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REPORTING TO GOD

by

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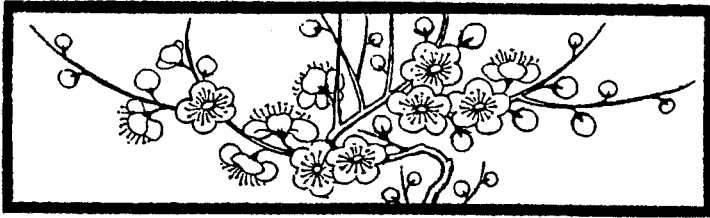
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Reporting to God

My life on the Internet began in autumn of 1994, when I was sitting in my office in the Sears Tower reading a magazine known as *Wired*. It was the first issue I had ever received. My son, Philip, had urged me to subscribe on the grounds that it was the *Rolling Stone* of the '90s. That may not have been the best way to persuade me to subscribe, but I did anyway.

The very first issue had an article by a reporter for the paper *Newsday*, Josh Quittner, who wrote about his amusing conversations with McDonald's Corporation in Oak Brook, Illinois. (At the time I was the outside trademark counsel for McDonald's.) Quittner had called the corporate headquarters and wound up speaking to a media-relations person. He asked whether McDonald's cared about a domain name on the Internet. The answer from McDonald's was along the lines of "What is the Internet?" Quittner talked about his plan to register the name "mcdonalds.com," and got no objection. He proceeded to register the name and then wrote the very funny article in the issue of *Wired* magazine that I was reading. Among other things, he mentioned that he might auction off the name to Wendy's or Burger King.

As I read, I thought "Oh no, this is a problem." At that very moment, my office telephone rang. It was my client, McDonald's. The first question was, "Have you ever heard of *Wired* magazine?" I replied, "I'm reading it." I was then told, "Well, do something."

That started me on a new life, a new career, and probably some of the most interesting things I have ever done. At the time, I knew practically nothing about the Internet. I did know that my wife, Carlotta, at the University of Chicago's Oriental Institute, had her own Internet address for scholarly use. I was very jealous, because in 1994 it was not possible for most people to have a true Internet address. There were various email systems, like CompuServe, but they were very different from email today, and they were not very well interconnected. It is hard to believe, but at that time, there was still a policy that the Internet was not to be used for commercial purposes.

I started doing research and gradually learned all kinds of interesting things, one of which was that the people who became known as "cybersquatters" were rampant. These were people who knew a little about the Internet and famous trademarks, and they were grabbing domain names right and left. Totally unauthorized people were registering names like coke.com, xerox.com, ford.com, and so on. As a trademark lawyer, I knew that that these were clearly infringements, but my research showed that there were no laws on the subject and no court decisions because the Internet was so new.

I turned to a trade group that I belonged to, the International Trademark Association, which has its headquarters in New York. I called a friend of mine whom I had gotten to know years ago in, of all places, our church. My friend John said, "Oh yes, the Internet. We're very interested in that. Actually, we're forming a new committee called the Internet Subcommittee. How would you like to be the co-chair? We've already picked the other guy."

I said, "That sounds very interesting, I'll do it," and I became one of the founding co-chairs of the Internet Subcommittee of the International Trademark Association. Shortly thereafter, my new co-chair, Bob Frank, and I got acquainted in a series of phone calls. We became very good friends, and we are still in touch, although Bob has retired from the trademark wars. At the time, he was the president of a company that performed trademark searches for lawyers and their clients that wanted to adopt new trademarks.

In addition to the phone calls, we also went to meetings in Washington, D.C., Naples, Florida, San Diego and other pleasant watering holes. I learned that the trademark bar never holds meetings in Peoria or Des Moines. (As time went on, I learned that neither do the people who make the Internet work.) Bob and I kept very busy learning a lot about the growing problem of cybersquatting, that is, trademark infringements on the Internet.

Meanwhile, McDonald's Corporation had entered into negotiations with the author of the story in *Wired* magazine. I had urged a quiet settlement; given the state of the law at that time, a lawsuit was not likely to bring about a good result for either party. The reporter turned out to be very gentlemanly about the whole thing; he said he would be happy to hand over the name mcdonalds.com to McDonald's Corporation, if McDonald's would make a gift to a favorite charity of his, a public school in a poor area of Brooklyn. (Incidentally, this is all public information.) McDonald's gave approximately $5,000 to the school, including some computer equipment, and everybody was happy. The reporter wrote a good story, he got his publicity, and McDonald's got its name back. A few years later, I took him to lunch at Four Seasons in New York to thank him for changing my life.

