# "Forgetting on the Internet": Conference Report

By Anna Schimke[1]

Forgetting on the Internet and the right to be forgotten have been controversially discussed during the past years both in public and in academic discourse. The debate certainly was stimulated by the publication of the draft version for a new data protection regulation (DPR) by the European Commission, which included in Art. 17 the so called "right to be forgotten".[2] Especially in the USA, this right provoked a series of negative reactions. Several authors consider it to be a threat for the right to free speech on the Internet or a typical example for the unfortunate practice of European data protection regulation.[3] The recent judgment of the European Court of Justice concerning a right to be forgotten in the context of search engines highlights the relevance of the debate.[4]

The interdisciplinary conference "Forgetting on the Internet" was held in Hamburg on January 16 and 17, 2014. It was hosted by Professor Dr. Marion Albers, professor for public law at the University of Hamburg, and supported by the Fritz Thyssen Foundation. The conference took the right to be forgotten as proposed in the DPR as a starting point for a more general debate on the phenomenon "forgetting on the Internet". The conference had three goals. Firstly, it aimed at a better understanding of the Commission's proposal. Secondly, it wanted to take a closer look on the ways of forgetting on the Internet in order to get insight into the context of such a regulation. It therefore was designed as an interdisciplinary workshop, in which several perspectives were presented and put together. Accordingly, scholars of cultural, technical, social, information and legal sciences were invited. By doing so, the Conference finally hoped to give new impulses to the current debate, which might also contribute to broaden the international discussion.

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[2] The consolidated version after the LIBE vote does not speak about a right to be forgotten anymore, but provides in Art. 17 a right to erasure. Available at http://www.janalbrecht.eu/fileadmin/material/Dokumente/DPR-Regulation-inofficial-consolidated-LIBE.pdf.

[3] A summary provides Steven C. Bennett, *The "Right to be Forgotten": Reconciling EU und US Perspectives*, 30 BERKLEY JOURNAL OF INTERNATIONAL LAW, 161, 164 (2012).

[4] Case C-131/12, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzáles, 2014 ECLI:EU:C:2014:616.

After an introduction into the topic by Professor Dr. Marion Albers an overview on fundamental problems and challenges of forgetting on the Internet was given by Professor Dr. Gerrit Hornung, University of Passau, from a legal perspective. Forgetting on the Internet is characterized – as Hornung pointed out – by at least three features: the perpetuation of so far fleeting informations as well as an easy and worldwide access to these informations. With respect to the right to be forgotten as proposed in Art. 17 DPR Hornung suggested that the term "forgetting" should be dropped since it promised complete control over the process of communication. However, the right to be forgotten did not fulfill and wasn't even meant to fulfill such a promise. According to Hornung, the content of the right to be forgotten in Art. 17 DPR is only a duty to provide information on the action taken by the controller and third parties concerning personal data. Apart from the right to be forgotten in particular, forgetting on the Internet in general has, as Hornung pointed out, at least three legal dimensions within the German legal order: the basic law provides protection where the General Right to Personality prevails over the public interest to know personal information or to process personal data, the data protection regime comprises rights to erasure and to anonymity and finally the media law could provide rights and obligations that concern informations which have been rightfully published. However, when regulating forgetting on the Internet, one should keep potential chilling effects in mind as well as rights that guarantee public communication. Lastly, a 100 % solution, *e.g.* complete erasure of personal data, is in Hornung's view not necessary to provide a satisfying level of protection.

The sociological principles of forgetting were discussed by PD Dr. Peter Wehling, University of Augsburg. To Wehling, remembering and forgetting are social practices, which are neither purely individual nor collective. Citing Bruno Latour's examples of hotel rooms' keychains, Wehling emphasized the constitutive role that objects and technical artefacts have for the process of forgetting. People delegate processes of memorization on material artefacts. A process that is always characterized by two things: remembering and forgetting. Hence, the often cited phrase that the Internet "never forgets" is not an appropriate description of forgetting on the Internet since it overemphasizes forgetting while not considering remembering. Furthermore, when thinking about forgetting on the Internet, the social construction of technology must be considered. Consequently, a right to be forgotten cannot only be achieved with technical means only but requires social means as well, *e.g.* with anonymous application procedures. Finally,

Wehling reflected the political-normative implications of a right to be forgotten. He assumed that one major implication is to prevent third parties from gaining knowledge on other persons that has the potential to be discriminating. From this it follows, that the discrimination due to membership in a group and to criteria like, i. e., race or gender is an important issue when discussing a right to be forgotten.

