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# CyberCorporation Law\* – Comparative Legal Semiotics/Comparative Legal Logistics

BERNHARD GROSSFELD\*\*

*"The web of our life is of a mingled yarn, good and ill together"*<sup>1</sup>

*"There is nothing but a dream to create the future"*<sup>2</sup>

## I. Introduction: Sir Joseph Gold

When I met Sir Joseph Gold in Dallas eighteen years ago, we started talking about legal accounting, but after a short time the subject became literature and law and – even more exotic for some – poetry and law. Joseph Gold collected the work of Samuel Becket (1906 – 1989). Becket's best-known work, *Waiting for Godot*, about the "abuse of empty words" (trash words), struck a cord of sympathy with Gold that led him to look for the truth in living poetry and for creativity combined with sparseness of language. That was the subject of our "dreams on poetry" that we shared. Back in Germany, I received a neatly wrapped parcel from him and I picked up a book *Shakespeare and His Legal Problems* by George W. Keeton.<sup>3</sup> The author had dedicated it to his parents, and he had given the book to Joe in 1939 "with all good wishes." Forty-four years later Joe gave it to my wife, Maria, and to me. The Foreword to this book is from Lord Darling, P.C., who equates "the greatest lawyer" that Gray's Inn has "produced" with "England's supreme poet."

### A. DREAMING LAW

When talking at this occasion and in view of the personal background, it seems proper to start as "lightly" as Joe loved it in Keeton's book about Shakespeare. Therefore, I will begin a "light luggage" journey (Goethe's poetic notion as understood by Wittgenstein) into the still largely uncharted world of Cyberspace with Shakespeare's "We are such stuff

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\*Wolfram Timm, *Das Gesellschaftsrecht im Cyberspace*, in Festschrift Marcus Lutter 157, (2000).

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1. WILLIAM SHAKESPEARE, *ALL'S WELL THAT ENDS WELL* act 4, sc. 3, at 71–72.

2. See FLORENCE LITTAUER, *DARE TO DREAM* 50 (1994) (quoting Victor Hugo).

3. GEORGE W. KEETON, *SHAKESPEARE AND HIS LEGAL PROBLEMS* (1930).

as dreams are made on, and our little life is rounded with a sleep"<sup>4</sup> or with the children's song (comparatists have to stay naïve<sup>5</sup>):

"Row, row, row the boat  
Gently down the stream,  
Merrily, merrily, merrily,  
Life is but a dream."

This is no time-consuming detour but a precise shortcut into the subject matter: Laws are mental maps of fears and hopes, of experience and speculation, of heaven and earth, which can be and are compared to the "logic" and structure of dreams.<sup>6</sup> Let's "craftdream" into the virtual world of Cyberspace, let's "dreamcraft" about the impact of new semiotics and new intellectual logistics, taking corporation law as an example. And do not forget, we are talking about a man who worked for and who gave all his talents to a dream – a fair and well-balanced international monetary system – a truly global dream.

## B. DREAM PERSPECTIVES

Comparative law tells us that the integrating power of legal concepts cannot be explained functionally but only by common experiences, common fears and hopes, and common dreams about what the future could and should be.

Cyberspace has become a new dream for us to network the world. "Cyber" is an abbreviation of the original Greek word "cybernetics" (steersman). We are steering into a new ocean, much larger than the Mediterranean which the Greeks had before their eyes and therefore in their minds. "Cyberspace" refers to the universe behind the computer screen, a kind of new creation. Therefore, Kevin Kelly, a co-founder of the journal *Wired*, moves the question of "who created the world" from theology and physics into the realm of technology. In his eyes it is no longer the study of God's secrets but the exploration of the creator through creating virtual realities. He quotes Stewart Brand with saying: "We are like Gods, and it could be that – one day – we will become good in it."<sup>7</sup> Brave new world!

## C. VIRTUAL "BODIES"

I do not want to go into theology or neo-theology (without God) and even if you were interested in the subject, you might think: "Wait a minute! What about corporations?" CyberCorporations? Let's come to corporations then.

At first glance, corporations seem to have little to do with a virtual world. They are very real powers and the word "corporations," as derived from Latin "corpora" (bodies), leaves little doubt about their forceful reality. In addition, corporations entered our world and govern our world as geographically precisely defined entities: Delaware corporations, German corporations, Nauru corporations. No trace of "globalization"! But a closer look at

4. WILLIAM SHAKESPEARE, *THE TEMPEST* act 4, sc. 1, at 156–58.

5. Bernhard Grossfeld, *RECHTSVERGLEICHUNG* [Comparative Law] 58 (2001).

6. William Twining, *Mapping Law*, 50 N. IR. LEGAL Q. 12, 48 (1999).

7. *Who Created the World?* FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 9, 2001, No. 7, at 53. For a more cautious approach, see Misha Glenny, *How Europe Can Stop Worrying and Learn to Love the Future*, *WIRED*, Feb. 9, 2001, at 102.

them tells us that corporations are virtual in their very nature and that the geographical attachments are often just fakes, or semiotic abracadabras.

Corporations as virtual realities were first recognized in 1819 in *The Trustees of Dartmouth College v. Woodward*.<sup>8</sup> Chief Justice John Marshall called them "artificial being[s], invisible, intangible, and existing only in contemplation of law," a definition that is as modern as ever. Corporations are "entities whose very existence and attributes are a product of state law,"<sup>9</sup> a view shared by the European Court of Justice. Corporations are not the product of a socially defined group's orally transmitted traditional body of rules. They need the alphabet and they exist in contemplation of written law only. We must add—the letter of the law forms the law of the letter and with it the legal personality. Virtuality depends on a particular semiotic system. The signs create a new entity and give them an independent "life." This life no longer depends on geography but on the willingness of a given culture to accept the authority of particular signs<sup>10</sup> for reasons that we often do not know.

#### D. GEOGRAPHY

But this conclusion is already a step too fast. In the beginning virtuality ran parallel to geography. The modern corporate law starts with new ideas in New Jersey and Delaware, both geographical concepts and even very particular concepts, indeed. New Jersey is the state "across the river" from New York, and Delaware is so conveniently located between New York and Washington, D.C.

The separation and thereby the history of globalization started for the corporate world in 1839 with *Bank of Augusta v. Earle*.<sup>11</sup> At first glance it seems to be a wonderful example of how geography actually sits in the center of the virtual entity that we call a corporation. Virtuality had its feet in a fertile soil.

##### 1. *Bank of Augusta*

In *Bank of Augusta*, the issue was whether a Georgia corporation could acquire contract rights in Alabama. This question had a vital geographical background. "Location, location, location" was at the heart of the matter. Notwithstanding all legal rhetoric, location defined the outcome from the very beginning. Augusta, Georgia sits on the right bank of the Savannah River, which reaches the Atlantic Ocean at Savannah, Georgia. At the northern left bank of the Savannah River is South Carolina; Alabama is to the West. Augusta was *the* trading and banking center of the Southern cotton industry and part of the former glory, when cotton was "king." Savannah was *the* harbor to export cotton. In short, through geography, and through geography alone, this case would determine the entire interstate future of the cotton trade.

Under these circumstances, it is clear that the U.S. Supreme Court took as a starting point that the corporate reality depended on geography.<sup>12</sup>

It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of

8. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 528, 636 (1819).

9. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87, 107 S. Ct. 1637, 1649 (1987).

10. Hagen Henry, *Die juristische Person in Afrika*, in *FESTSCHRIFT FÜR MUENKNER* 417 (2000).

11. *Bank of Augusta v. Earle*, 38 U.S. 519 (1839).

12. *Id.* at 588–89.

the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty.

## 2. *Towards Globality*

But in final analysis, geography moved into the background quickly: The power of signs! The *Bank of Augusta* court overcame geographical limitations with the following words that opened the way towards globalization:<sup>13</sup>

But although it (the corporation) must live and have its being in that state only, yet it does not by any means follow that its existence there will not be recognised in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. Yet, . . . it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person, in the state of its creation, is acknowledged and recognised by the law of the nation where the dealing takes place.