The Internet Subcommittee of the Trademark Association started to take up a good deal of my time. The legal and techni-

cal issues became more and more complex. There were some court cases. Lawsuits were brought by various trademark owners who were aggrieved by the so-called cybersquatters, but the courts were ill-equipped to deal with this new and strange thing called the Internet.

At this point, I have to digress to a brief technical interlude. What is the Internet? It is a network of networks. It has been called a metaphor by one of its famous founders, Vint Cerf. For our purposes it is enough to know that each network forming a part of the Internet has to have an address. There are two inter-related addressing systems; one is a number system that is analogous to telephone numbers, and the other, that we are more familiar with, is called the domain name system. The so-called top level domains, such as .com, .net and .org, were developed as a mnemonic device to keep track of the networks because the number addresses were hard to remember. The domains familiar to most of us are .com,.net and .org, but there are also domains with two letters, one for each country in the world, such as .uk for the United Kingdom, .us for the United States, .cn for China, and so on. Those country domains are assigned locally, but the addresses work all over the world.

From the early 1990s until 1998, there was one company, Network Solutions, Inc., better known as NSI, that kept track of the .com, .net, and .org domain names,. It has an interesting history. A U.S. government body, the National Science Foundation, was funding most of the research and connection costs of the early development of the Internet. When the domain name system was developed, the National Science Foundation put out a request for bids for a contract for a private company to do the work of assigning and registering domain names. The usual federal government advantage was offered to minority-owned businesses, and an African American entrepreneur established a new cor-

poration, Network Solutions, and successfully bid on the contract.

Shortly thereafter, a very large privately held corporation in Washington, Science Applications International Corporation, or SAIC, realized that the Internet would be the next big thing. SAIC bought out the original owner's interest in Network Solutions and made it a wholly owned subsidiary of SAIC.

SAIC is also very interesting. It was founded by, and is still owned by, the spooks. People like Admiral Bobby Inman, the former head of the CIA, was one of its founders, and its directors and officers are all former top people in the national spy and security structure in Washington. It does a lot of contract work that the government wants done by people with the right connections.

When SAIC bought Network Solutions, the federal government was paying that company to register the domain names. If you wanted a domain name like, for example, mcdonalds.com, it was free for the asking. Somehow, SAIC persuaded the National Science Foundation to change this arrangement. Without any public bidding, the National Science Foundation, in the dark of the night, authorized Network Solutions to charge $50 per name per year for each domain name registration. NSI had to pay $15 of that amount to the U.S. government, but it kept $35. It is estimated that the actual cost of registering a domain name was probably pretty close to a dollar per name. I have always wondered what the procedure was that persuaded the federal government to make this change. It is interesting to note that when SAIC (and other investors) finally sold out their interest in Network Solutions to its present owner, VeriSign, they took in a cool twenty-one billion dollars.

Back to my story. Through my work in the Internet subcommittee of the Trademark Association, I had met Vint Cerf, who is widely known as the "Father of the Internet." (Vint himself in-

sists that the honor belongs equally to his colleague Bob Kahn.) In April of 1995, I sent an email to Vint and invited myself to attend a meeting in San Diego, California, the "Summit Meeting on the Internet" sponsored by something called the Internet Society. I knew very little about the Internet Society, but was able to find its Web site and learned that it is a professional organization composed primarily of computer science engineers, the technical people who make the Internet work. The Internet Society is still open to any member of the public who is interested. I paid, I think, $25 to join. Vint Cerf spoke to the office manager of the Society who was organizing the San Diego meeting. I was invited to appear on a panel to discuss cybersquatters and the problems of trademark infringement in the domain name system.

