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DISSERTATION

**WILL FACEBOOK REMEMBER YOU FOREVER: THE RIGHT TO BE
FORGOTTEN ON SOCIAL NETWORKS WITHIN THE PRIVACY FRAMEWORK**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
LIST OF ABBREVIATIONS	ii
ABSTRACT	iii
1. INTRODUCTION	1
2. PRIVACY AND ITS RELATED KEY CONCEPTS ON INTERNET	2
2.1. The Principles of Privacy and European Privacy Legislation	4
2.2. Privacy in the Online Social Networks.....	7
3. AS A NEW EUROPEAN CONCEPT: THE RIGHT TO BE FORGOTTEN.....	11
3.1. Why Do The European Regulators Need to Introduce “A New Right” for Privacy? 14	
3.2. Under What Conditions Can Anybody Claim This Right?	20
3.3. What Are The Main Criticisms Against This Concept?.....	26
4. FACEBOOK CASE.....	35
4.1. A Brief History of Facebook and Its Basic Characteristics.....	35
4.2. Facebook’s Privacy Policy: Its Implementations and Challenges.....	38
4.3. Facebook in Battle with the Right to Be Forgotten	42
4.4. Some Comments and Recommendations for Facebook Case	45
5. CONCLUSION.....	47
BIBLIOGRAPHY	49

LIST OF ABBREVIATIONS

European Commission	EC
European Convention for Human Rights	ECHR
European Union	EU
European Union General Data Protection Regulation	GDPR
Intellectual Property	IP
Right to be Forgotten	RtbF
Social Networks	SNs
Social Networking Sites	SNSs
Facebook's Statement of Rights and Responsibilities	SRRs
United Kingdom	UK
United States	US
Universal Declaration of Human Rights	UDHR

ABSTRACT

Today, the information situated in the digital environment is never completely disappeared, because of several challenges including strategic choices, legal deficiencies and technical obstacles. However, the proposed “right to be forgotten” which was launched by the European Commission in the Draft General Data Protection Regulation, aims giving an opportunity to data subject to request an online data controller to delete all data about him even if it has been made public, with the exception of a legitimate purpose for storing the data. This proposed right allows the online users to control their own data more and to decide what kind of data about them may be left on the Internet. The current debates have gained intensive worldwide extent, and there are several opponent and proponent arguments over them. This dissertation presents and analyses this important right in a European privacy-based perspective in social networks especially Facebook.

1. INTRODUCTION

Privacy is seen as fundamental human right for everyone that is protected by several international and national regulations. In this scope, for the European Union (EU) citizens' privacy is guaranteed by data protection regulations that the current rules on personal data protection in EU were adopted in 1995 under the Data Protection Directive 95/46/EC. On the other hand, since the Directive came into force, communications technologies have dramatically changed. Especially, Internet challenges the traditional communication regulations. Today, Internet is used widespread by both individuals and entities, and as a consequence, people's habits on sharing personal information change by using new Net tools as social networks (SN), blogs, content providers and cloud computing means. The challenges of Internet concerning personal data require modernisation of current rules ensuring more effective protection; thus, the proposal for a new data protection reform package was presented by the European Commission (EC) on 25 January 2012. So called "right to be forgotten" (RtbF) is one of the most important reform's proposals on this data protection regulation package.

This dissertation basically deals with a kind of tool for protection of privacy as proposal of RtbF in SNs, especially Facebook case. In order to achieve this aim, the dissertation seeks to answer of some questions such as "What is privacy in the digital world especially in social networks? Is it always opponent to the right of free speech and information? Is there a real control mechanism for data owner over her data on social networks? What is the new privacy protection tool named RtbF which was introduced by the European Commission in its new regulatory framework? Will this right be applicable for SNs especially in Facebook in practice?" In this context, firstly the concept of privacy and its key concepts on Internet will be briefly examined. Secondly, the privacy framework of the current EU Data Protection Regulations and the principles for data protection will be given. Thirdly, the term SNs and its relation with the privacy will be examined. Then, the concept of RtbF will be examined in detail; followed by the Facebook case which will be discussed within the above mentioned context, and some comments and recommendations on this case will be presented. Finally, some concluding remarks will be made.

2. PRIVACY AND ITS RELATED KEY CONCEPTS ON INTERNET

“Privacy” is a concept which is hard to define, and there are different subtopics and theories over it. There is also a reasonable suspicion about this concept’s objectivity¹ which means that it can be understood differently by different people.² Moreover, the questions of “Is there any certain distinction between private matter and public matter?” and “How many people’s knowledge is enough for the private information to become public?” are difficult to answer.³ In early period of the development of the debates on this issue, Warren and Brandeis described privacy as “*the right to be let alone*” and qualified it as an essential right to the individual that should be protected⁴. Actually, privacy can be defined as personal information (e.g. a person’s name, addresses, user name, telephone number, password, etc.) that “*an individual deems important and unattainable by the general population*” and it also includes the person’s right to control the dissemination of these information.⁵ According to Rauhofer, privacy is a tool for individual’s self-determination in the democratic political process and it draws the line between individuals and the other individuals or the state.⁶ Similarly, William Pfaff considered that there is a strict connection between the concept of liberty and privacy.⁷ In Rubinfeld's view, the privacy can be understood within two different contexts as one of them is that it “*limits the ability of others to gain, disseminate, or use information about oneself*” and the other one is that it “*concerns us attaches to the rightholder's own actions*”.⁸ Additionally, Rolf H. Weber explains the privacy elements based on Hayden Ramsay’s opinions who identified the five forms of privacy, as “(i)*The first privacy element refers to the control over the flow of information, in which freedom and individuality are not*

¹ Edwards, Lilian, (2009), Privacy and Data Protection Online: The Laws Don’t Work, edited by Ian Lilian Edwards and Charlotte Waelde, *Law and Internet*, Hart Publishing, Third Edition, p.443.

² Townsend, Stephen (2010), Privacy in the Facebook Age, p.3, <http://stephendtownsend.com/wordpress/wp-content/uploads/2010/12/Privacy-in-the-Facebook-Age.pdf>

³ Strahilevitz, Lior Jacob (2004), A Social Networks Theory Of Privacy, John M. Olin Law&Economics Working Paper No:230 (2D Series) and Public Law And Legal Theory Working Paper No:79, p.2, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=629283

⁴ Warren, Samuel D. and Brandeis, Louis D. (1890), Right to Privacy, *Harvard Law Review* Vol.4, No:5, <http://faculty.uml.edu/sgallagher/Brandeisprivacy.htm>

⁵ Timm, Dianne M. and Duven, Carolyn J. (2008), Privacy and Social Networking Sites, “*Using Emerging Technologies To Enhance Student Engagement*”, *New Directions For Student Services*, No:124, p.90, <http://blog.reyunco.com/pdf/Chapter6.pdf>

⁶ Rauhofer, Judith, (2009), Privacy and Surveillance: Legal and Socioeconomic Aspects of State Intrusion into Electronic Communications, edited by Lilian Edwards and Charlotte Waelde, *Law and Internet*, Hart Publishing, Third Edition, p.548.

⁷ Pfaff, William (1998), Kill Privacy, Kill Freedom: Armageddon in the Culture Wars, *Commonweal*, Vol.125, No:17,

<http://www.questia.com/library/1G1-21227659/kill-privacy-kill-freedom-armageddon-in-the-culture#articleDetails>

⁸ Rubinfeld, Jed (1989), The Right of Privacy, *Harvard Law Review*, Vol.102, No:4, p.740.

considered the only values of social life, but also truthfulness and practical wisdom; furthermore, privacy should not be limited to controlling information but extended to the risk of invasion of privacy. (ii)The second privacy element concerns the freedom from interference and observation; insofar, according to Ramsay, the threat of loss of autonomy does not adequately explain the meaning of violation and danger people experience with the most serious attacks on their privacy. (iii)The third privacy element looks at the maintenance of a sphere of inviolability around each person, which can be seen as a substantial moral good contrasting to the lack of respect for the value of persons. (iv)The fourth privacy element constitutes the need for solitude as already discussed by Warren/Brandeis. (v)The fifth privacy element can be identified in the term of “domesticity,” asking for safety from observation and intrusion.”⁹ Briefly, the control over the personal data and need for safe harbours without interference and observation seems as the main elements of privacy.

On the other hand, online privacy is a more complex notion. The Internet is defined as a mass medium which is conceived to carry, host and transmit the information or the other content¹⁰ and its nature holds some unique characteristics like globality, borderlessness, geographical independence, portability and being widely used, making the Internet inherently different to other forms of communication¹¹. Moreover, the Internet provides new ways for anonymous and pseudonymous communication¹². It also largely increased the data creation and collection and has no centralized control mechanisms.¹³ In this context, its decentralized, open, and interactive nature causes that the Internet to be the first electronic medium to allow every user for publishing and engaging in commerce despite geographic, social, and political barriers¹⁴. Because of above mentioned features, on cyberspace, the invasion of privacy is easier than real world and also protecting the privacy on the Internet has several challenges. It can be threatened by many sources which originate from technology, governments’ actions and private sector’s activities.¹⁵ However, the law faces a big dilemma on technology because of

⁹ Weber, Rolf H. (2011), *The Right to Be Forgotten: More Than a Pandora’s Box?*, 2 JIPITEC, p.124.

¹⁰ Edwards, Lilian, (2009), *The Fall and Rise of Intermediary Liability Online*, edited by Lilian Edwards and Charlotte Waelde, *Law and Internet*, Hart Publishing, Third Edition, p. 47.

¹¹ Svantesson, Dan Jerkber B. (2005), ‘The characteristics making internet communication challenge traditional models of regulation-what every international jurist should know about the internet’, *International Journal of Law & Information Technology*, p.

¹² Stein, E. (2003), *Queers Anonymous: Lesbians, Gay Men, Free Speech, and Cyberspace*, *Harvard Civil Rights and Civil Liberties Law Review*, Vol.38, No:1, p.159.

¹³ Berman, Jerry and Mulligan, Deirdre (1999), *Privacy in the Digital Age: Work in Progress*, *Nova Law Review*, Vol.23, No: 2, <https://www.cdt.org/publications/lawreview/1999nova.shtml>

¹⁴ *Ibid.*

¹⁵ Rotenberg, Marc (1998), *Preserving Privacy In The Information Society*, UNESCO Infoethics

its inherently unpredictable developments, and additionally the online personal data issues generally need sophisticated analysis tools for both government agencies and businesses.¹⁶ There is also a common trend in Internet regulation such that the Internet is subject to smaller levels of regulation than other media. Moreover, the American and European data privacy approaches are quite different from each other. In brief, the American privacy approach is more related with the “*control of personal information and personal autonomy*”, while the European legal privacy approach is based on the concepts of “*dignity and the fundamental rights*”.¹⁷ The basic characteristics of the US perspective which differs from the EU perspective is that data privacy is considered as “*the data protection in the United States chiefly depends on whether the person concerned has a ‘reasonable expectation of privacy.’*”¹⁸

2.1. The Principles of Privacy and European Privacy Legislation

The basic international legislation on privacy is involved in the Article 12 of the Universal Declaration of Human Rights (UDHR) which states that “*No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*”¹⁹

Similarly, according to the Article 8 of the European Convention for Human Rights (ECHR), “*1. Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of

http://www.unesco.org/webworld/infoethics_2/eng/papers/paper_10.htm

¹⁶ O'Reilly, Dennis (2013), Internet privacy in an age of surveillance, http://howto.cnet.com/8301-11310_39-57596008-285/internet-privacy-in-an-age-of-surveillance/

¹⁷ Panagopoulou-Koutnatzi, Fereniki (2011), Facebook as a Challenge to Privacy, 4th International Conference on Information Law, Thessaloniki, Greece, p.1, <http://conferences.ionio.gr/icil2011/speakers>

¹⁸ Spies, Axel (2011), EU Data Protection Framework-Reform of the EU Data Protection Directive: ‘Right to Be Forgotten’-What Should Be Forgotten and How?, Privacy & Security Law Report, 10 PVLR, The Bureau of National Affairs, Inc, p.3, <http://www.bingham.com/Publications/Files/2011/12/Reform-of-the-EU-Data-Protection-Directive-Right-to-Be-Forgotten--What-Should-Be-Forgotten-and-How>

¹⁹ The Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/index.shtml#a12>

the rights and freedoms of others.”²⁰. On the other hand, as a category of fundamental rights in Article 8 of the Charter of Fundamental Rights of the EU which states that “1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified...”²¹

Moreover, the Article 16 of the Treaty on the Functioning of the EU states that “1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities...”²²

On the other hand, the Data Protection Directive (95/46/EC) is the major European legislative instrument for data protection determining when the processing of such data is lawful.²³ It has two main legislative aims as achieving the Internal Market and protection of fundamental rights and freedoms of individuals.²⁴ According to Article 1 of the Directive, “...Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.”²⁵ Subsequently, under the Article 2 of the Directive, the key concepts for the purposes of the Directive are ‘Personal data’ which is defined as “any information relating to an identified or identifiable natural

²⁰ European Convention on Human Rights (1953), http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf

²¹ Charter Of Fundamental Rights Of The European Union, (2000/C 364/01), http://www.europarl.europa.eu/charter/pdf/text_en.pdf

²² Treaty on the Functioning of the European Union (2010), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>

²³ European Commission's Information Society and Media Directorate-General (2009), EU study on the Legal analysis of a Single Market for the Information Society (SMART 2007/0037): New rules for a new age?, 03.Overview, p.3, http://ec.europa.eu/information_society/newsroom/cf/itemdetail.cfm?item_id=7022

²⁴ European Commission (2012), Current EU Legal Instruments For The Protection Of Personal Data, Annexes to the impact assessments, p.2, http://ec.europa.eu/justice/data-protection/document/review2012/sec_2012_72_annexes_en.pdf

²⁵ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity”, ‘processing’ which refers “any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction”; the ‘controller’ which means “the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data; where the purposes and means of processing are determined by national or Community laws or regulations, the controller or the specific criteria for his nomination may be designated by national or Community law” and ‘processor’ which is defined as “a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller.”²⁶ Article 6 and 7 of the Directive of 1995 set out principles and criteria for data quality and processing such as lawfulness, fairness, proportionality, legitimate purposes, unambiguously consent and transparency.²⁷ The Directive of 1995 applies to both the public and the private sectors; while it does not apply to the processing of personal data during the police and judicial cooperation in criminal situations.²⁸ In essence, in 2008, the Council adopted a ‘third pillar’ “Data Protection Framework Decision 2008/977/JHA”²⁹ on protection of personal data, which complemented the Directive of 1995 as a general instrument in order to protect personal data for police and judicial co-operation in criminal matters,³⁰ with a deadline of two years on the implementation of this measure in Member State’s national law; however, the Treaty of Lisbon in December 2009 repealed the previous ‘third pillar’, and the Article 16 of TFEU put

²⁶ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

²⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML>

²⁸ Supra no:24, p.2.

