



**PROCEEDINGS**

(In open court at 1:30 p.m.)

THE COURT: Please be seated.

07-cr-65, United States vs. Min Kim. Ms. Davies appears for the government, and Mr. Kim is present with his attorney, Ms. Grady, for the continuation of this sentencing hearing following defendant's plea of guilty to Count 14, the false header information to send spam electronic mail, 18 U.S.C. Section 1037(a)(3); and Count 7, possession of a destructive device, 26 U.S.C. Section 5861(d).

As is apparent from the Presentence Report and our hearing that commenced on Friday, it is undisputed that if the specific offense characteristic of actual loss under Guideline Section 2B1.1, Application Note 3, does not apply, then the total Offense Level is 17, with a Criminal History Category Level I, yielding a Guideline range as advised of 24 to 30 months.

On the other hand it is undisputed that if 2B1.1 offense characteristic calculates a loss amount alternatively by defendant's gain, then the total Offense Level becomes 19, with a Criminal History Category Level of I, resulting in an advisory Guideline range of - what? - 30 to 37 months.

So the narrow focus of the issue and the hearing and the evidence taken last Friday is whether or not the government can establish by a preponderance of the evidence actual loss as

1 a result of defendant's conduct; the government objecting to  
2 the Presentence Report's declination to assign an increased  
3 offense level score under Guideline Section 2B1.1, Application  
4 Note 3(A).

5 So I think inasmuch as the objection is made by the  
6 government and the government bears the burden with respect to  
7 this upward adjustment to the offense level, I'll take your  
8 argument first.

9 Ms. Davies.

10 MS. DAVIES: Thank you, your Honor.

11 As the Court has noted the government bears the burden  
12 of proof of loss in this case by a preponderance of the  
13 evidence. It is also well settled that the Court obviously  
14 yields great discretion in deciding the measure of loss so long  
15 as there's a reasonable basis.

16 And the Court has posited two scenarios, that is  
17 because the gain is not contested in this matter whether or not  
18 the government can meet its burden of proof by a preponderance  
19 that there is actual loss within the meaning and definitions of  
20 the Guideline.

21 And here the government submits that it meets that  
22 burden that defendant caused actual loss because as defined  
23 that is reasonably foreseeable pecuniary harm.

24 And in this case, as defendant has stipulated, Mr. Kim  
25 took steps to disguise his Internet protocol address through

1 proxies and false headers. And he also stipulated that ISPs  
2 typically maintain hot lines and block lists and other steps in  
3 order to counter measures such as he took. And the government  
4 submits that that provides some of the information the Court  
5 needs, that is, that ISPs incur costs to stop spam in the  
6 fashion that Mr. Kim chose to commit his crime.

7 I submit that both legally and factually there is a  
8 basis for this Court to find that there was reasonably  
9 foreseeable pecuniary harm from victims in this case, and that  
10 first of all the Court can look to the statute. The government  
11 submitted a brief explaining some of the statutory findings,  
12 the policy reasons underpinning the passage of the CAN-SPAM  
13 Act, and very specifically there were quoted portions where  
14 Congress made findings that spam, you know, poses a great cost  
15 to the American economy.

16 Moreover, the Court can see from the statutory  
17 language cited in the brief that there are liquidated damages  
18 and penalty clauses within the statute because there is a known  
19 loss, but precisely, because it is difficult to assess, just  
20 what that loss is on a per e-mail or per spam basis.

21 Moreover, I cited to the Court some civil case law  
22 again, you know, supporting that same proposition, that there  
23 really should be no question that there is loss caused by  
24 conduct such as that of Mr. Kim's, but that by its inherent  
25 nature, the nature of the crime, that someone is disguising

1 their identity and sending as much volume as they can through  
2 the means of the Internet, it is very difficult to assess what  
3 that is.

4           Factually the record the government has attempted to  
5 present in the evidentiary hearing on Friday, I would remind  
6 the Court just of a few points.

7           Special Agent Schons testified that there were 7.5  
8 million e-mail addresses retrieved from the computer taken  
9 during the search warrant of Mr. Kim's computer. That  
10 additionally he admitted to agents during interview that he had  
11 bought an additional 200 million e-mails in order to continue  
12 his spamming activity.