I wasn't sure that anyone would pay for my trip to San Diego, and had first asked two of my colleagues in the Internet Subcommittee whether they were going to be in the vicinity. They both said that they were far too busy to bother with this and urged me to go. I decided to go ahead, bought a ticket, the cheapest available, and found myself in San Diego one evening at a very nice cocktail party in the Sheraton Hotel on San Diego Bay. I went around introducing myself to people, some of whose names I recognized, and others that I did not know at all. One of the people I had never met, but had heard of, was Jonathan Postel. Postel was already a legend. It was a little later that the following appeared in the *Economist* magazine:

> God, at least in the West, is often represented as a man with a flowing beard and sandals . . . if the Net does have a god, he is probably Jon Postel, a man who matches that description to a T. Mr. Postel's claim to cyber-divinity, besides his appearance, is that he is the chairman and, in effect, the sole member of the Internet Assigned Numbers Authority, the organization that coordinates almost all Internet addresses. (February 8, 1997, 88)

Jon was a professor at the University of Southern California. He was not one of the creators of the Internet, but he worked with Vint Cerf and Bob Kahn and was trusted by everybody to do the technical coordination at the heart of the Internet addressing and domain name system. He was the absolutely perfect picture of a geek. He not only had the long bushy beard that came nearly to his waist, but he had a ponytail that went nearly to his waist in back. He always wore T-shirts and sandals and had no interest whatever in sartorial elegance.

In San Diego, I went up to him and introduced myself. He looked at me a little bit as if I had crawled out from under a rock. He knew that I had been assigned to his panel at the meeting, but he was not enthusiastic about it. His panel was intended to be highly technical, and the last thing in the world he wanted was to add some damn trademark lawyer. In any event, he said, "Why don't you sit in the audience, and, if there's time, I'll call you up after we're done. Then you can say whatever you want to say." I said, "Wait a minute. I flew all the way out here, and I was promised a position on this panel. I would really like to sit up on the platform. I won't take very long, but I do have something to say." Jon reluctantly agreed.

The next morning I sat on the platform with a distinguished array of the engineers who coordinate the Internet. One had just flown in from Amsterdam and was still wearing the cutoff shorts and T-shirt he had worn since he left there. As it turned out, Postel and his group did not fill the hour that was allotted to the panel, and I was able to stand up and speak after they were done. I spoke for about ten minutes on what I saw as the problems caused by trademark infringement and possible solutions that would involve changes in the domain name system. Boy, was I naive. My suggestions of possible solutions created a fire storm. Vint Cerf was in the audience. When I finished speaking, he

stood up and grabbed a microphone. I saw that he was close to apoplectic. He said—perhaps not his exact words—"How dare you come out here and tell us how to run the Internet?" I was, of course, quite flustered and tried to make the best of it, mostly to the effect that I was really trying to help, and trying to keep the Internet from getting tangled up in legal complications.

The summit meeting went on for the remainder of the afternoon. There was another cocktail gathering that evening, which gave me the opportunity to try to calm the waters a bit. I was at least partially successful. I had realized that lawyers were not popular in this crowd; I had shed my necktie and tried to look as unlawyer-like as possible. The next day proved the wisdom of that decision. I sat in the audience and listened to a panel of lawyers who had come in for the second day. They were from Los Angeles and New York, all dressed the way lawyers normally dress. As I sat in the audience, listening to the comments of the geeks sitting around me, I realized just how bad an image the legal profession has. The panel certainly didn't help; they were arrogant, talked in legalese jargon and talked down to an audience that knew far more about the Internet than any of them.

One of the good things that happened at the meeting was a lunch I had with the correspondent from the *Economist* who had flown in from London. He very kindly quoted me in the next issue and mentioned my name, which is always a good thing. (I am firm believer in Elizabeth Taylor's adage that all publicity is good publicity so long as they spell your name right.)

After the San Diego meeting, I told my co-chair of the Internet Subcommittee what had happened. I suggested that we try to arrange a meeting with Jon Postel to give him better information about trademark law and the risks to the Internet stemming from the cybersquatter problem. We called Postel and arranged a meeting in California, which turned out to be one of the most

useful things that we could have done. Postel was unquestionably a genius; he absorbed the basic principles of trademark law in no time. He recognized then that the whole concept of the domain name system and the legal system for protection of trademarks were on a collision course and agreed that something needed to be done. Bob and I had some suggestions, and by this time our suggestions were far more practical than the ones I had mentioned in San Diego.

There was still a great deal of work to be done. Many more meetings followed, and my new life of living on airplanes really began. I spoke at Harvard, went to an Internet meeting in Montreal, and spent a fascinating day in Madison, Wisconsin. The day in Madison was arranged by Larry Landweber, then chair of the Computer Science Department at the University of Wisconsin. He took me out in his sailboat and explained to me the mysteries of the Internet.