²⁹ Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:350:0060:01:EN:HTML>

³⁰ European Commission, 25.1.2012, COM(2012) 11 final 2012/0011 (COD), 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), 2012/0011 (COD), p.1, http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf

in place a new rule regarding the data protection issues with the exception of particular matters about foreign policy.³¹

The Data Protection Regulation (EC) NO 45/2001 stipulates certain data protection principles to harmonise the all data processing rules and implementations of EU Member States, and establishes the European Data Protection Supervisor as an independent supervisory body.³² Additionally, the "E-Privacy" Directive 2002/58/EC is related with the processing of personal data in the electronic communication sector.³³

Finally, the core principles of privacy protection are referred to as "Fair Information Practices" which is a general term for using to "*set out the rights of those who provide their own personally identifiable information and the responsibilities of those who collect this information*".³⁴ They are not specific principles; however generally there is a common practice over their constituents including "*notice/awareness; choice/consent; access/participation; integrity/security; and enforcement/redress*".³⁵ These rules are the basic structure of many privacy laws and policies, and they can be found in several general agreements, for example, in the OECD Privacy Guidelines of 1980.³⁶ In this Guideline, some essential principles are recognised as follows; collection limitation principle, data quality principle, purpose specifications principle, use limitation principle, security safeguards principle, openness principle, individual participation principle and accountability principle.³⁷

2.2. Privacy in the Online Social Networks

According to Castells "*a network is a set of interconnected nodes.*" and "*a network society is a society whose social structure is made of networks powered by microelectronics-based*

³¹ Peers, Steve (2012), The Directive on data protection and law enforcement: A Missed Opportunity?, Statewatch, p.1, <http://www.statewatch.org/analyses/no-176-leas-data%20protection.pdf>

³² European Data Protection Supervisor, (2013), Data protection principles at the level of EU institutions and bodies? <http://www.edps.europa.eu/EDPSWEB/edps/EDPS/Dataprotection/QA/QA3>

³³ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:en:HTML>

³⁴ Supra no:15

³⁵ Federal Trade Commission, Fair Information Practice Principles, <http://www.ftc.gov/reports/privacy3/fairinfo.shtm>

³⁶ Supra no:15.

³⁷ Ambrose, Meg Leta and Ausloos, Jef (2013), The Right To Be Forgotten Across The Pond, Journal Of Information Policy 3, p.9-10.

information and communication technologies”.³⁸ A real SN is characterized as complicated and dynamic.³⁹ Indeed, as the main communication and information tools for human, the “media and SNs” has been rapidly change their forms because of the technological developments; and this issue causes the new opportunities and risks for the societies.⁴⁰ For improving to information society, the online SNs play an important role by building a new social structure.⁴¹ According to a study in 2013 by Experian Marketing Services, Internet users in United States (US) spend an average of 16 minutes out of every hour on social networking sites (SNSs), and this amount is a bit less for United Kingdom’s (UK) users who spend 13 minutes of each hour on these sites.⁴²

The first sample of the SNs is seen as *sixdegrees.com* which was launched in 1997; and then, in mid 2000’s, there was an explosion in the numbers of these sites.⁴³ The SNSs can be defined as web services that provide users with various devices for “posting personal data and creating user-generated content directed to a given user’s interest and personal life, and provides a means for users to socially interact over the internet, through e-mail, instant messaging or otherwise”.⁴⁴ They allow users for “(1) constructing a public or semi-public profile within a bounded system, (2) articulating a list of other users with whom they share a connection, and (3) viewing and traversing their list of connections and those made by others within the system”.⁴⁵ The SNSs can be categorized in seven classes as “business, common interests, dating, face-to-face facilitation, friends, pets, and photos”.⁴⁶ These sites such as Facebook, Twitter, LinkedIn, Myspace and Tumblr connect users to each other who have

³⁸ Castells, Manuel (2004), *Informationalism, Networks and the Network Society: A Theoretical Blueprint*, edited by Manuel Castells, “*The Network Society: A Cross-Cultural Perspective*”, Northampton, MA: Edward Elgar,

<http://annenberglaw.usc.edu/Faculty/Communication/~media/Faculty/Facpdfs/Informationalism%20pdf.ashx>

³⁹ Supra no:3, p.30

⁴⁰ Determann, Lothar (2012), *Social Media Privacy: A Dozen Myths and Facts*, Stanford Technology Law Review no:7, p.1, <http://stlr.stanford.edu/pdf/determann-socialmediaprivacy.pdf>

⁴¹ Kincsei, Attila (2008), *Technology and society in the information age*, “Information Society: From Theory to Political Practice”, Coursebook, NET-IS, Gondolat-Új Mandátum, Budapest, p.60, http://www.itk.hu/netis/doc/NETIS_Course_Book_English.pdf

⁴² Gaudin, Sharon (2013), *Americans spend 16 minutes of every hour online on social nets*, http://www.computerworld.com/s/article/9238469/Americans_spend_16_minutes_of_every_hour_online_on_social_nets

⁴³ Marichal, José (2012), *Facebook Democracy: The Architecture of Disclosure and the Threat to Public Life*, Ashgate, p.3.

⁴⁴ Reitler Kailas & Rosenblatt LLC (2012), *Social Networking And The Overlooked Issue Of Security*, p.1, <http://www.reitlerlaw.com/wp-content/uploads/2012/04/ABA-Social-Networking-Article.pdf>

⁴⁵ Boyd, Danah M. and Ellison, Nicole B. (2007), *Social Network Sites: Definition, History, and Scholarship*, *Journal of Computer-Mediated Communication*, 13(1), <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html>

⁴⁶ Gross, Ralph and Acquisti, Alessandro (2005), *Information Revelation and Privacy in Online Social Networks (The Facebook case)*, ACM Workshop on Privacy in the Electronic Society (WPES), p.1, <http://sozio-informatik.net/fileadmin/IISI/upload/2009/p265.pdf>

common backgrounds or interests. On the other hand, the connection between the users is not always at the same level. According to some sociologists, the relationships are falling into two categories as “strong/weak ties” or “high/low intensity”.⁴⁷ Relatedly, the SNs provide a useful instrument to stay in touch with favoured social environment such as family, friends and colleagues; but they also present a risk that the personal data including information, photos and comments might be viewed more broadly than users realise.⁴⁸ Meanwhile, most part of the information which shared or posted in an account is assessable as personal information that the user willingly shares or posts to the SNSs.⁴⁹ In the digital age, user-generated content is one of the main sources of social media. It simply refers to “*any material created and uploaded to the Internet by non-media professionals*”.⁵⁰ Within this scope, “*the intent of the information shared*” and “*the expectation that it will remain private*” are significant items for striving the issue of privacy on these sites.⁵¹

Although the data privacy in the social media is quite popular subject nowadays, it is not clearly recognized by most of the national and international laws.⁵² For SNSs, the security and the access control mechanisms are not designed very strong and the privacy is not considered as the first priority in the development of them.⁵³ As a result, privacy on SNSs is one of the most critical social and judicial issues of digital world. On the other hand, in the liability context, the SNs providers have no direct responsibilities for the infringements of privacy by users.⁵⁴ Furthermore, there is a significant difference between the US and European approaches about the privacy legislation. While the US has been addressing data processing activities very narrowly just using general consumer laws; the European data protection law has tried to regulate data-related activities separately and broadly with limited exceptions.⁵⁵ Nevertheless, the Directive of 1995 does not apply to the individuals who upload the data with purposes of ‘purely personal’ or ‘in the course of a household activity’, and also does not apply to the providers which offer services to a private individual; thus, this causes a

⁴⁷ Supra no:3, p.32.

⁴⁸ European Commission, How will the data protection reform affect social networks?, p.1, http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/3_en.pdf

⁴⁹ Supra no:5, no:124, p.90.

⁵⁰ Interactive Advertising Bureau Platform Status Report: (2008) User Generated Content, Social Media, and Advertising-An Overview, p.1, http://www.iab.net/media/file/2008_ugc_platform.pdf

⁵¹ Supra no:5, p.90.

⁵² Supra no:40, p.1.

⁵³ Al Hasib, Abdullah (2008), Threats of Online Social Networks, TKK T-110.5190 Seminar on Internetworking, http://www.cse.hut.fi/en/publications/B/1/papers/Hasib_final.pdf

⁵⁴ Supra no:40, p.1.

⁵⁵ Ibid, p.4.

situation of lack of safeguards related with the security of personal data.⁵⁶ In other words, the current EU data protection regulation does not provide a protection to the data for purely personal purposes.⁵⁷

According to the EC, the SNs widely change the user's attitudes over data protection; for example, 79% of social networks users are likely to share their real name, 51% their photo and 47% their nationality with every one, and only 26% of social network users feel in complete control of their data.⁵⁸ Additionally, the researchers from UK-based Security Lancaster declared that "*Although social networking sites continue to attract millions of diverse users worldwide, they remain plagued by privacy compromises that breed user dissatisfaction and lack of trust*".⁵⁹ The important question to be considered here is that "Do people have any property rights over their digital personal data uploaded by themselves on SNs?" Pamela Samuelson, U.C. Berkeley cyber law expert, considers that there are some characteristics of information such as "*(1) intangible; (2) without concrete definition; and (3) 'leaky' or prone to sharing unless kept secret.*" that make it difficult to recognize as property.⁶⁰ On the other hand, the issue of possession on information seems more complicated rather than tangible physical properties, because "the personal information can be easily replicated and shared in a much different way".⁶¹ Determann thinks that no one owns these data and if anyone owns the data about them, it is the SNs providers companies.⁶² On the contrary, Yoder considers that Facebook is not the owner of the information which is shared on it.⁶³ Importantly, Lessig argued about the statement that whether or not the privacy which empowers individuals to choose to be isolated, is a form of property and concluded that for the thought of privacy as property, the cultural resources support the values of privacy,

⁵⁶ Article 29-Data Protection Working Party, Working Party on Police and Justice, (2009), The Future of Privacy, 02356/09/EN, WP 168, p.18,
http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp168_en.pdf

⁵⁷ Supra no:40, p.2.

⁵⁸ European Commission, How does the data protection reform strengthen citizens' rights?, p.1,
http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/2_en.pdf

⁵⁹ Security Lancaster, Lancaster University (2013), Social media plagued by privacy problems, say researchers,
<http://www.lancaster.ac.uk/news/articles/2013/social-media-plagued-by-privacy-problems-say-researchers/>

⁶⁰ McNealy, Jasmine (2013), Online Privacy & The Right To Be Forgotten, <http://footnotel.com/online-privacy-the-right-to-be-forgotten-4/>

⁶¹ Ibid.

⁶² Supra no:40, p.1.

⁶³ Yoder, Dan (2010), '10 Reasons to Delete Your Facebook Account', *Business Insider*, accessed online at <<http://www.businessinsider.com/10-reasons-to-delete-your-facebook-account-2010-5>>

however it is not absolute or unregulated and it can be limited by law like constitutional or contractual limitations.⁶⁴

The SNSs have several similar features such as “persistence” which means “*digital expressions are automatically recorded and archived,*” “replicability” which means “*digital content is easily duplicated,*” “scalability” which means “*the potential visibility of digital content is great,*” and finally “searchability” which means “*digital content is often accessible through search engines.*”⁶⁵ On the other hand on SNSs, there are two typical privacy attacks to data as identity disclosure and attribute disclosure; and they can be originated from the common networks (friends), the links and/or groups.⁶⁶ Recently, most of the SNSs enable their users to control their personal profiles and to block the public access to these accounts.⁶⁷ However, the answers of the questions that “what privacy control’s tools are usable and how they should be available” are not found so easily for the “*average users to specify this kind of detailed policy*”.⁶⁸

3. AS A NEW EUROPEAN CONCEPT: THE RIGHT TO BE FORGOTTEN

Most pertinently, for the digital environment establishing unique, technologically neutral and future-proof set of rules across the EU seems as a vital tool for protecting personal data.⁶⁹ However, according to Determann, the European data protection laws are “*overbroad, under-enforced, outdated and awaiting reality checks in courts*”.⁷⁰ In order to achieve updating these rules on personal data, the proposal of General Data Protection Regulation (GDPR) was published on 25th January 2012. According to these new proposed reform, “*As underlined by the Court of Justice of the EU, the right to the protection of personal data is not an absolute*

⁶⁴ Lessig, Lawrence (2002), Privacy as Property, *Social Research: An International Quarterly* Privacy in Post-Communist Europe, Arien Mack, Editor Andras Sajo, Vol.69, No:1, p.247-269, <http://www.englishdiscourse.org/lessig.html>

⁶⁵ Boyd, Danah and Marwick, Alice (2011), Social Privacy in Networked Publics: Teens’ Attitudes, Practices, And Strategies, p.9, <http://ssrn.com/abstract=1925128>

⁶⁶ Zheleva, Elena and Getoor, Lise (2009), To Join or Not to Join: The Illusion of Privacy in Social Networks with Mixed Public and Private User Profiles, Track: Security and Privacy/Session: Web Privacy, p.533-535, <http://www2009.eprints.org/54/1/p531.pdf>

⁶⁷ Ibid, p.531.

⁶⁸ Fang, Lujun and LeFevre, Kristen (2010), Privacy Wizards for Social Networking Sites, Proceedings of the 19th international conference on World wide web, Raleigh, North Carolina, USA, http://web.eecs.umich.edu/~klefevre/Publications_files/www2010.pdf

⁶⁹ European Commission, How will the EU’s reform adapt data protection rules to new technological developments?, p.2.

http://ec.europa.eu/justice/data-protection/document/review2012/factsheets/8_en.pdf

⁷⁰ Supra no:40, p.5.

right, but must be considered in relation to its function in society.”⁷¹ One of the most controversial proposals of this new regulation is known as the RtbF.

As José Marichal mentioned in his book, when a Yaqui Indian shaman was advising as “*It is best to erase all personal history because that makes us free from the encumbering thoughts of other people...You must begin to erase yourself*”, he did not consider the current “hyper-connected” world.⁷² However today, people want to be forgotten by the other people and delete their undesired digital evidences on Internet. For this concept, there is an explicit conflict between the European and US approaches, as well as responded so differently to other Internet privacy issues.⁷³ As it is well known, this concept originated from Europe. Historically, the first appearance of this right is regarding with the judicial or criminal past of an individual, especially the creation of criminal records.⁷⁴ However, today, the RtbF is related with all personal data. In early periods, Alex Türk, the French data privacy commissioner, coined the term of the “*right to oblivion*.”⁷⁵ Similarly, Jonathan Zittrain proposed a concept named ‘reputation bankruptcy’ which allows people a ‘fresh start’ on the Internet.⁷⁶ On the contrary, as argued below, the statement of “*Americans want to be famous while the French want to be forgotten.*” summarises the different perspectives of US and EU, very interestingly.⁷⁷ Although there are similar consumer complaints, the US has no federal law that guarantees on this issue for its citizens, and furthermore even there is no desire or attempt for it.⁷⁸ An example from US case law which is so familiar to people interested this issue, is that *Stacy Snyder case*⁷⁹. In this case, Miss Snyder who is a young teacher in training, posted on her profile a picture of herself while she was drunk; thus, her employer considered that she was not suitable for being a teacher, and in addition her University denied her

⁷¹ Supra no:30, p.6.

