

Spam in The Holy Land: *Can and Should a Tiny Country Tackle a Global Problem?*

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ABSTRACT

The article deals with Internet spam - a topic that has caused great concern for nations worldwide. Israel, due to internal and mostly external pressures, such as a recent lawsuit by Microsoft, has been compelled to reach a solution for the infusion and distribution of spam into and from the country via the Internet. The article discusses the various proposals that are currently being considered by the Israeli legislature, the international court case that has propelled the issue to the forefront of Israeli public discourse, and the effectiveness of current legislation in dealing with the issue.

The article also focuses on the issue of whether a tiny country can afford to be "left out in the cold" by ignoring worldwide cyberspace concerns or whether a small country can be compelled to adopt legislation for the benefit of the greater "good" even if it might not have an urgent interest in doing so.

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I. INTRODUCTION

¶1 Mass commercial mailings, also known as junk mail, have proliferated by way of electronic mail since the Internet became the preferred mass communication network.¹ The widespread use of the Internet has only encouraged this type of direct marketing, and there is probably no electronic mailbox today that can claim to have never received unsolicited mail, commonly known as spam. According to some estimates, junk mail in the form of advertisements for products or services aimed at Internet users make up at least sixty-five percent of electronic mail around the world.²

¶2 Israel, a small country of approximately seven million residents and an estimated three million Internet users,³ has also become a home to junk mail distributors.⁴ In recent

1. The beginning of this phenomenon can be traced to mail sent as early as 1978 over the ArpaNet network to all of its subscribers on the west coast of the United States. HAIFA CTR. OF LAW & TECH., BOOKLET NO. 4, MAIL OR GARBAGE? THE REGULARIZATION OF UNSOLICITED EMAILS 1 (2004).

2. This statistic is from data of the Symantec Information Security Corporation, as reported by YNET on August 10, 2004. Symantec – Bright Mail: Spam Rate Is at 65%, <http://www.ynet.co.il/articles/0,7340,L-2961195,00.html> (last visited Feb. 9, 2007). See also Elizabeth Alongi, *Has the U.S. Canned Spam?*, 46 ARIZ. L. REV. 263 (2004) (providing an up-to-date description of the phenomenon, its scope and the legal methods used to combat it in the United States and other countries).

3. See Internet Usage and Marketing Report, <http://www.internetworldstats.com/me/il.htm> (last visited April 18, 2006).

months, this phenomenon has become a hot topic among Israeli jurists and lay people as two proposed bills to combat this problem are being reviewed by the Knesset, Israel's parliament.⁵ Underscoring the prominence of this issue is a multi-million dollar lawsuit that was submitted to the Tel Aviv District Court by Microsoft International against a local Israeli distributor of electronic junk mail. This lawsuit thrust Israel into the international arena and raised practical and concrete issues of how to combat the increasingly annoying problem of spam on both the local and global stages.

¶3 The proposed legislation in the Israeli parliament and the lawsuit brought by Microsoft has turned Israel into a fascinating test case for examining how a global phenomenon can be combated on a domestic level, if at all. Moreover, the entire discussion in this area touches upon a more central issue currently absorbing the international legal community: what is the relationship between global problems and the effectiveness of domestic laws that attempt to regulate them. This article, through an analysis of Israel's attempt to combat the dissemination of junk mail through legislative and judicial means, will analyze the ability of a tiny country such as Israel to combat a global phenomenon on its own.

II. PRESENT LAWS DEALING WITH JUNK MAIL

¶4 There is no current legislation in Israel that deals with the direct issue of junk mail.⁶ The legal status of spam and the entire problem of junk mail distribution are difficult to accurately assess. This is because the definitions of junk mail range from the very serious, such as fraudulent mail (that is part of the overall theft issue on the Internet and the dissemination of viruses that interfere with the operation of the computer or which enable a computer to be controlled by strangers), to the more benign, such as commercial advertisements or any other type of unsolicited, unwanted electronic mail.

¶5 Israel's existing Computers Law⁷ only deals with the more serious cases, covering the distribution of viruses,⁸ unlawful invasion of computer material,⁹ transmittal

4. There are estimates that approximately fifty-five percent of all email messages in Israel are junk mail, of which only five percent are in Hebrew. For a press survey of the Israeli situation, see, Shachar Samucha, *That Someone Will Remove the Spam*, HAARETZ, Aug. 22, 2003. See also Ido Amin, *The Year in Which the World Accepted the Article*, GLOBES, Jan. 10, 2005.

5. See *Examining the Need for Legislation Regarding Spam and Bezeq Rates for Internet Surfing*, Record No. 3, Subcomm. for Matters of Research and Development of Technological Sciences (Nov. 4, 2003), available at <http://www.knesset.gov.il/protocols/data/html/mada/2003-11-04-01.html> (Isr.); Record No. 5, Subcomm. for Matters of Research and Development of Technological Sciences (Nov. 23, 2004), available at <http://www.knesset.gov.il/protocols/data/html/mada/2004-11-23.html> (Isr.).

6. The existing laws that do deal with computer related offenses are: The Computers Law, 1995, S.H. 366; Protection of Privacy Law, 5741-1981 S.H. 1011 page 128 (Isr.); Telecommunications Law 5742-1982, 36 LSI 35 (1981) (Isr.). These laws are arguably not equipped to deal with the phenomenon of spam. See discussion *infra* notes 23-53.

7. The Computers Law, *supra* note 6.

8. *Id.* at art. 6. See also C.C. (TA) 5476/03 Israel v. Yosef Shai, 04 (19) 399, available at http://www.nevo.co.il/Psika_word/shalom/s03005476-4.doc.

of fraudulent information,¹⁰ and interference or disruption of a computer.¹¹ Spam eludes an exact definition and includes a variety of material. The Tel Aviv Magistrates Court that dealt with this issue defined electronic junk mail as “electronic mail that is sent not on the basis of a prior communication between the parties, for commercial purposes and generally to a large group of email users.”¹² Others describe the problem according to the damage or benefit to the recipient.¹³ Under this approach, any communication that causes damage, or does not bring direct benefit to the recipient, may be considered junk mail.¹⁴ One judge defined junk mail as “junk ... notices” that are unsolicited and forced on the public.¹⁵

¶6 This article will adopt the broad definition of junk mail, as mail that is unsolicited and unwanted by the recipient. Any legislation will, of course, require more narrow and precise definitions.

