The CyberArt of Forgetting

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Viktor Mayer-Schönberger, Delete: The Virtue of Forgetting in the Digital Age (2009).

"Since the beginning of time, for us humans, forgetting has been the norm and remembering the exception." (2) Advances in information technology have been shifting this default, Viktor Mayer-Schönberger, an Associate Professor of Public Policy and Director of the Information and Innovation Policy Research Centre at the Lee Kuan Yew School of Public Policy, National University of Singapore, argues. This shift may have grave consequences. Therefore, the default needs to be reset. What these grave consequences are and how the reset can be managed are the core issues of his book.

At this stage it is my time for full disclosure: The author of **Delete** has been a long time friend. He is Austrian and I am German. We befriended at a time when the people in the field of information and law were all on a first name basis, and their numbers such that you could easily remember them without any technical support. Both our nationalities point to national memories, which, although different, keep haunting us and our countries, and Mayer-Schönberger does not leave them unmentioned. And finally, at about the time the book came out, the city archive building of my hometown Cologne, containing the city's 2000 years of memory, collapsed into the excavation site of a subway tunnel. All this did not make the reading of **Delete** the reading of just another treatise.

Although the book focuses on memory, it is in essence about what I believe to be the key issue of Cyberlaw: the discovery that technology forces silent assumptions of law to speak up. Laws (and so do customs) build on mostly tacit assumptions on what is physically, organizationally, economically and socially possible at a given time. These assumptions works as a silent restraint on what you may do to remain covered by the rules—this restraint being additionally safeguarded by some general principles like proportionality. Technological developments move the barriers of what has been assumed as being possible. And suddenly, we have to take a stand on these restraints: Did we accept them because we valued what they had protected, even if only silently, or by sheer ignorance of what the future might hold? Or did we accept them, more or less grudgingly, because we assumed that there was no way to ever overcome these restrictions? In the former case we have to look for solutions that help to restore at least the functions of these restraints. In the latter case, we have to adjust the rules to receive change. Which road to take makes up the arguments of Cyberlaw.

Delete argues for an equifunctional restoration of the "natural" processes of forgetting in the face of the technological possibilities of total recall: As the author points out in chapter 4, after some general introductions into the scope of individual, social and technical memory in chapters 2 and 3, technologically enhanced memory carries the risk of exacerbating imbalances of informational power, it does not ensure information quality, it stifles change, it negates time, it makes us vulnerable by limiting our capability to judge, it bars us from reconstructing the past, it limits contextual understanding; all this not only affecting individual self-understanding and interpersonal relations, but also our institutions of collective memory. This does not remain unnoticed; there are, Mayer-Schönberger concedes, compensations and remedies at work, and he goes through them in chapter 5. There are some who think we will adjust as we have always adjusted to technological change, some preach information abstinence, others favor an ecological understanding of the information environment where we handle information sparingly. There are regulatory structures, provided for example by privacy laws, which (also) address past information and its impact on the present and the future, or contractual constructs which would allow for negotiating about information. And there are technical solutions, some of them already tested in a digital rights context, which might be adopted. Even full contextualization and total transparency might be promising counter strategies. After analyzing all of them, the author concludes

somewhat resignedly that " … to combat the dangers posed by digital remembering, it may require us to give up on finding a perfect answer, and instead pragmatically aim for a solution mix …" (168) But he does not leave us with this, he wants to contribute with an own solution; not a comprehensive one, rather a contribution to that solution mix: and so in chapter 6, he suggests instituting expiration dates for information, by a combination of contractual exercise, technological design, and legal rules providing a suitable environment for such an installation. Expiration dates for information are not meant as a panacea, but as a way to help to reset at least the default from remembering to forgetting.

Reading is often also searching for something to take with you well beyond what the text you read is about. A message, perhaps, that unsettles you, or perhaps confirms an insight which you thought you would only be sharing with a very few. In German, we call this *Lesefrüchte* (fruits of reading). I found something like that where—in the context of remedies against digital remembering—Mayer-Schönberger discusses and basically discards current DRM systems as a feasible solution to control one's own information. He believes that—as a basic prerequisite to make such a solution feasible at all—one would need "… to create usage languages that more adequately describe an individual's choice of sharing her information for a specific purpose under certain conditions." (151) This is the software designer speaking (part of the author's activities are directed at designing software), and he rightly calls developing such a language a "tall order." But this is – I believe – the task that is unavoidable to take on for the future of Cyberlaw: developing an adequate language *to describe and prescribe* information handling in our societies. If Cyberlaw as a discipline seeks to contribute something original to law in the Digital Society, it has to supplement its methodology. Just as Civil Law has incorporated economic insights of the 19th and 20th century into its methodology by developing the law and economics approach, Cyberlaw will have to supplement its tools with a law and information toolset to grasp the conceptual, technological and social changes introduced with digital technologies. Such a language would be an essential step. There are already examples of such attempts, compiled, for example, in a 2004 book edited by Urs Gasser, the Executive Director of the Harvard Berkman Center for Internet and Society: Information Quality Regulation: Foundations, Perspectives, and Applications (2004).

Reading is always engaging in a text, and "engaging" evokes the terminology of boxing. There are texts you feel you have to fight to win. There are texts like a friendly chat by the ringside, where you just can let go. There are texts that train you, you read and listen and learn, and there is little else *you* can do. And then there are the sparring sessions. You have to be on full alert, you have to give what you have, but there is an underlying understanding between you and the text that you do it for a common cause. This book, in its chapters 4 and 5 in particular, is laid out like an invitation to such a sparring session. There you find the detailed arguments, spread out one by one. Get ready to highlight where you agree, note contradictions and arguments not carried through to their consequential end, and make annotations where you feel a new punch. The session will be worth the effort.

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