The decisive idea was that corporations must not “actually exist” as “corpora” abroad. The virtual world won on a global scale. This was achieved by the magic words “comity of nations” that were “imposed” on a reticent Alabama: Love your neighbor!<sup>14</sup> It emancipated the corporation from geography and visibility and made it a virtual global actor. A new dream of reality blossomed. It opened the way to the “Frankenstein monster” of the Brandeis dissent in *Liggett v. Lee*<sup>15</sup> (1932), to the present position of Delaware<sup>16</sup> and of multinational corporations.<sup>17</sup> They are all products of the power of virtuality, of this new “tree of life” that sprang up from the written law: From a virtual entity to a transborder and to a transnational corporation<sup>18</sup> and from there to CyberCorporation. *The Trustees of Dartmouth College* and of *Bank of Augusta*—birthright!

## 3. *Present Status*

Following *Bank of Augusta*, the present state of things is as follows.

A “corporation” is a legal entity granted a charter, recognition of independent existence, and a public record of parameters of limited liability as regards the affairs of the newly established corporate citizen. Authority to issue corporate charters resides exclusively with the supreme sovereign authority in control of the jurisdiction or territory in which the corporate citizen intends to operate. A corporation is domiciled only in the jurisdiction of the issuing authority. However, with rare exceptions, all corporations are free to conduct business in other jurisdictions, providing they meet registration requirements, if any, for the recognition of foreign corporations.

13. COPING WITH GLOBALIZATION (Aseem Pakrash & Jeffrey A. Hart eds., 2000).

14. See Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563 (2000) (discussing the present status of comity).

15. *Liggett v. Lee*, 288 U.S. 517, 567 (1932).

16. Bernhard Grossfeld, *Loss of Distance: Global Corporate Actors and Global Corporate Governance – Internet v. Geography*, 34 INT'L LAW. 963 (2000).

17. Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

18. RAYMOND VERNON, IN *THE HURRICANE'S EYE: THE TROUBLED PROSPECTS OF MULTINATIONAL ENTERPRISES* (1998).

## II. Comparative Legal Semiotics<sup>19</sup>

As we have seen, there is a constant competition between geography and signs, between mother earth and father heaven. Hoping to have convinced you that dreams, virtuality, and corporations belong closely together, I would like to turn your interest more closely to the instruments that create virtual worlds. Our views of order are inseparably intertwined and are constantly interacting with particular semiotic impacts (*cf.* the French “*faculte de droit et lettres*”). Different semiotic systems attain a different status and different impacts in different cultures.

I already drew your attention to the fact that legal entities or juridical persons have no existence outside of writing, be it called statute or register. It also goes without saying that signs create reality (consider: “All things came to be through the word.”<sup>20</sup>). They make us see the world. Take the expression “the seven hills of Rome” that let us see Rome on seven hills. Visit the Vatican and you will be disappointed. Different signs create different views of the world and new signs let us see a new world. Just compare the alpha-numerically induced worldview from the alphabet (*cf.* to decipher) with the more “picturous” view evoked by Chinese “drawings” – as the Chinese call their letters.<sup>21</sup>

### A. SENTIMENT DU COEUR

Through the Internet today we are again changing our semiotic matrix. Remember, different semiotic systems suggest how we should think and how we should act. They make us feel differently about what is “in order” – as order is – in Blaise Pacals’s definition a “sentiment du Coeur.” This seemingly “sentimental” definition is fully in line with a wide, yet, precise concept of law as proposed by Josef Kohler (1849–1919):

Law exists before any court or any executory performance exists. It exists in the hearts of the people as a feeling of what should be and of what should not be . . . Law shows itself in that the community as a whole not only approves or disapproves of the act of the individual, but also supports the one who is believed to have justice on his side in his pursuance and exercise of law.<sup>22</sup>

Kohler refers to the “*Rechtsgefuehl*” (feeling for law) prevalent to all cultures:

Therefore, there is no people without law; there are people without courts, there are people that lack a state organisation or that possess one which is developed only in merest rudiments – but there is no people without law: Man cannot be Non-Man.<sup>23</sup>

The “heart” is the place where semiotic systems enter our life largely subconsciously; where they become our hidden masters.

19. Bernhard Grossfeld, *Comparative Legal Semiotics: Numbers in Law*, J. S. AFRICAN L. 2001.

20. John 1:3; *see also* Isaiah 55:11: “So shall my word be/that goes forth from my mouth/It shall not return to me void/but shall do my will/achieving the end for which I sent it.”

21. Jack A. Hiller & Bernhard Grossfeld, *Comparative Legal Semiotics and the Divided Brain: Are We Educating Half-Brained Lawyers*, 50 AM. J. COMP. L. 1 (forthcoming 2002).

22. Josef Kohler, *Ueber das Recht der Australneger*, 7 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 321 (1887), *quoting* Ruediger Schott, *Main Trends in German Ethnological Jurisprudence and Legal Ethnology*, in *Folk Law: Essays in the Theory and Practice of Lex Non Scripta* 201, 206 (Alison Dundes Renteln & Alan Dundes eds., 1995). For a modern view about “hard law” and “soft law,” *see* COMMITMENT AND COMPLIANCE (Dinah Shelton ed., 2000); *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960 – 1995* (Katharina Pistor & Philip A. Wellons eds., 1998).

23. *See* Kohler, *supra* note 22, at 324; Schott, *supra* note 22, at 207.

## B. GOING DECIMAL

Not to get too far away from the corporate world, I take an example from the New York Stock Exchange's recent move to decimals.<sup>24</sup> Stocks are now quoted in one-cent increments in contrast with the fraction-based quotations like 1/8 as before (following a centuries-old Mediterranean counting method that came to Wall Street via Mexico). When a stock moves 1/8 at a time, it is actually moving 12.5 cents at a time. Going decimal has changed the trading pattern: With stocks quoted in decimals, it is much easier for the floor trading specialist firm to step in front of an order – it takes only a penny change in price. The same could happen in a non-decimal world, but the specialist would run a larger risk: She would have to advance the price by 1/16 or 6.25 cents to step ahead.

Now the NYSE specialist firm can profit by “stepping in front of them” with an offer of just a penny a share higher when they know of an investor waiting to buy the stock.<sup>25</sup> As a consequence, institutional traders fear to be “pennied out” and are curtailing their use of limit orders. Thus, the move to one-cent increments cuts limit orders and market ‘depth.’ The switch in signs is a switch in content. The new semiotic system changes the market pattern. Small wonder that investors and traders are upset.

## C. CORPORATE HOMES AWAY FROM HOME

The power of semiotics is even more visible when we look at actors who exist almost entirely on semiotic structures, namely, corporations. In *Bank of Augusta*, we met a firm with a clear geographic center in Augusta. Augusta was more than a name. However, geography later lost importance. The catchwords for this development are “charter mongering states,” or “corporate homes away from home” – referring to a discussion associated with names like Delaware, Liechtenstein, Isle of Man, and Nauru or with the term “pseudoforeign corporations.”<sup>26</sup> As corporations are paper constructs, semiotic handbags, so geography itself became a paper construct. What counts, and what counts alone, is the location of the paper, which we call “register.” These corporate “homes” know the facts better than anybody else, but they juggle around with words and try to present virtuality (“organized on paper”<sup>27</sup> by registration in Delaware, for instance) as geographic reality. They do this to protect the “internal affairs rule” on their turfs and in their favor. This internal affairs rule is *the* virtual “reality” in the United States: “No principle of corporation law and practice is more firmly established than a State’s authority to regulate domestic corporations.”<sup>28</sup>

The Delaware Supreme Court praises this conflict of law rule over local interests (of others):

[T]he internal affairs doctrine is not merely a principle of conflicts law. It is also one of serious constitutional proportions. . . . The alternatives present almost intolerable consequences to

24. Jeff D. Opdyke & Gregory Zuckerman, *On NYSE, Decimals Have Downside*, WALL ST. J. EUR., Feb. 12, 2001, at 17.

25. Gregory Zuckerman, *Big Board Hears Complaints Over Decimal Pricing Systems*, WALL ST. J. EUR., Feb. 20, 2001, at 19.

