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**The Limits of the Law to Remedy Online Holocaust Denial**

I very much appreciate being part of this important program. Thank you so much for inviting me.

Like many of you here, I have a “day job” in addition to my dedication to Jewish causes. For my “day job,” I am an Internet and privacy lawyer, leading the global practice at Hogan Lovells. And since the earliest days of the Internet, I have tried to use my professional knowledge to fight online hate speech, especially anti-Semitism and Holocaust denial, as well as racism, homophobia and all forms of Internet hate. It pains me that a remarkable tool for education, communications and entertainment is perverted to advance the lies of hatred, and I have been doing what I can to help address this scourge.

The last time I was in Berlin was a few years ago. I was here for a meeting of the International Network Against Cyber-Hate, “INACH”– which I then chaired. INACH is a collaboration of NGOs from around the world that work together to combat online hate speech, including Holocaust denial. A member of INACH is the Anti-Defamation League, whose Task Force on Internet Hate I founded in1995 and that I continue to lead.

At the INACH meeting here in Berlin, we gathered in the so-called “New Synagogue” on Oranienburger Strasse in the Mitte. That synagogue is one of a handful that still stand in Berlin. Before the Shoah, there were more than 80 synagogues in Berlin I am told.

There was great symbolism in sitting in one of the few remaining synagogue buildings in Berlin just a few miles from Wansee, where on January 20, 1942, senior Nazi officials met to plan the “Final Solution” to what they blandly called the "Jewish Question" – the extermination of the Jews of Europe. Given where we were, the screen shots of dozens of Internet sites denying that the Holocaust ever happened were especially chilling to watch. I remember the November weather in Berlin that year was cold and wet, and I arrived back at my hotel in the evenings feeling raw physically and emotionally.

Only a few years have passed since that Berlin gathering, but much has changed on the Internet. Facebook was just underway when I was here for the INACH meeting. Today, it has 800 million users, and is likely to enroll the one billionth user next year.

Last month, I was in London for a meeting of a Task Force on Internet Hate created by the Inter-Parliamentary Coalition for Combatting Anti-Semitism, known as the ICCA. It was there that I again saw how much the Internet has changed in just a few years, how many more outlets there are for people to engage in Holocaust denial, including Facebook, and how big a problem online hate has become.

The ICCA Task Force includes Members of Parliament from around the world, Internet experts, scholars and representatives of Internet companies. I co-chair the ICCA Task Force with Yuli Edelstein, Israel’s Minister of Public Affairs and the Diaspora. I should note that the fact that Facebook and Google have chosen to participate in the work of the Task Force is an extremely positive sign – an indication of the awareness by those companies of the problem and a sign of their commitment to do more to address the problem.

In London, the ICCA Task Force held a hearing in a committee room in the Houses of Parliament on the nature and extent of Internet hate today. At the London hearing, we saw the same kind of Holocaust denial web sites displayed at that INACH gathering in Berlin a few years go; but we also saw how Holocaust denial has infiltrated social media. This is where the growth of online hate has occurred. Through social media, everyone can be a publisher with global reach.

From YouTube videos featuring notorious Holocaust deniers such as Ernst Zundel and entitled “The Holocaust Debunked,” to Holocaust denial groups on Facebook, we saw how Holocaust denial has embraced Web 2.0 and the tools of social media. There even are Twitter accounts used to promote the vicious and hateful lies of Holocaust denial. Beyond that, legitimate news sites that permit public comment on news stories also have been found to contain rantings of anti-Semites and Holocaust deniers. The instances of online hate are growing geometrically through online tools that facilitate posting to the Internet. The number of websites, online videos, Facebook postings by its 800 million users, and blog entries is staggering. And, or course, with mobile devices to access the always–on Internet, Holocaust denial is just a click away on a device in your pocket. Hate on the Internet has become commonplace, even ordinary.

