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## No Right to Be Forgotten: Second Circuit Rejects Claims Based on Refusal to Delete Accurate Reports of Arrest

*By Jonathan Bloom**

### Introduction

The Second Circuit's January 28, 2015 decision in *Martin v. Hearst Corporation*[1] affirmed a news organization's First Amendment right to report truthful information. In upholding the district court's grant of summary judgment in favor of the media defendants, the court of appeals held that Connecticut's Erasure Statute—which expunges the official record of a prior arrest—does not provide a basis for defamation or invasion of privacy claims against news outlets that accurately reported the plaintiff's arrest and then refused to remove the reports from their websites following erasure of that arrest.

*Martin*, and other similar rulings, hold that accurate news reporting is not subject to liability under laws that impose specified restrictions on the use of certain personal information, such as for law enforcement purposes. These decisions—some of which rely expressly on the First Amendment—stand in contrast to the heightened protection of privacy in the European Union (EU), where the recent recognition of a "right to be forgotten" requiring Internet search engines to remove links to web pages upon request, involves a purging of the online factual record that would not pass muster under U.S. law.

### Factual Background

On August 20, 2010, Lorraine Martin and her two sons were arrested after police executed a search warrant and found drugs and drug paraphernalia in her home in Greenwich, CT. The Martins were charged with various drug-related offenses. Shortly thereafter, local news outlets—Main Street Connect, *The Connecticut Post*, *The Stamford Advocate*, *The Greenwich Time*, and News 12 Interactive—accurately reported Martin's arrest in print and online. In January 2012, the charges against Martin were dropped, and her arrest records were erased pursuant to Connecticut's Erasure Statute.[2] Martin then requested that the news outlets remove the reports of her arrest from their websites on the ground that they had become false and defamatory as a result of the Erasure Statute's "deemer" provision, which provides that a person subject to erasure is "deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased."[3]



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When the news outlets refused her request, Martin brought a federal class action suit in the District of Connecticut, asserting causes of action for libel, false light invasion of privacy, negligent infliction of emotional distress, and invasion of privacy by appropriation. The defendants moved to dismiss.

## The District Court Proceedings

The district court (Judge Michael P. Shea) granted summary judgment in favor of the defendants, holding that the "deemer" provision did not alter the fact that Martin had been arrested[4] and that the accuracy of the challenged reports barred Martin's tort claims.[5] The court disagreed that under the "deemer" provision Martin was "deemed to have been never arrested" as a matter of fact.[6] Instead, the court held that the "deemer" provision merely imposed requirements on courts and law enforcement agencies, not on private parties.[7] Further, the court held that the First Amendment foreclosed a broader interpretation of the "deemer" provision because it would expose publishers to liability for true and newsworthy statements,[8] and it cited cases in which other courts interpreting the same or analogous language had reached the same conclusion.[9] Based on the limited scope of the "deemer" provision and the fact that the articles were true at the time of publication, the court dismissed Martin's claims. Martin appealed.

## The Second Circuit's Affirmance

The Second Circuit, in an opinion by Judge Richard C. Wesley, affirmed. According to the court, the plain language of the Erasure Statute "insulat[es] the defendant from the consequences of the prior prosecution by ensuring that the defendant is no longer considered to have been arrested for the alleged crimes to which the records pertained and allowing him to swear so under oath."[10] The court held that the Erasure Statute does not affect the truthfulness of historically accurate news accounts of an arrest because the "deemer" provision creates a "legal fiction" rather than an erasure of historical fact.[11]

The court also noted that the Erasure Statute appears under the Criminal Procedure title of the Connecticut General Statutes, demonstrating that the legislature did not intend for it to provide a basis for defamation suits.[12] Moreover, the court reasoned that the few exceptions to the erasure requirements indicate that erasure only applies in the context of judicial and law enforcement systems.[13] Therefore, the Erasure Statute only affected the legal status of Martin's arrest; it did not change the fact that Martin was arrested or that the defendants' articles accurately reported Martin's arrest at the time they were published.[14]

The court held that the accuracy of the challenged reports foreclosed all of Martin's claims. The libel and false light invasion of privacy claims failed because falsity is an element of both causes of action, and the reports were true; the negligent infliction of emotional distress claim failed because it was not negligent to publish a true and newsworthy article; and the invasion of privacy by appropriation claim failed because simply publishing an article that brings one's activities before the public did not amount to improper appropriation of an individual's name or likeness.[15]

The court also rejected Martin's argument that the reports of her arrest constituted defamation by implication because they did not mention that the charges against her had been dropped.[16] Although the court acknowledged that truthful statements can carry a false and defamatory meaning by implication—for example, by omitting critical facts and context—it distinguished Martin's case on the ground that reasonable readers know that arrested individuals are not always charged.[17] Consequently, although the defendants' reporting of Martin's arrest may have been incomplete, their reports were not misleading and therefore were not defamatory by implication.[18]

## Discussion

The Second Circuit's ruling in *Martin* was based on a strict reading of Connecticut's Erasure Statute as well as the commonsense proposition that historical facts do not become false by operation of a statutory restriction on how they can be used. Although the Second Circuit did not reach the First Amendment defense (and, unlike the district court, did not discuss it), it cited cases that did address the free-speech implications of reading erasure laws more broadly. For

example, in *G.D. v. Kenny*,[19] a New Jersey Supreme Court case, the court noted that an "overly broad reading of [the expungement] statute likely would violate free-speech rights guaranteed under the First Amendment" and that truth is "absolutely protected under the First Amendment."[20] Similarly, the district court in *Martin* stated that "if the 'deemer' provision of the erasure laws operated to allow defamation liability to be imposed on true and newsworthy statements, it would run afoul of the First Amendment."[21]