26. *Western Air Lines, Inc. v. Sobieski*, 12 Cal. Rptr. 719 (1961).

27. *German-American Coffee Co. v. Diehl*, 109 N.E. 875 (N.Y. 1915).

28. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987).

the corporate enterprise and its managers . . . Such issues have been the subject of litigation and scholarly discussions for decades. However, an attitude has developed in some quarters which exalts local interests over more fundamental doctrines. We approach such teachings with reservations.<sup>29</sup>

In *Draper v. Gardner Defined Plan Trust*, the Court further explained: "No more than two non-California state courts have cited to the *Western Air Lines* case and none of the states, including California, appear to have rejected the internal affairs doctrine."<sup>30</sup> A clear concept of virtual locality or local virtuality. Compare this with the language in *Western Air Lines* that "the fiction of Delaware residence should yield to the totality of California contacts."<sup>31</sup> The power of letters, or the power of facts?<sup>32</sup> What is virtual, what is real? "Words, words, words" (again Shakespeare!). Trash words? A Delaware "dream" turned into a "benefit" for the world.

#### D. EUROPEAN UNION

So far, the European Union is firmly committed to "real" reality, to real geography and, therefore, to local concepts of corporation law as expressed by the seat theory. In most Continental European states, corporations must be incorporated in the state where their headquarters are located.<sup>33</sup> The law of that state governs the legal capacity and the internal affairs. But some commentators believe the bulwark of geography might have become a deathblow.<sup>34</sup>

On March 9, 1999, the European Court of Justice rendered the *Centros* decision.<sup>35</sup> In that case, Danish residents wanted to circumvent the minimum capital requirements of Danish corporation law. Therefore, they decided to set up an English limited company, Centros Ltd., without starting any business activity in England. The company then applied for registration at the Danish registry office, but was turned down for two reasons: Centros Ltd. had not established a trade or business in the United Kingdom, and it was not seeking to establish a branch in Denmark but a principal office; therefore, it was seeking to circumvent Danish rules on minimum capital.

The European Court of Justice held that the refusal of registration was contrary to articles 42, 46, and 48 (under the new numbering) of the European Treaty dealing with freedom of establishment. The Court referred expressly to "a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business." The Court, however, added an escape clause. That interpretation,

29. *McDermott Inc. v. Lewis*, 531 A.2d 206, 216-17 (Del. 1987).

30. *Draper v. Gardner Defined Plan Trust*, 625 A.2d 859, 867 n.10 (Del. 1993).

31. *Western Air Lines*, 12 Cal. Rep. at 722; cf. William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT'L L. 213 (1999).

32. Cf. *Norlin Corp. v. Rooney, Pace Inc.*, 744 F.2d 255 (2d Cir. 1984).

33. Bernhard Grossfeld, *Loss of Distance: Global Corporate Actors and Global Corporate Governance: Internet v. Geography*, 34 INT'L LAW. 963, 970 (2000).

34. Eddy Wymeersch, *Centros: A Landmark Decision in European Company Law*, in CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW 629 (Theodor Baums et al. eds., 2000); Hans-Georg Koppensteiner, *Die Sitzverlegungsrichtlinie nach Centros*, in Festschrift fuer Marcus Lutter 141 (2000).

35. Case C-212/97, *Centros Ltd. v. Erhvervs- og Selskabsstyrelsen*, [1999] ECR I-1459.



does not, however, prevent the authorities of the (host state) concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, . . . or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

The decision has provoked "great waves of unrest on the continent."<sup>36</sup> The Austrian Supreme Court regarded the seat doctrine as overruled,<sup>37</sup> and the German Federal Court for Civil Matters and a lower German court referred the question again to the European Court of Justice. Nobody dares to make a prediction about the outcome.<sup>38</sup> But the chances are that the traditional mixture of virtuality and geography is losing coherence or possibly even withering away.

### III. Comparative Legal Logistics

Having seen the strength of semiotic systems and the weakness of geography, we can take for granted that the digital world of the Internet will open a new chapter in this ongoing struggle. In addition, it will constitute a new legal logistic by widening the number of participants and changing the character of the audience. Numbers count!

In this context, I want to remind you of the "mos mathematicorum" of the Middle Ages, which came with the infiltration of Arabic numerals, with double accounting techniques, and with the printing press.<sup>39</sup> New numerals and an avalanche of printed letters carried new contents to a new constituency. Legal semiotics and legal logistics formed a powerful alliance that shaped the modern word particularly in view of the "sentiments du Coeur."

The Internet is a stepping-stone into a similarly evolving drama<sup>40</sup> and it gets additional strength by the fact that it is a worldwide *homogenized* semiotic system.<sup>41</sup> It is in this context that we have to approach our subject. We do not have to deal just with the power of semiotic systems but also with their logistics, that is, whether, why, how, and how far they can be transplanted in a digital space thereby forming a transnational territory and a global audience.<sup>42</sup>

#### A. FIRST IMPRESSIONS

##### 1. Legal Online Research

Lawyers first got to know the Internet through online research for legal materials. Law had run out of control and had become largely inaccessible, as already complained by Alfred, Lord Tennyson in *Aylmer's Field*:

36. Wymeersch, *supra* note 34, at 630; Daniel Zimmer, *Private International Law Aspects of Business Organisation in Europe*, 1 EUR. BUS. ORG. L. REV. 585 (2000).

37. (Austrian) Oberster Gerichtshof, Neue Zeitschrift fuer Gesellschaftsrecht 2000, at 26.

38. Bernhard Grossfeld, *Wirtschaftsprüfer und Globalisierung: Die Zukunft des Bilanzrechts*, DIE WIRTSCHAFTSPRUEFUNG (2001), at 129.

39. PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK XXIII (1996); R.W. SOUTHERN, THE MAKING OF THE MIDDLE AGES (1953); Bernhard Grossfeld, *Global Accounting: Where Internet Meets Geography*, 48 AM. J. COMP. L. 261 (2000).

40. M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989); M. ETHAN KATSH, LAW IN A DIGITAL WORLD (1995).

41. For a similar view, see Thomas C. Baxter, Jr., *Dollarization and Its Impact on U.S. Law*, in this issue at 1427.

42. Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996); David R. Johnson & David Post, *Law and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

Mastering the lawless science of our law,  
That codeless myriad of precedent,  
That wilderness of single instances, Through which a few, by wit or fortune led,  
May beat a pathway out to wealth and fame.<sup>43</sup>

But the technological digital revolution has gone far beyond the realm of this part of legal logistics.

## 2. *Markets Online Research*

The Internet plays havoc with geographic boundaries far beyond legal information. It creates a distinct Cyberspace of markets, which needs and creates new laws and new legal institutions, and forms new global corporate organizations. Virtual legal worlds create a forum for dissemination; they stretch the limits of the semiotic system, which receives additional authority from the technological glamour surrounding it. The new technical means of communications constitute not only markets for goods but also markets for world-views. By the same token, they homogenize these markets as they bring together similar experiences. In addition, logistics determine the accessibility of information and the reactions. It limits or broadens the number of participants and, through that, its power and social implications.

## 3. *Orality of Writing/Visual Communication*

Semiotic systems make content and open logistics. This will even affect the relation between orality and writing. Writing is our prime instrument to cope with distance that cannot be bridged by the spoken word. The necessity to span distance explains the preponderance of the written law in our cultures. But if distance is no longer problematic an elder semiotic system becomes more important: the spoken word. The Internet turns the whole world into a chat room!

