Journal of The Korea Society of Computer and Information
Vol. 22 No. 10, pp. 151-157, October 2017
www.ksci.re.kr
https://doi.org/10.9708/jksci.2017.22.10.151

A Study on the right to be forgotten in Digital Information Societies

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Abstract

In the case of uploading privacy information of an information owner in the Internet, the information owner may want to deliver the privacy information itself or remove such information from the search list in order to prevent third parties from accessing the privacy information of the information owner. Such a right to be forgotten may collide with the freedom of expression of a third party. The right to be forgotten, which originates from the self-determination right on privacy information based on Article 10 and 17 of the Constitution and the freedom of expression, which is based on Article 21 thereof are all relative basic rights and are both limited by Item 2 under Article 37 of the same law, which is the general limitation provision for the basic rights. Therefore, when the right to be forgotten and the freedom of expression collides, it is not possible to give priority to one of the those unilaterally. It depends on the nature of the case at hand to find a natural balance for the harmonious solution for both parties. The criteria can be the sensitivity to the privacy of the information owner caused by the disclose of the privacy information, the public benefits such information may serve, the social common good that could be expected by the disclosure of the privacy information and the damages suffered in terms of the personal interest caused by the disclosure of the information, in a comprehensive manner.

▸Keyword: Digital Information Societies, the right to be forgotten, self-determination right of one's own individual information, the Freedom of Expression, Personal Information Protection Act

Ⅰ. Introduction

The information on the Internet today is like air to the people of modern society, who communicate through virtual spaces, etc., in real time.

Now, it is more natural to switch on the smart phone, rather than talking to the person next to you to address your ideas, as the SNS can be used to disseminate your ideas worldwide.

Also, when you are curious about the views of other people, it is not the person next to you but the Internet where you turn to for a quick search of the desired information.

With the birth of a new cyberspace called the Internet, public access to various kinds of information has become easier and the characteristics of cyberspace represented by openness and variety have maximized information sharing and affected the relationships of social members to a great extent for the cyberspace to continue evolving as a living space essential for any member of the knowledge information societies.

Especially, the advance in the digital technology and searching technology now provide us with unlimited access to information and convenience in life, like the world has never seen before.

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• Received: 2017. 09. 12, Revised: 2017. 09. 25, Accepted: 2017. 10. 11.
• This study was supported by research fund from Chosun University, 2016

However, the information on the Internet is characterized by easy access via searching, limitless duplication, fast and wide dispersion, and indefinite archival at a low cost.

Therefore, once your information is uploaded to the Internet, the information is spread widely and rapidly and remain there for a long time. This information can be re-revealed to the world even after many years.

Such privacy information can be disclosed by the individual him/herself. But, there have been issues were the privacy information of others are disclosed over the Internet, infringing the privacy.

As such, the advance of the information and communication technology gives freedom of information to some, while causing pain to others due to the disclosure of privacy information, making it a double-edged sword[1].

The information owners who are faced with such a situation as this are, both in South Korea and elsewhere, claim their so-called right to be forgotten, that is, the right to have their privacy information deleted or cause to cease the processing of such information. Many countries are taking various measures and actions in order to protect such rights.

In South Korea, too, there have been a consensus about the need for the legal right to be forgotten.

Based on such awareness, the authors of this study defined the concept of the right to be forgotten and summarized and classified the findings and notions of preceding studies regarding the right to be forgotten.

This is followed by an examination whether the laws of South Korea have definitions for the right to be forgotten and a review on the relevant issues related to the right to be forgotten in the perspective of legal policies, in order to provide a strategy for improvement.

Ⅱ. General Theory of the Right to Be Forgotten

1. Background

The right to be forgotten originates from the right to oblivion in French laws.

The concept of right to oblivion is that a criminal, once served his/her time of punishment, should be endowed with a right to object publication of the verdict and punishment.

It was Viktor Mayer's article published in 2009 and his subsequently published book that made the concept of the right to oblivion as the right to be forgotten surface, which drew global attention and triggered discussions on the topic in earnest.