A. Spam Versus Direct Mailings

¶7 Direct mail in Israel is defined and regulated by the Protection of Privacy Law.¹⁶ Under this law, senders of direct mailings must register their databases with the Database Registry maintained by the Ministry of Justice.¹⁷ The law also requires that all communications contain the sender’s full identity, the source of the information contained in the communication, and the statements that the communication is part of direct mailing and the addressee has the right to be removed from the database.¹⁸

¶8 This law, however, does not specifically mention electronic junk mail, and therefore, the existing terminology in the Protection of Privacy Law may not be sufficient to cover distributors of spam. For example, the law defines a “direct mailing” as “a personal communication to an individual, based on his belonging to a sector of the population, that was determined by one or more features of persons whose names are included in a database.”¹⁹ Many of these features do not apply to junk mail. Spam is not

9. The Computers Law, *supra* note 6, at art. 4. *See also* C.C. (Jer) 3813/99 State of Israel v. Oded Rephaeli, 60 (3) P.D. 241; C.C. 1394/99 Israel v. Ehud Tannenbaum, [1999] Kfar Shaba Magistrate decisions 2001 (2) 41.

10. The Computers Law, *supra* note 6, at art. 3.

11. *Id.* at art 2. *See also* Oded Rephaeli, *supra* note 9.

12. Magistrates Court 6000/03 (TA) Even Chen Uri v. Suissa Nir [2003] Magistrate Laws volume 24 925. The Judge adopted the definition from American literature on the topic, and referred to David E. Sorkin, *Technical and Legal Approaches to Unsolicited Electronic Mail*, 35 U.S.F. L. Rev. 325 (2001).

13. *See Proposed Bill from the Israeli Consumer Council, Proposal to Amend the Protection of Privacy Law (Prevention of Unwanted Solicitations)*, (2003), under which unsolicited mail may be sent if the recipient can derive a direct benefit from it. Under this approach spam can be defined as “any mail that does not bring direct benefit to the recipient.” This bill has since been superceded by another bill proposed by Knesset member Roman Bronfman, *infra* note 58; *see also*, HAIFA CTR. OF LAW & TECH., BOOKLET NO. 4, MAIL OR GARBAGE? THE REGULARIZATION OF UNSOLICITED EMAILS 2 (2004).

14. *Id.*

15. CrimC(Jer) 3047/03 Israel v. Mizrachi Avi, [2004] 12 IsrSC 397.

16. Protection of Privacy Law *supra* note 6.

17. *Id.* at art. 8.

18. *Id.* at arts. 17C-F.

19. *Id.* at art. 17C.

necessarily a “personal communication,” nor is it usually sent to persons based on one or more attributes or an affiliation with a specific group. In most cases, spam is sent to a collective list of email addresses which does not constitute a “database” under the law.²⁰ If the list does not comprise a database then most of the requirements under the law are rendered inapplicable.²¹ Therefore, a significant portion of internet junk mail would not fall under the definition of “direct mailing” and would not be subject to regulation or control by this law.

B. The Telecommunications Law – The Prohibition on Sending Faxes without Prior Consent and Anti-Harassment Provisions

¶9 The Telecommunications Law regulates the sending of commercial faxes.²² Based on the opt-in model²³, commercial advertisements may not be sent via fax without prior written consent by the recipient.²⁴ However, a one-time notice to a business offering the ability to receive further advertisements over the business’s fax machine is not considered a violation of this provision.²⁵ This statute was designed to prevent the financial and other costs incurred by a recipient of these types of faxes due to the loss of time and resources these types of faxes consume while keeping the fax machine busy.²⁶ This law applies to faxes only, and it would be difficult to try and adapt it to email marketing, whose characteristics differ significantly from fax activity.²⁷

¶10 Article 30 of the Telecommunications Law contains a general clause prohibiting

20. A “Database” as defined in article 7 of the Protection of Privacy Law is a “collection of information, held magnetically or optically designated for computer use, exclusive of: (1) A collection for personal use that is not for business purposes; or (2) a collection that includes only names, addresses and ways of communicating, which by itself does not create any characterization that infringes on the privacy of the people whose names are included in it, on condition that the owner of the collection or a body corporate under his control owns an additional collection.”

21. *See id.* at art. 17C–E.

22. Telecommunications Law, *supra* note 6, at art. 7.

23. The opt-in model is based on the consent of the individual to receive commercial advertisements. According to this model, an individual may choose to receive advertisements (opt-in). If an individual does not give consent for this, it is clear according to the opt-in model that a commercial entity may not deliver advertisements to this individual. The opt-out model, on the other hand, means that unless an individual notifies he is not interested in receiving advertisements from a commercial entity, this entity may continue delivering various advertisements to the individual.

24. *Id.* at art. 30A(a).

25. *Id.*

26. *See* Haim Ravia, *Junk Email*, (April 1, 1999), available at <http://www.law.co.il/showarticles.php?d=e&article=23> (“Section 30A of the Telecommunications Law prohibits the transmission of advertisements by facsimile without obtaining the addressee’s prior written consent. The rationale of the section lies in the fact that the transmitter of advertisements by fax is using the recipient’s money and resources in order to give him information in which he is not necessarily interested.”).