You might argue against me by referring to the fact that we *type* into the computer. But it is already "readable" that our e-mails are closer to our spoken language: more spontaneous, less formal, less "high style." Today I would not write to Sir Joseph Gold as "Dear Joe"; I would just e-mail "Hi." We arrive at the "orality of writing." The trend towards orality will get more breadth and speed when talking into and listening to the computer becomes *the* standard. While we operate primarily in a literate world, our thought is marked by a "heavy oral residue."<sup>44</sup> The reactivation of this "residue" will make distances further disappear.<sup>45</sup>

But the trend goes beyond this. Already not just words but signs and pictures can be researched over the Internet, adding a new realm of communication in addition to letters, numbers, and spoken words. This increases interactive closeness as visual signs and picture recognition create new face-to-face situations. Symbolic behavior in which people engage all the time<sup>46</sup> gets a new chance.

## B. CYBER CORPORATE STRUCTURE

It is a small wonder that the virtual entity "corporation" fits so neatly into the world of Cyberspace. It is kind of a "natural" candidate, or even a native of this new land. Being a

43. David G. Post, *The Law is Where You Find It*, THE AM. LAW., Mar. 1996, at 98, available at <http://www.temple.edu/lawschool/dpost/Where.html>.

44. Laurie C. Kadoch, *Seduced by Narrative: Persuasion in the Courtroom*, 49 DRAKE L. REV. 71, 74 (2000).

45. See also WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD (1982).

46. Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998).

creature of virtuality based on signs (and on signs only) it finally meets the environment of its own beginnings. Therefore, the combination of new semiotics and new logistics changes the corporate world. In a word, Internet technology is disrupting the old-fashioned institutional arrangements, and forces us to ask questions that used to be unthinkable.

The "life" of virtual actors in a virtual world, therefore, is the new challenge for national and international corporation law, and it is this that I call CyberCorporation Law. This is much more than just new partnership contracts<sup>47</sup> or virtual shareholder meetings. The Internet is a code developer of gigantic proportions, and it will bring us to technology-led solutions of new corporate governance issues.<sup>48</sup>

### 1. *Examples*

#### a. Evaluation

The questions with Cyberspace start at home right now. Corporations that operate only or mainly in the world of Cyberspace are difficult to evaluate in all kinds of appraisal situations. Since the *Weinberger* case,<sup>49</sup> the evaluation of corporations is a job for lawyers that want to stay in corporate business by not losing too much ground to accountants.<sup>50</sup> Though we are now convinced that we have to look into future discounted cash flows, we are still asset-oriented as every financial statement testifies. Assets are the basis for traditional business. This view is not out of the real world. But what about assets with corporations like CMGI, Pacific Cyberworks, and Yahoo!? Are they all hope for the future; are they all goodwill?

The glamour of the "sticky cult" has vanished. It turned out to be stupid. For too long we have been made to believe that firms that engaged customers for long stretches of time on the Internet must be valuable. But stickiness does not produce success and is no substitute for future net income.<sup>51</sup> Stickiness is not cash that counts for cash flows.

Goodwill as an intangible asset is already virtual in itself, but what is its standing in a virtual world? We lack experience and the public is probably not even aware of the compound power of virtuality meeting virtuality. The treatment of goodwill is *the* decisive factor in corporate financial statements, and in corporate restructuring. Just consider the present "merger of equals" discussion with regard to the Daimler/Chrysler deal (is it not interesting that Daimler precedes Chrysler, even though alphabetically *C* precedes *D*?).

#### b. Intra-Net Structure Corporations

The problem is accentuated by the rise of decentralized corporate structures: Intra-net organized transnational corporations are an emerging problem in the "real" world already.<sup>52</sup> P2P technology—Napster, Gnutella or Majonation style—interweave all parts of the struc-

47. ELIZABETH BERWANGER, *DER GESELLSCHAFTSVERTRAG EINES VIRTUELLEN UNTERNEHMENS* (2000); Kathryn Combs, *Limited Liability Companies and Technology Transfer*, 24 J. TECH. TRANSFER (1999).

48. Christopher T. Marsden, *Book Review*, 63 MOD. L. REV. 624 (2000) (reviewing LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (1999)); Grossfeld, *supra* note 33.

49. *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).

50. Bernhard Grossfeld, *Lawyers and Accountants: A Semiotic Competition*, 36 WAKE FOREST L. REV. 167 (2001).

51. Thomas E. Weber, *A "Sticky" Situation: How a Web Buzzword Spun Out of Control*, WALL ST. J., Mar. 5, 2001, at B1.

52. Daniel Zimmer, *Von Debraco bis DaimlerChrysler: Alte und neue Schwierigkeiten bei der internationalgesellschaftsrechtlichen Sitzbestimmung*, in *CORPORATIONS, CAPITAL MARKETS AND BUSINESS IN THE LAW*, *supra* note 34, at 655.

ture with each other without indicating a center of decision-making, without indicating a "seat." The whole "thing" (or however you may call it) is breathing in a common rhythm with all its parts. There is no central "heart"; the rhythm is set and controlled by the network. This spells trouble for traditional concepts of domicile.

The question reached a German court and is now pending before the German Federal High Court for Civil Matters. The Court of Appeal in Frankfurt/Main was confronted with a case involving Nixtects Ltd., a private limited company registered in England.<sup>53</sup> When the company tried to collect a debt in Germany the defendant argued that the company had its main administration in Germany and therefore (being incorporated at the wrong place – England) had no standing to sue in a German court. This illustrates the "death penalty" flowing from the generally accepted seat theory.

The Court, however, found that the company had, indeed, no "seat" in England. It was managed by three pilots from various, often changing places outside England. Therefore, the seat theory was inapplicable. Further appeal is pending.

#### C. GLOBAL ACCOUNTING LAW<sup>54</sup>

The loss of geographic attachment giving a virtual monopoly to virtuality is even more visible in standards of accounting. It was the general opinion that the law of incorporation (be it Delaware or Germany) governed the applicable rules of accounting. That is no longer the prevailing view, as expressed by the European Commission:<sup>55</sup>

Adaptation of financial statements to take account of legal and tax conventions was justified when investors and other stakeholders were generally of the same nationality as the company. But today the securities of any one company tend increasingly to be held by an internationally diverse group of investors. The interests of investors from another Member State are not served by having to interpret, or decipher, financial statements prepared in accordance with the local conventions of the country where the company is incorporated.<sup>56</sup>

#### D. GLOBAL EVALUATIONS

We are confronted with a similar problem when we evaluate the shares of a German corporation or of a foreign corporation. Do we have to evaluate them from the point of view of domestic shareholders or of foreign shareholders? Do we have to capitalize the future cash flows with a basic German, a basic foreign, or an international interest rate? What markets should be considered to determine the market value? These questions lead to shaky grounds as attachment to a particular geographical location.<sup>57</sup>

#### E. CYBER HOMES

This leads us to the general question: Where is the corporate home in Cyberspace? Are these corporations never away from home? Do they carry their homes with them like the snail carries her house?

53. RECHT DER INTERNATIONALEN WIRTSCHAFT 1999, 783.

54. Grossfeld, *supra* note 39, at 268.

55. COM(00)359 final at 4.

56. Peter Hommelhoff, *Das Unternehmensrecht vor den Herausforderungen der Globalisierung*, in Festschrift fuer Marcus Lutter 95 (2000).

57. Bernhard Grossfeld, *Global Valuation: Geography and Semiotics*, 55 SMU L. REV. (forthcoming Apr. 2002).

The *Wall Street Journal Europe*<sup>58</sup> tells us a story from Hamilton, Bermuda, about the Internet company, Playcentric.com, a music and record merchant. It operates out of a hurricane-proof shelter in a former U.S. military base. It has the structure of a major multinational. Its servers are located in the Bermudas; its operating unit is in Barbados, and it has a distribution deal with a record store in Toronto.

These firms can domicile anywhere. "Server farms" are sprouting up around the world. They are warehouses built to hold long rows of servers or to host as many as 1.2 million Web sites. Currently, Internet-based companies are a tax examiner's nightmare. But they might become the corporation or securities lawyer's nightmare. Take as an example, HavenCo, a self-proclaimed "data haven." The company runs more than thirty servers from anti-aircraft platform, the likewise self-proclaimed "Principality of Sealand."<sup>59</sup> As users want to protect their servers from being subpoenaed, HavenCo has stated that it would comply with subpoenas only if the Court of Sealand issued them; however, there is no Court of Sealand, so it's very unlikely.