I commented at the ICCA hearing on how during the Nazi era, the routine appearance of anti-Semitic expressions made them commonplace, even ordinary, to the citizens of Germany who stood by when the seeds of the Holocaust were sown. There was an exhibit at the US Holocaust Memorial Museum in 2009 on that very subject. Today, to a new generation, online hate including Holocaust denial, is a routine appearance. Thankfully, there are messages online containing counter-speech and setting the record straight, and many of the people exposed to the lies view them through the filter of the education they have received that teaches the lessons of the Holocaust. But the Holocaust denial propaganda continues with unknown effect.

Or rather, I should say, we can never measure the true effects of online Holocaust denial. Recall that in 2009, a notorious Holocaust denier and neo-Nazi white supremacist named James Von Brunn, who maintained a Holocaust denial web site and who was egged-on by fellow haters online to keep his rage alive, stormed the Holocaust museum in Washington and shot to death a museum guard named Stephen Johns. We will never know what role exactly the Internet played in provoking Von Brunn, who was in his 80s, to go on his rampage at the Holocaust Museum. But we do know that the Internet was a tool he and his fellow Holocaust deniers used to communicate, recruit and provoke. In the pre-Internet era, these people met down dark alleys and used plain brown wrappers to distribute their hate-filled lies.

Beyond the potential of the Internet Holocaust denial to misinform; beyond its potential to recruit and incite Holocaust deniers and allow them to collaborate; the mere appearance of Holocaust denial on the Internet is disgusting to civilized people, and to survivors, a vicious affront.

So, with that background, I want to tell you that I stand before you as a very conflicted lawyer. It is my job to find legal solutions to problems. That is what we do as lawyers. But as much as I am inclined to say “There ought to be a law” when I see online Holocaust denial, I know and have seen that law is a largely impotent tool against the proliferation of Holocaust denial online. The sheer scale of the Internet and the literally millions of places where Holocaust denial can and does appear makes policing content and bringing successful prosecutions a Herculean task, at a time when law enforcement resources are already strained by multiple priorities and in a challenging world economy. Moreover, evading Holocaust denial laws is an easy thing to do on the Internet.

In countries that have adopted speech codes prohibiting Holocaust denial, the effects of those laws online have marginal at best in stopping Holocaust deniers online. On the INACH list serve that I subscribe to, there are celebrations of successful convictions in Europe, but they number in the dozens in any given year -- dozens from an Internet with billions of users.

At best, the prosecutions are symbolic. Yes, some notorious and outrageous web sites have been eliminated. But the prosecutions do not address or affect as a deterrent the growth of online hate speech, especially the more insidious forms of Holocaust denial such as passing comments on news sites, Facebook postings and Twitter feeds – the kind of denial that states it as a “given.” Isolated prosecutions do little. As with kitchen counter cockroaches, smashing one in one place does nothing to stop their appearance elsewhere.

And remember, that the Internet permits a great deal of speech to be broadcast anonymously, so identification for prosecution often is impossible. Moreover, even where identification and conviction results, convictions frequently turn the targets into martyrs for their benighted cause, prompting more attention to their lies and tribute sites to them spreading their Holocaust denial messages even further than they might otherwise go.

The case of Frederic Toeben is instructive. Toeben as many of you know is the Australian Holocaust denier (and favorite of Iran’s Ahmadinejad) who was convicted in German for *hard-copy* distribution in Germany of Holocaust denial publications in 1999. That conviction made him a folk hero among fellow deniers. Notably, in the 1999 prosecution, the Court *declined* to convict of online material posted outside of Germany.

In 2008, Germany attempted to prosecute Toeben for his online postings from Australia. Toeben was arrested in the UK, but he escaped extradition from the UK to Germany because of legal technicalities having to do with the difference in speech codes in the UK and in Germany. That episode brought attention to Toeben’s web site and hate speech far beyond what his own publicity efforts could have produced, and prompted sympathy sites from neo-Nazi sympathizers around the world. Germany eventually gave up its efforts to bring Toeben to Germany for a trial.