27. *See* Elad Sharaf, *Spam in Israel – A Survey of the Existing Law and the Desirable Law*, L. AND BUS. C 455 (1995) (Isr.). However, there are those who claim that there is a similarity between emails and faxes, since in both, the sender makes use, inter alia, of the addressee’s resources. *See* Haim Ravia, *Opt-in or Opt-Out* (Isr.) (Dec. 12, 2002), available at <http://www.law.co.il/showarticles.php?d=h&article=193> (arguing that the differences between the two technologies overcome the similarities and that a clause dealing with faxes cannot be applied to email messages, which enable the simultaneous delivery of large quantities of mail without involving a massive waste of paper or ink, which are perishable resources).

the use of a telecommunications device in a manner that might “unlawfully harm, frighten, harass, [or] cause anxiety or anger.”²⁸ This clause was instituted to deal with late night telephone harassment.²⁹ Since electronic mail uses telecommunication devices, it falls under the purview of this clause.³⁰

¶ 11 The legal and constructive question, for which no real authoritative answer has been found, is whether Article 30 can be conscripted for use in combating the widespread phenomenon of electronic junk mail, or in other words, can an unsolicited email message constitute harassment or a type of harm protected under Article 30?

¶ 12 This issue of interpretation has not yet been heard by the Israel Supreme Court, but it has been handled comprehensively by the Tel Aviv District Court.³¹ The District Court has held that Article 30 refers only to the technical and physical use of a telecommunication device for purposes of harassment and is not intended to deal with the content of such communication or to restrict freedom of expression.³² Therefore, an unsolicited message, notwithstanding its content, would not constitute harm or harassment under Article 30.³³

¶ 13 Nonetheless, even under this approach which places great emphasis on the freedom of expression aspect, electronic junk mail can in fact cause technical or physical damage to a computer, for example, by overloading it with many copies of the same mail message, thereby bringing it under Article 30.³⁴ The violation of this Article carries a penalty of three years imprisonment, making it a relatively serious offense.³⁵ The severity of the punishment is also a good indicator that the law was most likely intended to deal primarily with serious cases and not necessarily relatively harmless instances of undesirable emails.

C. Protection of Privacy Law – Protection Against Harassment and Abuse of Information

¶ 14 The Protection of Privacy Law³⁶ is an important and expansive law which has not been fully realized in practice and case law in Israel. This law establishes a broad

28. Telecommunications Law, *supra* note 6, at art. 30.

29. See CrimA 10462/03 Helinor Haror v. Israel, [2005] IsrSC (2) 4099; CrimA 70868/00 Israel v. Elad Ben Yosef Baruch, [2002] IsrDC (2) 1269.

30. See Telecommunications Law, *supra* note 6, at art. 1 (defining a “telecommunications device”).

31. CrimA 70868/00 Israel v. Elad Ben Yosef Baruch, [2002] IsrDC (2) 1269.

32. *Id.* at 12. See also HAIFA CTR. OF LAW & TECH., BOOKLET NO. 4, MAIL OR GARBAGE? THE REGULARIZATION OF UNSOLICITED EMAILS 38-39 (2004).

33. *Baruch*, IsrDC (2), 1269, 1273-74; see also HAIFA CTR. OF LAW & TECH., *supra* note 31, at 38-39.

34. *Baruch*, IsrDC (2) 1269, 1277-79. Notwithstanding her verdict in the case, Judge Berliner also stated that “the number of calls (or communication by any other device such as the internet), their frequency, length, etc, are the circumstances that will be examined and taken into account in each and every case, in the determination of whether the use was done in order to harass, cause fear, etc.” *Id.* at 4-5. HAIFA CTR. OF LAW & TECH., *supra* note 31 at 38-39.

35. Telecommunications Law, *supra* note 6.

36. The Protection of Privacy Law, *supra* note 6.

definition of infringement of privacy that may, in specific instances, extend to use of electronic junk mail.³⁷

¶15 Article 2(1) of the law provides that harm to privacy is “spying on or trailing a person, in a manner likely to harass him, or any other harassment.”³⁸ Collecting a person’s email and sending unwelcome email to that same person can constitute a type of stalking and harassment of that person to the extent that his privacy is infringed under this Article.

¶16 In this author’s opinion, this clause can only be used in rare and serious cases of electronic junk mail distribution, such as those instances where the sender collects the email address of a particular person and continues to send unsolicited email messages to that person. Even a generous interpretation of “another harassment” does not include, nor should it include, all unsolicited mail that arrives in our electronic mailboxes.

¶17 Article 2(9) of the Protection of Privacy Law states that infringement of privacy occurs even when “use is made of knowledge of the private matters of a person, other than for the purpose for which the information was given.”³⁹ A claim could be made that use of an electronic address in order to send out junk mail falls under this provision since common sense would seem to dictate that no person shares this type of information to receive unwanted mail. The question then becomes whether an email address, which is a trivial piece of information, can be considered a “private matter of a person.” In the past, the Israel Supreme Court has ruled that even an address or telephone number of a person constitutes a private matter,⁴⁰ however, there is no direct case law dealing with the issue of electronic mail addresses.⁴¹

¶18 The only ruling dealing with junk mail familiar to this author was issued by the Tel Aviv District Court.⁴² The district court heard a petition for leave to appeal a Small Claims Court decision in which the court held that collecting email addresses from a website constituted an invasion of privacy and trespass.⁴³ In this case, the owner of the site sued a user of the site for allegedly collecting email addresses off the site and using them to send solicitations for the user’s own site.⁴⁴ The district court, in overturning the decision, noted that the email addresses in question were posted freely by the users of the site and that they were free not to do so.⁴⁵ Since they did, the court held that the collection and use of those addresses by another user did not constitute a wrong under the

37. See *infra* discussion in text accompanying notes 37-41.

38. The Protection of Privacy Law, *supra* note 6, at art. 2(1).

39. The Protection of Privacy Law, *supra* note 6, at art. 2(9).

40. CA 439/88 Israel v. Moshe Ventura, [1994] 48 (iii) P.D. 808.

41. See discussion in this article regarding the limitations in the Computers Law, Protection of Privacy Law, and the Telecommunications Law.

42. Petition for Leave to Appeal, CA (TA) 2542/03 Nir Suissa v. Ori Ben Haim [2005], available at <http://www.nevo.co.il>.

43. Small Claims Court (Magistrates Court TA) 6000/03 Even Chen Ori v. Suissa Nir [2003] Magistrates Rulings volume 24 925.