Next speaker was Professor Dr. Aleida Assmann, University of Konstanz, who gave insight into forms of forgetting from a cultural studies perspective. Assmann identifies seven forms of forgetting: automatical forgetting (material, biological, technical), stored forgetting (entering the archive), repressive and punitive forgetting (damnatio memoriae), defensive forgetting and forgetting to protect the offender, selective forgetting, constructive forgetting and therapeutic forgetting. Automatical forgetting signifies that the default modus so far has been forgetting, not remembering. Stored forgetting is related to a latent memory. This memory refers to things that are selected and stored in order to be interpreted in the future. Selective forgetting has an executive function. Here, memory frames play an important role. What is to be remembered and what is to be forgotten, is determined by the respective social groups. The repressive and punitive forgetting operates on the idea, that the erasure of one's name is a form of destruction. An example for this kind of forgetting is the burning of books by the Nazis. The defensive forgetting and the forgetting to protect the offender becomes fragile, when political systems change. Where the latter two forms of forgetting have negative connotations, constructive forgetting and therapeutic forgetting are positive forms of forgetting. Constructive forgetting on the one hand refers to a political and biographical new beginning. Therapeutic forgetting on the other hand means to remember in order to forget as it is done for example in truth commissions. With respect to forgetting on the Internet and the right to be forgotten, Assmann asked if there might have been a paradigm shift from the wish to be remembered to the right to be forgotten.

The following contribution, given by Professor Dr. Karsten Weber, University of Technology Cottbus, placed special emphasis on potential negative effects a right to be forgotten might have. Weber argued from the point of view of the information sciences. Within this perspective, the storage of information and more specifically ways of storing infomation on a permanent basis are highly important. In other words, the long-lasting storage of information is one goal of the information sciences. Other important issues within the informational sciences are questions of

systematizing those information as well as questions concerning the access to information and their completeness. From this point of view, functions as - for example – Wikipedia's, where the history of an article can be followed, is a positive achievement. According to this self-conception, the erasure of information is nothing that should be pursued. Weber concluded that the limitation of access to specific information is a better way to deal with certain problems that might go along with the storing of information within the digital era than the erasure of those information.

Providing a legal perspective, Professor Dr. Wolfgang Schulz, Hans-Bredow-Institut Hamburg, presented his thesis on governance factors of forgetting on the Internet. His concept of governance factors is oriented on the concept Lawrence Lessig presented in his book "Code and other laws of cyberspace"[5]. Thus, four factors of governance can be identified: law, code, contracts and social norms. Schulz then asked how these four factors must interplay in order to guarantee a right to be forgotten. According to Schulz, the governance of forgetting on the Internet is more than an interpretation of a right to be forgotten. In his point of view, remembering and forgetting are features of the public domain. With new technologies, new social practices have been formed. Among others, the interplay between technical and social practices has altered the temporal structure of the public or, more specifically, the public memory. It is no longer the memory of the mass media but also the memory of, for example, search engines. Within this new framing, problems can occur when unwanted informations are made public in contexts that are relevant for the respective persons. Answers to these problems can be found on the different levels of governance. One example is the orientation of search engines on the actuality of processed informations, another an expiry date for data.

Also from a legal point of view, Professor Dr. Indra Spiecker, University of Frankfurt a.M., elaborated on the right to be forgotten. In doing so, she paid special attention to the right to be forgotten as it was proposed in Art. 17 DPR. Spiecker first drew attention to some legal ideas that succumb the right to be forgotten, *e.g.*: restitution in kind, indivisibility of information, protection of individual rights, control of one's data. She then explained the provision of Art. 17 DPR and its problems. For Spiecker, the provision of the right to be forgotten in Art. 17 DPR is a duty to inform. In practice, it is a reminder to the duty to delete as provided by the existing data

[5] LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

protection regime. Several factors minimize the effectiveness of the provision, especially the reservation of appropriateness as well as the question of the right party against whom the claim is directed. Finally, Spiecker described certain lacks of enforcement of the right to be forgotten, *e.g.* that individual right claims are not very effective in an international and globalized context and that the law of evidence remain undefined.

At the end of the first day, Dr. Rainer Stentzel, Federal Ministry of the Interior, member of the German delegation discussing the European Data Protection Regulation in the European Council, reported on the perspective of the German delegation on the right to be forgotten as proposed in Art. 17 DPR. According to Stentzel, the delegation is skeptical whether forgetting is a legal principle or not. Central questions for the delegation were on the one hand which infrastructure is necessary in order to guarantee the right to be forgotten and on the other hand which reciprocal rights must be taken into account.