Another brief technical digression. What I learned from Larry is that no one is in charge of the Internet. There is a hierarchy of the networks that make up the Internet. There are thirteen computer servers (called the root servers) at the top of the hierarchy. Ten of these are in the United States, some run by the government and others by private entities. Of the other three, one is in Amsterdam, one in Sweden and one in Japan. There is no law, no treaty and no contract among these servers, but they must be coordinated. They must all run in synchronicity, or there is no Internet. Looking at this from a legal standpoint, I was appalled. There were no legal controls or legal authority of any kind, and there was little if any physical security for many of the servers.

I also learned that the technical protocols that make the Internet work are set by a body called the Internet Engineering Task Force, or IETF. Until very recently, it was an unincorporated voluntary association that had no legal existence. More on this later.

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My next major trip was to Dublin, Ireland, where I had been invited to speak by the Organization for Economic Cooperation and Development, the OECD, at a conference at Trinity College. I flew to Dublin and was assigned a dormitory room at Trinity, which, of course, was a place that one would find interesting under any circumstance. (As an aside, if you are vacationing in Dublin in the summertime, Trinity offers splendid accommodations at very reasonable prices in the rooms that are normally used by students during the academic year.)

The major accomplishment of this meeting was my introduction to three people who became very important in my story. First was Don Heath, who had just been appointed the president and chief executive officer of the Internet Society. Also, I met Robert Shaw, a representative of the International Telecommunications Union, or ITU. The ITU is a United Nations international treaty organization located in Geneva, Switzerland. The ITU, among other things, is responsible for coordinating the frequencies used by radio and television stations and satellites. The ITU would like very much to run the Internet, as you may have read recently in the newspapers. In addition, I met Albert Tramposch, a lawyer born in America, but working at the World Intellectual Property Organization, another UN treaty body in Geneva.

The four of us, myself, Don Heath, Bob Shaw and Albert Tramposch, hit it off immediately. One evening we did a pub crawl, the obvious thing to do when in Dublin. There really should be a plaque in one of those pubs that would read as follows: "Sitting at this table, in June 1995, Don Heath, David Maher, Bob Shaw and Albert Tramposch created the basic concepts that now govern the technical coordination of Internet addresses and domain names." Over pints, we argued about different ways of administering the technical side of the Internet. We

agreed on the outline of a plan that became the structure of the organization that now does the technical coordination. There were, of course, other dinners and pub crawls in Dublin, which added to the expansion of knowledge of all concerned.

Following Dublin, there were meetings in Montreal and more in Washington, D.C., that I attended in my capacity as the co-chair of the INTA subcommittee on the Internet. It was a busy time. The Internet was expanding at an explosive rate. The introduction of the World Wide Web and the ability to use the Internet for purely private or purely commercial purposes had begun in a big way. One result was an explosion of trade publications, whose reporters needed stories. I quickly learned that part of my job was to speak to them, and I thoroughly enjoyed it, especially when I found that if you give a reporter a quotable quote, you will see your name in print.

I also learned, however, that the International Trademark Association, which is approximately 150 years old, does not approve of having the chairs of subcommittees receive publicity or, heaven forbid, get involved in policy making. The upshot of all this was that on September 1, 1996, there was a teleconference involving the two co-chairs of the subcommittee, myself and Bob Frank, and the members of our parent committee. They informed Bob and me that the board of INTA had decided that we were no longer allowed to speak to the press, or for that matter, to speak to anyone outside the INTA organization. Our job was to prepare background papers and reports on what was going on on the Internet and then send them upstairs for action. I resigned angrily on the spot. Bob resigned a week later.

I felt bad about this because, by this time, I was beginning to enjoy the travel and the companionship of people who were involved in running the Internet. But the conditions and restrictions placed on us by the INTA were intolerable. Fate stepped in

again. Don Heath, the president of the Internet Society, and one of my Dublin pub-crawl friends, had conferred with Jon Postel, and they had decided that it was time to restructure the entire domain name system. They had decided to create something called the International Ad Hoc Committee to do the job. Don had planned to appoint me as the representative of the International Trademark Association, but I could no longer take that position. Don appointed me to the committee anyway, but as a representative of the Internet Society.