44. CA (TA) 2542/03 Nir Suissa v. Ori Ben Haim [2005] at section 3, available at <http://www.nevo.co.il>.

45. *Id.* at 18-19.

specific circumstances of the case and compared the case to subscribers in a telephone book whose addresses can be used freely by anyone who so wishes.⁴⁶ The court did however emphasize that the case only dealt with the relationship between an owner of a site and a browser to the site and left open the question of whether once these addresses were collected, the sending of unsolicited and unwanted mail (spam) to them would not in fact constitute a criminal act.⁴⁷

D. The Computers Law – Unlawful to Disrupt or Interfere with the Use of a Computer

¶ 19 The Computers Law is the most pertinent of all the Israeli discussed in this article.⁴⁸ This law was enacted at the beginning of the Internet revolution, before electronic junk mail was given serious thought. The law deals with the regulation of a number of matters that a decade ago were thought to be very important.⁴⁹ It covers the more serious offenses and crimes, such as dissemination of viruses, as well as amendments to the evidentiary laws regarding computer output and searching and seizing computer material.⁵⁰ Although junk mail is not mentioned specifically in the law, this author believes that it can still be applied to some of the more egregious spam cases.

¶ 20 Article 2 of the Computers Law establishes the offense of unlawful interference with the normal operation of a computer or its use.⁵¹ An argument can be made that overloading a computer with bulk mail or sending a particularly heavy message can constitute the intended interference.⁵² However, this article is designed around rare and serious cases of junk mail which interfere and disrupt the normal operation of a computer.⁵³ Regular mail, even if unsolicited, is not an offense under this article.⁵⁴

46. *Id.* at 19.

47. *Id.* at 20.

48. The Computers Law, *supra* note 6.

49. The law mainly deals with offenses against the actual computer instrument and programs.

50. *See* The Computers Law, *supra* note 6, at arts. 2–6, 10.

51. Article 7 of the Computers Law establishes the civil wrong as follows: “unlawful interference with the use of a computer or computer parts.” This definition also can apply to cases involving a large spam message, particularly if it decreases or stops the work on the computer.

52. Haim Ravia, *supra* note 26, states that “section 2 of the Computers Law, 5755-1995 prohibits the disruption of a computer's satisfactory operation or interference with its use. Ordinarily, one short e-mail message, that is one or two kilobytes in size, could not be construed as disrupting the operation of a computer. However, that is not the case when the message includes a large attachment that can paralyze the recipient computer's e-mail traffic for several minutes. Sending tens of thousands of e-mails simultaneously might also be construed as disrupting the satisfactory operation of the Internet service provider's computer system, as the police argued in a recent case.”

53. *See* Sharaf, *supra* note 27, at 454, where the author argues that it would be difficult to prove damages under this law. However, the author states that an Internet service provider might theoretically have a case if he can prove that the sending of massive emails caused the disruption of the functioning of their servers. In general, the author notes that the law is basically criminal in nature and that it would not therefore prove an effective tool in the enforcement of these types of offenses due to the inability of enforcement agencies to deal with these crimes, and should be covered under a civil offense.

54. *Id.*

E. Summary of Current Israeli Law

¶ 21 As can be seen from the brief review of current Israeli law, only serious offenses such as the distribution of computer viruses, mass mailings or heavy messages to the same email address which interfere and disrupt the normal use of a computer, are addressed by the law.⁵⁵ None of the current statutes deal specifically with unsolicited electronic messages even if the same message is sent to, or intended for, thousands of recipients.

¶ 22 Against this backdrop, the Israeli legal community has taken a number of measures that have the potential to affect a change of the status quo and give rise to new legislation in this field. One method is the attempt to introduce legislation that would deal specifically with electronic junk mail.⁵⁶ Another is through the use of the court system as demonstrated by the lawsuit brought by Microsoft International against an Israeli distributor of spam.⁵⁷

¶ 23 The former method is playing out in the Knesset, which is currently considering two proposed bills based on existing legislation in Europe and America.⁵⁸

III. PROPOSED LEGISLATION

A. Proposal for an Amendment of the Protection of Privacy Law

¶ 24 In July 2004, Knesset Member Roman Bronfman presented a bill that was drafted together with the Israel Consumer Council.⁵⁹ The bill is based mainly on the American model used for telemarketing.⁶⁰ Under this proposal, electronic messages may be sent to all persons except for those who have clearly stated that they do not wish to receive unsolicited mail (opt-out model).⁶¹

¶ 25 The bill would make it unlawful to send unwanted mail to another person if the recipient has made a request not to receive the specific type of mail and his request is

55. See discussion in the text accompanying notes 6–53.

56. See below the two proposals of law before the Knesset at text accompanying notes 59 and 77.

57. Statement of Claim, CC (TA) 1262/05 Microsoft Corp. v. Amir Gennis, [2005], available at <http://www.nrg.co.il/images/stuff/computers/File.pdf>.

58. A third proposal that did not reach the Knesset is a prior proposal by the Israel Consumer Council to Amend the Protection of Privacy (Prevention of Unsolicited Communication) Law, 5763-2003. Knesset Member Bronfman's bill is largely based on this proposal.

59. Draft bill amending the Prevention of Unsolicited Communication Law 2004, HH, 2757 [hereinafter *Proposed Bill*].

60. Based on the "Do Not Call Registry" in the United States. National Do Not Call Registry, <http://www.donotcall.gov> (last visited Feb. 9, 2007). It has been argued that this model has not been entirely successful in combating spam and in fact studies have shown that spam has increased since the enactment of the law. See Lance Ulanoff, *Spam: A Reality Check*, PC MAG. (Feb. 18, 2004), available at <http://www.pcmag.com/article2/0,1895,1529243,00.asp>.

