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THE RIGHT TO BE FORGOTTEN: ESTABLISHMENT AND DEVELOPMENT

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The article deals with the main stages of development of the right to be forgotten at the international level. The order of formation and legal regulation of the right to be forgotten is investigated. Special attention is paid to expanding human rights in a world undergoing digital transformation, in particular for the protection of privacy on the Internet. A general conclusion is made concerning the right to be forgotten and its role in solving the problem of protecting the rights of individuals from disseminating incomplete and irrelevant information about them on the digital network. Three separate categories of the right to be forgotten are analyzed: deleting publication by the owner; deleting re-posted content by the content-owner; and deleting publications made by one user about another user. The need to improve the legal regulation of the right to be forgotten is defined. The importance of taking into account the relationship between the right to be forgotten and other human rights, in particular the right to freedom of expression and access to information, is proved. The necessity of developing unified rules of data deletion as well as the insufficiency of regulation of just a part of digital space for ensuring reliable protection of the privacy of users is substantiated. The emphasis is made on the mostly positive public perception of the right to be forgotten and the large number of requests for removal since the launch of the online form in 2014. The validity of some scholars' concerns about possible abuses in deleting information is substantiated. The complexity of the practical realization of the right to oblivion due to the variability of the technological world and the resistance of IT giants is established. It is substantiated that due to the technical impossibility of complete removal of inaccurate information, it is necessary to pay attention not only to legal protection mechanisms, but also to increase the legal awareness of Internet users.

Keywords: digital rights, balance of interests, privacy, freedom of speech, right to information, Internet, digital environment.

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Introduction. The relevance of the research topic is due to the fact that in the era of maximum coverage of the World Wide Web (Internet) formed a powerful digital memory: personal information that has reached the Internet, remains there forever. As Professor W. Mayer-Schoenber of the Oxford Internet Institute rightly points out [13], we have more digital devices today than ever before, so it's harder to keep personal information secret. With the click of a computer mouse, much of the world's knowledge is now accessible. The Internet Society notes that «the Internet is an open area for free speech by people around the world, regardless of geographical location» [1]. In 2019, according to a survey conducted by the recruitment business Careerbuilder [11], 70 % of companies in the United States used social networks to select job candidates, and 48 % checked the activity of employees in social networks. Financial organizations can analyze their clients' profiles on social media before determining whether or not to offer

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loans. But it is undeniable that the technical ability to instantly find millions of terabytes of data also comes at a price. Search engines provide access to different types of information, including true, false, irrelevant, outdated, incomplete, out of context. In addition, such data can be used repeatedly and indefinitely, as well as stored on media without restriction. That is, search engines provide uncontrolled access to information that people may not want to share. For example, old photos or videos of sensitive content, publications about their crimes and offenses in the past. Access to such information on the Internet can have a wide range of consequences for users from problems with obtaining a visa or work to social hostility, isolation. All this indicates the relevance of the following research.

Analysis of recent researches and publications. Various aspects of the right to be forgotten have been the subject of research by certain scholars, including I. V. Spasybo-Fateeva [23], T. P. Popovych [22], P. M. Sukhorolskyi [25]. The implementation of rights on the Internet was also analyzed in the works of these researchers: L. S. Yavorska [20], L. L. Tarasenko [26], R. B. Topolevsky [27]. At the same time, the formation and development (genesis) of the right to forget have not been studied, which indicates the relevance of this article.

The aim of the article. The objectives of the article are to characterize the formation and development of the right to be forgotten on the Internet, to identify gaps in legal regulation, to substantiate the conclusions on improving the legal regulation of the studied relations.

The task of the article is to determine the stages of formation of the right to be forgotten, to characterize them, to analyze foreign experience in the legal regulation of the right to be forgotten and the relevant legal cases, as well as to determine the content of the right to be forgotten.

Results. Human rights activists and scholars from around the world periodically make proposals to expand the scope of human rights protection beyond the currently recognized areas. The catalyst is various factors, including technological change. International organizations are also involved in the «discovery» of new human rights within those already directly recognized in international treaties. Recognition and consolidation of such rights often leads to debate and controversy. That is why the historical process of the emergence of new law, until it reaches «full recognition» as a part of public international law is interesting for legal science. Furthermore, legal instruments for the digital world are still in the early phases of development and debate.