⁷² Supra no:43, p.1.

⁷³ Hendel, John (2011), In Europe, a Right to Be Forgotten Trumps the Memory of the Internet, the Atlantic, <http://www.theatlantic.com/technology/archive/2011/02/in-europe-a-right-to-be-forgotten-trumps-the-memory-of-the-internet/70643/>

⁷⁴ de Terwangne, Cécile (2012), Internet Privacy and the Right to Be Forgotten/Right to Oblivion, “Monograph VII International Conference on Internet, Law & Politics. Net Neutrality and other challenges for the future of the Internet”, Universitat Oberta de Catalunya, p.111, <http://www.raco.cat/index.php/IDP/article/download/251842/337492>

⁷⁵ Rosen, Jeffrey (2011-2012), The Robert L. Levine Distinguished Lecture-The Deciders: The Future Of Privacy And Free Speech In The Age Of Facebook And Google, Fordham Law Review, Vol.80, p.1533.

⁷⁶ Ausloos, Jef (2012), The ‘Right to be Forgotten’-Worth Remembering? CLSR, Vol.28, Issue:2, p.3, <http://ssrn.com/abstract=1970392>

⁷⁷ Supra no:75, p.1533.

⁷⁸ Venables, Michael (2013), The EU's 'Right To Be Forgotten': What Data Protections Are We Missing in the US?, <http://www.forbes.com/sites/michaelvenables/2013/03/08/the-ecs-right-to-be-forgotten-proposal-in-the-u-s/>

⁷⁹ *Snyder v. Millersville Univ.*, No. 07-1660, 2008 WL 5093140, at 14-16 (E.D. Pa.Dec. 3, 2008).

studying degree.⁸⁰ After these results, she sued them, and consequently the court decided that “her speech was not a matter of public concern, and therefore was not protected by the First Amendment”.⁸¹

In EU legislation, the Article 17 of The Proposal of GDPR regulates the "Right to Be Forgotten" as “Right to be forgotten and to erasure:

1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data which are made available by the data subject while he or she was a child, where one of the following grounds applies:

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

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

(c) the data subject objects to the processing of personal data pursuant to Article 19;

(d) the processing of the data does not comply with this Regulation for other reasons.

2. Where the controller referred to in paragraph 1 has made the personal data public, it shall take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, 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. Where the controller has authorised a third party publication of personal data, the controller shall be considered responsible for that publication.

3. The controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary:

(a) for exercising the right of freedom of expression in accordance with Article 80;

(b) for reasons of public interest in the area of public health in accordance with Article 81;

(c) for historical, statistical and scientific research purposes in accordance with Article 83;

(d) for compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued;

⁸⁰ Supra no:75, p.1532.

⁸¹ Ibid, p.1532.

(e) in the cases referred to in paragraph 4.

4. Instead of erasure, the controller shall restrict processing of personal data where:

(a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy of the data;

(b) the controller no longer needs the personal data for the accomplishment of its task but they have to be maintained for purposes of proof;

(c) the processing is unlawful and the data subject opposes their erasure and requests the restriction of their use instead;

(d) the data subject requests to transmit the personal data into another automated processing system in accordance with Article 18(2)...”⁸² This article briefly means that if a European user

no longer wants her data to be processed, and there is no legitimate justification for keeping the data, the companies and public authorities should delete it.⁸³ Obviously, RtbF intends to provide the Internet users more control over their personal data.⁸⁴ Further, this right intends “to provide legal certainty and to minimize administrative burdens for businesses”.⁸⁵

However, the ongoing debates are still contentious over the final version of this provision and it is not expected that the proposal become law until 2014.⁸⁶ Most importantly, “the effective exercise of the right to be forgotten depends to a large degree on user awareness”, but “users are often not cognizant of the identities of the myriad data controllers who are digitally processing and storing their personal data”.⁸⁷ This point is critical to understand the importance of the public debates over creating public awareness over this right.

3.1. Why Do The European Regulators Need to Introduce “A New Right” for Privacy?

The RtbF which proposes to protect the online user’s related with the privacy concern, is considered as “almost poetic” for the consumers.⁸⁸ So, what are the key reasons for this proposal offered by EC?

⁸² Supra no:30, p.51-53.

⁸³ Supra no:58, p.1.

⁸⁴ Harris, Leslie (2013), How to Fix the EU's 'Right to Be Forgotten', http://www.huffingtonpost.com/leslie-harris/right-to-be-forgotten-internet_b_3321469.html

⁸⁵ Supra no:37, p.11.

⁸⁶ Ibid, p.10.

⁸⁷ Fazlioglu, Muge (2013), Forget Me Not: The Clash Of The Right To Be Forgotten And Freedom Of Expression On The Internet, International Data Privacy Law, p.3, <http://idpl.oxfordjournals.org/>

⁸⁸ Supra no:78.

The first reason is related with the online user's worries and expectations on the certain Internet environment. Human memory which refers to "the process of remembering" is a very "complex and elusive" issue⁸⁹, and the images, the voices, the ongoing experiences of the life and all kind of other information in "a brain-wide process" are the subjects of individual's memory.⁹⁰ On the other hand, human memory is not unlimited to store all kind of information, and several factors affect the human's ability to remember.⁹¹ According to Elizabeth Loftus, people forget because of four major reasons as "*retrieval failure, interference, failure to store and motivated forgetting*".⁹² After a while, though not for every individual but in general, the news, gossips or information are very likely to be forgotten in the public. Viktor Mayer-Schönberger considers this issue as "*For almost all of human history, collecting information and storing information was time-consuming and costly, and therefore we stored as little as possible.*"⁹³ However, the computers' features are different than people, and the Internet records everything and "*does not forget*" as is seen a website named "<http://web.archive.org>" which provides the "*culminating years of world wide web history*" via "the Internet Archive Wayback Machine".⁹⁴ Additionally, today, the "*data storage has become incredibly cheap and simple.*"⁹⁵ Carmi Levy, an independent technology analyst, expressed the situation as "*The bad news for anyone who has been outed-the Internet does not have a delete button.*"⁹⁶ Similarly, a CNBC interview with Google CEO Eric Schmidt, he clearly explained his opinions about this issue as "*If you have something that you don't want anyone to know, maybe you shouldn't be doing it in the first place. But if you really need that kind of privacy, the reality is that search engines, including Google, do retain this information for some time.*"⁹⁷ Further, Jennifer Stoddart, Canadian Privacy Commissioner said that "*You may not realize it, but whenever you go online, you're building an identity*

⁸⁹ Mohs, Richard C. (2007), "How Human Memory Works" HowStuffWorks.com., <http://science.howstuffworks.com/life/inside-the-mind/human-brain/human-memory.htm>

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Cherry, Kendra, Explanations for Forgetting: Reasons Why We Forget, About.com, <http://psychology.about.com/od/cognitivepsychology/tp/explanations-for-forgetting.htm>

⁹³ Nelles, Drew (2013), The Internet dilemma: Do people have a right to be forgotten?, The Globe and Mail, <http://www.theglobeandmail.com/life/the-internet-dilemma-do-people-have-a-right-to-be-forgotten/article11715854/?page=all>

⁹⁴ Smith, Jonathan B. The Internet Doesn't Forget, <http://www.chiefoptimizer.com/281/lifehack/the-internet-doesnt-forget/#axzz2d4UtoVOT>

⁹⁵ Huempfer, Sebastian (2012), Why we need a right to be forgotten, Free Speech Debate, <http://freespeechdebate.com/en/2012/02/why-we-need-a-right-to-be-forgotten/>

⁹⁶ Quan, Douglas (2012), The Internet doesn't forget: Managing disgrace in the digital age, Postmedia News, <http://www.canada.com/sports/Internet+doesn+forget+Managing+disgrace+digital/4992930/story.html>

⁹⁷ Google CEO On Privacy (VIDEO): 'If You Have Something You Don't Want Anyone To Know, Maybe You Shouldn't Be Doing It', (2011), http://www.huffingtonpost.com/2009/12/07/google-ceo-on-privacy-if_n_383105.html

through the words and images you post and the activities you do. This can become part of your reputation, and it can be a lasting one. Once personal information goes online, it may be difficult to delete. While you may be able to delete it in one place, there may be cached versions or copies stored elsewhere that you cannot control. Digital storage is cheap and computer memory is plentiful--and unlike people, the Net never forgets”⁹⁸As a consequence of this reality, social SNSs can be used as a source of information for the recruitment of job candidates.⁹⁹ Within this scope, according to a survey by Information Commissioner’s Office, “four out of 10 students are worried that personal details they have shared on social networking sites, such as Facebook, as well as elsewhere online, could blight their chances of getting a job”.¹⁰⁰ For example, “an embarrassing photo or menacing personal information” which was shared or posted by carelessly, could limit future opportunities of an applicant.¹⁰¹ Additionally, Eric Schmidt remarks the future complications of this trouble saying “Every young person one day will be entitled automatically to change his or her name on reaching adulthood in order to disown youthful hijinks stored on their friends’ social media sites”¹⁰² Within this scope, Mayer-Schönberger describes seven potential (legal) responses that could mitigate the ills of digital memory, as “digital abstinence, information privacy rights, digital privacy rights infrastructure, cognitive adjustment, information ecology, perfect contextualization and expiration dates on digital information”.¹⁰³ On the other hand generally speaking, in order to “purge the internet from the shameful content and maintain the upstanding online reputation”¹⁰⁴ of users, today RtbF seems the most crucial life-jackets for Internet users. Viktor Mayer-Schönberger shares his opinions about this issue as “I propose that we shift the default when storing personal information back to where it has been for millennia, from remembering forever to forgetting over time. I suggest that we achieve this reversal with a combination of law and software. The primary role of law in my proposal is to

⁹⁸ Stoddart, Jennifer (2011), What is Data Privacy Day?, Sector Private’s Blog,

<http://sectorprivate.wordpress.com/2011/01/25/what-is-data-privacy-day-privacy-commissioner-of-canada/>

⁹⁹ LinkedIn, (2012), Linked:HR (#1 Human Resources Group), Do you consider Facebook a valid source of information for recruitment of job candidates?, <http://www.linkedin.com/groups/Do-you-consider-Facebook-valid-3761.S.103560319>

¹⁰⁰ Barnett, Emma (2011), Students fear Facebook posts will hurt job prospects,

<http://www.telegraph.co.uk/technology/social-media/8850783/Students-fear-Facebook-posts-will-hurt-job-prospects.html>

¹⁰¹ Mirshak, Meg (2007), Face(book) the Facts: The Public is Watching,

<http://www.nytimes.com/2007/07/22/technology/22face.html?pagewanted=print>

¹⁰² Kirkpatrick, Marshall (2010), Google CEO Suggests You Change Your Name to Escape His Permanent Record,

http://readwrite.com/2010/08/16/google_ceo_suggests_you_change_your_name_to_escape#awesm=~ofE0f3aMC1FWyp

¹⁰³ Supra no:9, p.125-126.

¹⁰⁴ Dachis, Adam (2011), How to fix Internet Embarrassments and Improve Your Online Reputation, <http://lifehacker.com/5850288/how-to-fix-internet-embarrassments-and-improve-your-online-reputation>

mandate that those who create software that collects and stores data build into their code not only the ability to forget with time, but make such forgetting the default. The technical principle is similarly simple: Data is associated with meta-data that defines how long the underlying personal information ought to be stored. Once data has reached its expiry date, it will be deleted automatically by software, by Lessig's West Coast Code."¹⁰⁵ Viviane Reding, the European Commissioner for Justice, commented on the importance of RtbF that "As somebody once said: 'God forgives and forgets but the Web never does!' This is why the 'right to be forgotten' is so important for me. With more and more private data floating around the Web – especially on social networking sites – people should have the right to have their data completely removed."¹⁰⁶

Other reason is a kind of consumer's concern about "where their data is migrating" and "what are they used for" in digital environment.¹⁰⁷ A recent research made by LogRhythm shows that "80% of the UK public implicitly do not trust organisations to keep their data safe".¹⁰⁸ Additionally, the user's "awareness of what and with whom personal data being shared" is seen extremely problematic in Internet.¹⁰⁹ According to Rob Shavell, a co-founder of Abine, "Social networks are amassing about a thousand times more data about us than they were a year ago. We don't really know what it means yet, or how it will impact us."¹¹⁰ Jasmine McNealy notes that "Social media sites like Facebook, Tumblr, and Twitter all require or encourage users to submit certain identifying information and have privacy policies governing how that information may be used. Unfortunately most users do not read these policies. Still more problematic are the sites, applications, and devices that collect information without the user's express consent."¹¹¹ Related with this issue, Erin Egan, Facebook's chief privacy officer, defended her employer with the statements that "For Facebook, we have social plugins. We don't use that data for an advertising purpose-we use

¹⁰⁵ Mayer-Schönberger, Victor (2007), "Useful Void: The Art of Forgetting in the Age of Ubiquitous Computing", *Working paper RWP07-022*, John F. Kennedy School of Government, Harvard University, p.17, http://www.vmsweb.net/attachments/pdf/Useful_Void.pdf

¹⁰⁶ Supra no:74, p.110.

¹⁰⁷ Supra no:78.

¹⁰⁸ Ashford, Warwick (2013), Proposed EU data breach laws will require proactive security, <http://www.computerweekly.com/news/2240176411/Proposed-EU-data-breach-laws-will-require-proactive-security>

¹⁰⁹ Supra no:87, p.3.

¹¹⁰ Richmond, Riva (2011), As 'Like' Buttons Spread, So Do Facebook's Tentacles, The New York Times, http://bits.blogs.nytimes.com/2011/09/27/as-like-buttons-spread-so-do-facebooks-tentacles/?_r=0

¹¹¹ Supra no:60.

it to personalize the data on those pages.”¹¹² However, the fact is that the personal data (including user’s search history, location data, browsing habits and reading behaviour) “is often collected and used outside the individual’s control or even knowledge.”¹¹³

Furthermore, there is an important question about whether any alternative rules of this right are exist. According to rules of current data protection regulation “every person has the right to control the processing of their personal data” (including the right to request the erasure of data), and they can request to erase their data, if the “data are incomplete, not up to date, inaccurate or were collected in violation of the law or are no longer necessary for the purposes for which they were collected.”¹¹⁴ Some writers think that the RtbF “seems to be an extension of the existing right currently contained in Article 12 of Directive 95/46 to have data erased”, and they do not find meaningful to create a new right under a different name.¹¹⁵ Although the Article 6 (1,e) of same Directive states that personal data can be kept “for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.”, the practices of keeping the data on the Internet are totally different from this provision.¹¹⁶ For analysing these issues, it can be useful making a dual division based on the sources of the controller as the “search engines” which point people to content that exists elsewhere and the SNs which host content created by people.¹¹⁷ An example case related content created by people can be given from German jurisdiction which is about the murders, Wolfgang Werle and Manfred Lauber who killed a famous actor, Walter Sedlmayr, in 1990.¹¹⁸ After the murders were sentenced to prison, their names appeared in Wikipedia

¹¹² Ackerman, Elise (2013), Google And Facebook Ignore "Do Not Track" Requests, Claim They Confuse Consumers,

<http://www.forbes.com/sites/eliseackerman/2013/02/27/big-internet-companies-struggle-over-proper-response-to-consumers-do-not-track-requests/>

¹¹³ Supra no:37, p.4.

