tribune*, *supra* at fn. 13; *Briscoe v. Reader's Digest Association, Inc.*, *supra* at fn. 10, ("The right to know and the right to have others not know are, simplistically considered, irreconcilable. But the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy. The goals sought by each may be achieved with a minimum of intrusion upon the other."). See also SOLOVE, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967, 977-1000 (2003), on the balancing position between free speech and privacy; the author also expressed criticisms against the different "absolutist" approach that does not admit limits to the use of information constituting speech.

[13] *See, e.g.*, the following cases decided by Italian courts: Trib. Roma, 25 May 1985, in *Dir. aut.*, 1986, pp. 184 sqq.; Trib. Roma, 8 November 1996, in *Giust. civ.*, 1997, I, pp. 1979 sqq.; Pret. Roma, 25 January 1979, *supra* at fn. 3. See also, on the Quebec case law, TRUDEL, *L'oubli en tant que droit et obligation dans les systèmes juridiques civilistes*, http://www.chairelrwilson.ca/cours/drt6913/Notes%20oubli3808.pdf.

valuable for purposes of information and education. Such a lapse of time is, however, a factor to be considered, with other facts, in determining whether the publicity goes to unreasonable lengths in revealing facts about one who has resumed the private, lawful and unexciting life led by the great bulk of the community".[14]

A more precise definition of the limits to the freedom of expression with regard to former events of an individual's life can be found in *Briscoe v. Reader's Digest Association, Inc.*[15] The court distinguished between cases in which, by reason of the nature of the facts ("so unique as to capture the imagination of all"), an individual whose name is fixed in the public's memory "never becomes an anonymous member of the community again" and the different cases in which "identification will no longer serve to bring forth witnesses or obtain succour for victims. Unless the individual has reattracted the public eye to himself in some independent fashion, the only public 'interest' that would usually be served is that of curiosity".[16]

In many cases courts have adopted a wide interpretation of legitimate public concern,[17] especially with regard to the information contained in public records,[18] and have recognized a broad interpretation of the newsworthiness privilege[19]. But, in spite of this progressive expansion of constitutional protection under the First Amendment[20] and

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[14]*See* Restatement 2d, Torts, § 652D, comment k. See also *Diaz v. Oakland Tribune*, *supra* at fn. 13.

[15]*See Briscoe v. Reader's Digest Association, Inc.*, *supra* at fn. 10 (involving the publication of an account of the plaintiff convicted eleven years earlier).

[16]*See* VOLOKH, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1051, 1090-1093 (2000), which expressed criticism about this decision.

[17]*See Cox Broadcasting Corp. v. Cohn* 420 U.S. 469 (1975) (involving the broadcast of a deceased rape victim's name during a news report); *see also Howard v. Des Moines Register & Tribune Co.* 283 N.W.2d 289 (Iowa 1979) (involving the disclosure in a newspaper of the story of a woman sterilized against her wishes while she was confined in an institution); *Virgil v. Time Inc.* 527 F.2d 1122 (9th Cir. 1975) (involving the publication of private facts of a Californian body surfer); *Uranga v. Federated Publications, Inc.* 67. P.3d 29 (Idaho 2003) (involving the publication of an article containing a photographic representation of a forty-year-old document from a court file accusing a man of homosexual activity). See also Restatement of torts § 867 comment C (1939).

[18]*See* Florida Star v. B.J.F, 491 U.S. 524 (1989).

[19]Criticisms has been expressed by SOLOVE, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967, 992 (2003), when the author observes that "If the interest of the speaker or listener is defined in terms of self-determination and autonomy, the interest of the harmed individual can be conceptualized in similar terms—as an assault on self-determination and autonomy. There is no clear reason why the autonomy of speakers or listeners should prevail over that of the harmed individuals"; *see also* SOLOVE, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 532-533 (2006). See ZIMMERMAN, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 301-303, 350-358 (1983) on the difficulty to define the privilege of newsworthiness.

[20]*See* BARBAS, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171 (2010); GOUNALAKIS, *Privacy and the Media. A Comparative Perspective*, München, 2000, at pp. 25 *et sqq.* and at pp. 48 *et sqq.*; WHITMAN, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L. J. 1151, 1209 (2004); EPSTEIN, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52

the emphasis on the offensiveness of published information[21], we can not consider the right to be forgotten a *corpus alienum* in US law.[22]

3. The recent European case law on the right to be forgotten in the light of the Directive 95/46/EC

In a number of cases, the implementation of Article 12 of the Directive 95/46/EC in the different national legal frameworks around Europe gave a legal base to the *droit à l'oubli* and involved the national data protection authorities in defining the boundaries of this right.