One technique to deal with the problem of people being protected from excessive, outdated information about them on the digital network may be to recognize the right to be forgotten. The right to forget belongs to the generation of «new rights». This is a legitimate opportunity for a person to «control» their past on the Internet and require search engines to remove information that is true but that the person would like to remove due to certain valid circumstances.

The discussion of this concept has been going on since the 70s of the 20th century. In the foreign scientific literature, the right to forget is also mentioned under the following definitions: «the right to erasure»; the right to destroy information (Christopher Kuner, 2015 [10]); the right to non-existence (Sayes Myers, 2014 [14]); the right to information ecology (Victor Mayer-Schönberger, 2011 [12]).

Rhetoric related to the introduction of the idea of a new law can be indispensable for achieving the discourse necessary to assert the existence and recognition of this right. The term «right to be forgotten» is still often criticized by scholars, although it is the most commonly used. Undoubtedly, such a concept may be misleading at first or be

unusual. However, without the mysterious title of the right, the debate probably would not have reached its current scale, which in itself would have meant less protection of the right to privacy on the Internet.

The right to be forgotten has many preconditions in the legislation of different countries, although at first it concerned mostly convicted criminals. The ancestor of the concept is considered to be France. One argument in support is that in 2010, the Charter on the Right to Forget (Le droit à l'oubli) was adopted in that country. According to this document, a convicted offender who has served his term and is rehabilitated has the right to object to the publication of the facts of his conviction and imprisonment [17]. A similar principle exists in the UK. Even in the United States [6], where freedom of speech and the right to information take precedence over the right to privacy, it is forbidden to mention the names of minors in court reports, as this not only hinders the offender's rehabilitation, but also has a harmful impact on adult life.

Some scholars saw the early stages of development as the right to be forgotten as an extension of the right to remove information about convictions in the technological sphere [18]. The right to be forgotten has also developed in relation to the right to protection of personal data and privacy. For example, the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data gave the data subject the right to seek rectification or destruction of data if they were processed in contravention of domestic law implementing the principles set out in the Convention [3]. A similar wording was contained in the Charter of Fundamental Rights of the European Union, namely: the right of the user to access the data collected about him and the right to correct errors in them.

Officially, for the first time, the right to be forgotten was partially enshrined in the European Union Data Protection Directive. However, since this act was developed in 1990, when the Internet did not yet exist in its modern form, and three years before the founding of Google, the Directive could not provide all the details. It aimed to regulate and supervise data controllers and ensure the protection of fundamental rights and freedoms of individuals, including their right to privacy by the data processing system [4].

To replace this directive, on April 14, 2016, the European Parliament ratified the General Data Protection Regulation, which entered into force on May 25, 2018. By introducing the new regulation, the European Union aimed to harmonize the laws on confidentiality, data protection in its twenty-eight Member States and to ensure legal certainty for all European citizens [5]. This type of legislative act as a regulation was also chosen not by chance, as the directive is only a guide for Member States, which will then transpose it into national law. The regulations do not require such a procedure and come into force immediately after adoption.

The new regulation has an extraterritorial effect and applies to all companies that process personal data of EU residents and citizens, regardless of the location of such a company [24]. It does not matter whether such companies have personal data of users. The General Data Protection Regulation introduced the following: formalization of the right to erase information and the right to prohibit profiling, the right to transfer data, fines for violating the confidentiality of data for companies.

Lawyers, search giants and IT companies have different views on legal innovation: Google CEO Eric Schmidt said there were still many open questions, as there was a clash between the right to be forgotten and the right to access information [21]. Professor Jeffrey Rosen emphasizes that the right to be forgotten made Google the main censor in the European Union [9].

Vice-President of the European Commission Viviane Reding, on the other hand, said that the right to be forgotten was one of the conceptual foundations of EU data protection in the digital environment. Users should not face problems when deleting their profiles on social networks. The right to be forgotten also applies to personal data that are no longer needed for the purposes for which they were collected. In addition, all data must be destroyed after the expiration of the agreed storage period.