13           The Court heard about the DarkMailer program, how it  
14 effectively acts as a mail-merge program to combine text of  
15 spam with e-mail addresses in order to commit these bulk  
16 mailings. And, again, we know there were the 7.5 million  
17 already on his computer and that he bought 200 million  
18 additional e-mail for that purpose. And we know that he was  
19 successful.

20           Special Agent Schons testified as to querying the  
21 legal database. We had Exhibit 1 before the Court that showed  
22 examples of where his spam had successfully gotten through. We  
23 also know he was successful from the stipulated facts again  
24 when he acknowledged that he had sent tens of thousands of  
25 e-mail during the relevant time period. We know that from the

1 logging information that Special Agent Schons testified to, the  
2 proxy server that reflected approximately 23,000 spam sent from  
3 that logging information.

4 And Special Agent Schons testified as to the various  
5 domain names that had been gleaned from the computer records,  
6 both the logs from the proxy server and Mr. Kim's own computer,  
7 and that he had contacted representatives of some of those ISPs  
8 as to the cost incurred as a result of spam.

9 Then the Court had the testimony of Ms. Lee from  
10 Microsoft detailing the very many types of costs at the  
11 different levels of spam that Microsoft is required to deal  
12 with. And her testimony that someone who earned on the order  
13 of \$250,000, by virtue of her knowledge of how many spam you  
14 must send in order to successfully get through and get paid, is  
15 someone who had caused millions of spam messages to be sent.

16 From all of that information, your Honor, I submit the  
17 government has met its preponderance standard.

18 Now Ms. Grady attempted to establish during  
19 cross-examination of Ms. Lee that notwithstanding the  
20 activities of persons like Mr. Kim's spamming, Microsoft was  
21 nonetheless profitable.

22 And I submit that that's completely irrelevant. The  
23 Guidelines do not require that the loss be so much so as to  
24 offset entirely somebody's profit, but only that there be,  
25 again, reasonably foreseeable pecuniary harm. And from all the

1 information before this Court -- and I would direct the Court's  
2 attention to Exhibit 2, I believe it was, that showed the very  
3 meticulous records Mr. Kim kept of the spamming activities he  
4 had done, his success rates of various attempts of URLs to  
5 which he had directed spam.

6 This is somebody who is sophisticated. This was a  
7 business for him. And he certainly knew enough about what he  
8 was doing and the consequences that he was causing to others to  
9 have reasonably been able to foresee that pecuniary harm to  
10 ISPs and others would result. And I submit, your Honor, that  
11 that is the standard that must be shown here.

12 Now in my mind this is precisely the situation that is  
13 contemplated by 2B1.1, Application Note 3(B), because as the  
14 Court knows it says that the Court shall use the gain that  
15 resulted from the offense as an alternative measure of loss  
16 only if there is a loss but it reasonably cannot be determined.

17 Your Honor, that is this case. This is a situation  
18 where there are many people involved in this particular kind of  
19 offense conduct, but the fact that this Court cannot  
20 differentiate the harm caused by Mr. Kim in a precise manner  
21 from the harm caused by others, in my mind precisely puts it in  
22 a situation where there is a loss. It cannot be reasonably  
23 calculated with certainty, and so we look to the alternative  
24 measure. And that alternative measure is not disputed here.  
25 Mr. Kim acknowledges what his gain was in this instance, and

1 that's \$250,000 from his criminal activity.

2 With all of the information before the Court I believe  
3 the government has met its standard.

4 And let me make a final point, and that is the  
5 government is not taking this position because it is seeking  
6 the most Draconian sanction that might be available for  
7 Mr. Kim; rather, it is legally troubling that conduct such as  
8 that by Mr. Kim, that required passage of the CAN-SPAM Act,  
9 that has the recognized effect on the economy as a whole, and  
10 the ongoing and truly tremendous costs to ISPs across the  
11 nation can simply be treated as a nuisance. That is legally  
12 wrong. That is why I presented the evidence I did. I think  
13 the Court properly can in this case make a determination there  
14 is a loss. And at that point obviously the Court exercises  
15 discretion to decide how to consider Mr. Kim's gain in  
16 fashioning a sentencing.