¹¹⁴ Smętek, Joanna and Warso, Zuzanna (2012),The right to be forgotten–step in the right direction?, Europa Praw Czlowieka, p.2,

<http://www.europapraw.org/en/policy-papers/policy-paper-prawo-do-bycia-zapomnianym-wzmocnienie-autonomii-informacyjnej-czy-wprowadzenie-cenzury-w-internecie>

¹¹⁵ Kuner, Christopher (2012), Privacy & Security Law Report, 11 PVL R 06, p.6,

http://www.ico.org.uk/news/events/~media/documents/future_of_dp_in_europe_2012/ico_event_future_of_dp_in_europe_2012_Chris_Kuner_article.ashx

¹¹⁶ Supra no:37, p.7.

¹¹⁷ Fleischer, Peter (2012), Our thoughts on the right to be forgotten, Google,

<http://googlepolicyeurope.blogspot.co.uk/2012/02/our-thoughts-on-right-to-be-forgotten.html>

¹¹⁸ Ciučkowska–Leszczewicz, Katarzyna (2012), The Right To Be Forgotten: European Approach To Protection Of Personal Data, UWM Law Review, Vol.4, p.30,

<http://www.uwm.edu.pl/lawreview/sites/default/files/Ciu%C4%87kowska%E2%80%93Leszczewicz%202012%20-%20The%20Right%20to%20Be%20Forgotten.%20European%20Approach%20to%20Protection%20of%20Personal%20Data.pdf>

entry; however they have been released on parole and they requested to delete their name from the English and German language Wikipedia.¹¹⁹ Finally, although their names were removed from German language web site, English language one left the entries because of the territorial effects of the German court's decision.¹²⁰ On the other hand, more recently, a different approach stands out over the search engines, which can be basically defined as a service that "*helps its users locate publicly accessible content on the Internet*".¹²¹ These search engines such as Google, Bing and Yahoo help to find the users any kind of information amongst the "huge mass of data stored" on the Internet including the personal data.¹²² Today, their impacts are clearly visible as Megan Angelo said "*You are what Google says you are.*"¹²³ According to a recent case which is pending at the Court of Justice of the European Union, *Google v. Mario Costeja González*¹²⁴, the Advocate General Niilo Jääskinen delivered his opinions as under the current EU data protection regulation, the Internet users have no RtbF on search engines.¹²⁵ The facts of the case are that in early 1998, a Spanish newspaper published in its printed edition announcements about a court-ordered foreclosure real-estate auction to pay social security debt, and then an electronic version of the newspaper was made available online.¹²⁶ In 2009, the former debtor discovered that when he is 'googling' his name, the online notice can be seen; soon after he requested the publisher to take the information down, but it was refused by the editor because of the publication was originally court-ordered.¹²⁷ Following this, he asked Google Spain to not show any links to the newspaper when his name and surnames were entered¹²⁸, and also complained to Spain's Data Protection Authority.¹²⁹ Although the authority called Google to take the measures necessary to

¹¹⁹ Ibid, p.30.

¹²⁰ Ibid.

¹²¹ Grimmelmann, James, (2007), The Structure of Search Engine Law, Iowa Law Review, Vol.93, No:1, p.3, http://www.nyu.edu/projects/nissenbaum/papers/Grimmelmann_StructureOfSearchEngineLaw.pdf

¹²² BBC, What is search engine? <http://www.bbc.co.uk/webwise/guides/about-search-engines>

¹²³ Angelo, Megan (2009), "You Are What Google Says You Are," Wired,

<http://www.wired.com/business/2009/02/you-are-what-go/>

¹²⁴ *Case C-131/12: Google Spain SL & Google Inc. v Agencia Española de Protección de Datos (AEPD) & Mario Costeja González*

¹²⁵ English, Rosalind (2013), There is no right 'to be forgotten' by internet search engines, UK Human Rights Blog, <http://ukhumanrightsblog.com/2013/07/01/there-is-no-right-to-be-forgotten-by-internet-search-engines/>

¹²⁶ Opinion Of Advocate General Jääskinen delivered on 25 June 2013, Case C-131/12 Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, InfoCuria - Case-law of the Court of Justice,

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=138782&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=362663>

¹²⁷ Weiss, Marie-Andree (2013), CJEU Advocate General Finds No Right to be Forgotten by Search Engines under EU Law, <http://www.dmlp.org/blog/2013/cjeu-advocate-general-finds-no-right-be-forgotten-search-engines-under-eu-law>

¹²⁸ Supra no:126.

¹²⁹ Supra no:127.

withdraw the data from its servers,¹³⁰ it refused to request the newspaper because the publication was legally justified (in other words, the original content is determined legal and will remain on the online newspaper).¹³¹ As a result, Google has appealed the decision of the authority and in this case, the Advocate General Niilo Jääskinen published his opinions as “...2. *An internet search engine service provider, whose search engine locates information published or included on the internet by third parties, indexes it automatically, stores it temporarily and finally makes it available to internet users according to a particular order of preference, ‘processes’ personal data in the sense of Article 2(b) of Directive 95/46 when that information contains personal data. However, the internet search engine service provider cannot be considered as ‘controller’ of the processing of such personal data in the sense of Article 2(d) of Directive 95/46, with the exception of the contents of the index of its search engine, provided that the service provider does not index or archive personal data against the instructions or requests of the publisher of the web page.*

3. *The rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for in Article 14(a), of Directive 95/46, do not confer on the data subject a right to address himself to a search engine service provider in order to prevent indexing of the information relating to him personally, published legally 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.”* These opinion is very important over the debate for “Is there any need for proposing a new regulation about this issue?”; thus, the answer seems probably “yes” in order to resolving the current uncertainty and discrepancy over the issue.

3.2. Under What Conditions Can Anybody Claim This Right?

According to the proposed Article 17, a user can request an online service’s “controller” for deleting her personal data (even if the data has been made public) under certain grounds. Within this scope, the term of “data subject” which supplies with the term of user in this case, means “*an identified natural person or a natural person who can be identified, directly or indirectly, by means reasonably likely to be used by the controller or by any other natural or legal person, in particular by reference to an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental,*

¹³⁰ Supra no:126.

¹³¹ Supra no:127.

economic, cultural or social identity of that person.”¹³² On the other hand, Article 4 of the Proposal for GDPR defines the 'controller' as “*the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes, conditions and means of the processing of personal data; where the purposes, conditions and means of processing are determined by Union law or Member State law, the controller or the specific criteria for his nomination maybe designated by Union law or by Member State law.*”¹³³ The “controller” who has rights and obligations under this article, simply means that the person that decides how and why such data is processed.¹³⁴ Further, according to Proposed Article 3(2), data controllers who is not established in the EU, may be also subject to this regulation “*when their processing activities are related to ‘the offering of goods or services’ to data subjects residing in the EU, or to the monitoring of the behaviour of EU residents*”.¹³⁵ Importantly, according to Viviane Reding, “*social networking [websites] and search engines may exercise control on the content, conditions, and means of processing, thereby acting as data controllers*”, and thus they are subjects of the obligations laid down in the proposed provisions.¹³⁶ On the other hand, the “*Internet users are sharing not only their own information on the Web, but also information about others.*”¹³⁷ Within this scope, when the personal data was defined as “any information” relating to a data subject; no distinction regarded the source of the information (who posted the information on the Web) was made.¹³⁸ However, Jef Ausloos thinks that this right “presuppose a contractual relationship” based on the individual’s consent over the processing of personal data, excluding the situations “*where personal data is (legally) obtained without the individual’s consent*”.¹³⁹

In light of all these definitions and provisions, the data subject can use the right;

- if the main purpose of the collection or processing for the personal data is disappeared;
- if the data subject withdraws her consent on the lawful processing which is based according to Article 6(1,a), or if the storage period consented is expired, and there is no other legal ground for the processing of these data (Only this provision seems

¹³² Supra no:30, p.41.

¹³³ Supra no:30, p.41-42.

¹³⁴ Information Commissioner’s Office, Key definitions of the Data Protection Act, http://www.ico.org.uk/for_organisations/data_protection/the_guide/key_definitions

¹³⁵ Supra no:115, p.4.

¹³⁶ Supra no:87, p.4.

¹³⁷ Ibid, p.4.

¹³⁸ Supra no:118, p.33-34.

¹³⁹ Supra no:76, p.7.

compatible with the view which “*introduce the concept of forgetting in the digital age through expiration dates for information*”¹⁴⁰)

- if the data subject objects to the processing of personal data using the right of objection under Article 19;
- if there are other reasons for the processing of the data does not comply with this Regulation¹⁴¹.

By the way, the draft article makes a distinction regarding the nature of the data and provides a visible priority to the children’s data in order to protect them by using the statement of “*especially in relation to personal data which are made available by the data subject while he or she was a child*”. However, this statement is criticised in the report of Jan-Philipp Albrecht, European Parliament rapporteur, (mentioned as “Albrecht revisions” versus the Commission proposal) with a reason that the “*right to erasure should apply to all data subjects equally*”.¹⁴²

On the other hand, if the personal data is made public by the controller, the controller will be responsible for that publication (even if it has authorised a third party for the publication) and it shall take all reasonable steps like to inform third parties related the processing such data by linking to, or copying or replying them.¹⁴³ Viviane Reding explains how these provisions would work by giving an example that “*Somebody’s personal data is published online and is then copied to another website. Additionally, a search engine links to the original story/website. Here the right to be forgotten can be exercised if the person withdraws his/her consent for the data processing. The original website would need to take down the personal data (if no legitimate reasons exist to keep it) and inform the other website that the individual wants to have his/her data deleted. You would thus for example no longer find the information listed on the search engine as the site on which the original information had been posted, has taken down this information.*”, and she also added an example about how it would not work that “*A press report reveals information about an individual of public importance. In this instance, it is likely that the exception relating to the right to freedom of expression and*

¹⁴⁰ Koops, Bert-Jaap (2012), Forgetting Footprints, Shunning Shadows. A Critical Analysis of the “Right To Be Forgotten” in Big Data Practice, Tilburg Law School Legal Studies Research Paper Series, No:8, p.5, <http://ssrn.com/abstract=1986719>

¹⁴¹ Article 17(1) of Supra no:30, p.51.

¹⁴² The Centre for European Legal Studies (2013), EU Proposals On The Right To Be Forgotten, CELS Workshop on the Right to be Forgotten, p.2, <http://www.cels.law.cam.ac.uk/Cambridge%20Conference%20RTBF%20proposals.pdf>

¹⁴³ Article 17(2) of Supra no:30, p.51.

freedom of the media (set out in Articles 17 and 80 of our proposed Regulation) would apply."¹⁴⁴

The second example above is linked with the exceptions of the controller's obligation (erasure the request data without delay). According to Article 17(3), there are five reasonable situations for retention of the personal data:

- *"for exercising the right of freedom of expression in accordance with Article 80"*:
The concept of "freedom of speech" has a very complex and extensive evolution which varies by the nations. Furthermore today, the tolerance for freedom of speech and its interpretations differ from country to country. Importantly, it has a close link between the *"democracy's political process"* and *"function of protecting minorities and political opponents"*.¹⁴⁵ On the other hand, the term of "freedom of expression" is hard to define and there is no academic consensus over its definition. Relatedly, Joseph Raz considers that this right which protects people's freedom to communicate in public, is a *"liberal puzzle"*.¹⁴⁶ It is a kind of system (both political and cultural)¹⁴⁷ which is interactive and appropriative, allows people to participate freely in culture and helps for constituting them as individuals.¹⁴⁸ That system preserves the individual liberty from the state interference (the constitutive feature of public discourse) and also individual's freedom to communicate with other people (social nature of individual).¹⁴⁹ It has three main purposes as being an instrument for the realization of truth; being a means of democratic self-government; and being a perspective of human dignity.¹⁵⁰ However, although the "expression" has greater protection compared with other types of activities; this protection is not absolute, and in specific circumstances, it can be limited by law.¹⁵¹ According to the Article 19 of the UDHR *"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold*

¹⁴⁴ Supra no:78.

¹⁴⁵ Harris, David; O'Boyle, Micheal; Bates, Ed and Buckley, Carla (2009), Harris, O'Boyle & Warbick, Law of the European Convention on Human Rights, Oxford University Press, Second Edition, p.443.

¹⁴⁶ Raz, Joseph (1991), Free Expression and Personal Identification, Oxford Journal Of Legal Studies, Vol.11, no:3, p.303.

¹⁴⁷ M. Balkin, Jack (2004), Digital Speech And Democratic Culture: A Theory Of Freedom Of Expression For The Information Society, New York University Law Review, Vol. 79, p.4.

¹⁴⁸ Ibid, p.3-4.

¹⁴⁹ Moon, Richard (2009), The Social Character Of Freedom Of Expression, Amsterdam Law Forum, Vol.2, p.43-46.

¹⁵⁰ Weinrib, Jacob (2009), What Is The Purpose Of Freedom Of Expression?, University Of Toronto Faculty Of Law Review, Vol.67, Issue:1, p.167.

¹⁵¹ Harel, Alon (2011), Freedom Of Speech, p.3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1931709

opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."¹⁵² Further, according to the first paragraph of the Article 10 of the ECHR, the freedom of expression includes both freedom of opinion, the right to give information, to disseminate ideas, and to receive them.¹⁵³ In its second paragraph, this article provides the restrictions of the free speech as exceptions that the States may only impose them in appropriate conditions.¹⁵⁴ However, Article 17(3) limits the practices of the "right of freedom of expression" with the Article 80 which obliges "*Member States to adopt exemptions and derogations from specific provisions of the Regulation where necessary to reconcile the right to the protection of personal data with the right of freedom of expression. It is based on Article 9 of Directive 95/46/EC, as interpreted by the Court of Justice of the EU*". Importantly, Article 80 mentions "*solely for journalistic purposes or the purpose of artistic or literary expression*", except political speech. This provision is seen too narrow and unsatisfactory for "*the international human rights obligations regarding free expression*".¹⁵⁵

- "*for reasons of public interest in the area of public health in accordance with Article 81*": Similar to the other abstract concepts, it is often unclear and there is no single definition of the term of public interest. Both definitions have very particular purposes which are changing according to the related issues. As examples of these definitions, the International Federation of Accountants defined it as '*the net benefits derived for, and procedural rigour employed on behalf of, all society in relation to any action, decision or policy*'.¹⁵⁶ For journalism, it means a "*possible justification for the use of subterfuge or covert activities*".¹⁵⁷ Nevertheless, as Weisbrod asked "*Is there a single concept of public interest that can, at least conceptually, allow us to rank all activities according to their degree of public-interestness; or are there multiple public interests,*

¹⁵² Supra no:19.

¹⁵³ Úbeda de Torres, Amaya, (2003), Freedom of Expression under the European Convention on Human Rights: A Comparison With the Inter-American System of Protection of Human Rights, The Human Rights Brief, Vol.10, Issue:2, p.6.