61. *Supra* note 58. The bill would add article 17J to the Protection of Privacy Law and describe the opt-out approach.

recorded in a registry.⁶² The sending of this type of unsolicited mail would constitute an infringement of privacy.⁶³ A person who does not wish to receive solicitations by email would have to register in advance with a special registry set up for those who do not want to receive junk mail. The registry would be kept by a Registrar of Databases, under the auspices of the Ministry of Justice.⁶⁴

¶ 26 If a person fails to record his desire not to receive unsolicited mail with the Registrar, he will not be protected by law and may be sent an unlimited amount of unsolicited mail.⁶⁵ This model was designed to protect both the freedom to pursue one's occupation and the right to freedom of expression for senders and advertisers.⁶⁶ As such, the law attempts to create a balance between the right of a person to send the messages with the right of the individual to be able to choose whether or not to accept them.⁶⁷

¶ 27 The term "unsolicited messages" in this bill is broadly defined to include communications over the phone, fax, by email or other interactive devices, with two significant exceptions: 1) if the recipient requested the information from the business, or is entitled to receive the information by law or contract; 2) if the incoming message is not an advertisement the object of which is to provide a product or service.⁶⁸

¶ 28 A few problems, some more substantial than others,⁶⁹ exist with respect to this proposal. For instance, the second exception which permits the sending of messages that do not contain advertisements appears, in this author's opinion, to open the door to the lawful sending of other, no less annoying junk mail in the form of political literature, solicitations for charity, donations, religious proselytizing, etc..⁷⁰

¶ 29 The bill also fails to take into account the actual senders of the messages such as a subcontractor or distribution company (who may be foreign nationals outside of Israel beyond Israel's judicial reach), or a person responsible for the content of the messages who may benefit from the responses to the message.⁷¹ More serious is the absence of any clear prohibition against forgery or concealment of the message source. Without such a prohibition it is more difficult to identify the senders of the junk messages, especially if they work via computers outside of Israel.

¶ 30 The main issue however in the proposed law is whether junk mail is in fact an infringement of one's privacy. Theoretically, the bill takes a strong stand by stating that junk mail does in fact violate an individual's right to privacy. The bill is an amendment

62. *Proposed Bill, supra* note 59, at art. 17J(b).

63. The bill and explanatory material can be accessed at <http://www.knesset.gov.il/privatelaw/data/16/2757.rtf>. (Feb. 24, 2004).

64. *Proposed Bill, supra* note 59, at art. 17J(b).

65. *Proposed Bill, supra* note 59.

66. *See Proposed Bill, supra* note 59, ¶ 4 (explaining the proposed bill).

67. *Id. See also* HAIFA CENTER, *supra* note 13, at 42.

68. *Proposed Bill, supra* note 59, at art. 17J(2).

69. YANIV DRUCKMAN ET AL., SPAM – REGULATION OF UNWELCOME ELECTRONIC MAIL 42 (N. Elkin Koren & M. Birnhak eds., 2004).

70. *See* HAIFA CENTER, *supra* note 13, at 42.

71. *Id.*

of the Protection of Privacy Law⁷² and specifically states that unsolicited messages constitute an infringement of privacy.⁷³ However, a closer look at the bill reveals that the proposal differentiates between various types of junk mail according to content.⁷⁴ Junk mail in the form of advertisements is prohibited, but other types of messages, even if unsolicited and unwelcome, are not.⁷⁵ This bill places the burden of dealing with the harm on the recipient.⁷⁶ If in fact these types of messages are invasions of privacy, then the recipient should not be forced to have to protect himself against them, and all such types of communications without the addressee's consent should be banned.

¶31 In light of the foregoing, despite being couched in right to privacy terms, under this bill, junk mail is not considered an invasion of privacy per se but rather a type of harassment connected to the normal and proper use of our telecommunication devices.⁷⁷ The proposed law therefore seems to be intended to ensure that these instruments are used properly according to our needs or the benefit of the user. The bill protects the property rights of an individual to his communication devices such as his telephone, fax, and computer, and ensures that they remain free and efficient tools of communication.⁷⁸

B. Proposal for an Amendment to the Telecommunications Law

¶32 In June of 2004, while the former bill was being circulated, another bill was being prepared by the government.⁷⁹ This bill is an amendment of Article 30 of the Telecommunications Law and follows the opt-in approach of the European Union under which unsolicited communications for purposes of direct marketing may not be sent to an individual without his prior consent.⁸⁰

¶33 Under this bill, Article 30, which deals with advertisements dispatched through faxes, would be amended to include telemarketing by automatic dialing, electronic mail and short message services (SMS).⁸¹ A potential recipient of these types of messages must provide prior express consent in order for the sender to lawfully send him these messages.⁸² The initial offer from the distributor to the recipient in order to enable the

72. The proposed amendment is the Prevention of Unwanted Solicitations, 5764-2004 (amending The Protection of Privacy Law). Protection of Privacy Bill (Amendment – Prevention of Unwanted Solicitations), 5764-2004.

73. Protection of Privacy Bill, *supra* note 72.

74. *Proposed Bill*, *supra* note 59, at 17J(b).

75. *Id.*

76. See Sharaf, *supra* note 27, at 457, 459 (discussing the various actions and considerations that a consumer would have to take into account in deciding whether to utilize this option).

77. *Proposed Bill*, *supra* note 59, at paragraph 3 of the explanatory remarks (describing the burden imposed on the customer by the tying up of telephone lines, wasting of the customer's paper on which the solicitations are printed, and the wasting of ink).

78. *Id.*

79. Memorandum of a proposed bill for the Amendment of the Telecommunications Law (Amendment No. 31), 5764 – 2004. The memo was approved in May 2005 by the Legislative Ministerial Committee.