In 2011, in this sense, the French CNIL (Commission nationale Informatique et Libertés) ruled on a litigation regarding the association named LEXEEK, which made judiciary documents available to the general public without removing names and other private data. The CNIL ordered the association to erase the name and address of the parties or witnesses at trial, considering such a practice to impinge on the right to privacy and to be forgotten ("pratique attentatoire au respect de la vie privée des personnes et au droit à l'oubli numérique")

More recently a Spanish case (*Mario Costeja Gonzalez v. La Vanguardia, Google España and Google Inc*) decided by the national Data Protection Authority has assumed a significant relevance in the light of its possible future wider implications on the interpretation of the Directive 95/46/EC, as it has been referred to the European Court of Justice.

The original case was decided by the Spanish Data Protection Authority in 2010 and concerned a claim based on the right to be forgotten with regard to some information which appeared in a Spanish newspaper and was made searchable on-line by Google. The DPA issued a resolution against Google Spain SL and Google Inc "urging the agency to take steps to remove its index data and preclude future access to the same". This decision was appealed by Google Inc and Google Spain. In appeal, the court raised some prejudicial questions to the European Court of Justice regarding these topics: the application of national law on data protection to a non-EU company providing search

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STANFORD LAW REVIEW 1003, 1015-1017, 1047 (2000); Hauch, *Protecting Private Facts in France: the Warren & Brandeis Torts is Alive and Well and Flourishing in Paris*, 68 TUL. L. REV. 1219, 1227 (1994); WACKS, *Personal Information. Privacy and the Law*, 154-177 (1989); ZIMMERMANN, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 326-341, 365 (1983); PROSSER, *Privacy*, 48 CAL. L. REV. 383, 410-419 (1960). Different North-American legal scholars have expressed criticism against limits to disclosure of true personal information: *see* VOLOKH, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1051, 1090-95 (2000); *but see* SCHWARTZ, *Eugene Volokh's First Amendment Jurisprudence*, 52 STAN. L. REV. 1559 (2000). *See also* EMERSON, *The Right of Privacy and Freedom of the Press*, 14 HARV. C.R.-C.L. L. REV. 329, 346-348, 359-360 (1979); EPSTEIN, *Privacy, Property Rights, and Misrepresentations*, 12 GA. L. REV. 455, 472-473 (1978).

[21] *See* Restatement 2d, Torts, § 652D.

[22] *See*, *inter alia*, SOLOVE, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L. J. 967, 1053-1063 (2003) and SOLOVE, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet*, New Haven-London, 2007.

engine services, the role assumed by these non-EU companies in data processing, the protection of the right to be forgotten.

Leaving aside the first two aspects, even if they assume a considerable importance in defining the legal obligations of key intermediaries such as search engines, there is a high interest in the imminent decision of the European Court of Justice (Case C-131/12) regarding the limits of the 'derecho al olvido' (the right to be forgotten – the right to be forgotten e oral hearing on 26 February 2013; opinion of the advocate general on 25 June 2013). Specifically, the Spanish judge referred to the Court of Justice the following question:

> *"must it be considered that the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for by Article 14(a), of Directive 95/46/EC, extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties' web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion, even though the information in question has been lawfully published by third parties?".*

The same questions concerning the right to be forgotten have arisen in different countries in Europe, and also outside, and demonstrate the need to define a clear balance between information and oblivion and between public interest and personal rights. However, at the same time, with regard to the dispositions of the Directive 95/46/EC and even more to the new EU Proposal for a General Data Protection, it is necessary to clarify the relationship between the notion of *droit à l'oubli*, as defined in case law regarding media activities, and the wider and general notion of the right to erasure.

4. The EU Proposal for a General Data Protection Regulation

Having thus defined the European and U.S. case law frameworks on the right to be forgotten, we should now consider whether the EU Directive 95/46/EC and the proposal of the new general regulation on data protection are coherent with the opinions expressed by the courts and the legal scholars.

Article 6 of Directive 95/46/EC stipulates that personal data must only be collected for specified purposes and "not further processed in a way incompatible with those purposes"; under the same article, personal data should be kept in a form which permits the identification of data subjects "for no longer than is necessary for the purposes for which the data were collected or for which they are further processed".[23] Both these rules limit an indiscriminate and endless collection of the data and are focused on the different parameters concerning the length of the time of retention and the processing purposes, which in the media context should be adequately evaluated.

[23]Both the rules admit specific exceptions for historical, statistical or scientific purposes, giving adequate safeguards.

