

**DISSEMINATING INDECENT MATERIAL TO MINORS IN THE  
SECOND DEGREE  
Penal Law § 235.21(1)(a)  
(Committed on or after Nov. 1, 1996)**

The (*specify*) count is Disseminating Indecent Material to Minors in the Second Degree.

Under our law, a person is guilty of Disseminating Indecent Material to Minors in the Second Degree when, with knowledge of its character and content, he or she sells or loans to a minor for monetary consideration any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors.

The following terms used in that definition have a special meaning:

MINOR means any person less than seventeen years old.<sup>1</sup>

NUDITY means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.<sup>2</sup>

SEXUAL CONDUCT means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.<sup>3</sup>

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<sup>1</sup> Penal Law § 235.20(1).

<sup>2</sup> Penal Law § 235.20(2).

<sup>3</sup> Penal Law § 235.20(3).

SADO-MASOCHISTIC ABUSE means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.<sup>4</sup>

HARMFUL TO MINORS means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(a) considered as a whole, appeals to the prurient interest in sex of minors; and

(b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) considered as a whole, lacks serious literary, artistic, political and scientific value for minors.<sup>5</sup>

“Sexual excitement” as used in this definition means the condition of human male or female genitals when in a state of sexual stimulation or arousal.<sup>6</sup>

Under our law, a person who, for monetary consideration, sells or loans to a minor any of the described material is presumed to do so with knowledge of the character and content of that material.<sup>7</sup> This means that, if the People have proven beyond a reasonable doubt that the defendant, for monetary consideration, sold or loaned to a minor any of the described material, you may, but you are not required to, presume from that fact that the defendant did so with knowledge of the character and content of that material.

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<sup>4</sup> Penal Law § 235.20(5).

<sup>5</sup> Penal Law § 235.20(6).

<sup>6</sup> Penal Law § 235.20(4).

<sup>7</sup> See Penal Law § 235.23(1).

*[Add where the affirmative defense to this crime is not raised:*

It is not an element of this crime, and thus the People are not required to prove beyond a reasonable doubt, that the defendant knew the person was less than seventeen years of age.<sup>8</sup>]

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case, beyond a reasonable doubt, each of the following four elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), for monetary consideration, sold or loaned any

*[Specify as appropriate:* picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image] of a person or portion of the human body which depicted nudity, sexual conduct or sado-masochistic abuse;

2. That the defendant had knowledge of the character and content of that material;

3. That the material was harmful to minors; and

4. That the defendant sold or loaned that material to (specify), and (specify) was a minor.

*[NOTE: If the affirmative defense does not apply:*

If you find the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable

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<sup>8</sup> See Penal Law § 15.05(3).

doubt any one or more of those elements, you must find the defendant not guilty of this crime.

*[NOTE: If the affirmative defense does apply:*

If you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of Disseminating Indecent Material to Minors in the Second Degree.

If you find that the People have proven beyond a reasonable doubt each of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of the crime of Disseminating Indecent Material to Minors in the Second Degree, you will not consider the affirmative defense.

Under our law, the People are not required to prove beyond a reasonable doubt, that the defendant knew the person was less than seventeen years of age. It is, however, an affirmative defense to this charge of Disseminating Indecent Material to Minors in the Second Degree that:

(a) the defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and

(b) such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more.<sup>9</sup>

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

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<sup>9</sup> See Penal Law § 235.23(2).

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

If you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven beyond a reasonable doubt each of the elements of Disseminating Indecent Material to Minors in the Second Degree, you must find the defendant guilty of that crime.

If you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of Disseminating Indecent Material to Minors in the Second Degree.]