#### F. VIRTUAL CORPORATIONS<sup>60</sup>

Interestingly, the *Wall Street Journal* report does not mention the law under which these corporations are incorporated. Does it matter? Has corporate law withered away in Cyberspace? Is it a basis for trust in these "beings" when it can be chosen by random (as is largely the case in the United States)?<sup>61</sup>

The shift away from geography has made corporations even more virtual than they were before. Certainly, there is still one vital geographic factor. So far, corporations must be created by a state, big or small, be it a continent or a tiny island in the South Pacific. Geography still counts, as it is only through geography that corporations are recognized by courts. The law of "Delaware" for instance is a geographical concept. We distribute the power to give the "name" "corporation" along geographical lines, and the name constitutes the legal entity; as with states,<sup>62</sup> so with corporations.

But how real is this geography and how virtual (from latin "vis" = "power") is the magical power of words that pretend to go with geography? Are we associating "state" with "statute" just by the closeness of the sounds? What makes us trust in a piece of land that stores paper? Does it stand for guanxi, bakschisch, or . . . (just add any other name)? Does it share our ideas about "symmetrical" social relations (reciprocity),<sup>63</sup> over the chain of gifts and counter-gifts, over the "cash flow of justice" in which we were trained to believe as in reality? Are

58. Michael Allen, *As Dot-Coms Go Bust In U.S., Bermuda Hosts an Odd Little Boomlet*, WALL ST. J., Jan. 8, 2001, at A1.

59. HavenCo, Ltd., available at <http://www.havenco.com>; About Sealand, available at <http://www.sealandgov.com>. For the international status, see Rene Kardol, Proposed Inhabited Artificial Islands in International Waters, MA Thesis University of Amsterdam, available at <http://www.luf.org/artisle.html>.

60. Cf. WILLIAM H. DAVIDOW & MICHAEL S. MALONE, THE VIRTUAL CORPORATION: STRUCTURING AND REVITALIZING THE CORPORATION FOR THE 21ST CENTURY (1993); Claire Moore Dickerson, *Spinning Out of Control: The Virtual Organization and Conflicting Governance Vectors*, 59 U. PITT. L. REV. 759 (1998).

61. Grossfeld, *supra* note 50, at 167; H. Cousy/C. Van Schoubroeck/B. Windey, The Virtual Enterprise: Techno - Legal Issues, Research project (no. 119519 and no. 1119520), Commission of the European Communities, Directorate General XIII.

62. EBERHARD STRAUB, JOHANN GUSTAV DROYSSEN UND DIE GESCHICHTE PREUSSENS 19 (2000).

63. Richard Thurnwald, *Die Gemeinde der Banaro*, 38 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 362 (1920).

the local authorities faithful “agents” of the statutory language?<sup>64</sup> “What’s in a name. . .?” Do we believe in fiction with closed eyes beyond any reasonable limits? Given these doubts there is small wonder that the law of incorporation matters less than we were made to believe – particularly in Europe.

#### G. LESSONS FROM DELAWARE?

It can clearly be seen that the last thing shareholders worry about is where U.S. companies are incorporated. The state of incorporation is not at all that important in determining stock prices. U.S. corporations can choose to incorporate in any state, regardless of the actual location of their headquarters. Delaware is the prime choice for more than half of U.S. public corporations and many, if not most, newly chartered corporations going public take refuge there. Shareholders are believed to have enough research to compile in picking stocks without caring for the law of incorporation and its details.<sup>65</sup>

The Delaware experiences, in particular, repeatedly challenge our conventional wisdom concerning the usefulness of corporation laws. Recently, Robert Daines challenged the traditional view that holds Delaware at the bottom of the class in terms of shareholder protection.<sup>66</sup> After having researched more than 4,400 publicly traded corporations, he found that Delaware corporations were worth 5 percent more than corporations incorporated elsewhere. Is it because Delaware law is better? Is there a more balanced statutory and regulatory pattern, or is it just that highly valued corporations choose to incorporate there? Does the law improve shareholder value? Is corporate federalism *not* a race to the bottom – as Brandeis saw it – but, to the contrary, a race to the top?<sup>67</sup> Some legal scholars argue that as a result of institutional owners and through charters, bylaws, and contracts, the differences in corporate laws do not make much difference to shareholders. Others see it as a function of and a buffer for insolvencies.<sup>68</sup>

#### H. CYBERTRUST

Certainly, this is not “the end of history for corporate law” as proposed by Henry Hansmann and Reinier Kraakman,<sup>69</sup> but we might not be too far from it. My guess is that *global* markets, as the most important arbitrators, might see the matter differently from what lawyers have learned and believed so far. Market participants need indicators for trustworthiness, but whether offshore incorporations, island incorporations, or other “geographically tainted” incorporations offer a sufficient basis of trust remains to be seen. What about foreign courts that are expected to apply the sometimes-lofty concepts of words? What makes markets rely on them? Foreign juries are not what foreign investors believe in – even inlanders do not trust them.<sup>70</sup> The same is true with professional judges dependant on local

64. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

65. Steven Lipin, *Companies Incorporated In Delaware Are Valued*, WALL ST. J. EUR., Feb. 29, 2000, at 28; Bernhard Grossfeld, *Global Corporate Reorganizations*, 3 RICHMOND J. INT’L L. & BUS. (forthcoming 2002).

66. Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law* (2000) (unpublished research paper), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=217849](http://papers.ssrn.com/paper.taf?abstract_id=217849).

67. Cf. Roberta Romano, *Corporate Federalism as a Way to the Top*; Kahan & Kamar, *supra* note 66.

68. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law* (2000) (unpublished discussion paper, Harvard Law School), available at [http://www.harvard.edu/programs/olin\\_center/](http://www.harvard.edu/programs/olin_center/).

69. *Id.*

70. William Glaberson, *Juries, Their Powers Under Siege, Find Their Role Is Being Eroded*, N.Y. TIMES, Mar. 2, 2001, at A1.

constituencies. And after all: What about Marc Rich exceptions? What about local cash flows of justice?

Foreign bankruptcy laws as an intrinsic feature of corporation law<sup>71</sup> are likewise no place for soft landings. Law is the protection in a worst-case scenario, but markets follow going concerns and try to avoid the worst cases whenever possible. Our Western ideas about the rule of law go together with the concentration of enforcement by power in state authorities, taking it out of private hands. But what happens if the state monopoly loses its teeth? If law "is" what courts are willing to enforce and what courts can enforce, what about corporate laws abroad that cannot be relied upon to be meaningfully enforced?

Who knows or even cares under what law "global players" are incorporated? Markets see safety in numbers, approved by accountants and rating agencies.<sup>72</sup> Therefore, International Accounting Standards or Generally Accepted Accounting Principles will be the battlefield in CyberCorporation law,<sup>73</sup> giving accountants a competitive advantage over lawyers. Lawyers beware!

Global "teletrusts" are needed to determine instruments' reliability. WebTrust seals, as provided by the American Institute of Certified Public Accountants (AICPA) and the Canadian Institute of Chartered Accountants (CICA),<sup>74</sup> credit ratings, and media-channeled information might do a better job in the future. New media and new technology substitute the law as an instrument to exchange reliability – know-how. This is another example of how new legal semiotics and new legal logistics carry new content and create new behavioral structures. The distance to corporations without a state law of incorporation is a short step. And this step has been proposed.

#### IV. CyberCorporations

All this leads to the inevitable result of CyberCorporations – corporations structured by the Internet and in the Internet to use the principles of cybernetics. This goes far beyond an Internet organization of Extranet and Intranet.<sup>75</sup>

A true cybercorporation is like an agile, fluid organism being able to react speedily (due to continuous learning, evolving and transforming) to the changes in its environment such as competition, government regulations, culture, customer requirements, supplier requirement, etc.<sup>76</sup>

The strategy is clear:

This effort will involve a study of application methods to facilitate 'distributed' management, operations, and development for corporations/enterprises. As such it involves a greatly expanded concept of telecommuting, where many if not all of the employees are physically located at separate sites.<sup>77</sup>

71. Christoph G. Paulus, *Verbindungslinien des modernen Insolvenzrechts*, in *ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT* 2189 (2000).