17 And on that I would submit.

18 THE COURT: Ms. Grady.

19 MS. GRADY: I don't know how the government can ask  
20 the Court to make a finding that loss occurred based on the  
21 fact that loss cannot be differentiated. In other words how  
22 can loss be reasonably foreseeable to this defendant when it is  
23 not only -- when it cannot be differentiated at all in relation  
24 to this defendant. And that really is the --

25 THE COURT: Then why have subparagraph (B) to



1 Application Note 3?

2 MS. GRADY: It must be reasonably foreseeable  
3 pecuniary harm.

4 THE COURT: So your focus may be that it was not  
5 reasonably foreseeable?

6 MS. GRADY: No, actually that's not my primary focus.  
7 My primary focus is that this issue here is not whether -- the  
8 issue here is not whether spam causes companies like Microsoft  
9 or Adelphia to spend money to combat spam. The issue here is  
10 whether the spam that was sent by this defendant caused these  
11 companies to incur pecuniary harm. And that question requires  
12 the Court to ask what evidence is there that this spam that was  
13 sent by this defendant caused loss. And to answer that  
14 question we have to know whether the money spent for the new  
15 servers and the filters, and the like, as were described by the  
16 witnesses that testified on Friday, would have been spent  
17 regardless of the spam encountered here. And I think the  
18 answer is pretty plainly, yes, it would have; and the reason  
19 for that I think appears obvious. Companies that sponsor  
20 e-mail will always invest in building a better spam trap. And  
21 that I think amounts to the cost of doing business in this  
22 industry.

23 You know, I tried to -- I thought perhaps the  
24 representative from Microsoft would be able to tell us how many  
25 e-mails -- spam e-mails hit their filters on a daily basis,

1 because she talked about specifically not simply spam that  
2 violates 18 U.S.C. 1037, she talked about all spam. Microsoft  
3 has built these filters to combat all spam, not simply illegal  
4 spam. And Microsoft has incurred these costs for the purpose  
5 of combatting all spam, all junk mail, not simply illegal junk  
6 mail.

7           So, you know -- and I read, although I don't have the  
8 source, because it's not quoted, but there was an article in  
9 the New Yorker in August where they talk about a hundred  
10 billion e-mails being identified as spam every day in the  
11 industry. Now that's a current number. I couldn't find the  
12 number for 2004. But it's obvious that the number goes up  
13 every year.

14           So, you know, here's another way that I would ask the  
15 Court to look at it:

16           Companies like Microsoft clearly spend money to combat  
17 all spam, not simply illegal spam. Even if the spam in this  
18 case had been sent with true header information so that it did  
19 not violate the criminal code, it would have encountered  
20 Microsoft's spam filters anyway, but this defendant wouldn't be  
21 here.

22           THE COURT: It's because the spam, through the proxy  
23 server, with headers stripped, with the DarkMailer that it got  
24 through and increased storage costs. Your argument really is  
25 one: Well, the problem is so vast that it is *de minimis*, and

1 because the pecuniary harm is *de minimis* the Guideline  
2 application shouldn't apply.

3 MS. GRADY: Well, I don't think I am -- I'm not trying  
4 to say that the pecuniary harm is *de minimis*. What I think is  
5 important is trying to figure out -- I'm not saying -- I'm not  
6 saying that there is pecuniary harm, number one, because I'm  
7 not so sure that -- I don't think you need to get there. It's  
8 sort of a ridiculous argument for me to be engaging in here  
9 because --

10 THE COURT: If the header-stripped spam through the  
11 proxy server got through the blacklist -- and, after all,  
12 according to the stipulated facts it was the blacklisting that  
13 motivated Mr. Kim to go to DarkMailer and a proxy server, and  
14 if the spam was fraudulent, because the header was stripped, it  
15 became anonymous, it got through the blacklist, and then got  
16 through the filter, and wound up being sent to the ultimate  
17 address, there's at least, at least additional storage costs.  
18 And, at least according to Ms. Lee, it's the customer's number  
19 one complaint and loss of goodwill.

20 MS. GRADY: What if we could identify the spam sent in  
21 this case with the storage costs, and what if the storage costs  
22 were \$10, then there would be no loss under these Guidelines.

23 Or what if the storage cost was zero, because relative  
24 to all of the other spams that get through the filter there  
25 would have been costs that were incurred anyway, making the

1 harm -- potential harm or harm caused by the spam here  
2 irrelevant?

3 THE COURT: Well, of course if you can put a \$10  
4 figure on it, it's monetary, isn't it, and your argument is one  
5 of *de minimis*.