The reflexive use of the law as the tool of first resort to deal with online hate speech threatens to weaken respect for and obedience to the law if such attempted law enforcement fails, or is used against minor violations. Years of legal wrangling resulted from the French prosecution of Yahoo! for the online posting in the US by a Yahoo! user seeking to sell Nazi memorabilia – a posting that could be seen on the US site by French visitors. Yahoo! had removed such items from its French site. In the end, ads for Nazi memorabilia disappeared from Yahoo! in the US, but the matter also resulted in an opinion from a US court that, under the First Amendment to the United States Constitution, there could be no enforcement in the US of any French judgment resulting from the episode. Meanwhile, content far more serious that swastika cufflinks proliferated on the Internet.

And it must be noted that the cross-border prosecutions give support to repressive regimes like China to request international support and assistance in enforcing their speech laws, which they justify as important as the laws against Holocaust denial, but which in fact are laws squelching the free expression of ideas.

Still, I recognize that laws against Holocaust denial can serve to express decent society's outrage against speech that goes well beyond the pale of what is acceptable in normal discourse, especially in light of recent history. The European Union's Framework decision on Racism and Xenophobia states that denying or grossly trivializing "crimes of genocide" should be made "punishable in all EU Member States". The under-subscribed hate speech protocol to the Cybercrime Treaty is to like effect. In countries like Germany and Austria, the enforcement of laws against Holocaust deniers – given the bitterly sad history of those countries – serves as a message to all citizens (especially impressionable children) that it literally is unspeakable to deny the Holocaust given the horrors of genocide inflicted in those countries.

Thus, I am not saying that law has no role to play in fighting online hate speech – far from it. I am saying that countries with speech codes should make sure that the proper discretion is employed to use those laws against Internet hate speech, lest the enforcement be seen as ineffectual, resulting in a diminished respect for and compliance with the law. And I am saying that the realities of the Internet are such that censoring online content through legal means in one country is far from a guarantee that the Web Site is shuttered for all time.

And that is largely because of the legal framework in my home country, the US. The First Amendment to the United States Constitution establishes freedom of expression and protects virtually all speech, even the most repugnant such as Holocaust denial. The law may be used only if hate speech creates an imminent threat of violence or interferes directly with individuals’ legal rights. Unlike in many countries, there is no human right to be free from the indignity of hate speech that can be balanced against another’s right to free expression.

I think it is fair to say that under the First Amendment, the US is a *de facto* a haven for hate speech, essentially free from the strictures of the law, and Internet content can be published in the US and broadcast to the world.

I should note that the big Internet companies who broadcast to the world, intermediaries like Google and Facebook can choose to edit content from their services under *their* First Amendment rights. The can and sometimes do decide that content that cannot be subjected to legal regulation under the First Amendment may be declared by them to be out of bounds for inclusion on their service. Facebook and YouTube do not permit nudity, for example, and online services frequently have Terms of Service that by their terms prohibit hate speech. At the Anti-Defamation League, professionals regularly monitor the Internet and bring hate content to service providers’ attention for removal under their Terms of Service.

But the editorial discretion of Internet companies in enforcing their Terms of Service is colored by the First Amendment tradition of their home country, the US. Except where absolutely clear to them that the speech is inappropriate, the major Internet companies err on the side of publication rather than restricting content. Facebook, for example permits Holocaust denial groups. I and others have tried to explain to its officials that Holocaust denial *per se* is hate speech, so far to no avail, but our discussions are continuing.

And when earlier this year a Third Intifada group was established on Facebook over the objections of the ADL and Israel’s Minister Edelstein, among others, the initial decision at Facebook was to allow the group. But when members of the group and the group’s moderator posted hate speech that to Facebook more clearly violated its Terms of Service, the group was taken down.

When the ICCA Task Force meets again, it will be in Palo Alto, CA under the auspices of the Stanford Center for Internet and Society. There, we will convene many of the Internet companies through whose services hate speech is published. The Stanford meeting will be focused on ways to address Internet hate and we hope the Internet intermediaries will come forward to help more than they have. Again, having Facebook and Google participate on the Task Force is a very good sign. By the way, shortly before I came to Berlin, ADL’s National Director, Abe Foxman, delivered a compelling speech at the ADL National Commission meeting in New York City for greater involvement of Internet companies in the fight against online hate.