80. Council Directive 58/13, art. 3, 2002 (EC). (Directive on Privacy and Electronic Communications.)

81. See *supra* note 59, at art. 30A(A).

82. *Id.*

recipient to continue receiving mail would not be considered unlawful.⁸³

¶ 34 However, there are further exceptions to this bill as well. Express consent is not required if a relationship exists between the sender and the recipient under specific conditions: if the recipient had provided his details to the sender, he was afforded an opportunity to refuse any more communications, he did not refuse, and if the advertisement refers to a product or service which he purchased from the sender or about which he negotiated.⁸⁴

¶ 35 Even if a recipient gives his consent to accept certain emails, the amended law would require that the solicitations themselves clearly state that they are advertisements, that the identity of the sender is clear, and that a valid email address is provided to which the recipient can send a refusal notice stating that he does not wish to receive any further mail.⁸⁵

¶ 36 The government-sponsored bill incorporates the offense of sending unsolicited mail as part of the Communications Law, but states that the act of sending such mail constitutes “harassment” under Article 2(1) of the Protection of Privacy Law.⁸⁶ By doing so, it takes a stance similar to the other proposal and views the distribution of junk mail as an infringement of privacy.⁸⁷ Despite the use of privacy terminology however, the emphasis of the bill is not on the direct invasion of privacy caused by the sending of junk mail but rather on the harassment of the recipients.⁸⁸ Although the scope of the prohibition is broader in this model and consistent with the accepted approach regarding protection of privacy (namely, everything is prohibited, unless there is agreement by the individual), there is still an understanding that commercial solicitations can be sent to individuals via a variety of different communication devices, and that the prohibition only applies to repeated harassment when no prior relationship exists between the parties.⁸⁹ Again, this bill emphasizes the harassment aspect and the quantity of mail and not the actual unsolicited communication.

¶ 37 The government-sponsored bill does not address the issue of junk mail sent outside of Israeli jurisdiction, but the broad definition of “dispatch” includes those instances when the actual dispatcher of the messages is outside of the country but the content of the message is aimed at advertising and promoting an Israeli business.⁹⁰ In

83. *Id.* This paragraph provides for an exception to the rule in the case of a one time solicitation to a merchant, including an offer to consent to receive a solicitation from the sender, through one or more of the means of communication listed.

84. *See supra* note 59, at art. 30A(A1) (1)–(3).

85. *Id.* at art. 30A (A2) (1)–(4).

86. *Id.* at art. 30A (B2)(1).

87. *Id.* This provision has important practical implications because under the Protection of Privacy Law, one can sue for damages without the need for proof of change.

88. Draft bill amending the Telecommunications Law at art. 30A(B2), 2004, HH, 5764 (stating that “a violation of the provisions of this article constitutes harassment under its meaning in article 2(1) of the Protection of Privacy Law.”).

89. *See supra* text accompanying notes 83–84.

90. Draft bill amending the Telecommunications Law at 30A(B3)(C), 2004, HH, 5764 (defining “dispatch”). *See also* HAIFA CENTER, *supra* note 13, at 44.

these instances, liability will fall on the business in Israel, unless it can prove that the message was sent without its knowledge and reasonable steps were taken to prevent the dispatch.⁹¹

¶ 38 While these two bills do not solve the problem of spam sent from other countries to addresses in Israel, they do provide a partial solution or at least attempt to deal with junk mail sent from Israel, even when designated for other countries. This can reduce the amount of junk mail that the Israeli user receives.⁹²

IV. A TEST CASE: MICROSOFT AND THE ISRAELI SPAMMER

¶ 39 Junk mail or spam sent from Israel to other countries or even within Israel is the subject of a multi-million dollar lawsuit brought in the beginning of 2005 by Microsoft International against Mr. Amir Gennis and his New Approach corporation who were in the business of sending electronic solicitations from Israel.⁹³

¶ 40 This lawsuit is part of Microsoft's worldwide battle against spam. Microsoft asked for five dollars in damages for every mail that was sent, and it estimated that Gennis distributed at least ten million spam messages through Microsoft's universal mail service, Hotmail, for a damages total of approximately fifty million dollars.⁹⁴

¶ 41 In its thorough statement of claim, Microsoft described the damages it and its users incurred as a result of the proliferation of junk mail. It estimated that junk messages constitute 60-80% of all mail traffic, which overloads the service providers and their users.⁹⁵ The company claimed that 0.78% (sixteenth place in the world) of all junk mail in the world originates from Israel.⁹⁶

¶ 42 According to Microsoft's statement of claim, spam is a completely professional industry but is unlawful even if no specific laws have been enacted to combat it.⁹⁷ Microsoft sued for violations of Articles 29, 30, and 31 of the Communications Law, 31a of the Protection of Privacy Law, as well as other general provisions of the Computers Law, Commercial Tort Law 5759. It also sued for trespass of property, negligence, breach of Hotmail's service contract, and for an alleged violation of the Penal Code prohibiting acceptance of property through deceitful means.⁹⁸

¶ 43 Microsoft's wide-ranging statement of claim was an invitation to the court to find the proper legal anchor by which to hang a ruling that spam is illegal in Israel

91. See HAIFA CENTER, *supra* note 13, at 44.

92. However, if the majority of junk mail distributors in Israel switch to other servers outside of Israel, the problem will more or less remain the same.

93. Statement of Claim, CC (TA) 1262/05 Microsoft Corp. v. Amir Gennis, [2005], available at <http://www.nrg.co.il/images/stuff/computers/File.pdf>.

94. Nonetheless, the lawsuit was capped at 2.5 million shekels (approximately \$500,000), which according to the plaintiff, is due to the actual likelihood of collecting from the defendants. *Id.* § 81

95. *Id.* § 15.

96. *Id.* § 20.

97. *Id.* §§ 14-22.

98. *Id.* §§ 58-64.

notwithstanding the absence of any legislation to that effect.

¶44 Along with the lawsuit, Microsoft has been promoting its global initiative titled “Spam in a Box” in Israel. The purpose is to create a central database documenting complaints of spam by users the world over, which would encourage the filing of lawsuits such as class actions on behalf of the victims.⁹⁹ This would encourage Israeli users to file class actions in countries around the world since, in its estimation, approximately half of all spam sent to Israelis originates outside of the country.¹⁰⁰

¶45 The defendant distributors on the other hand, argued in their writ of defense that Microsoft and its service provider, MSN, are their business competitors since Microsoft also distributes junk mail to its subscribers, and they argued that the whole lawsuit was designed to reduce competition and eliminate small competitors from little countries to protect its monopoly on access to its users.¹⁰¹ The defendants argued that no law exists that prohibits the distribution of commercial mailings and that they did not distribute any messages containing viruses, messages which are fraudulent, or messages that could harm or interfere with computer operations.¹⁰²