My first question, of course, was "What is this International Ad Hoc Committee going to do?" Don told me that Jon Postel had realized that there had to be new domain names, and that the new domains should not be part of the $50 per-name per-year sweetheart deal that Network Solutions was then running. Jon had made a suggestion that there be approximately five hundred new domain names, but various other geeks had suggested that this was too many for the system to absorb at one time, mainly for technical reasons.

The trademark lawyers had heard about Jon's proposal and were frothing at the mouth. The idea that there would be lots of new domain names simply meant, to them, that there would be more opportunities for cybersquatting. It was about this time that I began to realize that I had become a "recovering trademark lawyer." I had gotten so close to the geeks that I was thinking like them; my concerns were for the benefit of the Internet, and not necessarily for the benefit of trademark owners. Since then I have been dubbed an "honorary geek."

The International Ad Hoc Committee was quite a group. There were eleven of us, eight engineers and three lawyers. The eight engineers were Don Heath and Bob Shaw, my pals from Dublin, Geoff from Australia, Hank from Israel, Jun Murai from Japan, Perry from New York, Dave from Silicon Valley, and

George from the National Science Foundation in Washington. The lawyers were myself, Albert Tramposch, another one from the Dublin group, and Sally Abel, a partner in a Palo Alto law firm. (Sally had succeeded me as co-chair of the INTA Internet Subcommittee of the Trademark Association.)

We had our first meeting of the entire committee in San Jose, California, in December 1996. I remember getting a call from Dave Crocker. He asked me what I was planning to wear to the meeting. I said, "Well, I assume I don't need to wear a suit, but I thought a sport coat and a shirt and tie would be appropriate." Dave said, "David, if you wear a shirt and a tie and a sport coat, no one will speak to you, and even worse, you'll poison the rest of us. This meeting is going to be held in conjunction with the Internet Engineering Task Force, and everyone wears T-shirts." I unpacked my bag and repacked it with T-shirts.

As I mentioned earlier, the Internet Engineering Task Force is the unincorporated group that writes the technical protocols that make the Internet work. It is open to anyone, although, generally speaking, only engineers show up. It meets usually three times a year, twice in the United States and once in a country outside the U.S. A participant pays a few hundred dollars, which covers the cost of the rooms and coffee and doughnuts. It is organized into working groups according to the particular talents of the participants. Obviously, if someone like a lawyer shows up and wants to join, he or she will be assigned to the working group on providing doughnuts or cleaning up the mess after luncheon is served. It is totally a meritocracy. No votes are ever taken. Everything in the IETF is done by consensus.

Holding the first meeting of the International Ad Hoc Committee in conjunction with the IETF in San Jose was another extraordinary experience. The IETF had reserved a special room for the Ad Hoc Committee, and Perry, our security expert, in-

stalled elaborate equipment to sweep the room for bugs. I realized that I was really hobnobbing with the aristocracy of the Internet if someone was concerned that our conference might be bugged.

The initial meeting of the Ad Hoc Committee was a little bit tense. The eight engineers looked askance at the three lawyers, but within twenty-four hours, we became a cohesive group. Assignments were parcelled out, and, basically, we agreed that everything could be done by consensus. There were difficulties with a few personalities—even geeks can be prima donnas. Perry would get all wound up, and someone would finally say, "Shut up, Perry." He would sulk for a while but soon resumed active participation. We all made friendships that have lasted to this very day, long after the disbanding of the committee.

After San Jose, we had to have another meeting, and there was a global teleconference to decide where. I suggested meeting at the O'Hare conference facilities in Chicago. On the call, there was a pause, and someone said, "Nahh." Jun Murai then suggested that Tokyo was the most central location, and I decided that my suggestions were not wanted. We briefly considered Sydney, Tel Aviv, Washington and several other cities around the world but finally compromised on Geneva, Switzerland. I went home that evening and told Carlotta that my life had changed. I also told her that I thought this would be about a six-month project and might involve one or two trips to Europe. Little did I know.

The first meeting in Geneva was held in January 1997, at the International Telecommunications Union headquarters, the nerve center of world telecommunications. We had a well-equipped conference room, although I did notice that the geeks had more trouble getting their network connections to work than I did, with my primitive dial-up modem. I also recall that Sally

Abel arrived a few minutes late. Perry, our enfant terrible, greeted her, "Hi, Sally, want to jack in?" Sally, a very soignée lady, gave him a look, but Perry was oblivious to having said anything other than a normal geek greeting.