The article does not define the balance between the maintenance and the erasure of the data, which should be determined by the nature of the specific data collection. In the field of media activities this balance necessarily derives from the legal boundaries defined by the courts in the case law concerning the right to be forgotten. From this perspective, when the dissemination of individual facts is relative to past events that have no relationship with the present lifestyle or activities of the data subject, the dissemination has to be considered an unnecessarily long processing of data and therefore constitutes an incompatible way of managing the data in relation to the initial purposes.[24]

The legal provisions, as they appear in the following Article 12 of Directive 95/46/EC, do not only consider the relationship between memory and oblivion, but also have a wider range of applications concerning the right to obtain the erasure "of data the processing of which does not comply with the provisions of this Directive" from the controller.[25] Erasure is not strictly related to the dynamics of media communication, but with a more general activity of data processing realized without the consent of the data subject or without providing adequate information for him, or out of the legal framework defined by data protection laws. From this perspective, the key-role, however, is assumed by the length of time of the data processing and its purposes.

The new provisions of Article 17 of the EU Proposal for a General Data Protection Regulation do not seem to represent a revolutionary change to the existing rules with regard to protected interests, since the central prescription recognizes "the right to obtain from the controller the erasure of personal data", in a manner analogous to the above-mentioned Article 12 of the Directive 95/46/CE. As stated in the Explanatory memorandum of the EU Proposal, Article 17 is more analytical in defining the right, only mentioned in Directive 95/46/EC, by providing "the conditions of the right to be forgotten". From this perspective, this Article defines the different situations in which this right can be invoked,[26] but the various cases are still within the two main hypotheses already defined, albeit more rigidly, by the Directive 95/46/EC in force[27]: erasure due to data retention in contrast with the law or due to the original or supervening lack of the reasons that legitimate the processing of information.

This brief analysis shows that the innovative aspect of the proposed rules does not regard the right granted to the individual, but the different rules concerning the extension of the protection offered in relation to the new electronic ways of disseminating information.[28] As assumed in the Explanatory memorandum, the

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[24] *See* Article 6 of the Directive 95/46/EC.

[25] See BEZANSON, *The right to Privacy Revisited: Privacy, News, and Social Change*, 1890-1990, 80 CAL. L. REV. 1133, 1150-1151, 1168 (1992), on the new paradigm of the right to privacy in the modern age and the relevance assumed by the individual choice and control over data.

[26] This article specifically identifies the following different cases in which the right to be forgotten will be admitted: the data are no longer necessary in relation to the purposes, the data subject withdraws consent, the storage period has expired, the processing is illegal or does not comply with the law, the data subject exercises the right to object. See also Recital (53) in the preamble to the EU Proposal.

[27] *See* respectively Article 6(1), 7(a), 12 (b), 14 of the Directive 95/46/EC. With regard to the last Article 14, the proposed new definition of the right to object seems to offer a wider protection, *see* Article 19 of the EU Proposal.

[28] *See* Recital (54) in the preamble to the EU Proposal.

Regulation will oblige the controller that made the personal data public "to inform third parties on the data subject's request to erase any links to, or copy or replication of that personal data". In this sense Article 13 of the EU proposal states that the controller shall communicate any erasure, or rectification, "to each recipient to whom the data have been disclosed" and is released from that obligation only by proving that this communication is impossible or involves a disproportionate amount of effort. The following Article 17 defines more accurate prescriptions in this regard: where the controller has made personal data public, it shall take "all reasonable steps, including technical measures […] to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data" and the controller shall be considered responsible for third party publication of personal data, carried out under its authorization. The controller is also required to act without delay and to implement "mechanisms to ensure that the time limits established for the erasure of personal data and/or for a periodic review of the need for the storage of the data are observed".

As we await the approval of these new rules and for the following delegated acts that will probably be adopted by the Commission in order to specify the conditions for deleting links, copies or replications of personal data from publicly available communication services,[29] we should observe that the notion of the right to be forgotten adopted by the Proposal is different from the concept defined by the case law in Europe and the U.S. There is an overlapping of concepts defining the right to be forgotten as the right of the data subject to withdraw their consent to data processing. However, in cases concerning the droit à l'oubli a question regarding withdrawal does not exist, since, in relation to the original disclosure of the news, the consent is not rendered relevant by the existence of an overriding public interest in the information. The different representation of the right to be forgotten as the right to have personal data completely removed is consistent with the notion of droit à l'oubli, but in this case it has a wider scope, because the erasure of the data is not only related to the loss of interest in past events, but also to other situations (e.g. wrongful or illicit data processing) that do not concern the balance between media and individual life.