The U.S. Supreme Court has emphasized the right of the press to report truthful, lawfully obtained information on matters of public interest even where significant privacy concerns are implicated. It has held, for example, that the First and Fourteenth Amendments "will not allow exposing the press to liability for truthfully publishing information released to the public in official court records"[22] and that "if a newspaper lawfully obtains truthful information about a matter of public significance, then state officials may not constitutionally punish publication of the information absent a need to further a state interest of the highest order."[23] Although the Court has "refus[ed] to answer categorically whether truthful publication may ever be punished consistent with the First Amendment,"[24] it has held that privacy concerns "give way when balanced against the interest in publishing matters of public importance."[25]

These constitutional principles surely would have foreclosed Martin's claims had the Second Circuit's reading of the Erasure Statute not resolved the case. They reflect the heightened protection for free speech as against privacy rights under U.S. law relative to the EU. The distinction is underscored by the contrast between *Martin* and other similar cases with the robust privacy protection guaranteed by the so-called "right to be forgotten" recently recognized in the EU.[26] Specifically, in May 2014 the European Court of Justice held that EU data protection laws require search engines to establish a mechanism for individuals to remove links with personal information that is "inadequate, irrelevant or no longer relevant, or excessive" from their search results.[27] In another case, a Danish lawyer obtained an order from a Paris court requiring Google to remove links to defamatory malpractice, fraud, and other accusations against him in all of Google's global search engine domains.[28]

The push to expand the reach of the "right to be forgotten" is a serious one. The *New York Times* has reported that European regulators as well as judges "are demanding that Google and other companies remove links covered by the right-to-be-forgotten principle from all results pages in all countries and regardless of where the search takes place," which "would allow Europeans to decide what information citizens of every other nation can access."[29] Google has so far refused to remove links from search results in countries outside the EU, but the stakes will be raised if the right to be forgotten is codified, which EU officials are negotiating now.[30]

## Conclusion

*Martin* turned on the Second Circuit's holding that Connecticut's Erasure Statute did not require reports of the plaintiff's arrest to be purged from the Internet. It is clear, however, as the district court noted, that even if the statute reached more broadly and allowed for a private tort action, Martin's claims would have run up against the strong First Amendment protection for the reporting of truthful information on matters of public concern. This principle will likely pose an insuperable obstacle to any legislature that decides to mimic the EU and enact its own version of a "right to be forgotten."

1. No. 13-3315, 2015 WL 347052 (2d Cir. Jan. 28, 2015).
2. Conn. Gen. Stat. § 54-142(a)(c)(1).
3. Conn. Gen. Stat. § 54-142(a)(e)(3).
4. *Martin v. Hearst Corp.*, No. 3:12cv1023 (MPS), 2013 WL 5310165, at *1 (D. Conn. Aug. 5, 2013).
5. *Id.*
6. *Id.* at *2-*3.
7. *Id.* at *3-*4.
8. *Id.* at *4.
9. *Id.* at *5. *See, e.g., Martin v. Griffin*, No. CV 990586133S, 2000 WL 872464, at *12 (Conn. Super. Ct. June 13, 2000) ("The erasure statute operates in the legal sphere, not the historical sphere."); *G.D. v. Kenny*, 205 N.J. 275, 302 (N.J. 2011) ("[T]he expungement statute does not transmute a

once-true fact into a falsehood . . . . It is not intended to create an Orwellian scheme whereby previously public information—long maintained in official records—now becomes beyond the reach of public discourse on penalty of a defamation action."); *Rzeznik v. Chief of Police*, 373 N.E.2d 1128, 1132 (Mass. 1978) (stating that a similar law did not "purport completely to erase the fact of a prior criminal conviction").

10. *Martin*, 2015 WL 347052, at *2 (quoting *State v. Apt*, 146 Conn. App. 641, 649-50) (Conn. App. Ct. 2013) (internal quotation marks omitted).
11. *Id.* at *3.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at *4.
16. *Id.*
17. *Id.* at *5.
18. *Id.*
19. *G.D. v. Kenny*, 205 N.J. 275, 299 (N.J. 2011) (alteration in original).
20. *Id.* at 293 (quoting *Ward v. Zelikovsky*, 136 N.J. 516, 530 (1994)) (internal quotation marks omitted).
21. *Martin v. Hearst Corp.*, No. 3:12cv1023 (MPS), 2013 WL 5310165, at *4 (D. Conn. Aug. 5, 2013).
22. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975).
23. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979).
24. *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001).
25. *Id.* at 534.
26. Mark Scott, *'Right to Be Forgotten' Should Apply Worldwide, E.U. Panel Says*, N.Y. Times, Nov. 26, 2014, available at http://www.nytimes.com/2014/11/27/technology/right-to-be-forgotten-should-be-extended-beyond-europe-eu-panel-says.html.
27. Case C-131/12, Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González (May 13, 2014), available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0131.
28. Mark Scott, *A Question Over the Reach of Europe's 'Right to Be Forgotten'*, N.Y. Times, Feb. 1, 2015, available at http://bits.blogs.nytimes.com/2015/02/01/questions-for-europes-right-to-be-forgotten/?_r=0.
29. *Europe's Expanding 'Right to Be Forgotten'*, N.Y. Times (editorial), Feb. 4, 2015, available at http://www.nytimes.com/2015/02/04/opinion/europes-expanding-right-to-be-forgotten.html?ref=opinion.
30. *Id.*

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