Also interesting is the opinion expressed by Google's chief privacy adviser Peter Fleischer. He notes that the right to be forgotten usually covered three separate categories of cases, each of which posed increasing threats to freedom of expression. The first category covers the issue of deleting user-distributed content. It is more symbolic and does not cause objections, because most social networks and blogs already provide such an opportunity. Although the consolidation of the right to erasure would be another lever to influence the observance of the declared privacy policy on social networks. Users need to make sure that their photos and other data have been removed from the archives, not just removed from public display.

The second category of cases concerns the removal of re-posted content. For example, a person publishes on his/her own page in the social network a photo with a certain delicate content, after a certain time he/she deletes it. But later, he/she discovers that several of his/her friends have copied and republished images on their own websites (social media profiles). Can a person force a social network to remove a photo from their friends' albums without their consent? Under European law of oblivion, the default answer is almost certainly «yes». Exceptions are the cases where such data are necessary for the exercise of the «right to freedom of expression» or are published solely for journalistic purposes or for artistic as well as literary purposes. Consequently, the social network must decide for itself whether to delete data often in ambiguous cases, especially when the publications concern public figures. According to Fleischer, the third category of removal requests concerns publications made by one user about another user. Will the removal of such publications violate freedom of speech? For the present this question is unanswered.

In practice, freedom of expression and freedom of speech coexist with other rights. It is the responsibility of international organizations, tech giants and search engines to protect all users' rights, not only those that meet economic interest.

Of course, detailed verification and consideration of removal requests, deindexing require additional costs for companies. Restricting the use of users' personal data can significantly push American and European technology companies away from Chinese ones in areas such as artificial intelligence. As a result, many technology corporations will lobby for «weak» privacy rules.

The world community began to actively discuss the right to be forgotten in 2014, in connection with the decision of the European Court of Justice in the case of Google Spain SL, Google Inc. V Agencia Española de Protección de Datos, Mario Costeja González. The case began in 2010 when Spanish citizen Mario Costeha Gonzalez filed a complaint with the Spanish Data Protection Agency against the publishers of the daily newspaper La Vanguardia Ediciones SL and Google Spain SL and Google Inc. The complaint was based on the fact that when searching for his name in the Google search engine, a link to two pages of the Catalan newspaper La Vanguardia (1998 issue) was displayed. The article revealed his personal data related to the process of seizing property and selling a mortgaged house at auction. The Spaniard stressed that the circumstances due to which he was forced to lose his property remained in the past, and the seizure of property was lifted, so the reference to this event was then completely irrelevant.

M. Gonzalez appealed to the National Data Protection Agency of Spain with two requests: removal or anonymization or concealment of Google Inc. and Google Spain its personal information related to the incident from search results. The first complaint was rejected because the publication in the newspaper was carried out in accordance with the law. Google Inc. and its subsidiary Google Spain, upheld the complaint as the search engines were subject to the Spanish «Organic Law on personal data protection» № 15/1999 [2].

Google Inc. and Google Spain, in turn, had filed lawsuits to overturn the Spanish National Data Protection Agency's decision with the Spanish Supreme Court. The Court decided to stay the proceedings and to refer a number of questions to the Court of Justice of the European Union regarding the proper implementation of the Directive and the extraterritorial protection of personal data:

– Does Article 4 (1) (a) of the Data Protection Directive apply to a foreign search company with an affiliate or subsidiary that targets EU citizens and processes their personal data;

– Can an individual user request the search engine to remove their personal data from public access;

– Whether the temporary storage of information indexed by search engines on the Internet should be considered as the use of equipment under Article 4 (1) (c) of the Data Protection Directive, if so, whether the link was considered available when the company refused to disclose the site; where he kept these indices, citing competition motives [8].

The search engine argued [7] that its activities could not be considered as data processing because it dealt with all information on the Internet without distinguishing between personal data and other information. Google also stressed that in accordance with the principle of proportionality, any request to remove information should be addressed to the website, the publisher of the newspaper, as only these entities can assess the legality of the publication. The user's wishes are not enough to delete information. In addition, the Internet giant pointed out that forcing a search engine operator to remove information published on the Internet from its indexes would jeopardize the fundamental rights of website publishers and other Internet users.