Finally, Article 17 of the proposed Regulation does not consider the right to be forgotten from the media perspective, as does the *droit à l'oubli*. The article provides an explicit exception with regard to this aspect declaring that the right to be forgotten does not impact on freedom of expression and, in accordance with Article 80, Member States shall provide for exemptions or derogations "for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression in order to reconcile the right to the protection of personal data with the rules governing freedom of expression".[30]

In conclusion, in spite of the specific disposition concerning the right to be forgotten, with regard to the traditional context in which the *droit à l'oubli* is evoked – involving newspapers and other forms of journalism – the balance between oblivion and information is still undetermined and will only be reasonably defined if the historical evolution and conceptualization of the *droit à l'oubli* is considered. We should also underline that the notion of "journalistic purposes" adopted by the proposal is broad and not strictly limited to media activities. This notion includes any activities connected to

[29] *See* Article 17 (9) of the EU Proposal.

[30] *See also* Recital (121) in the preamble to the EU Proposal.

"the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them" by the media, but also by different entities acting for both profit and non-profit making purposes. Also individual non-profit activities, such as managing a blog, seem to fall outside the scope of the Regulation, in accordance with Article 2 (2) (d) which provides that the regulation does not apply to the processing of personal data "by a natural person without any gainful interest in the course of its own exclusively personal or household activity".[31]

From this perspective, the technical solutions useful for the erasure of any links to, or copy or replication of personal data will be adopted principally by non-media companies, active in the sector of search engines, marketing or database services. This onus does not seem excessive in the present phase of the information age, where few companies are managing an enormous amount of data and spreading or organizing it in order to make it accessible online: the balance between the individual right to be forgotten and the "right to make profits" cannot be found by requiring the data subjects to have an active role in searching for any information concerning them, when this information has been spread on-line as a result of the decision of the controller to make the personal data public. At the same time the EU proposal does not impose a general obligation to erase data managed by third parties, but requires only that third parties be informed that a data subject has requested them to delete any links or copy or replication and then further restricts this obligation by introducing the notion of proportionality when it requires they take all "reasonable" steps to achieve its aim.[32]

5. False perspectives and real problems

We should consider now the criticism levelled by U.S. companies, media and legal scholars against the regulation on the right to be forgotten defined in the EU proposal. From a certain point of view some of the oppositions represent a sort of paradox. On the one hand, big IT companies are trying to promote the idea that sharing information is a social norm and that privacy or oblivion are outdated concepts. On the other hand, the same companies are progressively collecting an enormous amount of data in order to profile individuals and, above all, to extract predictive information with high economic, social, political and strategic value. In a world where it is assumed that no value is attributed to privacy and oblivion, the only ones to gain from this abandonment of old rights are the owners of these platforms or services which have an exclusive and comprehensive view of the entire mass of data.

This phenomenon of great data concentration, also known as big data, regards not only social networks but also other kinds of companies in different sectors characterized by a high level of personal data flow.[33] These are the new "masters of big data" in an

[31]This opinion is also supported by the wording of the proposal, changed from the latest draft version in which this exception for personal was admitted "unless personal data of other natural persons is made accessible to an indefinite number of individuals", that represents the usual condition of the dissemination of information through blogs.

[32]*See* Article 17 (2) of the EU Proposal.

[33]Large amounts of data are also collected in the marketing and distribution sectors and by search engines and intermediaries in information flows.

era in which not everyone has access to all sources of information and not everyone has the knowledge or the instruments to exploit them.

From this perspective, data represents not only money, but also power. This is a predictive power that gives its wielder prior knowledge about the future developments of society, politics and market. This power is clearly undermined by any attempt to reduce the amount of data collected and for this reason the right to be forgotten represents a critical issue, in particular where it is guaranteed as a more general right to erase the data. For this reason, the owners of big data have tried to make it more difficult to change privacy settings, have used technical devices to track users in a persistent way and have thus evoked the end of the privacy era.[34] But this position represents an antinomy because they do not share the information taken from the data and, even though they give little value to privacy and affirm the end of oblivion (describing our life as a time-line), they extract a high value from this data.

In this context, the freedom of self-determination with regard to personal data assumes a fundamental role, but it needs to be protected and improved by the legislator in order to contrast the increasing technical solutions which aim to limit it.

At the same time, this freedom should be balanced with the right to receive information and the exception provided by the EU proposal described above should be evaluated in this sense. Nowadays, the Net is increasingly becoming the collective knowledge, as demonstrated by the way in which our brain memorizes data: recent studies have demonstrated that the large amounts of data available on-line induce people not to memorize the information they have received, but memorize the location in which the information is available. For this reason an indiscriminate right to the erasure of personal data could have negative effects on this collective knowledge.