72. Grossfeld, *supra* note 50.

73. Grossfeld, *supra* note 39.

74. AICPA/CICA WebTrust Principles and Criteria for Business-to-Consumer Electronic Commerce (Oct. 15, 1999) (document), available at <http://ftp.aicpa.org/public/download/webtrust/VE20-102099.doc>.

75. Cyber Corporation, at <http://www.opencon.ch/html/cybercorp/index.htm>; Teletrust/Case Studies Cyber Corporation, at <http://www.teletrust.ch/html/case.htm>.

76. Pushkar Saxeba, The Cybercorporation era, at <http://www.aisapages.com.sg/direct/text/may4.htm>.

77. Jeffrey A. Aaron & Jeff W. Evans, Application Reporting Form, Georgia Gigapop Initiative for Internet 2, at <http://www.hpc.gatech.edu/Internet2/applications/aaron3.html>.

Compare these descriptions with the *Bank of Augusta* concept as defined above under section I.D.3. What about the “supreme sovereign authority” “in control of the jurisdiction or territory in which the corporate citizen intends to operate?”

#### A. LEGAL MODELS<sup>78</sup>

It is exactly here that alternative concepts forge their way. They borrow the language from John Austin's (1790—1859) somewhat outdated<sup>79</sup> ideas about law as a species of “command” set by a “sovereign” (law from “above”),<sup>80</sup> but they give a new meaning to the term “sovereign.” Accordingly, they define “cybercorporations” as corporations “authorized by, domiciled in, and moderated by a duly organized ‘sovereign’ authority within cyberspace.”<sup>81</sup> The word “sovereign” appears to be paramount. It requires a ‘protected communications grid’ that intruders cannot enter. “Anyone who can create, maintain and protect such a grid becomes a ‘Cyberspace Sovereign.’”<sup>82</sup>

Appropriate articles of incorporation in cyberspace can be downloaded from the Internet, for example, from the “Cyber Corporation Authority.”<sup>83</sup> The “By-Laws” tell us in article I, section 1 about the “principal office”; that it is “hereby fixed and located at <http://www.millennianet.com/barry>.” The further text refers to CyberCorporation Law, which article X, section 1 defines as “adopted by a World body with the proper authority to adopt universal corporate laws for the [I]nternet.”

It is not quite clear whether this is distributed with tongue in cheek, as might be indicated by the following proviso:

There is no way of knowing what the financial consequences are in your incorporating with the C.C.A. We will present the best cyber documentation available to make your corporation acceptable to the many different government agencies involved in regulating businesses in the world, but we make no claim to their being acceptable by them. CAVEAT EMPTOR!

But anyhow, even the formal exaggerations might tell us about the future. Just consider that authors see contractual agreement as an answer to the present conflict of law problems in corporation law.<sup>84</sup> If the structure of a corporation is a contractual deal with the author of a statutory language freely chosen by interested parties (mainly management), why should the author be a state? What counts is trustworthiness – by whatever means.

#### B. CYBER LABOR UNIONS

Countervailing power is the name of the game also in Cyberspace. This is of particular importance for the “global” tele-employees and their social status. CyberCorporations

78. Joel P. Trachtman, *Cyberspace, Sovereignty, Jurisdiction, and Modernism*, 5 IND. J. GLOBAL LEGAL STUD. 561 (1998).

79. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 87, 107 S. Ct. 1637, 1649 (1987).

80. Alan Watson, *An Approach to Customary Law*, 1984 U. ILL. L. REV. 561 (1984); FOLK LAW, *supra* note 22, at 141.

81. *Laissez Faire City Cybercorporations*, available at <http://www.lfcity.com/gPages/gCyberCorps.html>.

82. *Id.*

83. Cyber Corporation Authority, available at <http://www.credits.org/CyberCorporationAuthority.html> (last visited Nov. 15, 2001).

84. Bernhard Grossfeld, *Loss of Distance: Global Corporate Actors and Global Corporate Governance: Internet v. Geography*, 34 INT'L LAW. 963, 973 (2000).



without CyberProtection for workers cannot be the answer. The global structure of corporations, the organisation, and protection of employees' interests has likewise become a global question. The Union Network International tries to provide an answer.

### C. DREAMING ORDER<sup>85</sup>

Cyberspace is a challenge for our traditional concepts of order – we would all agree. This is certainly true when we equate order with mathematics and geometry. But we have learned that the “*mos mathematicorum*” of the Middle Ages and the “*mos geometricus*” of the century of enlightenment are not proper guides for social organizations. Max Planck, George Cantor, Kurt Goedel, and Paul Cohen destroyed the mathematical dream when confronted with quantum physics and with the power of the continuum.<sup>86</sup> Having swept away these shadows cast by words we realize that – against Einstein's belief – God throws dice<sup>87</sup> and that every new order arises out of the collapse of chaos<sup>88</sup> on a “playing ground” of uncountable, controversial and often hap-hazardous forces.<sup>89</sup> Social orders are like cities. They grow somehow and become places to live in;<sup>90</sup> they are orders without law. “The idea of a city is a good metaphor for mental topography in general and for law in particular.”<sup>91</sup> Markets form patterns, patterns form conventions, conventions form law – though we cannot predict where and how.<sup>92</sup>

### D. GLOBAL PRINCIPLES OF CORPORATE GOVERNANCE

Internationally accepted standards might help to find new patterns in Cyberspace. The future seems to lie with new concepts of corporate governance as expressed in the OECD Principles of Corporate Governance, which bind management contractually.<sup>93</sup> The essential points are: protection of shareholders, equal treatment of shareholders, and disclosure and transparency. The underlying idea is that a good corporate governance regime helps to ensure that corporations take into account the interests of a wide range of constituencies. The hope is that this maintains the confidence of investors worldwide and helps attract long-term capital. PricewaterhouseCoopers (PWC) has published an “Index of Transparency” to measure corporate governance standards and the relevant costs. This is a clear indication of where the future will be. Codes of Conduct for global corporations might

85. LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (2000); KOEHLER & ARNDT, *RECHT DES INTERNET* (Heidelberg 2d ed., 2000); Katharina Boele-Woelki, *Internet und IPR: Wo Geht Jemand Ins Netz*, in *BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT* 39 (2000) 307; Christoph Engels, *Das Internet und der Nationalstaat*, *id.* at 353.

86. AMIR D. ACZEL, *MYSTERY OF THE ALEPH* (2000).

87. IAN STEWART, *DOES GOD PLAY DICE? THE MATHEMATICS OF CHAOS* (1990).

88. JACK COHEN & IAN STEWART, *THE COLLAPSE OF CHAOS: DISCOVERING SIMPLICITY IN A COMPLEX WORLD* (1994).

89. Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law*, 65 TENN. L. REV. 925 (1998), 66 TENN. L. REV. 137 (1998); David G. Post & Michael B. Eisen, *How Long is the Coastline of the Law? Thoughts on the Fractal Nature of Legal Systems*, 29 J. LEGAL STUD. 545 (2000).

90. PHILIPP OSWALT, *BERLIN – STADT OHNE FORM* (2000).

91. William Twining, *Mapping Law*, 50 N. IR. LEGAL Q. 12, 48 (1999).

92. Bernhard Grossfeld, *The Invisible Hand: Patterns of Order in Comparative Law*, J. S. AFRICAN L. 648 (1997).

93. See information from the OECD annual Council meeting, Paris 2000, available at <http://www.oecdwash.org>.

become a second chance.<sup>94</sup> They might help to assure that CyberCorporations operate for the benefit of the global village as a whole. But they cannot be *the* bulwarks of order. A new system of standards<sup>95</sup> will only emerge in conjunction with the inherent invisible hand of the Internet itself.