¹⁵⁴ Supra no:20, p.11.

¹⁵⁵ Center for Democracy&Technology (2013), On The "Right To Be Forgotten": Challenges And Suggested Changes To The Data Protection Regulation, p.1, <https://www.cdt.org/files/pdfs/CDT-Free-Expression-and-the-RTBF.pdf>

¹⁵⁶ ICAEW (2012), Acting In The Public Interest: A Framework For Analysis Market Foundations Initiative, p.11, <https://www.icaew.com/~media/Files/Technical/Ethics/public-int-rep-web.pdf>

¹⁵⁷ Elliott, Chris (2012), The readers' editor on ... how should we define 'in the public interest', The Guardian, <http://www.theguardian.com/commentisfree/2012/may/20/open-door-definition-public-interest>

which would imply the possibility of conflict among them?”¹⁵⁸ On the other hand, in this provision, the public interest is limited with concern of “public health” in accordance with Article 81. The term of public health is simply defined as “*the science of protecting and improving the health of communities through education, promotion of healthy lifestyles, and research for disease and injury prevention*”.¹⁵⁹ Within this content, the Article 81 “*obliges Member States, further to the conditions for special categories of data, to ensure specific safeguards for processing for health purposes*”.¹⁶⁰

- “*for historical, statistical and scientific research purposes in accordance with Article 83*”: It looks like the rule-makers give particular importance to the researches on history, statistic and science, and they enable researchers to collect personal data. Within this scope, according to the Article 83, “*personal data may be processed for historical, statistical or scientific research purposes only if: (a) these purposes cannot be otherwise fulfilled by processing data which does not permit or not any longer permit the identification of the data subject; (b) data enabling the attribution of information to an identified or identifiable data subject is kept separately from the other information as long as these purposes can be fulfilled in this manner.*”¹⁶¹
- “*for compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued*”: With this provision, the Union and Member State law which are specified as “*objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued*” are regulated.
- “*in the cases referred to in paragraph 4*”: If there is an option for restricting the content instead of erasure, it can be accepted as an exception. The paragraph 4 of Article 17 regulates the conditions of the restriction.

¹⁵⁸ Pleasence, Pascoe and Maclean, Sarah (1998), The Public Interest, Legal Aid Board Research Unit, p.5, http://www.justice.gov.uk/downloads/publications/research-and-analysis/lsrc/defining_the_public_interest.PDF#page=1&zoom=auto,0,849

¹⁵⁹ Association of Schools of Public Health, What is Public Health?, <http://www.whatispublichealth.org/what/>

¹⁶⁰ Supra no:30, p.15.

¹⁶¹ Article 83 of Ibid, p.96.

3.3. What Are The Main Criticisms Against This Concept?

After announcement of the draft regulation, the RtbF has been at the centre of some policy debates and, it is criticised for several major aspects. The first one of them is that it evaluated as “*broadly defined*”.¹⁶² Its legal status is also considered “unclear” that there is no consensus over “it is a right or interest or value”.¹⁶³ Further, Peter Fleischer, Google's Global Privacy Counsel, considered that although it is a very successful political slogan; like the other successful slogans, it looks like a “Rorschach test” that “*people can see in it what they want*”.¹⁶⁴ Moreover, Harris wrote that “*The right to be forgotten is at once seductive and deceptive. Seductive because it plays to that visceral longing for a second chance that lingers in all of us; deceptive because, while the notion is easily grasped, a thoughtful discussion on the issue quickly becomes mired in a labyrinth of complications.*”¹⁶⁵ Similarly, Jan-Philipp Albrecht expressed his opinions regarding this right that it needs “*more legal certainty, clarity and consistency*” as well as the other data processing activities in the EU.¹⁶⁶ A related question about its vagueness is that “*who has the right to demand that an item should be forgotten is subject to interpretation.*”; for instance, if multiple people appear in a group photo, and the data subjects have different wishes on deleting the photo, whose wishes should be respected?¹⁶⁷ Another argument regarding “the scope of RtbF is too broad” as follows: “*The right to be forgotten should only address data we create about ourselves. Libel laws already set the necessary boundaries for what others can say about us. Journalism is journalism, and comment is free. But users should be able and allowed to delete what they have said about themselves through words, deeds, likes, posts and shares, including photos and, after some time, spent criminal convictions, unless it is in the public interest, like a famous person's autobiography. To some extent, this is already the case: anyone can modify their Facebook timeline by adding and deleting posts and life events. But there needs to be greater transparency and this needs to be a right rather than something that service providers kindly agree to; otherwise new management or new owners may one day decide that nothing*

¹⁶² Supra no:84.

¹⁶³ Supra no:140, p.2-3.

¹⁶⁴ Fleischer, Peter (2012), The right to be forgotten, or how to edit your history, <http://peterfleischer.blogspot.co.uk/2012/01/right-to-be-forgotten-or-how-to-edit.html>

¹⁶⁵ Harris, Leslie (2011), Escaping Your Online Mistakes: Should There Be a Law? <http://abcnews.go.com/Technology/internet-mistakes-forgotten/story?id=13995752&page=2>

¹⁶⁶ Europa.eu (2013), Commission welcomes European Parliament rapporteurs' support for strong EU data protection rules, http://europa.eu/rapid/press-release_MEMO-13-4_en.htm

¹⁶⁷ Druschel, Peter; Backes, Michael and Tirtea, Rodica (2012), The right to be forgotten – between expectations and practice, ENISA, p.7, <http://www.enisa.europa.eu/activities/identity-and-trust/library/deliverables/the-right-to-be-forgotten>

can be deleted anymore.”¹⁶⁸ The above mentioned argument refers also refers the conflict between the RtbF and the right to information. On the other hand, as Rehtaeh Parsons’ father, whose daughter killed herself after allegedly being raped and bullied, said *“I don’t want her life to be defined by a Google search about suicide or death or rape. I want it to be about the giving heart she had.”*¹⁶⁹ “could the heirs use this right, after the decedent” is an important question about determining the scope of this right. A final issue which should be considered is related the question of “Could it be possible that the renounce of the future RtbF through the contractual transactions, before it has accrued?” That issue is related with the agreement’s validity in case if the Internet companies arrange “terms and conditions of service” inserted a disincentive provision taking their users’ explicit consent; though the need of claiming the right is not arisen, yet. On the other hand, even if there is a consensus over the validity of “renounce of the future RtbF” taking the user’s consent, a second issue may arise regarding the children users who use the SNSs widespread. Because of youthful lack of judgment, in most of the legal systems, the children have no competency to make a contract without guardian’s approval. If the child gives an explicit consent to renounce the right, is it really valid? Those are the questions over the scope of the RtbF which should be detailedly examined.

On the other hand, today, many online users are questioning about their privacy and free speech rights due to both governments’ and businesses’ overdrawn interventions. In order to secure these rights, multi steps are made by the defenders. It is generally thought that both privacy and freedom of speech are recognized as fundamental rights by several international conventions; but there must be also a “delicate balance” between each other because of some conflicts.¹⁷⁰ Some people consider that although they accept that they live with a constant public and private surveillance, like Neil M. Richards, a privacy scholar, writes that *“surveillance inclines us to the mainstream and the boring...when we are watched while engaging in intellectual activities, broadly defined—thinking, reading, web-surfing, or private communications—we are deterred from engaging in thoughts or deeds that others might find deviant.”*, and *“more online privacy would kill free speech”*; because if they already being

¹⁶⁸ Supra no:95.

¹⁶⁹ Supra no:93.

¹⁷⁰ Barendt, Eric (2012), Freedom of speech and privacy, <http://freespeechdebate.com/en/discuss/freedom-of-speech-and-privacy/>

watched, they want to use their free speech more broadly.¹⁷¹ More specifically, according to Jeffrey Rosen, the RtbF is “*the biggest threat to free speech on the Internet in the coming decade.*”¹⁷² Contrary to these views, some others think that “*privacy isn’t a hindrance to free speech; it’s the driving force behind it.*”, because it supports the “*self-expression, creativity*” and, it is “*not about having something to hide; it’s about having something to live for.*”¹⁷³ Remarkably, in most of the European countries, the privacy is defined more broadly and protected more powerful rather than in the US.¹⁷⁴ As a consequence, for some reasons the RtbF which is provided a vital role for protecting privacy, is found risky for free expression on digital world.¹⁷⁵ The idea behind this approach, in short, is to assume that “*it would significantly limit users’ free expression rights and impose unreasonable burdens on online platforms and ISPs, likely leading to fewer platforms for user speech.*”¹⁷⁶ Meanwhile, the proposed Article 17 (3) states that if “*the retention of the personal data is necessary for exercising the right of freedom of expression in accordance with Article 80*”, there will be an exception for the erasure process. However, the critical point is that this provision enables to the “*member states to decide in what circumstances free expression rights of other users should be taken into account*” which would framed with the risk of different implementations and arbitrariness for the different member states’ citizens whose countries have adopted “*different formulations of a free expression exception*”.¹⁷⁷ Within this scope, Albrecht and Sean Kelly, rapporteur for the ITRE Committee, have similarly suggested some amendments which contain “*deleting binding obligations on third parties and adds a provision calling for erasure requests to be carefully balanced against free expression concerns.*”¹⁷⁸ When taking into consideration of rising reactions on this issue, in practice, balancing the privacy right of a user and the free expression rights of others will not be an easy task for whole implementers.

¹⁷¹ Downey, Sarah A. (2013), Why the loss of online privacy will kill free speech?, The Online Privacy Blog, <http://www.abine.com/blog/2013/why-the-loss-of-online-privacy-will-kill-free-speech/>

¹⁷² Bennett, Colin J.; Molnar, Adam and Parsons, Christopher (2013), Forgetting, Non-Forgetting and Quasi-Forgetting in Social Networking: Canadian Policy and Corporate Practice, p.3, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2208098

¹⁷³ Supra no:171.

¹⁷⁴ Garton Ash, Timothy (2012), Free speech and privacy, <http://freespeechdebate.com/en/principle/p-8/free-speech-and-privacy/>

¹⁷⁵ Supra no:84.

¹⁷⁶ Supra no:155, p.1.

¹⁷⁷ Supra no:84.

¹⁷⁸ Supra no:155, p.2.

Thirdly, RtbF is also seen in conflict with “the right to information” which is generally recognized as a human right.¹⁷⁹ According to Banisar, the right to information “*provides that individuals have a basic human right to demand information held by government bodies.*” and also gives individuals opportunities to “*seek and receive information*”.¹⁸⁰ Today for facilitating access to information, the Internet, especially the search engines, has an undeniable role. In many respects, the RtbF is seen a potential obstacle interfering with others’ right to access information.¹⁸¹ In fact, some users and writers consider that the implications of this right cause a kind of censorship over the information.¹⁸² They think that because of the deleting the information on the Net, some “*important information might become inaccessible, incomplete and/or misrepresentative of reality*”, and public interest will be damaged forgetting the information.¹⁸³ Further, Cherri-Ann Beckles notes that “*archival records—records of enduring administrative, legal, fiscal, cultural, historical and intrinsic value—represent the essence of a society and provide glimpses into the past and lessons for future generations. Archives also protect individuals and society as a whole by ensuring there is evidence of accountability in individual and/or collective actions on a long-term basis. The erasure of such data may have a crippling effect on the advancement of a society as it relates to the knowledge required to move forward.*”¹⁸⁴ More recently, in France, the Association of French Archivists is objecting to the RtbF claiming that it “*could complicate the collection and digitization of mundane public documents...that form a first draft of history.*”¹⁸⁵ However, a tension has always been obvious between the data protection and information access.¹⁸⁶ Although both of the two rights are seen as significant rights which are not absolute under all circumstances, the particular interests related the two rights must be balanced by the implementers.

On the other hand, some significant questions have been raised over “what is the territorial scope of this right”. Definitely, the Proposed Reform is a clear attempt to harmonize data

¹⁷⁹ Supra no:74 p.111.

¹⁸⁰ Banisar, David (2011), *The Right To Information and Privacy: Balancing Rights and Managing Conflicts*, Working Paper, World Bank Institute, p.5, <http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/Right%20to%20Information%20and%20Privacy.pdf>

¹⁸¹ Supra no:87, p.5.

¹⁸² Supra no:9, p.122.

¹⁸³ Supra no:76, p.7.

¹⁸⁴ Beckles, Cherri-Ann (2013), *Will the Right To Be Forgotten Lead to a Society That Was Forgotten?*, https://www.privacyassociation.org/privacy_perspectives/post/will_the_right_to_be_forgotten_lead_to_a_society_that_was_forgotten

¹⁸⁵ Lynn, Kecia (2013), *French Archivists Say No To Proposed "Right To Be Forgotten"* <http://bigthink.com/ideafeed/french-archivists-say-no-to-proposed-right-to-be-forgotten>

¹⁸⁶ Supra no:9, p.123.

protection for EU citizens across the member states' borders. However, it also expands the territorial scope of current rules; and is valid for not only the organisations established in the EU, but also non-EU based data controllers whose *"processing relates to offering goods and services to individuals in the EU or the monitoring of their behaviour"*.¹⁸⁷ The main points of this criticism is that the recognition of this right, in practice, most probably will be failed because of the 'borderless' characteristic of data flow over the Internet, and the existence of various legal systems.¹⁸⁸ "The decentralized structure of the World Wide Web" is seen an obstacle for the enforcement of this right, because *"once an individual posts some personal information online, the data can easily be copied and widely distributed; deleting the original will do nothing to stop people from finding a copy elsewhere."*¹⁸⁹ However, in the Stockholm Programme, the EC clearly declared that the EU member states citizens' privacy *"must be preserved beyond national borders, especially by protecting personal data."*¹⁹⁰ Redding also stresses that *"Any company operating in the EU market or any online product that is targeted at EU consumers must comply with EU rules...Exempting non-EU companies from our data protection regulation is not on the table. It would mean applying double standards."*¹⁹¹ On the other hand, some authors think that the geo-location technologies using location identification systems via Internet or mobile devices, may be a future solution for the exercises of different jurisdictions hold own sovereignties.¹⁹²

"Whether or not it is applicable on legal and technical ways" is another (and perhaps most significantly) criticisms of the RtbF. ENISA considers that *"enforcing the right to be forgotten is impossible in an open, global system"* and describes the bases of this technical challenge as following: *"(i) allowing a person to identify and locate personal data items stored about them; (ii) tracking all copies of an item and all copies of information derived from the data item; (iii) determining whether a person has the right to request removal of a data item; and, (iv) effecting the erasure or removal of all exact or derived copies of the item"*

¹⁸⁷ Brown, Lawrence (2012), Proposed EU Data Protection Regulation - potential issues for asset managers, Simmons & Simmons, <http://www.aima.org/en/education/aimajournal/past-articles/index.cfm/jid/8475E488-B350-4939-AC2E1056D224612C>

¹⁸⁸ Supra no:87, p.1.

¹⁸⁹ Supra no:18, p.3.

¹⁹⁰ Supra no:87, p.2.