As a result, EU legalized the right to be forgotten for the first time in its General Data Protection Regulation, or GDPR.

Several revisions later, the 2016 GDPR of April 27, 2016 was enacted and announced. After a two-year grace period, the law is expected to come in direct effect over the entire Europe[2].

2. Concept

The right to be forgotten is a novel concept that came about recently. It is used as mixed with the right of oblivion or the right to delete.

However, there is no universally agreed concept or definition of this right.

'2016 GDPR,' where the right to be forgotten is defined, does not provide a clear definition of the concept.

However, there is no debate over the generally accepted notion that the right to be forgotten is the right to take various measures to prevent the privacy information of an individual from appearing in the search results continuously after the information was disclosed by the individual or others, as the Internet has become commercialized and the privacy information become exposed more easily and that it is the right to demand one's information to be deleted permanently.

That is, the right to be forgotten is, specifically, to strength then ownership of the information related to the photos, transaction information, and information on the tendency of a person that is created, stored, and distributed over the Internet, set the time limit for the circulation of such information, and request deletion, adjustment, or permanent disposal[3].

Therefore, it is the protection of privacy that the right to be forgotten is all about, and the right to be forgotten can be said to be an extended version of the self-determination right of one's own individual information and privacy that can demand the deletion or blocking the links of the information exposed in the cyberspace.

3. The Basis in the Constitution and the Scope of Protection

Firstly, the right to be forgotten originates from the self-determination right for one's own information.

Such a self-determination right is the right for the information owner to determine the disclosure and use of the privacy information. It means the right to decide by who when, and how such information is to be used.

With regard to the constitutional basis of the self-determination right for privacy information, the Constitutional Court of South Korea says that their is an independent basic right that is not specified in the constitution.

Here, the basis of the right to be forgotten include the general personality right based on Article 17, which provides for the freedom of privacy, and Article 10, the dignity, value, and right to pursue happiness, as well as the provisions for the basic democratic order, the principle of republic, and the principle of democracy[4].

Next, the scope of protection of the right to be forgotten does not cover everything related to the information. The right concerns the information that is related to individuals.

The information related to individuals may include the information related to the body, belief, social status, class, or other information that characterizes the personality of a human being, which can be used to identify a single individual.

It is not limited to the information concerning the sensitive or personal aspects but also the information that is created in the public life or such information that has already been disclosed[5].

It is not easy to discern individually-related information and non-individually-related information. However, it is not completely impossible to identify, either.

If we rule out the tremendous amount of non-individual information using computer-engineering method, it is possible to extract the individually-related information.

4. Collision with the Freedom of Expression

The self-determination right for privacy information is also a relative basic right that can be limited by other laws, as per Item 2 under Article 37 of the Constitution and should be in harmony with other basic rights.

Therefore, the right to be forgotten, which originates from the self-determination right of privacy information, is also based on the personality right in Article 10 and the freedom of privacy in Article 17.

Therefore, it can be said to be a relative basic right that can be limited in accordance with Item 2 in Article 37.

Especially, it is likely that the freedom of expression based on Article 21 may collide with the right to be forgotten.

The solution for such a collision may include limiting the freedom of expression by prioritizing the right to be forgotten of the information owner, limiting the right to be forgotten by prioritizing the freedom of expression of others, or hitting the balance between these two rights, which limits both the right to be forgotten of the information owner and the freedom of expression of others, while the interests of these two parties may be protected in a balanced manner[6].

However, more thoughts should be given whether it would be possible to solve this situation with a single criterion.

The reason is that the situations where the right to be forgotten of the information owner is becoming an issue is diverse, and the need to protected the freedom of expression for others differs by case.

In the end, the collision two basic rights should be compared and evaluated on a case-by-case basis in order to find a solution[7].

III. A Review of the Current Laws and Regulations

Concerning the discussions to introduce the right to be forgotten into South Korean Law, there can be arguments that there are provisions in the existing laws to realize the right to be forgotten and, therefore, the introduction of new provisions would not be necessary.