#### E. ARBITRAGE<sup>96</sup>

The withering away of geography, the disintegration of traditional sovereignty paradigms, and the fall of statutes into partial oblivion bring into jeopardy our concepts of prescriptive jurisdiction.<sup>97</sup> We have tried to impose national rules by reference to formal concepts: territoriality and extraterritoriality. These formal rules do not properly cope with the osmotic and elusive power of the new social relations in Cyberspace. Our traditional answers to the new challenge became increasingly indeterminate producing contradictory answers.

The danger is that Cyberspace facilitates a jurisdictional evasion and regulatory arbitrage producing a race to the bottom (but consider Delaware!).<sup>98</sup> But the question is how real the danger is. For a long time it has been argued that the stock market is the most efficient instrument of corporate control.<sup>99</sup> I was skeptical at the time.<sup>100</sup>

But the situation has changed dramatically. The Internet as an information superhighway with abundant information liquidity<sup>101</sup> will force corporations to be completely transparent; it will create a "naked" economy (John Chambers). Global markets in Cyberspace expect "good practice,"<sup>102</sup> exert tremendous Internet "peer pressure," and act very quickly; firms that use their mobility and flexibility to injure shareholders, workers, or customers will feel swifter and more brutal reactions than ever before. They will find it hard to raise capital, to hire labor, and to meet customers. Shareholders and stakeholders will flee to more reliable partners. Global markets do not care for proportionality; they do not care for a well-balanced *lex talionis*; and they are not concerned about "eye for eye, tooth for tooth."<sup>103</sup>

The extraordinary speed of the Internet will quickly reduce advantages from arbitrage. Reliability and trustworthiness are *the* prime factors in Cyberspace business where so much

94. Su-Ping Lu, *Corporate Code of Conduct and the FTC: Advancing Human Rights through Deceptive Advertising Law*, 38 COLUM. J. TRANSNAT'L L. 602 (2000).

95. Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995); Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713 (1997).

96. Trachtman, *supra* note 78.

97. Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 EMORY L.J. 911, 913 (1996).

98. See LESSONS FROM DELAWARE, *supra* section III, G.

99. ABRAM CHAYES, *The Modern Corporation and the Rule of Law*, in *THE CORPORATION IN MODERN SOCIETY* 25, 40 (Mason ed., 1960); J.A.C. Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 263, 272 (1968).

100. Bernhard Grossfeld, *Management and Control of Marketable Share Companies*, in *INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW*, vol. 13, ch.4, 1993, at 83 no. 191.

101. Robert Norman Sobol, *The Benefit of the Internet: The World Wide Web and the Securities Law Doctrine of Truth-on-the-Market*, 25 J. CORP. L. 85 (1999); Robert Norman Sobol, *Intelligent Agents and Futures Shock: Regulatory Challenges of the Internet*, 25 J. CORP. L. 103 (1999) (reviewing Howard M. FRIEDMAN, *SECURITIES REGULATION IN CYBERSPACE* (1998)).

102. Mario Giovanoli, *A New Architecture for the Global Financial Market: Legal Aspects of International Financial Standard Setting*, in *INTERNATIONAL MONETARY LAW* 34 (2001).

103. Exodus 21:24; cf. Matthew 5:38. See also Clinton Bailey, *A note on the Bequin Image of Adl as Justice*, in *FOLK LAW*, *supra* note 22.

is done in distant places.<sup>104</sup> Trust equals revenue! But trust needs no central design or direction.<sup>105</sup> The Internet is an electronic surveillance system of mutual control with an internal power of correction. It creates an economy without blinders and with sanctions of unpredictable powers and unlimited economic consequences. Consider the prospect announced by the European DataGrid: This high-speed computer network will harness together computers worldwide. It analyzes the data of the world's population. It will handle much larger amounts of data than any computing system so far.<sup>106</sup>

The pressures of the Web itself (the NetEffect) will make disorder an instrument of economic "regulation." "Disorder" becomes an instrument of economic order,<sup>107</sup> and Adam Smith's "invisible hand" gets a second chance for even more forceful interferences. The NetEffect on a market-led corporate governance will be dramatic, though the details may take us by surprise. A pattern will arise from chaos and the chaos will "collapse."<sup>108</sup> Whether it will be a "global legal order,"<sup>109</sup> as we understand it, is an open question.<sup>110</sup>

#### F. JURISDICTION<sup>111</sup>

But, after all, the rise of Cyberspace will not marginalize the state influence. The law of incorporation will withdraw only to the extent that other instruments take care of the trust issue. Also, President Clinton's Executive Order from August 5, 1999, setting up a Working Group on Unlawful Conduct on the Internet<sup>112</sup> might have a real chance. The Working Group will look into the extent to which existing federal laws provide a sufficient basis for effective investigation and prosecution of unlawful conduct that involves use of the Internet. Established structures create path dependency and counsel us to "hurry slowly."<sup>113</sup>

Most importantly, the influence of states will not disappear as long as states provide and control courts. The enforcement of law starts with traditional standards of personal and subject matter jurisdiction. In this respect, we already have some experiences with an off-shore (Antiguan) gambling company. The Supreme Court of the State of New York handled both standards convincingly.

The court tells us "that traditional jurisdictional standards have proved to be sufficient to resolve all civil Internet jurisdictional issues":

What makes Internet transactions shed their novelty for jurisdictional purposes is that similar to their traditional counterparts, they are all executed by and between individuals or corporate entities which are subject to a court's jurisdiction.<sup>114</sup>

104. Ian Smith, "Virtual" Cooperation: *The Jurist's Role*, in Festschrift fuer Muenkner 392, 394 (2000).

105. Cf. John Francis Carney, *Let a Thousand Takeover Directives Bloom*, WALL ST. J. EUR., Dec. 28, 2000, at 9.

106. Ben Vickers, *Accelerator to Impact Net*, WALL ST. J. EUR., Feb. 28, 2001, at 23.

107. Patrick Chabal & Jean-Pascal Daloz, *AFRICA WORKS: DISORDER AS A POLITICAL INSTRUMENT* (1999).

108. Robert Peters, "Marketplace of Ideas" or "Anarchy": *What will Cyberspace Become?* 51 MERCER L. REV. 909 (2000).

109. Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 INT'L & COMP. L. Q. 800 (2000) (proposing market-led corporate governance will produce a global legal order).

110. Francis Snyder, *Governing Globalisation: Global Legal Pluralism and European Law*, 5 EUR. L. REV. 334 (1999); Axel Horstmann, *Interkulturelle Hermeneutik: Eine neue Theorie des Verstehens?* 47 DEUTSCHE ZEITSCHRIFT FÜR PHILOSOPHIE 427 (1999).

111. Bryan E. Daughdrill, *Personal Jurisdiction and the Internet*, 51 MERCER L. REV. 919 (2000).

112. *At* <http://www.strategicintel.com/InternetEo.htm>.

113. Cf. Ludvig Holberg, *ITER SUBTERRANEUM (VOYAGE INTO THE INNER EARTH)*, Leipzig (1741). See Fidel Raedle, *Stress im Mittelalter und in der frühen Neuzeit* 24 (2000).

114. *New York v. World Interactive Gaming Corp.*, 1999 WL 591995.

The Court also affirmed subject matter jurisdiction on the ground that the gambling occurred in New York State:

Here, some or all of those funds in an Antiguan bank account are staked every time the New York user enters betting information into the computer. It is irrelevant that Internet gambling is legal in Antigua. The act of entering the bet and transmitting the information from New York via the Internet is adequate to constitute gambling activity within the New York state.<sup>115</sup>

#### G. SKIRMISHES

An early skirmish stemming from globalization followed the decision of a French court that ordered Yahoo! to block French users from accessing Nazi memorabilia on its U.S.-based Web site.<sup>116</sup> This controversial landmark decision determined how national jurisdiction applies to Cyberspace. The answer lies in the answer to the following question: Which countries can demand that their domestic laws are obeyed on Web firms with worldwide coverage?<sup>117</sup> The implications for other Internet companies are apparent.