The International Ad Hoc Committee produced a report and something called the "generic Top Level Domain Memorandum of Understanding." It proposed a worldwide agreement among all the parties involved in the technical operations of the Internet. The agreement would do two things—first, restructure the domain name system by adding new domains, and second, create a quasi-legal system for getting rid of the cybersquatters.

There was a signing ceremony, again in Geneva, in May of 1997. The Memorandum of Understanding purported to establish several new organizations, with separate entities to hold the computer records of domain name registrations and separate organizations to deal with the public and accept orders for the registrations. There would be seven new top-level domains: .biz, .info, .news, and so on.

Someone asked me, "Who gave you the authority to create new domain names?" I answered, "Very simple. God." At that time, if Jon Postel wanted to create new domain names, all he had to do was make a change in a small file that he controlled, called the root zone file. The changes would be installed on the thirteen root servers around the world, and that was it.

The Memorandum of Understanding drew support from quite a wide variety of international companies, including Deutsche Telecom, British Telecom and various other major European companies. We invited any company involved in the Internet to participate and ultimately got two hundred significant parties to sign.

There were, however, some important parties that were not interested in participating—among them IBM and AT&T. The In-

ternational Ad Hoc Committee quickly learned that what we were doing was attracting the attention of some major players on the Internet. So long as the Internet was just a useful tool for research and Department of Defense projects, all the participants were happy to let Jon Postel do his thing. The advent of the World Wide Web (that made pictures and graphics available on Web sites) changed everything. By 1997, commercial traffic had overwhelmed the geek traffic that had started it all. Even before the advent of Amazon and E-Bay, the giant corporations like IBM and AT&T realized that the Internet was about to become the fundamental medium of all global telecommunications. Part of their concern was protection of their trademarks; they did not want new domains opened up to cybersquatters. More importantly, they realized that the stability and security of the system was paramount.

In June 1997, I learned how the world had changed. That month, I made my first trip around the world. I flew to Kuala Lumpur for an Internet Society conference. While there, I was called out of a meeting room by Vint Cerf, who took me to meet Ira Magaziner. As you may recall, he was the expert whom Hilary Clinton had chosen to put together a program for massive changes in the U.S. healthcare system. The proposal that he and Mrs. Clinton created was such a disaster that Magaziner lost nearly all of his previous stature in the halls of government. He was nearly indicted for perjury, and, worse, he lost his office close to the Oval Office in the White House itself and was banished to the Old Executive Office Building. His new assignment, from President Clinton and Vice President Gore, was to figure out how to protect the interests of the U.S. government in the Internet.

In Kuala Lumpur, when I met Magaziner, he was very low key, but he also made it clear that the U.S. government was going to step into the process that the International Ad Hoc Committee

had begun. At first, I had no inkling of how great his involvement would be, but I soon found out. I and other members of the Ad Hoc Committee began commuting to Washington, attending meetings in Ira Magaziner's office in the Old Executive Office Building, and also calling on members of Congress and their staff people, trying to persuade them that they should let God do his thing.

It should come as no surprise that our efforts were not successful. First, the U.S. government produced something called a Green Paper that ignored the Ad Hoc Committee entirely. There was significant opposition to the Green Paper, and it was followed shortly by a White Paper that acknowledged our efforts. The White Paper picked up and adopted the principles that we had created and written up in our Memorandum of Understanding. However, the White Paper changed things around so that authority for Internet technical coordination came from the U.S. Department of Commerce, rather than from Jon Postel. Following the issuance of the White Paper, the U.S. government created something called the Internet Corporation for Assigned Names and Numbers, or ICANN. ICANN took over the work that Jon Postel had done so well up to that time.

In the remainder of 1997, I took two more trips around the world, as well as miscellaneous trips to Washington and Europe, trying to persuade the major players to support our Memorandum of Understanding, but the false gods were taking over.

But that is another chapter in this continuing story. The good news is that the friendships I made in the Ad Hoc Committee have lived on. We have enjoyed getting together in various cities around the world to reminisce about the days when we reported to God, and we changed the Internet.