For example, some say that Article 36 of the Personal Information Protection Act, Article 44-2 of AICN, and Article 14 of the Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reports provide for the right to be forgotten, arguing that the systems to protect the right to be forgotten is already in place in South Korea.

However, it needs to be seen whether the current provisions of South Korean laws sufficiently realize the right to be forgotten.

1. Personal Information Protection Act

According to Article 36 of the Personal Information Protection Act, the information owner may demand the

processor of the privacy information to delete the information unless the information is required to be collected in accordance with other laws(Item 1).

The processor of the privacy information who received such a request shall, unless there are separate processes defined in other laws, investigate the privacy information in question and take necessary actions, such as deletion, in accordance with the request from the information owner and inform the information owner of the result of such actions (Item 2).

If the processor of privacy information fails to take the requested actions, such as deletion, while being requested to delete the privacy information by the information owner, a fine up to 30 million won will be charged (Paragraph 11, Item 2, Article 75).

And, if the processor keeps using the information or provide such information to a third party, the processor may be put to up to two years' imprisonment or a fine up to 20 million won (Item 2, Article 73 of the same law).

The privacy information requested to be deleted is the information concerning the person, such as the name, resident registration number, information that can be used to identify the person through images, etc. (including the information that does not identify an individual but can be used for such an identification when combined with other information) (Paragraph 1, Article 2 of the same law).

However, the privacy information mentioned in this law is the privacy information that is contained in the personal information file that is managed by the information processor.

Therefore, it is different from the privacy information that can be searched over the Internet that is subject to the right to be forgotten[8].

The personal information protected by the Personal Information Protection Act is the personal information that is managed using the privacy information file by the processor of the information.

Therefore, it is difficult to demand correction or deletion of the privacy information obtained from Internet searches from the Internet search service provider.

2. Act on promotion of Information and Communications Network utilization and information protection, etc. (AICN)

With regard to the right to be forgotten, Act on promotion of Information and Communications Network utilization and information protection, etc. discusses the topic mainly through Item 1 and 4 of Article 44-2 of the said law.

If the privacy or reputation of a person has been infringed through the information that was provided to be disclosed to the public over the information network, the person whose right has been infringed may explain the nature of the infringement to the information communication service provider and request the deletion or counter-claims for the information. (Item 1, Article 44-2 of the law).

Also, in spite of the deletion request, if it is difficult for the information communication service provide to determine whether there is an infringement or a dispute between the parties of interest is expected, it is possible for the provider to take temporary actions (by blocking the access to the information temporarily) (Item 4, Article 44-2 of the law).

However, in the Act on promotion of Information and Communications Network utilization and information protection, etc., it is entirely up to the information communication service provider to decide whether to delete or take temporary actions upon a request from a person who claims that his/her privacy or reputation has been infringed.

Also, it is not possible to make such a request unless there is an infringement of privacy or reputation.

Therefore, the scope of privacy information that can be deleted through a request is very narrow[9].

Also, unlike the Personal Information Protection Act, the information communication service provider is not subject to any fine or punishment even if it refuses to delete or take temporary actions, making the effectiveness of the law questionable.

3. Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reports

If the third party that posted privacy information on the Internet is a press organization, it is possible to demand a corrective report based on Article 14 of the Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reports.

The right for a corrective report can be exercised by demanding a corrective report within three months from the day when the victim became aware of the media report, if the media report is not true.

However, it is not possible to make such a demand after six months from the report, etc.

According to the Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reports, it is

still possible to demand a corrective report if the content is not true and the individual suffered a damaged due to the report, even if the report does not contain any deliberation, faults, or violation of the law.

However, the right for a correction of a media report that originates from the right to be forgotten is a claim based On the self-determination right of privacy information and the personality right.

Therefore, whether the report is true or not is not of importance here.

The right to be forgotten should be based on the possibility of infringing the personality right through the disclosure of the privacy information over the Internet[10].

Therefore, the right to be forgotten should be available for the privacy information from the distant past, as well.