¶46 The defense of the Israeli distributors turned into a counterclaim against Microsoft in which they accused Microsoft of two serious allegations. First, the Israeli distributors argued that Microsoft’s activities against commercial mailings that they distribute are unlawful and constitute a violation of wiretapping provisions¹⁰³ and secondly, the Israeli distributors argued that Microsoft’s filtering of messages violates Article 29 of the Telecommunications Law which prohibits the interference, damage or removal of a telecommunication device.¹⁰⁴ Amir Gennis also filed a defamation suit against Microsoft’s legal counsel alleging that she called him a criminal while talking with the media.¹⁰⁵

¶47 Eventually this lawsuit ended by a settlement agreement on January 9, 2007. The legal process reached an advanced stage and Microsoft realized that the Knesset and Ministry of Communications were progressing in legislating a law against sending junk mail. In addition, Gennis had shown an unprecedented willingness to cease sending junk mail.¹⁰⁶

99. See Press Release, Microsoft Corp., “Microsoft Israel participated in a meeting of the Knesset committee of Science and Technology for promoting the war on junk mail in Israel” (November 24, 2004), available at <http://www.microsoft.com/israel/presspass/pr.asp?year=2004&month=11&id=686> (discussing the presentation of this venture to the Knesset subcommittee on the Internet for fighting spam in Israel — a subcommittee of the Knesset Science and Technology committee).

100. *Id.* ¶ 3.

101. Statement of Defense, CC (TA) 1262/05 Microsoft Corp. v. Amir Gennis, (*filed* Mar. 13, 2005).

102. *Id.*

103. See Unlawful Wiretapping Law, 5739-1979, 33 LSI 141 (1978-79) (Isr.), at arts. 2-3.

104. See Telecommunications Law, *supra* note 6, at art. 29.

105. Amir Gennis filed a lawsuit against Attorney She Lee Spiegelman for defamation in Civil File 26674/05 for derogatory and inaccurate comments made on February 27, 2005 about him to an Israeli news commentator and entertainer while discussing the Microsoft case against Gennis.

106. Yossi Hatoni: Microsoft Submitted a Claim and Amir Gennis Will Cease from Sending Junk Mail Permanently, <http://pc.bizportal.co.il/biznews02.shtml?mid=134675> (last visited Feb. 9, 2007).

¶48 Microsoft International, Microsoft Israel, MSN Israel and Amir Gennis reached an agreement according to which Gennis agreed not to send any more junk mail. In the agreement submitted to the court, Gennis undertook to abstain from sending electronic solicitations unless permitted by the recipients, and to abstain from providing anyone with means to distribute such electronic solicitations. In addition, Gennis undertook not to use Internet servers for the purpose of sending electronic solicitations without the agreement of the servers' owners. According to the agreement, if Amir Gennis breaches, he will be required to pay 100,000 shekels to the plaintiffs.¹⁰⁷

¶49 In addition, Gennis had to undertake to publish a response to the agreement saying that: "New Approach corporation and Mr. Amir Gennis express their sincere apologies to the plaintiffs and to any of their internet services subscribers if any damage and/or discomfort was caused to them due to sending spam messages, and undertake to cease from all such activities in the future. In addition New Approach corporation and Mr. Amir Gennis hereby apologize to Microsoft Israel, Microsoft Corporation and MSN Israel for any harm that may have been caused as a result of what has been said in the past regarding the matter of spam and the lawsuit, and retract all that has been said regarding this matter."¹⁰⁸

¶50 According to Microsoft, "Microsoft Israel has achieved its goal which is protecting the Israeli Internet users from junk mail, and we are very pleased with the final outcome of the legal process."¹⁰⁹

¶51 Microsoft's attorney stated that this accomplishment is more than what could have been achieved in court. Advocate Eyal Sagi said that "in a certain sense this settlement is better for the general public because it prevents his use of all internet servers and providers. In any case, we had planned to donate the money to the community, had we won."¹¹⁰

V. ANALYSIS – DOMESTIC SOLUTIONS TO A GLOBAL PROBLEM

¶52 Electronic junk mail has become a worldwide problem that attacks media operators, businesses, and private users.¹¹¹ This article deals with unsolicited electronic messages that are not viruses or fraudulent and therefore do not constitute any recognizable offense. Electronic junk mail unduly burdens the networks, causes unnecessary costs, and harasses the private Internet user by taking up his time and computer space.¹¹² Since this trend includes the use of networks and computers from one

107. Ido Kenan: Amir Gennis is Retiring from the Spam Business, <http://www.nrg.co.il/online/10/ART1/528/542.html> (last visited Feb. 9, 2007).

108. As a Result of the Settlement with Microsoft – Amir Gennis Will Stop Sending Junk Mail, <http://www.haaretz.co.il/hasite/objects/pages/PrintArticle.jhtml?itemNo=812233> (last visited Feb. 9, 2007).

109. *Id.*

110. Hatoni, *supra* note 106.

111. A recent report prepared by the OECD for the European Union states that spam is dangerous and expensive for businesses and private individuals. It causes a decrease of trust among users and harms electronic commerce. See OECD, *Background Paper for the OECD Workshop on Spam*, at 4-5, (2004).

112. See Sharaf, *supra* note 27. Chapter A' *The Problems that Spam Creates*, at 431-38.

location to send messages to many other locations, it may be difficult, if not impossible, to combat the problem with existing domestic laws and means of enforcement.¹¹³ This author believes that the problem of spam is best combated through the use of international treaties and cooperation. To reach that level takes time and substantial resources, which is why many countries are adopting interim solutions aimed at trying to deal with the problem on their own.¹¹⁴

¶ 53 Obviously, Israel recognizes that spam is an international problem that cannot exclusively be resolved through internal regulation, especially when most junk e-mail comes from outside of the country. However, even a small country has an obligation to the rest of the world. If Israel made no attempt to enact some type of enforcement then it would run the risk of becoming a distribution center for spam, which would have a profound effect on the global village of which it is part.