6 MS. GRADY: But we don't know that because -- and I  
7 see what you're saying. We don't know that, because we don't  
8 know in fact whether we get beyond that point here. What harm,  
9 if any, can be attributed to this defendant's conduct here? We  
10 don't know that unless we know the context in which harm occurs  
11 to companies like Microsoft and whether or not the costs that  
12 would result, assume pecuniary harm, would have resulted but --  
13 or would have resulted any way.

14 THE COURT: So your argument is a "but for."

15 MS. GRADY: Well, my argument is it has to be related  
16 to this defendant.

17 THE COURT: But for this defendant there was no  
18 monetary loss.

19 MS. GRADY: Otherwise we're really asking -- we're  
20 really penalizing him for being a part of, no matter how small,  
21 of this social nuisance of spamming. And we don't know how  
22 small his role is. We don't know, because we didn't hear  
23 evidence as to how big the entire problem is and what portion  
24 of that problem he occupies.

25 THE COURT: Which is another way of arguing that in

1 every prosecution for a criminal offense such as Count 14 there  
2 will never -- because it is so vast, there will never be a  
3 specific offense characteristic applied.

4 MS. GRADY: Well, I can't say that. I don't know. It  
5 may be that --

6 THE COURT: That's where your argument leads.

7 MS. GRADY: Well, given the state of things, I think  
8 you're probably right, because if Microsoft doesn't track the  
9 harm per spammer, I don't know how we can. And, you know, I  
10 don't -- I don't know enough about that business to know  
11 whether that's a reasonable approach for Microsoft to take or  
12 not.

13 I'm not so sure, though, that -- I wonder if that --  
14 if that fact could have been worked into the statute somehow  
15 when Congress was defining the elements of the offense.

16 THE COURT: So you want Microsoft and other ISPs to  
17 conduct further research and development in their software so  
18 that when these cases come to court on a federal prosecution  
19 they can say, This was the X amount of harm.

20 MS. GRADY: Well, I mean I'm not -- I'm not saying  
21 they should or shouldn't, I'm just saying that I don't think  
22 that the argument -- that that exercise is really required  
23 here. I mean it is if the government wants to prevail, but --  
24 on their argument, because the other side of this coin is that  
25 spamming -- any defendant who is part of the spamming process

1 and contributes and violates the law of spamming should be  
2 sentenced based on gain.

3 THE COURT: That presupposes the government has  
4 evidence of gain, as they do here. If there was no evidence of  
5 gain in this case, then subparagraph (B) would not kick in.

6 MS. GRADY: That's true, but spammers get paid. Most  
7 spammers get paid for spamming. So there probably will always  
8 be some evidence of gain, and that's certainly an easier road  
9 to go down if we operate on the premise that there is loss and  
10 that it cannot be identified.

11 But, you know, to take the technical terms out of  
12 this, which allows me to communicate at least more easily on  
13 the subject, is -- my argument is simple, which is that there  
14 must be loss attributable to this defendant. We must have some  
15 way of connecting those two points, and we don't have that  
16 here.

17 THE COURT: Okay. Do you have any brief rebuttal  
18 Ms. Davies?

19 MS. DAVIES: I do, your Honor. Thank you.

20 Your Honor, there were just a few points that I  
21 particularly wanted to respond to defense counsel's argument.  
22 Initially she started out saying that because Internet service  
23 providers like Microsoft choose to block all junk mail, there's  
24 no additional cost. But if the cost remembers the testimony  
25 from Ms. Lee, again we learned about the gateway, and then we

1 learned about the stage two procedures, and then about the  
2 third procedure -- the third process where it actually gets to  
3 an in-box.

4           And what she identified as making it the most  
5 expensive spam to deal with are those attributes that were  
6 present in Mr. Kim's spam; that is, he disguised the IP address  
7 through the DarkMailer, he sent it through proxies to try to  
8 disguise it. He tried to outwit and elude every protection put  
9 in place for that front-end commercial junk mail that Ms. Grady  
10 is trying to lump all this into. That's not what he did. The  
11 very nature of his conduct made it the most expensive and  
12 caused the most loss to Microsoft and others.