For the above reasons, the idea of fixing a general time limit for memorization and mandatory erasure[35], as well as recognizing an extensive right to erasure, represent inadequate solutions which were correctly avoided in the Proposal.[36] Similar solutions

[34]Theoretically a society without privacy and without oblivion could also be possible or desirable: if everyone has the possibility to know everything about the others and every aspect of their past life, probably the overload of information will become the most important limit to privacy invasion. However, in this hypothetical transparent world the asymmetries will not be removed, because those who make high investments in human and technological resources to collect the large amounts of data, will be able to manage big data and extract value from it in an exclusive way.

[35]*See* MAYER-SCHÖNBERGER, *Useful Void. The Art of Forgetting in the Age of Ubiquitous Computing*, 17 *et seqq.*, http://www.vmsweb.net/attachments/pdf/Useful_Void.pdf. With regard to the solution proposed, which suggests the use of technical measures (e.g. meta-data) in order to define the time limit for the conservation of all types of data automatically, it seems useful to offer a high level of compliance to the limits of data processing and to operate when specific indications on the length of data retention are provided by the law. This solution does not substantially change the crucial point of the question in the other hypothesis. In many cases, there is no specific indication by the legislator and it is necessary to balance the opposite interest in order to define an appropriate length of time. With regard to these situations any technical solutions necessarily require a previous and fundamental human evaluation of the specific case within the legal framework.

[36]See also a recent decision of the Italian high court (Corte di Cassazione), see Cass. 5 aprile 2012, n. 5525, on the opposite solution of contextualization. Contextualization is useful in order to protect reputation, see ZITTRAIN, *The Future of the Internet And How to Stop It*, New Haven-London, 2008, at p. 229-231, but it seems inadequate in the cases concerning the right to be

undermine the informational value and free-access nature of (a relevant part of) the Net by restricting the access to information to those who can create or use private databases. In this sense, in spite of the existence of the owners of big data and their obstacles, the Internet assumes an important role in the democratic and broad access to information and an adequate protection of the right to be forgotten does not reduce the historical and informative value of the data disseminated in the Net.

Finally, we should consider another aspect characterizing information on-line: namely, the reduced role of the traditional intermediaries of the media sector and the increasing importance of new intermediaries of a different nature. On the one hand, there are few big companies with specific skills in managing information, but without a media culture or background, like the owners of UCG platforms or search engines. On the other hand, there are many individual or small entities that offer their knowledge or ability to discover information and news in order to become opinion leaders or earn a reputation in their social and on-line entourage.

In both cases the historical figure of the journalist[37] is absent. The journalist defines the boundaries of the right of oblivion in specific cases, by his professional ability to distinguish between individual acts that are no longer relevant and facts that are still relevant or related to other present events of public interest.

For this reason in non-professional communication it could become more difficult to protect the right to be forgotten and assure its correct application and, at the same time, risks of under-deterrence and over-deterrence could occur. The increasing number of intermediaries, many with small dimensions, makes it more difficult for individuals to analyse the total amount of data available on-line, in order to find personal information related to them, and to act promptly to exercise their right to be forgotten. On the other hand, big intermediaries could be induced to adopt a defensive policy by accepting all the requests to erase the data in order to avoid litigation. They could adopt a generalized "notice and take down" based on contractual clauses and without an effective assessment of the balance between oblivion and information in the single case.

From this perspective, the complex balance between individual rights, collective knowledge and the right to receive information should not be exclusively entrusted to the inter-subjective interaction or to market dynamics, but requires an active role of the legislator and public authorities in order to guarantee both the respect of the fundamental rights of the individual and freedom of expression.

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forgotten, for two reasons. Firstly, the contextualization represents an effective solution concerning the re-publications of past events in the hypothesis of false light, when the representation of individual life is partial and incomplete, and, at the same time, the person has not objections to a correct and complete description of their life. The dynamic is different when people invoke the right to forgotten: in these cases the subjects involved do not want to disclose any elements of their past, whether positive or negative, complete or incomplete. They simply want to erase their past. For this reason, contextualization, which gives further information and throws light on the past, moves in the opposite direction. Secondly, considering the enormous amount of data managed by many subjects, contextualization can be very onerous, involving high costs, and furthermore, in the case of the information contained in a document, can have a negative impact on the authenticity of the original document.

[37]See BEZANSON, *The right to Privacy Revisited: Privacy, News, and Social Change*, 80 CAL. L. REV. 1133, 1140-1143 (1992), about the effect on the original idea of privacy of the changes in the control of information (and more generally on society) occurred in the lapse of time from 1890 to the 1990s, although in a pre-Internet era.

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