It is still an open question whether it is technologically possible to block the import of content from Internet service providers "sitting" in all parts of the world. Court decisions do not help against innovative programmers. It could become a run between the hare and the hedgehog as in the famous fairy tale of the brothers Grimm.

#### H. ENFORCEMENT

In any event, the question remains how enforceable the exertion of extraterritorial state jurisdiction is, given the fact that another country has to do the enforcing. Can we force another state to censor content? So far, there is no consensus in the international community on the enforcement limits to such rulings. And what happens if there is no foreign court as in the case of the "Principality of Sealand"?<sup>118</sup> It is with enforcement that Cyberspace might outwit courts. Marc Rich-type actors might also multiply.

#### I. SECURITIES<sup>119</sup>

The CyberCorporation lawyer is now mainly concerned with markets for securities over the Internet.<sup>120</sup> National securities laws might be circumvented by offers from a Web site based in an offshore "server farm."<sup>121</sup> How can we regulate what we cannot see?<sup>122</sup> The

115. *Id.* at 859–860; see also Daniel P. Schafer, *Canada's Approach to Jurisdiction over Cybertorts: Braintech v. Kostiuik*, 23 FORDHAM INT'L L.J. 1186 (2000).

116. Mylene Mangalindan & Kevin Delaney, *Technology Journal: Yahoo! Ban on Hate Material Stirs Debate*, WALL ST. J. EUR., Jun. 5, 2001.

117. Harald Baums, *Globalizing Capital Markets and Possible Regulatory Responses*, in LEGAL ASPECTS OF GLOBALIZATION 77 (Juergen Basedow & Toshiyuki Kono eds., 2000); Yoshiaki Nomura, *Globalization of Finance: How to Deal with Mandatory Rules*, in LEGAL ASPECTS OF GLOBALIZATION, *supra*, at 133.

118. See *supra* note 9.

119. See MARC STEINBERG, INTERNATIONAL SECURITIES REGULATION (2000); see also Trachtman, *supra* note 78.

120. ULRICH FLORIAN, RECHTSFRAGEN DES WERTPAPIERHANDELS IM INTERNET (2001).

121. John C. Coffee, *Brave New World? The Impact of the Internet on Modern Securities Regulation*, 52 BUS. LAW. 1195 (1997).

122. David M. Cielusniak, *You Cannot Fight What You Cannot See: Securities Regulation on the Internet*, 22 FORDHAM INT'L L.J. 612 (1998).

International Organization of Securities Commissions (IOSCO) has taken preliminary steps to cope with some of the problems in its document "Securities Activities on the Internet."<sup>123</sup> At first glance we might tend to apply similar rules as to telephone calls from foreign "boiler rooms" and the effects doctrine (selectively applied) may do the job.<sup>124</sup>

But there is a difference: Unlike a single telephone call, the Internet retrieves data on a "giant network which interconnects innumerable smaller groups of linked computer networks."<sup>125</sup> Numbers count, and they make the difference. Nevertheless, states retain powers against harmful effects from outside their boundaries, which pierce the sovereign walls. Their own regulatory efforts are not necessarily reflected back in their face.<sup>126</sup> Cyberspace is not beyond the jurisdictional reach of states, in particular the United States in the age of "Pax Americana." Nor should the European Commission be overlooked.<sup>127</sup> The warning continues to be valid: Don't fight the SEC!

## V. Beyond Corporation Law

### A. TECHNOLOGY

This brief tour d'horizon turned out to be a conversation about geography, semiotics, technology, and law. Probably, the technological aspect got short thrift. This is partly due to the fact that lawyers have been trained for too long to see the law as an autonomous subject, high above the intricacies of technological dynamics. But the study of organizational innovation is just the afterthought of technological innovation.<sup>128</sup> The world of Cyberspace is an almost purely technological world and presses the lawyer to be constantly aware of it. New semiotic and logistic systems based on new technology can only be handled and contained by people who know about the world in which they pretend to carry responsibility and that know how to handle instruments of equal strength.

### B. TRUSTEE FOR THE PUBLIC

Only open market and open logistic territories are reliable trustees for the public interest and, thus, socially acceptable. Cyberspace can only exert its regulatory and disciplinary powers when unfettered by information barriers. If Cyberspace is such a powerful medium for global corporate actors, it should remain an equally strong medium for corporate governance. This will only be so if the structure does not come under the control of the actors whom the public wants to control.<sup>129</sup> Let's do everything to keep the Internet "open."<sup>130</sup>

123. At [http://www.iosco.org/docs-public/1998-internet\\_securities.html](http://www.iosco.org/docs-public/1998-internet_securities.html) (last visited Sept. 11, 2000); see also Bernhard Grossfeld, *Loss of Distance: Global Corporate Actors and Global Corporate Governance*, 34 INT'L LAW. 963, 974 (2000).

124. Grossfeld, *supra* note 123.

125. *ACLU v. Reno*, 929 F. Supp. 824, 830 (E.D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).

126. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984); see also Joel P. Trachtman, *Externalities and Extraterritoriality: The Law and Economics of Prescriptive Jurisdiction*, in *COMPARATIVE ASPECTS OF INTERNATIONAL LAW* (Alan Sykes & Jagdeep Bhandari eds., 1997).

127. Roberta S. Karmel, *The Case for a European Securities Commission*, 38 COLUM. J. TRANSNAT'L L. 9 (1999).

128. Cf. John Hagel III & Marc Singer, *Unbundling The Corporation*, HARV. BUS. REV., Mar.-Apr. 1999, at 133.

129. Marsden, *supra* note 48; see also JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

130. Viktor Mayer-Schonberger, *Speech: Impeach the Internet!* 46 LOY. L. REV. 569 (2000).

C. PATENTS<sup>131</sup>

This brings us into another field of law – patent law. Patents are at the eye of the storm and have a deep impact on market directions<sup>132</sup> and market controls.<sup>133</sup> The issue is whether companies should be able to patent the software that creates the architecture of the Internet economy.<sup>134</sup> One flashpoint was when Amazon.com tried to patent two features: A “one click ordering” that makes shopping on the Internet easier, and an “associates’ program” to refer business to Amazon from other Web sites and to get a fraction of the revenue (business method patent). The revolt exploded when a software guru, Tim O’Reilly, entered the field on his Web site. He started an avalanche of protesters, arguing that “one click” is so ordinary and so intrinsic to e-commerce, like air or water to life. It is like trying to patent the goose, building a fence around it, and waiting for the golden eggs.<sup>135</sup>

## D. DREAMING ON

It is my honor and pleasure to come back to Sir Joseph Gold, to his love for poetry and through him to Shakespeare’s “[w]e are such stuff as dreams are made on.” It was probably not a bad idea to follow Gold’s example and to start with a great lawyer-poet who inspires us to feel that law is life and that life is a dream, an ever-new dream:

We are the music makers,  
And we are the dreamers of dreams,  
Wandering by lone sea breakers,  
And sitting by desolate streams.

World-losers and world-forsakers,  
On whom the pale moon gleams,  
Yet we are the movers and shakers  
Of the world forever, it seems.<sup>136</sup>

131. PETER B. MAGGS ET AL., *INTERNET AND COMPUTER LAW* 217 (2000).

132. PETER KURTZ, *ERFINDER UND PATENTE* (2000).

133. Julie E. Cohen & Mark A. Lemley, *Patent Scope and Innovation in the Software Industry*, 89 CAL. L. REV. 1 (2001).

134. David Ignatius, *Firestorm in Cyberspace*, WASH. POST, Mar. 19, 2000; see also Thomas E. Weber, *E-World: Computer Laws Have Broad Impact In an Age of Chips*, WALL ST. J. EUR., Dec. 11, 2000.

135. PAUL TORREMANS, *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW* (1998).

136. FLORENCE LITTAUER, *DARE TO DREAM* 45 (1994) (quoting Arthur William Edgar O’Shaunessy’s Ode); see also JANET S. WONG, *NIGHT GARDEN: POEMS FROM THE WORLD OF DREAMS* (2000).