13           The other part of the argument that the Court points  
14 out is that taken to its logical extension, it means that  
15 whenever you violate the CAN-SPAM Act, there's so many other  
16 violaters no one is ever going to bear any responsibility for  
17 the amount of damage they caused, the amount or loss of costs  
18 incurred as a result of their conduct.

19           And, your Honor, I submit that that's just turning 18  
20 U.S.C. 3553 on its head, because one of the things this Court  
21 needs to take into consideration is the deterrent value. And  
22 if you happen to pick a crime, as Mr. Kim has, where you have  
23 so many other people doing it, and you have so -- the whole  
24 inherent nature of it is to disguise who is doing it, you  
25 disguise it by using the proxies, by stripping your IP and the

1 things that make this criminal. You have prevented your victim  
2 from being able to track it, as Ms. Grady suggests the burden  
3 should be on Microsoft to do.

4 So that there's never any increment of responsibility  
5 placed. And I submit that that then affects any deterrent  
6 message that comes out of sentencing under CAN-SPAM if you say,  
7 I am one small drop in this pool, so don't hold me  
8 responsibility for the costs I am incurring on this industry.

9 Finally, Ms. Grady poses a bunch of "what ifs." But  
10 the evidence before this Court from Ms. Lee is that given the  
11 dollar amount Mr. Kim is not contesting he earned from his spam  
12 activity, he was significant. He was a significant source of  
13 spam e-mail based on the fact that we know, and he's not  
14 contesting, he earned \$250,000 from his activity.

15 From that, your Honor, and Ms. Grady suggests, well,  
16 there should have been something in the statute that addresses  
17 that. I submit there was. That's where the civil penalties  
18 and the liquidated damages came in. And as I set forth in my  
19 brief, if we compare what those civil penalties are with  
20 approximations of what Mr. Kim --

21 THE COURT: I think they are 25 to --

22 MS. DAVIES: Per e-mail. And according to Mr. Kim he  
23 must have sent millions in order to earn the \$250,000 he  
24 concedes.

25 THE COURT: But that's not asserted for determining a



1 calculated loss. It's civil.

2 MS. DAVIES: That's right, your Honor.

3 I cited one case to the Court that was similar, and  
4 again it sort of points out this whole problem. It is  
5 unpublished, it's from the Fourth Circuit in 2007, it was the  
6 **Brathwaite** decision. And it was essentially a situation where  
7 defendants were distributing fraudulent driver's licenses, and  
8 the Court used as the loss measurement their gain, because  
9 there was no way for the DMV at that point in time to quantify  
10 all the different kinds of actions that it would need to take  
11 to cancel the fraudulent licenses.

12 It's the same sort of thing. When a defendant engages  
13 in criminal conduct where there clearly is a harm, but it is  
14 not a harm that can be easily or reasonably calculated with  
15 certainty, that's where that application note definition comes  
16 in. That is this case.

17 If at the end of the day the Court is concerned that,  
18 given Ms. Grady's argument, the measure of gain is not a  
19 reasonable approximation of loss, then I submit the answer is  
20 you don't find there's no loss, because clearly there is  
21 reasonably foreseeable pecuniary harm in this case.

22 The Court has broad discretion, and again I'm legally  
23 troubled by the notion that we say this is a victimless crime.  
24 It's not.

25 And I submit.

1 THE COURT: Well, the Tenth Circuit will have an  
2 opportunity to, in its wisdom greater than this Court I'm sure,  
3 address this issue that is before me today.

4 By way of background, of course, we have the  
5 stipulation of facts relevant to sentencing set forth in the  
6 Plea Agreement, some of which set forth certain background into  
7 the nature of the problem concerning spamming generally.

8 Government counsel sets forth specifically the  
9 parties' stipulation of facts on pages 2, 3 and 4 of  
10 government's position regarding sentencing specifically with  
11 regard to Mr. Kim.

12 My focus is not so much on spam in general, although  
13 it has meaningful significance because of the effect on our  
14 Internet service providers and the billions of dollars of  
15 expense, which in turn prompted Congress in 2003 to enact the  
16 CAN-SPAM Act.

17 The focus more specifically in this case is on  
18 Count 14. As the stipulated facts reflect Mr. Kim in November  
19 2003 transmitted multiple commercial electronic messages to  
20 various recipients in order to be paid as an affiliate by  
21 businesses advertising through spam. To this end he leased  
22 space at an Internet service provider and web-hosting company,  
23 the Planet. In exchange for his spamming activity he was paid  
24 as an affiliate by various retailers, given an affiliate number  
25 giving rise to an entitlement to payment as reflected through

1 the testimony.