¹⁹¹ Smith, Tineka (2013), The right to be forgotten could be disastrous, <http://www.cbronline.com/news/tech/hardware/datacentre/the-right-to-be-forgotten-could-be-disastrous-070313>

¹⁹² Bennett, Steven C. (2012), The "Right to Be Forgotten": Reconciling EU and US Perspectives Berkeley Journal of International Law, Vol.30, Issue:1 Article:4, p.182-192, <http://scholarship.law.berkeley.edu/bjil/vol30/iss1/4>

in the case where an authorized person exercises the right."¹⁹³ On the other hand, today, the giant search engines and SNSs constantly and explicitly fight against this right; because the "forgetting" is evaluated as a complicated process in many respects.¹⁹⁴ For instance, Google thinks that there are practical and legal limits to deletion requests of users from hosting platforms; because of several reasons that firstly "*it is possible for any material published online to be copied and re-published elsewhere ...and it cannot be expected to maintain control over other copies of the material published elsewhere online, as these are outside of the control of the hosting platform.*"; secondly, "*it is important that hosting platforms not be obliged to delete materials when doing so would be likely to undermine the security of the service or allow for fraud.*"; thirdly, "*hosting platforms cannot be expected to delete materials created collaboratively at the unilateral request of a single contributor.*", and finally "*Internet hosting platforms should not be expected to exercise control over materials published by third parties.*"¹⁹⁵ Fleischer also added that for achieving a balanced and reasonable, and implementable approach, this right must be based on some certain principles as "*1) people should have the rights to access, rectify, delete or move the data they publish online. 2) people should not have the automatic right to delete what other people publish about them, since privacy rights cannot be deemed to trump freedom of expression, recognizing that some mechanisms need to be streamlined to resolve these conflicts. 3) web intermediaries host or find content, but they don't create or review it, and intermediaries shouldn't be used as tools to censor the web.*"¹⁹⁶ In 2010, an important case occurred in Argentina related the search engines which is regarding a pop star named "Virginia da Cunha" who voluntarily posted her racy photos on the Internet.¹⁹⁷ She requested from Google and Yahoo to remove these photos on their systems.¹⁹⁸ After their rejections, she sued these search engines and, while Google responded that "*it could not comply technologically with a broad legal injunction demanding the removal of the pictures*"¹⁹⁹, Yahoo defended itself as stated "*Technologically, it is so hard for us to do this. We cannot selectively just remove these pictures, which have been widely shared. Instead, we are going to have to remove all references to this person entirely.*"²⁰⁰ In this case, although the Argentine judge held that

¹⁹³ Supra no:167, p.8.

¹⁹⁴ Supra no:172, p.1.

¹⁹⁵ Supra no:117.

¹⁹⁶ Supra no:164.

¹⁹⁷ Supra no:75, p. 1534.

¹⁹⁸ Unpublish, (2012), The Right to be Forgotten: Applicability of the Da Cunha Case, <http://unpublish.com/the-right-to-be-forgotten-applicability-of-the-da-cunha-case/>

¹⁹⁹ Ibid.

²⁰⁰ Supra no:75, p. 1534.

Google and Yahoo were liable of this issue and they had to remove all of these photos, this decision was overturned at the appeal stage with the reason that “*Google and Yahoo could only be held liable if they knew content was defamatory and negligently failed to remove it*”.²⁰¹ Another issue related with the technical obstacle is regarding the provision on Article 17(2) which states that “*Where the controller referred to in paragraph 1 has made the personal data public, it shall take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, 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. Where the controller has authorised a third party publication of personal data, the controller shall be considered responsible for that publication.*” As it can be seen Google’s above mention statement, leading motive of this objection is that a personal data, for example, a political opinion which is posted a blog, can be quoted, shared, discussed or referenced many other bloggers, journalists or ordinary users who are possibly live in different countries; thus the erasing procedure seems almost impossible burden for the controller.²⁰² This issue is explained by the opponents as “*technically impossible to implement the right to be forgotten, because of the many back-ups of back-ups of back-ups that take place*” and “*But if you can be deleted from Google’s database, i.e. if you carry out a search on yourself and it no longer shows up, it might be in Google’s back-up, but if 99 % of the population don’t have access to it you have effectively been deleted*”.²⁰³ Additionally, deleting the data from an initial system and those downstream is seen a complex task because of the overwritten records caused by the updates and corrections.²⁰⁴ Another question can be asked related the SNSs as “if the pictures which are requested to delete by the data subject, had been copied and reposted by many friends to their own profiles, “how can the controller take ‘all reasonable steps’ on its own to identify any relevant third parties and secure possibility of data processing” and “could it be technically possible to delete all copies saved on other profiles by the controller”.²⁰⁵ Within this scope, the scope of the obligation of taking “all reasonable steps” is found so vague and broad.²⁰⁶ In light of all these, “Albrecht revisions” has proposed some amendments on RthF which restrict its scope “*by limiting notice obligations for controllers only to third parties to whom they*

²⁰¹ Rosen, Jeffrey (2012), The Right to be Forgotten, 64 Stan. L. Rev. Online 88, <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten>

²⁰² Supra no:84.

²⁰³ Kulevska, Sanna (2013), The Future of Your Past: A Right to be Forgotten Online?, Chilling Effects, <http://www.chillingeffects.org/weather.cgi?WeatherID=769>

²⁰⁴ Supra no:37, p.19.

²⁰⁵ Supra no:118, p.33,

²⁰⁶ Supra no:37, p.12.

have illegally transferred data, and by strengthening the requirements on States to provide exceptions for free expression to meet existing human rights standards”.²⁰⁷ Similarly, CDT has proposed changes for the Commission proposal which narrow the provision with providing “online services that receive take down requests are only required to forward the requests to third parties with whom they have a direct contractual relationship”.²⁰⁸

Additionally, the UK has a visible doubt for the recognition of this right.²⁰⁹ In 2012, an oral evidence was taken by UK Justice Committee about the Data Protection framework proposals which was reported to the House of Commons; and in that oral evidence, Jean Gonié, Director of Privacy EU Affairs, Microsoft, and Sietske de Groot, Senior EU and International Affairs Policy Adviser, Federation of Small Businesses, gave evidence as witnesses.²¹⁰ In the evidence, the question of “How feasible is it to permanently delete data, particularly if published on the internet, in accordance with this right to be forgotten?” was answered by Jean Gonié as “it is totally possible to retrieve any kind of data where, as a data controller, you have control of the data... The problem is that it is not possible to retrieve all kinds of data because of the openness of the internet and the worldwide architecture of the web,”²¹¹ and also Sietske de Groot as “We think that it is very difficult. You can notify the parties to whom you have given or sold the data, but how can you check that everything is deleted, especially at a time when everybody is on Facebook and posts messages on Facebook? We think that it is not feasible to do that.”²¹² More recently, the UK considers “the option for opting out of the right to be forgotten”²¹³, because of the “websites could be compelled to delete all data held on users at their request, if new European laws come into force”.²¹⁴ The UK has also criticised the provision of significantly higher penalties for data protection violations.²¹⁵ According to proposal regulation, if the data controller does not comply with the

²⁰⁷ Supra no:84.

²⁰⁸ Ibid.

²⁰⁹ Castellan, Pere Simón (2012), A Test For Data Protection Rights Effectiveness: Charting The Future Of The ‘Right To Be Forgotten’ Under European Law, The Columbia Journal Of European Law Online, Vol.19, p.5, <http://www.cjel.net/wp-content/uploads/2013/02/Castellano-edited-and-rev.pdf>

²¹⁰ Justice Committee Oral Evidence on European Union Data Protection framework proposals (4 September 2012), Examination of Witnesses, Jean Gonié, Director of Privacy EU Affairs, Q22, <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmjust/uc572-i/uc57201.htm>

²¹¹ Ibid.

²¹² Ibid.

²¹³ Ashford, Warwick (2013), UK calls for opt-out of online right to be forgotten, <http://www.computerweekly.com/news/2240180878/UK-calls-for-opt-out-of-online-right-to-be-forgotten>

²¹⁴ Warman, Matt (2010) EU proposes online right 'to be forgotten', The Telegraph, <http://www.telegraph.co.uk/technology/internet/8112702/EU-proposes-online-right-to-be-forgotten.html>

²¹⁵ Wagley, John (2013), EU Privacy Proposal Criticized, Security Management, <http://securitymanagement.com/article/eu-privacy-proposal-criticized-0012007>

rights established in Article 17, it may be subject to an administrative fine up to 1% or 2% of their worldwide turnover.²¹⁶ Additionally, some analysts stresses that the proposed right could create “a black hole” in the web economy.²¹⁷ Moreover, according to a report including the impacts of the new regulation over business prepared by London Economics, *“additional costs generated by administration from the right to be forgotten, explicit consent for data processing and the training of a data protection officer would lead to estimated extra costs of £50,000-£75,000 per year. The explicit consent requirement could lead to a 50% drop in turnover and a loss of 26 jobs. The proposals as drafted may cost UK businesses up to £633 million in lost advertising revenue.”*²¹⁸ However, the proponents of this right argue that this is an acceptable cost for the businesses, as Nick Brown, managing director of identity management specialists GB Group, notes that *“Industries that deal with data would not plummet, but they would have to change... Facebook, Google and other companies that manage vast amounts of data will need to take more responsibility if this legislation is enacted, and the process will not be a simple one. The ability to navigate through challenges like this is the challenge that all successful businesses face if they are to endure.”*²¹⁹

Finally, related to the difficulties on achieving the proposed right, *“the importance of individual responsibility and taking steps to be cautious about the digital footprints leaving online”* is broadly stressed nowadays.²²⁰ According to Martin Abrams, policy director of Hunton & Williams, *“It's almost absurd to say we have the right to disappear from public domain... We're really talking about the right not to be observed in the first place.... We've been focused on symptoms rather than the underlying issues.”*²²¹ Similarly, Cherri-Ann Beckles notes that *“More attention should instead be paid to educating individuals to ensure that the record they create on themselves is one they wish to be left behind. Control of data at the point of creation is far more manageable than trying to control data after records capture.”*²²² Adam Thierer explains his opinions more strictly as *“Instead of using censorship as a privacy policy, we should instead encourage better social norms, especially among*

²¹⁶ Supra no:210.

²¹⁷ Supra no:191.

²¹⁸ London Economics (2013), Implications of the European Commission’s proposal for a general data protection regulation for business, Final report to the Information Commissioner’s Office, p.29, http://www.ico.org.uk/about_us/research/~media/documents/library/Data_Protection/Research_and_reports/implications-european-commissions-proposal-general-data-protection-regulation-for-business.ashx

²¹⁹ Supra no:191.

²²⁰ Supra no:184.

²²¹ Supra no:73.

²²² Supra no:184.

youth. *Teaching our kids smarter online hygiene and “Netiquette” is vital. “Think before you click” should be lesson #1.*”²²³

4. FACEBOOK CASE

Today, Facebook is considered to be the biggest SNSs in the Internet.²²⁴ It is actually a global social phenomenon; and it *“appeared to some writers as angel, and some as demon; to some as an emerging global village, and to others as isolation in disguise; to some as an opportunity for maintaining relationships, and to others as broadcast narcissism.”*²²⁵ According to Mark Zuckerberg, the founder and CEO of Facebook, it gives the users the *“power to share and make the world open and connected.”*²²⁶ The history of Facebook, its basic features, its privacy policies and its relationships with the proposed RtbF analysed below.

4.1. A Brief History of Facebook and Its Basic Characteristics

Facebook is the most popular SNS which was designed for a private community (Harvard college users only) in 2004 and then supported other universities and colleges which provided email addresses to their members/students.²²⁷ In 2006, it became *“publically accessible to everyone over 13 years of age with any e-mail address”*.²²⁸ After that, it has gained huge audience worldwide and, recently it has *“1.11 billion monthly active users, 751 million mobile users, and 665 million daily users”* considering 2012’s data.²²⁹ Moreover, according to ComScore’s 2011 Social Report, while *“1 in every 5 minutes”* online is being spent on SNSs, these user’s spend *“3 out of every 4 minutes”* of their time on Facebook.²³⁰ Further, Facebook has a very huge data archive by using about 180,000 servers²³¹; for example, it

²²³ Thierer, Adam (2011), Erasing Our Past On The Internet, Forbes, <http://www.forbes.com/sites/adamthierer/2011/04/17/erasing-our-past-on-the-internet/>

²²⁴ Supra no:43, p.59.

²²⁵ Witkower, D. E. (2010), A Reply to Facebook Critics, *Facebook and Philosophy: What’s on your mind?*, edited by D.E. Wittkower, Open Court, Chicago and La Salle, Illinois, p.xxiii.

²²⁶ Ibid, p.xxxii.

²²⁷ Supra no:45.

²²⁸ Supra no:43, p.4.

²²⁹ Tam, Donna (2013), Facebook by the numbers: 1.06 billion monthly active users, http://news.cnet.com/8301-1023_3-57566550-93/facebook-by-the-numbers-1.06-billion-monthly-active-users/

²³⁰ Brodock, Kate (2012), 1 In Every 5 Minutes Online Is Being Spent On Social Networks (And More Data From Comscore’s 2011 Social Report), <http://www.othersidegroup.com/2012/01/1-in-every-5-minutes-online-is-being-spent-on-social-networks-and-more-data-from-comscores-2011-social-report/>

²³¹ Gruener, Wolfgang (2012), Facebook Estimated to Be Running 180,900 Servers,

currently has the largest photo collection in the world²³². According to Jay Parikh, vice president of Facebook, it stores over 200 billion photos getting 300 million photos up every day.²³³

By the way, in order to join Facebook, the individual should sign up as a member by providing necessary personal information like name, date of birth, e-mail address/telephone number and also creating a password for her/his profile.²³⁴ The Facebook members mostly use their real name when creating their accounts and organise their profiles around their offline (real-life) relationships.²³⁵ This fact helps to connect with old friends or strengthen the current relationships with existing friends.²³⁶ On the other hand, in Facebook, over half of friends consist of weak-tie friendships including not so close friends or friends of friends.²³⁷ After joining Facebook, the users have a relationship with others which are called "Friends," and they can view their friends' profiles, "*unless a profile owner has decided to deny permission to those in their network*".²³⁸ Facebook has collected several types of information about the user including "registration information" that mentioned before; "the information that user chooses to share" such as status update photos, comments, friends or likes; "information that others share about user" such as tag photos, location update, adding groups; and also "other information" such as when user looks at another person's timeline, send or receive a message, search for a friend or a Page, click on, view or otherwise interact with things, use a Facebook mobile app, or purchase Facebook Credits or make other purchases through Facebook; further, "additional related data (or metadata)" such as the time, date, and place that user took the photo or video; data from the computer, mobile phone or other device used to access Facebook including user's IP address and other information about things like the Internet service, location, the type of browser, or the pages that visited; "data whenever user visits a game, application, or website" that uses Facebook or visit a site with a Facebook feature; "sometimes through cookies" including the visiting date and time; the web address, or URL.²³⁹

<http://www.tomshardware.com/news/facebook-servers-power-wattage-network,16961.html>

²³² Zhang, Michael (2011), The Relative Sizes of the World's Largest Photo Libraries,

<http://petapixel.com/2011/09/16/the-relative-sizes-of-the-worlds-largest-photo-libraries/>

²³³ Andrews, Robert (2012), Facebook has 220 billion of your photos to put on ice,

<http://gigaom.com/2012/10/17/facebook-has-220-billion-of-your-photos-to-put-on-ice/>

²³⁴ Facebook: sign-up, www.facebook.com

²³⁵ Supra no:43, p.3.