The correction report right, therefore, is not sufficient as the right is valid for only three months from the time the individual became aware of the report and six months from the date of the report itself, after which a corrective report request cannot be made.

Of course, it is understandable that such provisions were introduced in order to solve the disputes over media reports promptly.

However, while the scope and dispersion rate of information from media reports is significantly, the time window to exercise the right is too narrow, making it an insufficient remedy for the damages suffered by the information owner.

Ⅳ. Conclusion

The emergence of knowledge information societies due to today's rapid development of information communications technology has brought changes to the lives of mankind to a level that was not even imagined in the past.

Today's cyberspace that functions as media where knowledge information is ceaselessly created and circulated is a living space essential for any member of knowledge information societies.

However, it is also true that personal information is indiscreetly circulated in the cyberspace to breach the social benefits and protection by law.

The right to be forgotten is an issue that is vigorously debated in our society.

While there are some voices advocating the right to be forgotten on the basis of privacy protection and the self-determination right for personal information, there are objections for the reason of limiting the freedom of expression and the right for information[11].

The right to be forgotten and the freedom of expression are both basic rights provided by the Constitution. Therefore, it is not possible to solve the issue by scarifying one right for the sake of another.

For this reason, it is necessary to solve the problem of colliding rights, between the right to be forgotten and the freedom of expression.

To solve the collision between the right to be forgotten and the freedom of expression, it is important to evaluate the benefits between the right to be forgotten and the good of the public[12].

If the two basic rights collide, it is necessary to find a way to preserve as much as these two rights possible, so that both of these rights can be respected, rather than prioritizing one over another through the evaluation of benefits.

For example, following is some examples of the cases where the good of the public should prevail over the right to be forgotten.

First, it is when the value of the information is significant as a record.

If the information on the Internet has a significant value as a historical record, the good of the public surely prevail over the right to demand deletion of the articles.

Second, based on whether the information concerns a public figure, if the interest of the public on the individual is significant, the interest of the public may prevail over the right to be forgotten.

Third, based on whether the report is untrue, if the report is found to be true, the freedom of expression may serve the good of the public better than the right to be forgotten would do[13].

There should be uniform regulations on personal information gathering in order to satisfy the constitutional demands to guarantee the basic rights of citizens, and legislative control should serve as the final fort the for the protection of freedom.

Next, it is necessary to revise the current laws on the right to be forgotten.

First, the privacy information mentioned in the Personal Information Protection Act is the privacy information that is contained in the personal information file that is

managed by the information processor.

Therefore, it is different from the privacy information that can be searched over the Internet that is subject to the right to be forgotten.

Therefore, it should be possible to request a correction or deletion of the privacy that can be obtained through an Internet search from the search engine company.

Secondly, the right to demand deletion of the privacy information in accordance with the Act on promotion of Information and Communications Network utilization and information protection, etc. is limited to the cases where there is an infringement or defamation due to the information disclosed[14].

However, the right to demand edition or deletion of privacy information as a part of the right to be forgotten should not be limited by such conditions.

Also, new provisions of the laws should be introduced so that if the information communication service provider fails to delete or take temporary actions in response to the request to delete privacy information, the provider could be fined or become subject to other punishments.

According to the Act on Press Arbitration and Remedies, etc. for Damage Caused by Press Reports, it is still possible to demand a corrective report if the content is not true and the individual suffered a damaged due to the report, even if the report does not contain any deliberation, faults, or violation of the law, within three months after the individual became aware of the report.

However, the right to demand a corrective report or deletion of articles as a part of the right to be forgotten does not concern the correctness of the report. And, it should be possible to demand deletion or correction of the information of older dates, as well[15].

Lastly, it should be noted that the right to be forgotten is not to demand that the memory of one's personal information be erased. Rather, it is about the right to control and manage one's personal information circulating around on the Internet.

At the same time, one should remember that there are the values of democracy and freedom of expression, in addition to the protection of privacy and personal information.

In the end, the final solution for the issue of right to be forgotten boils down to harmonizing these contrasting values. And, we should keep this in mind as we discuss the issue of right to be forgotten in South Korea.

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