2 But when Internet service providers began blocking his  
3 spam, he sought and found an unprotected server, referred to in  
4 the testimony as a proxy server, through which he could send  
5 his spam in order to disguise its origins and avoid IP blocks.

6 As Ms. Lee testified the first line of defense is to  
7 set up filters in this so-called blacklist so that as this  
8 packet is going down the pipe from the sender, in this case  
9 Mr. Kim, to the ultimate recipient, that is the address to  
10 which the spam is sent, it can be blocked at that point if it  
11 is not anonymous.

12 So in order to disguise its origin and avoid the IP  
13 blocks, in addition to the proxy server he also, the testimony  
14 showed, through a software program DarkMailer began falsifying  
15 header information on the spam he sent.

16 So in terms of Ms. Lee's testimony as to Microsoft,  
17 illustrative generally speaking of what the industry is doing  
18 generally to address this chronic problem, in addition to the  
19 phase 1 of additional routers and switches, the MSBL data base,  
20 which is the blacklist, additional mail administrators, the  
21 additional bandwidth that is incurred, all of which adds cost  
22 to the ISP, what occurred here is that Mr. Kim by his  
23 fraudulent activity in utilizing a proxy server and DarkMailer,  
24 stripping the header information to render the e-mails  
25 anonymous, he was able to defeat phase 2, the filtering

1 process, a process which at least in the case of Microsoft  
2 added additional costs to Microsoft as that ISP with regard to  
3 a third-party filter provider and in-house filtering, which  
4 required R&D, development costs, software, and all of which in  
5 both phase 1 and phase 2 requires ongoing updating and  
6 maintenance.

7           But Mr. Kim beat the filters because the e-mails were  
8 anonymous. And that in turn yields what Ms. Lee testified  
9 about in terms of the phase 3 problem, to at least Microsoft,  
10 and that is added storage cost, because some of this spam gets  
11 through using these fraudulent means such as Mr. Kim used.  
12 Loss of goodwill, it's the number one customer complaint. As  
13 she testified, a one-percent decrease in spam would save \$1  
14 million in storage expense.

15           The cheapest way in which an ISP such as Microsoft can  
16 address the problem is if this spam is not anonymous; that is,  
17 if the sender has not rendered it totally anonymous by such  
18 means as employed by Mr. Kim. The most expensive effect to the  
19 ISP is when the spammer is able to defeat the protective means  
20 employed by the ISP.

21           As Mr. Schons testified, certainly utilizing the proxy  
22 server in this case -- and all of these findings are applicable  
23 to the time period at issue here. With regard to the proxy  
24 server that is identified in the stipulation of facts, one ISP  
25 was Adelphia, and Adelphia has incurred additional costs by way

1 of additional servers of \$400,000 concerning outgoing mail and  
2 \$72,000 incoming.

3 It is the conduct and means and method by which  
4 Mr. Kim sent tens of thousands of these fraudulent spam e-mails  
5 that in my view caused monetary or pecuniary harm to at least  
6 Adelphia, and I would find it probable to numerous other ISP  
7 providers.

8 Ms. Lee acknowledged that while she can speak for  
9 Microsoft, it is to her knowledge the way other ISPs treat  
10 spam, given her interactions with other ISP employees.

11 The argument, and this was one which I think was  
12 implicit in Defense Exhibit A, is that Microsoft in the MSN  
13 division, I think it was, showed a profit. Cross-examination  
14 by the defense tried to get at: Well, the bottom line is not  
15 really affected.

16 That, however, is not a persuasive argument, because  
17 as Ms. Lee testified, and as occurs to me, the bottom line  
18 obviously cannot be an accurate reflection of whether or not  
19 loss was caused, because the bottom line could have been  
20 greater but for Mr. Kim's conduct.

21 And as Ms. Lee testified, for every spammer who --  
22 given the use of a proxy server and stripping of headers to  
23 render the message anonymous, for every one of those there is  
24 some incremental expense to the ISP.

25 It is uncomfortable to reason backwards from the

1 amount of gain to Mr. Kim of \$250,000 to say, Well, millions  
2 must have gotten through, but that is some evidence of the  
3 extent, the significant extent of his activity on ISP  
4 providers.