²³⁶ Ibid, p.4.

²³⁷ Ibid, p.6.

²³⁸ Supra no:45.

²³⁹ Facebook (2013), Data Use Policy, Information we receive about you,

In Facebook, each user are the “content provider” of their own life through “likes, status updates, photos or other applications”; and Facebook gives users the freedom to select who is allowed to see these contents.²⁴⁰ However, each piece of information which is uploaded on Facebook “becomes a shopper’s profile” which means that these key words are main targets for advertising and marketing.²⁴¹ According to José Marichal, “*Facebook seems to bridge the distinction between a neoliberal Web and a communitarian Web.*”²⁴² Within this scope, Facebook does not directly charge any fee from its users in order to register the site or to continue the membership; but it collects its revenue from mostly advertising based on the data sharing by its members or through Facebook Credits, a form of currency used for Facebook games.²⁴³ In the first case, Facebook benefits from its network effect which occurs “*when the value that one user receives from a product increases with the number of other users of that product,*”²⁴⁴ and thus it has a very big advertising revenue; for instance, in 2013, the total advertising revenue was \$1.25 billion in the first quarter and \$1.60 billion in the second quarter.²⁴⁵ Further, the investors are trying to build web services using Facebook’s data; for example, “*Electronic Arts bought social gaming site Playfish estimated value is \$275m and Zynga, another developer of popular games has already taken more than \$200m of venture capital.*”²⁴⁶ Those show that Facebook needs to collect more data for growing its business, as Jeff Chester, executive director of the Center for Digital Democracy, said.²⁴⁷ Hence, Facebook uses different business tools in order to collect personal data. One of them is regarding to collect data on the user’s profile which is voluntarily uploaded.²⁴⁸ The other one

<https://www.facebook.com/about/privacy/your-info>

²⁴⁰ Supra no:43, p.28.

²⁴¹ Tömböl, Mona and Schennach, Philippe (2013), EU vs. Facebook: Fighting for the Right to be Forgotten, Vieana Review, <http://www.viennareview.net/news/special-report/eu-vs-facebook-fighting-for-the-right-to-be-forgotten>

²⁴² Supra no:43, p.31.

²⁴³ Ostrow, Adam (2011), Facebook Will Never Charge You to Use It. Here's Why,

<http://mashable.com/2011/09/29/facebook-pay/>

²⁴⁴ Evans, David S. (2011), “Antitrust Economics of Two-Sided Markets”, *Platform Economics: Essays On Multi-Sided Businesses*, David S. Evans, ed., Competition Policy International, p.76,

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974020

²⁴⁵ Wilhelm, Alex (2013), Facebook’s Desktop Ad Revenue Grew Only \$69M In Q2, Mobile Rev To Outpace Desktop By EOY 2013, <http://techcrunch.com/2013/07/25/facebooks-desktop-ad-revenue-grew-only-69m-in-q2-mobile-rev-to-outpace-desktop-by-eoy-2013/>

²⁴⁶ Johnson, Bobbie (2010), How big is the Facebook economy?, theguardian,

<http://www.theguardian.com/technology/2010/mar/10/facebook-economy>

²⁴⁷ Wolverton, Troy (2012), Facebook IPO has privacy implications, advocates say, San Jose Mercury News, http://www.mercurynews.com/ci_20619038/facebook-ipo-has-privacy-implications-advocates-say

²⁴⁸ Hendry, Jennifer & Goodall, Kay (2010), “Facebook and the Commercialisation of Personal Information: Some Questions of Provider-to-User Privacy”, *Dimensions Of Technology Regulation*, M.E.A. Goodwin, B.J. Koops & R.E. Leenes, eds., Wolf Legal Publishing, p.1, <http://ssrn.com/abstract=1550821>

is the Facebook Like button which is “an image displaying a thumbs-up symbol accompanied by the word Like” and collects personal data “concerning browsing behaviour of individuals clearly.”²⁴⁹

4.2. Facebook’s Privacy Policy: Its Implementations and Challenges

Historically, when Facebook was launched as a closed network, its privacy settings were extremely limited.²⁵⁰ In 2005, the privacy settings had become strict as “*only members of groups specified in a user’s privacy settings could had access to their personal information*”.²⁵¹ But, in 2006, Facebook had changed these settings again, and allowed users to share some information such as their school, specified local area.²⁵² Every year, Facebook partially updates its privacy settings through its own terms and conditions. Because of these changes, Facebook users are largely confused about their privacy settings; for example, according to a poll in 2011, “*93% of Facebook users would prefer Facebook's privacy options to be opt-in rather than opt-out.*” and as the user’s behaviours that “*46% of Facebook users accepted friend requests from strangers; 89% of users in their 20s divulged their full birthday; nearly 100% of users post their email address and between 30-40% of users list data about their family and friends.*”²⁵³ On the other hand as Mark Zuckerberg said in January 2010, “*People have really gotten comfortable not only sharing more information and different kinds, but more openly and with more people. That social norm is just something that's evolved over time*”²⁵⁴ and also according to him “*privacy was no longer a social norm*” and “*The rise of social networking online means that people no longer have an expectation of privacy.*”²⁵⁵ However, according to a survey in 2013, 85 percent of Americans believe that their personal data is “available for businesses, government, individuals and other groups to access without their consent”; 90 percent of the 1,000 respondents consider that “they have

²⁴⁹ Roosendaal, Arnold (2011), Facebook tracks and traces everyone: Like this!, Tilburg Law School Legal Studies Research Paper Series, No:3, p.3-8, <http://ssrn.com/abstract=1717563>

²⁵⁰ Milivojevic, Sanja (2010), Social Networking Sites and Crime: Is Facebook more than just a Place to Procrastinate?, The Australian and New Zealand Critical Criminology Conference, p.2, http://ses.library.usyd.edu.au/bitstream/2123/7380/1/Milivojevic_ANZCCC2010.pdf

²⁵¹ Supra no:43, p.41.

²⁵² Ibid, p.41.

²⁵³ Sophos, (2011) Facebook: The Privacy Challenge,

<http://www.sophos.com/en-us/security-news-trends/security-trends/facebook.aspx>

²⁵⁴ Paul, Ian (2010), Facebook CEO Challenges the Social Norm of Privacy, <http://www.reuters.com/article/2010/01/12/urnidgns852573c400693880002576a80069db-idUS174222527820100112>

²⁵⁵ Johnson, Bobbie (2010), Privacy no longer a social norm, says Facebook founder, <http://www.theguardian.com/technology/2010/jan/11/facebook-privacy>

less privacy than earlier generations and expect that situation to get worse.”²⁵⁶ Another survey by Big Brother Watch shows that “more than three-quarters of more than 10,000 interview respondents from nine industrialized, non-North American countries are concerned about their online privacy” in Facebook.²⁵⁷ These surveys demonstrate that despite the CEO’s comments, privacy is still a primary concern for great numbers of Facebook users.

Facebook’s privacy policy is based on the degree of individual “privacy expectations” of the Facebook user who activates the privacy setting by choosing his profile to be accessible to the public or private network of friends.²⁵⁸ On the other hand, theoretically, Facebook’s current approach to privacy is clear that “*you own all of the content and information you post on Facebook, and you can control how it is shared.*”²⁵⁹ In this case, within the framework of above mentioned debates on “whether the digital personal data loaded by users is subject to property, and whether the people have rights over that data”, Facebook directly accepts that the users own all of the data posted by them self on the platform. However, Facebook also arranges specific permission processes sharing the user’s content and information through the “Statement of Rights and Responsibilities” (SRRs) that the users grant Facebook “non-exclusive, transferable, sub-licensable, royalty-free, worldwide license to use any Intellectual Property (IP) content posting on or in connection with Facebook.”²⁶⁰ According to this condition, the license automatically ends when the IP content or the related account is deleting, excluding the content has been shared with others, and they have not deleted it.²⁶¹ Furthermore; when IP content is deleted, it is deleted in a manner similar to emptying the recycle bin on a computer; but removed content may persist in backup copies for a period of time.²⁶² Also, when the member uses an application, it may access the personal content and information as well as content and information that others have shared with the user.²⁶³ Additionally, Facebook states some special provisions applicable to social plugins such as “Share or Like buttons” on the website that the users give Facebook permission to use and allow others to use links and content on Facebook.²⁶⁴ More importantly, according to SSRs,

²⁵⁶ Chabrow, Eric (2013), Facebook Glitch Raises Privacy Concerns, <http://www.bankinfosecurity.com/facebook-glitch-raises-privacy-concerns-a-5855/op-1>

²⁵⁷ Ibid.

²⁵⁸ Supra no:17, p.8.

²⁵⁹ Facebook, Statement of Rights and Responsibilities, (2013), <https://www.facebook.com/legal/terms>

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Ibid.

when the user publish content or information using the public setting, it means that the user is allowing everyone, including people off of Facebook, to access and use that information, and to associate it with him.²⁶⁵ This provision is directly connected with the debates over whether the personal data which is made public by the controller, should include the RtbF. According to the statement, the user admits that choosing the public setting gives permission to access and use the data by everyone. All of those provisions have negative impacts over the control of data subject in Facebook; thus, the user's privacy is largely restricted. More interestingly, Facebook's previous "Terms of Use" gave several rights to Facebook including to change, to modify, to add or to delete any provisions of this document at any time without further notice, and if the user continued to using the service meaning he accepted the new Terms of Use.²⁶⁶ According to current SRRs, the amendments can be occurred in the statement, if Facebook provides users notice (by posting the change on the Facebook Site Governance), and an opportunity to comment; but, the users have to visit Facebook Site Government Page and "like" the Page in order to get notice of any future changes to the Statement.²⁶⁷ The tools announcing the amendments are not seen very satisfactory for creating user's awareness on Facebook privacy policy changes.

In general, Facebook's privacy policy has a bad reputation, therefore some of the authors called this site as 'unethical', 'Disgracebook' and a 'bully'.²⁶⁸ Moreover, Facebook's privacy policy is criticised by saying that "*more is needed*".²⁶⁹ At this stage, what are the main reasons for the criticisms Facebook's privacy manners? First of all, most of the cases, Facebook (although strongly disaffirmed) has failed to protect its users from online predators.²⁷⁰ For instance; in 2010, an hacker announced that he attacked Facebook, and put "100 million people's details on BitTorrent site Pirate Bay", while Facebook claimed that "*In this case, information that people have agreed to make public was collected by a single researcher and already exists in Google, Bing, other search engines, as well as on Facebook.*"²⁷¹ Similarly, in 2013, it was hacked again, but it denied that "Facebook user data

²⁶⁵ Ibid.

²⁶⁶ Hull, Gordon; Lipford, Heather Richter and Latulipe, Celine (2011), Contextual Gaps: Privacy Issues on Facebook, Ethics and Information Technology Vol.13, No:4, p.3.

²⁶⁷ Supra no:259.

²⁶⁸ Supra no:250, p.2.

²⁶⁹ The Electronic Frontier Foundation (2010), Facebook changes are 'not enough', <https://www EFF.org/press/mentions/2010/5/28-0>

²⁷⁰ Supra no:250, p.1.

²⁷¹ Chacksfield, Marc (2010) Facebook 'hack' puts public data into the public domain, <http://www.techradar.com/news/internet/facebook-hack-puts-public-data-into-the-public-domain-706396>

was compromised."²⁷² Another reason is that, Facebook is collecting a vast amount of data about the users with different methods, and many applications on Facebook drew widespread criticism, because those are “*given access to far more personal data than they need to in order to run, including data on users who never even signed up for the application*” without giving users satisfactory warnings about the privacy risks.²⁷³ One of the methods for collecting user’s personal data is activated when the user clicks a Facebook “Like” button, not only in Facebook, but also on other Web (even if the user does not hit the button).²⁷⁴ As it is seen, although Facebook declares through current SSRs that it does not share information regarding the users unless received users permission, given them notice, or removed the name or any other personally identifying information from the information; in practice, the consent is received generally and the notice is not specifically given, usually just writing in data use policy.²⁷⁵ Furthermore, in many other cases, Facebook was accused that it violates users’ privacy. For example; Bogomil Shopov, a Bulgarian blogger and digital rights activist, made headlines when he reported acquiring more than one million Facebook data entries via ReadWrite (an application obtained the data); and this activity suggests a question about “*whether there's an international black market where anyone can buy supposedly secret Facebook user data.*”; and in relation to that, Facebook spokesman Chris Kraeuter explained the issue as “*Facebook is vigilant about protecting our users from those who would try to expose any form of user information. In this case, it appears someone has attempted to scrape information from our site.*”²⁷⁶ Similarly, Johannes Caspar who is a German data protection supervisor, said that Facebook’s automatic facial recognition (suggested automatic tagging) feature which puts photos at risk of being automatically tagged, could violate European privacy laws.²⁷⁷ Once more case from Germany, the German State’s data protection agency announced that the Facebook violates German’s social media privacy law “*by not allowing users to use a pseudonym*”.²⁷⁸ Finally, in 2013, an online surveillance scandal involving US intelligence agencies who had accessed the central servers on Internet, occurred, and that has

²⁷² Boorstin, Julia (2013), Facebook Reveals Hack Attack, Says User Data Not Compromised, CNBC, <http://www.cnn.com/id/100464999>

²⁷³ Soghoian, Chris (2008), Exclusive: The next Facebook privacy scandal, http://news.cnet.com/8301-13739_3-9854409-46.html

²⁷⁴ Supra no:110.

²⁷⁵ Supra no:239.