The court disagreed with this argument and noted the following in its decision. Google is involved in the processing of personal data because the search engine collects data that it subsequently «records» and «organizes» as part of its indexing programs, "stores" it on its servers and makes it available in the form of lists of search results. Search engines have the right to process personal data when necessary to ensure the legitimate interests of the data owner or third parties. However, this right is not absolute. It may be limited when it is contrary to the interests or fundamental rights of the data subject, in particular his or her right to confidentiality. The economic interests of the search engine are not enough to limit the right to privacy. Google Spain is an affiliate of Google Inc., and therefore Google Inc. falls under the EU Directive [8]. Under certain conditions, individuals have the right to submit requests to remove links that contain personal data about them. However, search engines may refuse if such information is not inaccurate, inappropriate or excessive for data processing purposes. The analysis of the possibility of removing also takes into account who made the request, the role of the user in political life, and other characteristics that affect the public interest in accessing such data.

In its ruling, the Court of Justice emphasized the need to balance the right to confidentiality and data protection of the data subject with the general interests of the search engine operator and the public in accessing information. Due to the prevalence of Internet access, search engines have significantly affected the right to privacy and

protection of personal data. The court ruled that in the present case, due to the above-mentioned circumstances, the data subject's rights outweigh the economic interests of the search engine operator and the general interests of Internet users in freedom of access to information. A search engine operator who is considered a «controller» is obliged to delete data if this violates the data subject's right to privacy.

Thus, the ruling of the European Court of Justice sets a precedent for the application of the right to be forgotten, according to which Google must delete personal data at the request. The Spaniard Costea Gonzalez – intentionally or unintentionally – has helped create a law that will play an important role in the digital age. Many key points of this decision can be further enshrined in the General Data Protection Regulation.

After losing the case, Google was forced to launch a special online form to request the removal of users' private information in order to minimize lawsuits. A so-called interest balance test has been developed, ie standardized criteria by which the controller weighs the interest (public or private) when processing a removal request.

It is clear that search engines follow these guidelines:

1. If the right to privacy and the rights of the search engine in general are equally important, the right to confidentiality shall prevail.

2. Factors to consider in the balancing test are the legitimacy of the interest, the potential for adverse effects on the data subject (eg reputation damage, discrimination or defamation) and emotional influences (eg irritability, fear and anxiety), public interest in given information.

3. Analyzing test results, search engines may suggest softer measures, such as pseudonymization and other anonymization techniques.

According to some experts, the right to be forgotten was well received by the public. This is evidenced by the number of queries that search services receive each year. In particular, according to a report by Google from their launch in May 2014 to 2018, the company received more than 2.4 million requests to remove URLs from its search engine [19]. Among the reasons for removal, the most popular is obsolescence, irrelevance of personal information. About a third of the removal requests concerned data on social media. Remolina Angarita, professor at the University of Los Angeles, rightly points out that the right to forget helps people to change their lives more easily, without being forever haunted by the specter of negative information about their past lives [15].

However, some concerns remain. Critics point out that the concept of extracting information that negatively affects a person's reputation at will is contrary to freedom of speech and the public's right to know.

How realistic it is to develop mechanisms for filtering and analyzing queries to avoid abuse. It is also worrying that the right to forget can be used not as a means of protecting the user on the Internet, but as a way to control the digital space in totalitarian regimes. This is foreshadowed by data from Google's 2020 report. In the first half of 2020, Russia tops the ranking of countries with the most requests for removal. Courts and other executive bodies of the Russian government sent 12,688 applications to Google. The second place in the ranking is occupied by South Korea [16]. The analysis of the origin and gradual consolidation of the right to forget allows us to conclude that the right to be forgotten was formed in almost perfect accordance with the scientific doctrine of "new human rights" – quickly, with much debate, related to other rights (privacy, the right to forgiveness). In addition, the emergence of this right is a natural need. As digital reality expands, so do human rights approaches to privacy.

The problematic aspect in the application of the right to be forgotten is not so much in the acceptance by the scientific community, but in the complexity of practical

implementation. Search engines, international organizations and other stakeholders have not yet agreed on harmonized specific standards and methods around the world. Judgments of the Court of Justice, the General Data Protection Regulation are aimed only at regulating the European part of the digital space. Another difficulty for the practical implementation of this right is ignorance of the changing technological world by legislators, judges, ie the lack of special technical knowledge that affects the possibility of introducing appropriate legal regulation, as well as law enforcement in resolving relevant disputes.