5 Certainly I can't take civil liquidated damages as  
6 provided in the statute as evidence of the harm here, of the  
7 actual loss, but it is some reflection by Congress that the  
8 type of activity that Mr. Kim was engaged in, as exemplified by  
9 Count 14, does represent actual loss.

10 "Actual loss" is defined in Application Note 3 as,  
11 quote: "The reasonably foreseeable pecuniary harm that  
12 resulted from the offense," unquote.

13 "'Pecuniary harm' means harm that is monetary," in the  
14 alternative, "or that otherwise is readily measurable in  
15 money."

16 The alternative in the disjunctive does not apply  
17 here. So as applicable here "pecuniary harm" means harm that  
18 is monetary. And it fleshes that out by saying, ". . .  
19 pecuniary harm does not include emotional distress, harm to  
20 reputation or other non-economic harm."

21 But what we are talking about here is some  
22 nonquantifiable monetary harm. That is economic harm.

23 It goes on to provide that, "For purposes of this  
24 Guideline 'reasonably foreseeable pecuniary harm' means  
25 pecuniary harm that the defendant knew or under the

1 circumstances reasonably should have known was a potential  
2 result of the offense."

3           The combination of the stipulated facts and the  
4 evidence that I received reflects that Mr. Kim is sophisticated  
5 with regard to economic gain to himself through spamming.  
6 Sophisticated to the extent that when he became blacklisted, he  
7 went to a proxy server, DarkMailer, and rendered his messages  
8 anonymous. Why? So as to beat the ISP's protective measures.

9           It is reasonable, therefore, to infer and conclude  
10 that he reasonably should have known that his conduct would  
11 cause pecuniary harm. After all, as reflected in Exhibit 2, he  
12 was very meticulous in keeping records of all of his spamming  
13 activity, including that which he rendered anonymous. And he  
14 was geared up to expand this activity.

15           So I will find and conclude that the government has  
16 met its burden to establish actual loss.

17           There is something that is very disquieting to the  
18 Court. In the argument that the magnitude of the Internet and  
19 spamming is so huge in a minute-by-minute context, magnified  
20 exponentially over time, that someone in Mr. Kim's position was  
21 simply a grain of sand in the Sahara, and that accordingly his  
22 acknowledged gain should be totally disregarded under paragraph  
23 (B) of Application Note 3, an argument that would run contrary  
24 to the intent of Congress in enacting the CAN-SPAM Act, would  
25 disregard the nature and the circumstances of the offense and

1 its seriousness, would certainly run totally counter to the  
2 concern of the Court to provide adequate deterrence to criminal  
3 conduct under 18 U.S.C. Section 3553(a).

4 So based upon these findings and conclusions I will  
5 sustain the government's objection.

6 Ms. Davies, do you have any further sentencing  
7 statement?

8 I note that you have your motion for the additional  
9 one-level decrease, which I will of course grant, as well as  
10 your motion to dismiss Counts 1 through 13 and 15 through 16  
11 and 18 and 19 of the Indictment.

12 MS. DAVIES: Your Honor, I submit the matter.

13 THE COURT: Okay. Ms. Grady, would you and your  
14 client please go to the podium.

15 I might advise, Ms. Grady, that in light of the  
16 Presentence Report and the 18 U.S.C. Section 3553 factors my  
17 inclination is to sentence the defendant at the bottom of the  
18 advisory Guideline range.

19 MS. GRADY: And thank you for telling me that, your  
20 Honor. And I want to thank the Court for its very careful  
21 consideration and the time devoted to this new and very  
22 interesting issue. And the government's presentation of the  
23 evidence on this case. I learn something new every day, and  
24 where else would I learn it but in this work. So this is --

25 THE COURT: That's true for both of us.



1 MS. GRADY: And I think this has been --

2 THE COURT: Whether we want to learn about the  
3 Internet and all of this or not, we're going to have to do it.

4 MS. GRADY: Well, but there will always be someone  
5 like Ms. Davies to teach us about it. And I have to say that I  
6 do appreciate the government's work here.