²⁷⁶ Copeland, Dave (2012), Facebook Tries To Silence Blogger To Cover Up User Data Scandal [Updated], <http://readwrite.com/2012/10/26/facebook-asked-blogger-who-purchased-user-data-to-keep-quiet#awesm=~ogukgZFDkQ4qEX>

²⁷⁷ O’Brien, Kevin J. (2011), Germany Investigating Facebook Tagging Feature, The New York Times, http://www.nytimes.com/2011/08/04/technology/germany-investigates-facebook-tagging.html?_r=0

²⁷⁸ Osborne, Louise (2013), German state fights Facebook over alleged privacy violations, theguardian, <http://www.theguardian.com/world/2013/jan/04/facebook-germany-data-protection>

already endangered the personal data for users of Facebook, as well as other Internet giants including Amazon, Microsoft, Google and eBay.²⁷⁹ However, Mark Zuckerberg objected that claim and said they were never a part of any programme allowing the US government direct access to their servers.²⁸⁰

4.3. Facebook in Battle with the Right to Be Forgotten

In addition to above mentioned criticisms, in Facebook, deleting an account is found extremely hard which is exemplified as Facebook looks like *“Hotel California-you can check out any time you like, but can you ever leave”*.²⁸¹ In fact, *“the deletion is not the same as forgetting.”*²⁸² More recently, Facebook was charged with hosted contents that its users had asked it to delete many years ago.²⁸³ Relatedly, before 2011, Facebook had not allowed users to remove their accounts permanently “with no option for recovery”, instead only deactivate them.²⁸⁴ Actually, “deactivating” the account allows having a break from Facebook and to “put it on hold and hides” users “timeline on the site”; and any of information is not deleted in case coming back to the sites.²⁸⁵ Today, Facebook states that *“If you don't think you'll use Facebook again, you can request to have your account permanently deleted.”*²⁸⁶ The process of “deletion” cancels the account and permanently removes all of the information on the account; and according to Facebook it typically takes about one month.²⁸⁷ However, the Electronic Frontier Foundation considered that *“Facebook is trying to trick their users into allowing them to keep their data even after they've “deleted” their account”*.²⁸⁸ Within this context, Max Schrems, who is a well-known figure in an on-going dispute between privacy rights and Facebook (as known Europe-v-Facebook), remarks that *“We never complained that*

²⁷⁹ Gevaudan, Camille (2013), Data protection: Does Facebook have a privacy phobia? <http://www.presseurop.eu/en/content/article/3916361-does-facebook-have-privacy-phobia>

²⁸⁰ EurActiv.com with Reuters (2013), US data scandal deepens EU-US divide on privacy, <http://www.euractiv.com/infosociety/us-data-scandal-deepens-eu-us-di-news-528437>

²⁸¹ Supra no:250, p.2.

²⁸² Supra no:172, p.13.

²⁸³ Cheng, Jacqui (2012), Over 3 years later, “deleted” Facebook photos are still online, <http://edition.cnn.com/2012/02/06/tech/social-media/deleted-facebook-photos-online/index.html>

²⁸⁴ Aspan, Maria (2008), How Sticky is Membership on Facebook? Just Try Breaking Free, New York Times, http://www.nytimes.com/2008/02/11/technology/11facebook.html?pagewanted=all&_r=0

²⁸⁵ DesMarais, Christina (2012), How to Delete Your Facebook Account Permanently, <http://www.techlicious.com/how-to/how-to-delete-your-facebook-account-permanently/>

²⁸⁶ Facebook, How do I permanently delete my account?, <https://www.facebook.com/help/www/224562897555674>

²⁸⁷ Supra no:285.

²⁸⁸ Baker, Philip G. (2010), Facebook's Arrogance, Electronic Frontier Foundation, <https://www.eff.org/press/mentions/2010/5/20>

if you post something on Facebook, it's going to be on Facebook... We complained that if you delete something, it's still there." in order to defend RtbF against Facebook's practices.²⁸⁹

Within the context of privacy, the issue between "Facebook" and RtbF has become increasingly serious and complex. As mentioned before, proposed RtbF allows the users to control their own data and sometimes to eliminate their trail and to ask data controller removing the selected information when they are no longer needed within the legitimate purposes.²⁹⁰ Generally speaking, Facebook obviously opposes the proposed RtbF, and it has been lobbying against that right.²⁹¹ Facebook explains its views on the proposed right as following:

"...it raises major concerns with regard to the right of others to remember and of freedom of expression on the Internet. There is also a risk that it could result in measures which are technically impossible to apply in practice and therefore make for bad 'law'. A right balance should be found between data subject's right to get their data deleted, the fundamental rights of other individuals and the reality of the online environment.

The proposal prescribes a right for people to have their data deleted and also requires data controllers, to take all reasonable steps to obtain erasure of content copied to a third party website or application. It is important to differentiate between three quite different aspects to the right to be forgotten:

- *The first is how people who have posted personal information online can later delete that information. Facebook believes that this is a right people should have at any time and their decisions should be complied with and respected. This is something that Facebook already offers-users can delete individual items of content they have posted on to the service including their whole account any time.*
- *The second relates to the provision under Article 17/2, which would require deletion of data that has been copied to another service. Such obligations are unreasonable and not feasible for services like Facebook since we cannot control data that has been*

²⁸⁹ Supra no:241.

²⁹⁰ Supra no:73.

²⁹¹ Bryant, Martin (2012), Facebook: Proposed EU 'right to be forgotten' raises "major concerns" over freedom of expression online, The Next Web, <http://thenextweb.com/facebook/2012/11/20/facebook-proposed-eu-right-to-be-forgotten-raises-major-concerns-over-freedom-of-expression-online/>

copied to another service. IN order to meet such obligations it would mean that service providers would be obliged to “monitor” people’s activities across the Internet. Facebook is strongly concerned that it could also lead to the interpretation that intermediary services could be considered responsible for erasing any content related to the data subject that requests it. This is technically impossible and directly conflicts with the way the Internet works and how the current liability status of intermediaries is designed.

- *The third is the idea that you can insist that information that others have posted about you be deleted-this is particularly contentious. It is clear that there is a potential conflict between the right for people to express themselves and the privacy rights of others. Facebook urges policy makers to consider fully the implications on the open Internet and personal expression as they determine the right balance. The definition of freedom of expression contained in Article 81 and further clarified in Recital 121 is defined quite narrowly and should be extended to cover for example more expressions of opinion, user generated content and more generally recognise the nature of new forms of communication such as blogging and social networking.*

Finally, the debate on the right to be forgotten affects a number of Internet services which rely on user-generated content. This issue is not unique to Facebook or social networking. Policy makers should take into account the “right to others to remember” and reach a balanced conclusion which respects freedom of expression.”²⁹² Those long statement shows that Facebook objects RtbF using all of the criticisms mentioned before others, without any additional legal ground or specific technical proof. In the first paragraph of the statement, it argues the conflict between that right and freedom of expression on the Internet. Second paragraph illustrates the technical obstacles that can be briefly explained as the new EU proposal for GDPR about RtbF targeting to “shoot the messenger,” is mainly focusing the “places where the content is shared” rather than the “source of the content”²⁹³ In other words, Facebook accepts the users’ “right to delete” by referring its current implementations; however, it clearly objects to the obligations on “deletion of data that has been copied to another service”, and “deletion of information that others have posted about data subject.” Facebook also believes that this right “would actually damage privacy” rather than be a

²⁹² Lobbying Document by "Facebook" (2012), Facebook’s views on the proposed data protection regulation (summary by europe-v-facebook.org), Published by europe-v-facebook.org, p.6-7, http://www.europe-v-facebook.org/FOI_Facebook_Lobbying.pdf.

²⁹³ Supra no:192, p. 165.

“massive boon” for privacy; because “the obligation to delete data that has been copied to other services” means that “service providers would be obliged to monitor people’s activities across the Internet.”²⁹⁴

4.4. Some Comments and Recommendations for Facebook Case

Like Larry Lessig’s four constraints as the “law, social norms, the market, and code” which serve regulatory purposes in society: all of those play a critical role in privacy regulations in the digital environment, especially in SNSs.²⁹⁵ The law has an important role in regulating privacy, but the technology’s code also can be used both to destroy and to protect privacy in SNSs, as well as the social norms which are inherently unstable and constantly evolving, but not disappearing.²⁹⁶ The dissemination of personal information by Facebook is quite usual habit for the users, especially youth generation; however, when the information has been posted online, and it is made public, data controlling becomes more difficult for the owner or poster of such information.²⁹⁷ When the aims of proposed right are analysed, it is seen that the basic targets are regarding protected user’s privacy, and correspondingly given the users more control over their personal data. On the other hand, as seen above, Facebook has several anti-thesis over enactment of this right. However, although Facebook is a company in the market which has profit-making financial aims; if it wants to proof its sincerity for respected the user’s privacy, it should make necessary strides in order to reduce the privacy concerns which are intended to overcome with the proposed right. These basic steps which are taken without distinctions between users in different locations may be as following:

- Within the scope of the claim that the “deletion” does not really remove the information on the account, the deleted items must be permanently removed from both the Facebook’s database and its backups. On the other hand, according to SRRs the the data will be deliberately kept within a reasonable time limit. However, the term of “reasonable” is not defined and it is also open-ended. Therefore, when the reasonable time limit is end and the data is permanently destroyed, the user who wanted all his data to be deleted should be informed through its registered e-mail. So, the previous

²⁹⁴ Brewster, Tom (2012), Facebook: EU’s ‘Right To Be Forgotten’ Will Enforce More User Tracking, Techweek Europe, <http://www.techweekeurope.co.uk/news/facebook-europe-right-to-be-forgotten-tracking-101253>

²⁹⁵ Supra no:65, p.4.

²⁹⁶ Ibid, p.5.

²⁹⁷ Supra no:266, p.2.

user can follow the process of erasing the data, and if there is no notice about the deletion, he will appeal about the process. This notice is very important for the "responsibility and accountability" of Facebook. In conjunction with this issue, the question of "What happens to the Facebook profile when its user dies?" is guide a very interesting debate.²⁹⁸ According to Stephania Buck, the data's fate on the deceased's profile could go one of four ways as "(1) *The profile remains untouched, unaccessed, unreported and therefore open to everyday wall posts, photo tags, status mentions and Facebook ads. In other words, business as usual;* (2) *A family member or close friend may choose to report a death to Facebook. Upon receipt of proof of death, such as a death certificate or local obituary, Facebook will switch the dead user's timeline to a "memorial page";* (3) *A close family member may petition Facebook to deactivate a dead user's account;* (4) *Users may gain access to a dead user's profile in one of two ways: either through knowledge of the dead user's password, a practice against Facebook's terms of service, or through a court subpoena*"; and Facebook chooses the memorial page option as an official policy for handling user deaths.²⁹⁹ Within this scope, upon request from legal heirs, Facebook should permanently delete all of the data belonging to the deceased.

- Several technical options must be created for users who care their privacy too much, such as permission to create "non-duplicable" or "un-shareable" user-contents in all circumstances.³⁰⁰ Those are significant tools in order to increase the ability of "access and control" over the personal data in Facebook.
- According to the SRRs, using the public setting allows everyone to access and use that user-content data. On the other hand, when the individual first used the Facebook, he has no sufficient knowledge about the privacy settings, and its implications. Additionally, the privacy settings of Facebook are also seen "*byzantine, difficult to find, and hard to understand, thereby creating a significant barrier to users' ability to form or effectuate their privacy preferences*".³⁰¹ Because of this, the user may suffer the first activities in the site. In order to protect the user from his early mistakes; initial privacy settings which are applied from first registration to the Facebook, must give

²⁹⁸ Black, Tiffany (2012), What Happens to Your Facebook Profile When You Die?

<http://facebook.about.com/od/Profiles/ss/What-Happens-To-Your-Facebook-Profile-When-You-Die.htm>

²⁹⁹ Buck, Stephanie (2013), How 1 Billion People Are Coping With Death and Facebook, <http://mashable.com/2013/02/13/facebook-after-death/>

³⁰⁰ Supra no:248, p.11.

³⁰¹ Supra no:266, p.15.

the user the strictest control over his personal data, and then it can be arranged by degrees according to user's request.

- Obviously, the proposed provision pays special attention to the “children-user’s data” or “the data made available while the data subject was a child”, and stresses this concern in the Article 17(1). On the other hand, although Facebook states that for joining Facebook the age limit is 13; a survey, made by Minor Monitor, suggests that thirty-eight percent of kids on Facebook are just 12 and under, and worse, 4 percent of those are 6 years old or less.³⁰² Furthermore, according to the Reports 11th annual study of the USC Annenberg Center for the Digital Future, thirty percent of parents let their children use Facebook unsupervised.³⁰³ When the fact that in principle “the minor has no right to sign a contract” is considered; the consent for collecting data by the child-user becomes more problematic. Because of this, in order to prevent future requests from former minors; Facebook should create a special account for the minor users that the data about minor cannot be public until the user reaches majority.
- Finally, the amendments on SRRs should be clearly noticed to the users not only put on the SRRs, but also conspicuously appeared on the users’ own profiles. This condition is very important for increasing the awareness of users on privacy issues.

5. CONCLUSION

All people have a sense of privacy, however the scope and definition of privacy may vary according to each of them.³⁰⁴ The global rise of the Internet has totally changed the people’s social behaviours like the necessity for virtual existence on the Web, and thus the current legislation on the data protection is no longer sufficient for privacy requirements. The idea of RtbF gaining heightened international importance is a consequence of this issue. The proposed right aims to give the right for requesting an online data controller to delete all data about him even if it has been made public, excluding the legitimate purposes for storing the data. It will also help to increase the "responsibility and accountability" on processing the personal data for the Web services. The RtbF basically includes two key parts of privacy as “access and control” over personal data.

³⁰² Matyszczuk, Chris (2012), Thirty-eight percent of kids on Facebook under 13? http://news.cnet.com/8301-17852_3-57413806-71/thirty-eight-percent-of-kids-on-facebook-under-13/

³⁰³ USC Annenberg (2013), Thirty percent of parents let children use Facebook unsupervised, reports 11th annual study of the USC Annenberg Center for the Digital Future, <http://annenberg.usc.edu/News%20and%20Events/News/130613DigitalFutureStudy.aspx>

³⁰⁴ Supra no:65, p.1.

On the other hand, one and a half year after the publication of the draft GDPR, the opinions over the RtbF are still controversial. Both in terms of the theoretical framework and practical issues on the ground for the new right have several challenges. Today the current discussions surrounding on this right are largely related with the issues of “the technical applicability of the right” and “the conflicts with the other fundamental rights”. The debates over the applicability of RtbF is basically related the issue that whether or not it could work in practical. The policy makers and regulators need to enact sufficiently clear, detailed and applicable legislations which balance the needs of the Internet industry and the data protection requirements. However, the scope of the provision about RtbF is also evaluated as “uncertain” and “in need of many interpretations” guiding the enforcement of this rules. Within this scope, the academic debates over the legal nature of the right, for example; whether or not this right is transmissible to heirs (as a result of the user’s death) or the others (contractual), and the validity of consent of minors, are important likewise the above mentioned subjects.

Today, the reality of SNSs is that all kind of user-originated contents including photos, messages, wall posts and likes are recorded, monitored, or stored by governments or the Internet companies. The future implementations of RtbF over the (mostly) American SNSs especially in Facebook have also evoked many questions like if the proposed right became a law, whether the rules will be common for all of the Facebook users or will there a differentiation for European and non-European users. Although the RtbF is seen a cornerstone of the new European privacy approach, the criticisms (especially chilling effect³⁰⁵ on the other fundamental rights, and technical obstacles) over that right must be taken into account by the both policy and law-makers to make a viable stride in practice for the reasonable privacy concerns. Further, Facebook must take necessary steps too on its privacy policies in order to reduce the negative reactions of users about their privacy. For now, the answer of the question “Will Facebook remember you forever?” still ambiguous; but future case may be changed according to further technical and legal developments.

³⁰⁵ Walker, Robert Kirk (2012), Note: The Right to Be Forgotten, *Hastings Law Journal*, Vol. 64, p.117.

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