The first presentation on the second day was given by Professor Dr. Mario Martini, German University of Administrative Sciences Speyer. Martini presented his thesis on the tension between big data-applications and the applicable data protection law. At first he clarified his understanding of big data: until 2013, big data stood for the analysis of large quantities of data, since 2013 big data characterizes a new surveillance potential. For the personal development of the individual, big data is problematic in so far as each person needs the possibility for a new beginning. Sharp lines of conflict also arise from a legal perspective with respect to the existing data protection principles, for example the principle of data economy. Having given an overview over the existing legal principles within the German legal order to guarantee forgetting – such as duties to erase –, Martini concluded that there is a gap in the protection of forgetting. As a remedy, he, *inter alia,* recommended expiry dates.

Afterwards, Professor Dr. Gerald Spindler, University of Göttingen, spoke about forgetting on the Internet as the subject of protection of the personality within civil law. Spindler identifies the right to be forgotten with cases in which the freedoms of communication are balanced with the protection of personality. These cases have existed before the development of the Internet. Therefore, a lot of established parameters can be applied also in cases of forgetting on the Internet. But certain modifications are necessary due to characteristics of the digital era as, for example, the possibilities for recombination of data, the persistence of information in time and

the Internet as a global phenomenon. A special challenge can be seen in the tripolar structure of cases on the Internet: victim, user and intermediary. Here, a lot of questions remain open, especially with respect to the role of the intermediary. An important judgment in this respect was the so called "autocomplete-case", in which the *Bundesgerichtshof* (Federal Court of Justice) ruled that the content of Google's autocomplete-function must be considered as being Google's own content with all consequences concerning Google's liability. Finally, Spindler referred to enforcement problems and problems that result from the topic's internationality, notably the question of the law applicable in the respective cases.

From a technical sciences perspective, Professor Dr. Hannes Fedderath, University of Hamburg, reported on techniques that enable and support forgetting on the Internet within the broader frame of IT-security. Fedderath referred to three protection objectives of IT-security: confidentiality, integrity, availability. Fedderath located the right to be forgotten in the context of the objective "confidentiality". For him, anonymity and impossibility of observing are inter alia part of forgetting on the Internet. According to Fedderath the confidentiality of data can only decrease with passage of time. Therefore, one should consider carefully before passing on or publishing sensitive data. Fedderath then presented components of techniques that support data protection. These are for example encryption against spying, broadcasts, proxies and MIX networks for the protection of the communication relation as well as pseudonyms and credentials for the protection of transactions. What cannot be guaranteed is, from a technical point of view, the goal that data which have been published once can effectively be removed or locked. Fedderath concluded that sensitive data should be protected carefully and that pseudonyms, encryption and anonyms should always be used.

At the end of the conference, Martin Rost, *Unabhängiges Landeszentrum für Datenschutz Schleswig-Holstein* (Commissioner for Data Protection Schleswig-Holstein), presented his thesis on forgetting in the light of the standard data protection model (DSM). For Rost, to speak about forgetting within the context of law is misleading: forgetting is a category belonging to systems of consciousness whereas law is part of the social system. The right to be forgotten should be understood as a procedure of erasure. The erasure of personal facts within the data protection regime is, according to Rost, a measure of protection, consisting of different levels: from earmarked knowledge to inaccessible or unrecognizable data up to its destruction. Due to the

personal character of this procedure, one has to apply the DSM. The DSM is a model for the scrutiny of procedures with relations to persons. It is constructed around six goals of protection: earmarking, integrity, availability, confidentiality, transparency, possibility to intervene. These goals are *inter alia* connected with an analysis of the respective need of protection. This need can be low, normal or high. Depending on the need for protection, another quality of erasure is necessary, *e.g.*: a low level of protection demands the release of memory areas, a normal level of protection demands the wiping of the data and the high level of protection demands the destruction of the data's symbol system or of its carrier. Rost concluded that with respect to authorities, companies, physicians, employers, departments of social sciences and other institutions, a lack of willingness to organize the erasure of data can be observed. It is a political question as to whether and how this disregard of data protection rules should be sanctioned.

Altogether, the conference enabled a detailed examination of the different facets of forgetting on the Internet. Although most of the contributions by legal scientists were skeptical about the term "forgetting" as a legal term, it became clear that this term has at least the potential to concentrate different approaches to the question whether and how published data can and should be altered or removed in the digital era. Especially the contributions by the social scientists were fruitful in this respect. It was consensus among the participants that the digital era challenges current concepts of data protection in general and concepts of forgetting in particular. These challenges require not only interdisciplinary approaches but also transatlantic discussions.