¶ 54 The Microsoft lawsuit also can be explained within the context of Israel's position vis-à-vis the other countries in the world. Microsoft, a foreign corporation is attempting to interfere with Israeli law and pressure the Israeli legislature and courts to adopt some type of solution regarding the electronic junk mail originating in Israel, which affects Microsoft users around the world. The lawsuit can be seen as an attempt to force Israel to take a stand against the dissemination of spam. Microsoft is aware that there is no Israeli legislation that prohibits spam per se unless viruses or fraudulent activity are involved.¹¹⁵ Microsoft is party to more than 120 similar lawsuits around the globe.¹¹⁶ An argument can be made that Microsoft's intervention in this area may be to accommodate the interests of a foreign corporation. From this perspective, the issue becomes whether a small country can afford to disregard Microsoft's attempt at constructing legislation for it and continue to remain a viable and respected player in the field.¹¹⁷

¶ 55 Notwithstanding the Microsoft lawsuit, Israel must consider how it wants to be viewed in the international arena. The choice facing its parliament is not merely a choice between two legal approaches, but whether Israel should take its own stand on this issue or conform to the existing world orientation.

¶ 56 Israel could establish itself as the spam distribution center for the world, a position which would marginally help Israeli investment and businesses. Yet the disadvantages of this approach outweigh the advantages. Not only would Israeli residents

113. See Alongi, *supra* note 2 for a detailed analysis of this subject.

114. For a discussion on the efforts of the United and the European Union in trying to combat spam, see Taiwo A. Oriola, *Regulating Unsolicited Commercial Electronic Mail in the United States and the European Union: Challenges and Prospects*, 7 TUL. J. TECH. & INTELL. PROP. 113 (2005); see also Sharaf, *supra* note 26; *supra* text accompanying notes 52–65.

115. See Microsoft Israel, *supra* note 99, which attributes Microsoft's participation in a Knesset subcommittee hearing to its awareness of the lack of any clear legislation on spam in Israel.

116. According to quotes by Microsoft's legal counsel in Israel, which appear in the writ of defense. Writ of Defense by the Defendants at paragraph 25, *Microsoft Corp.*, IsrDC, available at <http://www.nrg.co.il/images/stuff/computers/msn.rtf>.

117. Recently there is a new legislative initiative by the Minister of Communication, Ariel Atias, that will impose compensation of 1,000 shekels for sending junk mail by SMS or electronic mail, and this without the recipient having to prove any damages.

be exposed to an onslaught of spam, but other countries and international businesses may, in this author's opinion, view Israel as a renegade country and would apply commercial and diplomatic pressures to change Israel's policies and laws.

¶ 57 In this regard, the whole issue can be compared to the manner in which the global community acted to put pressure on countries throughout the world to adopt uniform protections of intellectual property, patents and copyrights. Many treaties were signed and countries were encouraged to adopt the legislative models of America and Europe.¹¹⁸ Similarly, Israel, as a small country does not have much choice, and will soon adopt legislation to combat junk mail.

¶ 58 Generally, Israel sides with the United States in technological matters. This time around however, the government and the Ministry of Justice support the European model. The Israeli courts may prefer to wait for direction in the form of legislation from the Knesset, but they may not have a choice, and will be compelled to precede the legislature and use their judicial powers to set the tone for Israel's position against the distribution of electronic junk mail.

VI. CONCLUSION

¶ 59 Electronic junk mail has increasingly become a world problem that affects the use of electronic mail and the Internet. Approximately sixty-five percent of all mail traffic is unsolicited spam.¹¹⁹

¶ 60 The Computer Law, which was enacted a decade ago, only deals with extreme and serious situations involving junk mail that disseminates viruses, contains fraudulent information, or disrupts and interferes with the normal operation of the computer. The offenses and crimes that exist in the present law do not effectively address the problem of the actual mail itself.

¶ 61 Legal solutions and enforcement can help combat Spam alongside other approaches, including private solutions, such as filtering spam messages and even changing the architecture of electronic mail.¹²⁰

¶ 62 Two different legislative models to combat spam currently are in circulation. The American model, based on the opt-out approach, is designed to enable the user to be removed from the sender's mailing list. The European model, the opt-in approach, requires the user's prior consent in order to receive any type of electronic advertisement. In recent years, legislation of both types have been enacted in various states in the United States and in Europe, and legal action has been initiated around the world.

118. In regard to international copyright treaties, *see* TONY GREENMAN, COPYRIGHTS – FROM THE AGE OF PRINTING TO THE DIGITAL AGE 15 (2003).

119. *See* YNET, *supra* note 2.

120. *See* Israel Internet Association, Principles of Private Solutions, http://www.isoc.org.il/index_eng.html (last visited Feb. 9, 2007).

¶ 63 Even Israel is struggling with the problem of spam. Junk e-mail is as prevalent in Israel as in other places in the world and it appears that Israel has become a significant source (number sixteen worldwide) of spam distribution. The fact that spam is so widespread in Israel has attracted Microsoft to file one of the biggest lawsuits in Israel against a leading Israeli spam distributor. Our analysis indicates that the intention of the lawsuit was to change the legal status quo in country and compel the State of Israel to join other countries, along with their legal systems, to fight spam.

¶ 64 Concurrently, Israel's parliament is reviewing two proposed bills reflecting the world's accepted approaches to fighting spam. It is probable that these bills also will receive considerable support from foreign organizations, such as Microsoft. Israel is now at a crossroad, but it appears that the country must join this global mission.

¶ 65 The question that interests Israeli jurists is whether the court will prohibit commercial junk mail by judicial action or whether the courts will leave this decision to the Knesset, which must choose between the two proposed bills. Laypersons are less interested in the question of whether it will be the courts or the parliament that decide this issue, and are focused more on whether the European or the American model will be adopted. Our opinion is that it is preferable to reach a uniform international solution that consolidates the two largest blocs, rather than leaving the choice up to small countries like Israel.¹²¹

121. I personally prefer the American approach, which favors freedom of expression and occupation. As noted above, spam does not really infringe on privacy, and in reality constitutes a slight nuisance at most. However, this article is not intended to compare the two approaches, and therefore this position is more of my personal opinion than a reasoned and formulated conclusion.