Proper legal regulation of the studied relations requires knowledge of the mechanism of operation of search engines and their technical capabilities. It is also important to remember that it is very difficult to completely remove certain information from the Internet, as it can be published or distributed on the Internet by millions of people. That is why today much attention should be paid not only to the creation and improvement of legal mechanisms to protect human rights and reputation on the Internet, but also to increase the level of legal awareness of users.

Conclusions. It is established that although for the first time the right to be forgotten was partially enshrined in the European Union Data Protection Directive of 1995, its active discussion began after the decision of the European Court of Justice in the case of Google Spain SL, Google Inc. V Agencia Española de Protección de Datos, Mario Costeja González (2014). It is proved that the right to be forgotten was formed in accordance with the scientific doctrine of «new rights» (the right to privacy, the right to forgiveness). It is established that due to the expansion of digital reality, the approaches to human rights are changing towards the priority of privacy. It is argued that search companies and technology giants often oppose strengthening the protection of confidentiality through their own economic interests, rather than in the context of protecting the right of access to information. The importance of further improving the test of balance of interests and the use of alternative means of protecting user privacy, including pseudonymization and other methods of anonymization, is substantiated. It is proven that it is very difficult to completely remove certain information from the Internet, as it can be published or disseminated by an indefinite number of people, so much attention should be paid not only to creating and improving legal mechanisms to protect human rights and reputation on the Internet.

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ПРАВО НА ЗАБУТТЯ: СТАНОВЛЕННЯ ТА РОЗВИТОК

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Проаналізовано основні етапи розвитку права на забуття на міжнародному рівні. Досліджено порядок становлення відповідного правового регулювання щодо права на забуття, а також основні теоретичні засади такого становлення. Доведено важливість розширення прав людини у світі, що переживає цифрову трансформацію, зокрема для захисту приватності в Інтернеті. Встановлено, що право на забуття є одним із найзручніших варіантів розв'язання проблеми захисту прав осіб від поширення неповної, неактуальної інформації про них у цифровій мережі та зазвичай охоплює три окремі категорії справ: видалення користувачем поширеного ним же контенту, видалення повторно розміщеного вмісту чужої публікації іншим користувачем, видалення публікацій підготованих одним користувачем про іншого користувача. Обґрунтовано потребу вдосконалення правового регулювання права на забуття.

Встановлено, що вперше право на забуття отримало відображення в Директиві Європейського Союзу про захист даних 1995 року, однак цей акт розроблено ще у 1990 році, коли Інтернету ще не існувало у його сучасному вигляді, тому ця Директива не могла передбачити усіх аспектів здійснення та захисту права на забуття. Доведено важливість врахування співвідношення права на забуття з іншими правами людини, зокрема з правом на свободу вираження поглядів, на інформацію. Встановлено, що Регламент ЄС «Загальні положення про захист даних» (GDPR) 2016 року запровадив офіційне закріплення права на стирання інформації та права на заборону профайлінгу, право на перенесення даних, штрафи за порушення конфіденційності даних для компаній. Обґрунтовано необхідність розроблення уніфікованих правил вилучення даних, недостатність регулювання лише частини цифрового простору для забезпечення надійного захисту приватності користувачів. Встановлено переважно позитивне сприйняття громадськістю права на забуття та велику кількість запитів на видалення з моменту запуску онлайн-форми у 2014 році. Доведено обґрунтованістість занепокоєння деяких науковців щодо можливих зловживань при видаленні інформації. Встановлено складність практичної реалізації права на забуття через мінливість технологічного світу та супротив ІТ-гігантів. Обґрунтовано, що через технічну неможливість повного видалення неточних відомостей, потрібно приділяти увагу не лише правовим механізмам захисту, але й підвищенню правової свідомості користувачів мережі Інтернет.

Ключові слова: цифрові права, баланс інтересів, приватність, свобода слова, право на інформацію, Інтернет, цифрове середовище.

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