Of course, US-based Internet companies make efforts to comply with local speech codes outside the US, but even where compliance is attempted, the sheer volume of user postings makes compliance difficult to achieve. Especially with an issue as complex as hate speech, technological filters play a limited role.

And it is unrealistic to expect human review of every posting. Google executives were convicted in Italy for not preventing the posting of a YouTube video of a disabled child being harassed, and for not removing it as quickly as officials would have like (although it was voluntarily removed when brought to the company’s attention). That conviction, currently on appeal, is roundly derided as one that ignores the realities of the Internet.

Still, INACH, the ADL and the ICCA Task Force all call upon the Internet intermediaries to enforce their terms of service against hate speech, to work harder to understand what qualifies as hate speech, and in particular to pull down Holocaust denial content. We do that *not* under the color of law, but in a call for moral and social responsibility. Our dialogue with the companies is ongoing and, as I mentioned, will be a focus of the ICCA meeting at Stanford next May.

To conclude my remarks, I wanted to mention that in connection with this meeting, I recently had a conversation with my friend (and the friend of many here, I suspect) Professor Deborah Lipstadt, Professor of Modern Jewish History and Holocaust Studies at Emory University. Deborah is perhaps the most accomplished practitioner of “counter-speech” given her victory over David Irving in his libel suit against her for labeling him a Holocaust denier. I asked Deborah about her position on laws criminalizing Holocaust denial given the six-year legal battle to which David Irving subjected her for calling him a Holocaust denier. I expected she might be a strong proponent for such laws in light of the time and expense (both emotional and financial) the dispute with Mr. Irving required.

But Deborah asked me, “Have you read my book?” meaning her book about the Irving libel trial. I had read it, but did not remember her position on this point. And in re-reading it, and other writings by Deborah, I saw that she is a big believer in free speech. In a piece for The Washington Post, she said:

So why not silence Irving and his compatriots? First of all, I believe in free speech. In the United States, the First Amendment guarantees people a right to make total fools of themselves. Sometimes it is painful to hear, but I would rather they had the freedom to say what they wished than the government had the power to control them.

She went on to say:

Furthermore, I do not believe that laws against denial are strategically wise. They tend to make martyrs of the accused, arousing sympathy for them. They also render the item which has been outlawed ‘forbidden fruit’. Thus it becomes more enticing and appealing to certain segments of society – disaffected youth, for example.

She also wrote about counter-speech and said this:

Most importantly, however, genocide denial laws suggest that we do not have the facts and the documentation to prove that these people are liars. We defeated David Irving in court not with law but with facts. We followed his footnotes and demonstrated that, in the words of Professor Richard Evans, Irving’s work on the Holocaust was a ‘tissue of lies’.

Our defeat of Irving is a far more powerful commentary on his work because it is rooted in the facts and did not occur under the cover of a general law outlawing Holocaust denial.

With her characteristic wit, Deborah concluded

I shudder at the thought that politicians might be given the power to legislate history. They can hardly fix the potholes in our streets. How can we expect them to decide what is the proper version of history?

Thus, I will close giving the last word to Deborah Lipstadt.

I will sum up by saying this: I am thoroughly disgusted by the common appearance of Holocaust denial online, in web sites of notorious deniers but also in incidental comments appended to news stories or YouTube videos. Last time in Berlin, I was chilled and deeply saddened by what I saw online at the meeting in the Synagogue on Orienstrasse. And in the ensuing years, the situation has gotten worse. Holocaust denial takes on a life of its own in the modern Internet. But I have concluded that the realities of the Internet are such that effectively policing online Holocaust denial through law is unachievable due to the scale and scope of the Internet, and also due to America’s First Amendment under which the US is global host of online hate, including Holocaust denial. In my work to fight Internet hate speech, I advocate counter-speech and education, and more frequent voluntary take-downs where possible by Internet intermediaries. Those tools, in the end, have the potential to be far more effective than the law in combatting online Holocaust denial. Odd as it may be for a lawyer to say that the law is a last resort, but that is where I come out on this subject.

Thank you so much for allowing me to speak with you today and to participate in this conference with you. I look forward to our continuing discussions.