7 And I have to say that I think Mr. Kim also is  
8 learning a lot. He's looking at serving a lot of time for a  
9 kid who is 24 years old. And I do respect the Court's  
10 inclination to impose a sentence at the bottom of the Guideline  
11 range. And I would ask that the Court designate the District  
12 of Colorado. I suspect he'll go to Florence, because that's  
13 close to where he lives, but I don't know.

14 THE COURT: Okay. Mr. Kim, do you have anything you  
15 want to say this afternoon?

16 THE DEFENDANT: No, sir.

17 THE COURT: Okay. For the reasons that I have stated  
18 upon the record in the application of Application Note 3 of  
19 Guideline Section 2B1.1(a) and (b), I will find that the loss  
20 in this case is determined to be between 200,000 and \$400,000.

21 Neither the government nor the defense have challenged  
22 any other aspect of the Presentence Report and, therefore, the  
23 remaining factual statements and Guideline applications are  
24 adopted without objection as my findings of fact concerning  
25 sentencing.

1 I find that the total Offense Level is 19, your  
2 Criminal History Category Level is I, and that results in an  
3 imprisonment range of 30 to 37 months as to Count 17 and 30 to  
4 36 months as to Count 14. The fine range is 6,000 to \$60,000.  
5 The supervised release range is two to three years.

6 I find no reason to depart from the Guideline range,  
7 which does not exceed 24 months, and I impose a sentence within  
8 that range.

9 Pursuant to the Sentencing Reform Act of 1984 it is  
10 the judgment of the Court that the defendant Min Kim is hereby  
11 committed to the custody of the Bureau of Prisons to be  
12 imprisoned for a term of 30 months on each of Counts 14 and 17,  
13 to be served concurrently. I recommend that the Bureau of  
14 Prisons place you at a facility within the District of  
15 Colorado.

16 Upon release from imprisonment you are placed on  
17 supervised release for a term of three years. This term  
18 consists of terms of one year on Count 14 and a term of three  
19 years on Count 17, to run concurrently.

20 Within 72 hours of release from the custody of the  
21 Bureau of Prisons you must report in person to the probation  
22 office in the district to which you are released.

23 While on supervised release you shall not commit  
24 another federal, state or local crime, shall not possess a  
25 firearm as defined in 18 U.S.C. Section 921. Now pay attention

1 to that. And you must comply with the standard conditions  
2 adopted by this Court.

3 You shall not unlawfully possess a controlled  
4 substance, and refrain from any unlawful use of a controlled  
5 substance. You shall submit to one drug test within 15 days of  
6 release on supervised release and two periodic tests  
7 thereafter.

8 You shall cooperate in the collection of DNA as  
9 directed by your probation officer.

10 I'll order that you perform 200 hours of community  
11 service as directed by your probation officer.

12 I'll impose the special assessment fee of \$100 on each  
13 count, for a total of \$200, and I order that that is due and  
14 payable immediately.

15 You have no ability to pay a fine, and I waive the  
16 fine in your case.

17 The sentence that I impose is one that I find and  
18 conclude is sufficient but not greater than necessary to comply  
19 with the purposes set forth in 18, United States Code, Section  
20 3553(a).

21 I also find you are not likely to flee or pose a  
22 danger to the safety of any other person or the community. So  
23 it is ordered that you surrender at the institution designated  
24 by the Bureau of Prisons before noon on January 7, 2008.

25 Now I advise you that you have the right to appeal my

1 sentencing decision to the Tenth Circuit Court of Appeals,  
2 which is done by filing a written notice of appeal with the  
3 clerk of this Court within ten days from the date of entry of  
4 judgment or you lose that right of appeal. You have a  
5 continued right to court-appointed counsel for this purpose.  
6 If you were to request it, the clerk of the Court must  
7 immediately prepare and file a notice of appeal on your behalf.

8 Anything further, Ms. Davies?

9 MS. DAVIES: No, your Honor. Thank you.

10 THE COURT: Ms. Grady?

11 MS. GRADY: No. Thank you.

12 THE COURT: Thank you. We'll be in recess.

13 (Proceedings concluded at 2:30 p.m.)

14 **REPORTER'S CERTIFICATE**

15  
16 I certify that the foregoing is a correct transcript from  
17 the record of proceedings in the above-entitled matter. Dated  
18 at Denver, Colorado, this 27th day of November, 2007.

19  
20 \_\_\_\_\_  
21 s/Gwen Daniel  
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