

**DISSEMINATING INDECENT MATERIAL TO MINORS
IN THE SECOND DEGREE
Penal Law § 235.21(3)
(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, knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he or she intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms: “minor,” “nudity,” “simulated,” “sexual conduct,” “sado-masochistic abuse,” “harmful to minors” and “intentionally.”

MINOR means any person less than seventeen years old.¹

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.²

SIMULATED means the explicit depiction of the condition or conduct described which creates the appearance of such

¹ Penal Law § 235.20(1).

² Penal Law § 235.20(2).

condition or conduct.³

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.⁴

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.⁵

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.⁶

“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.⁷

Intent means conscious objective or purpose. Thus, a person **INTENTIONALLY** uses a computer system to initiate or engage in a communication with a minor when that person's

³ See Penal Law § 235.00(6).

⁴ Penal Law § 235.20(3).

⁵ Penal Law § 235.20(5).

⁶ Penal Law § 235.20(6).

⁷ Penal Law § 235.20(4).

conscious objective or purpose is to do so .⁸

[*Note: Add if appropriate:*

It is a defense to this charge that:

Select as appropriate:

the defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of actions taken by the minor.

the defendant took, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to the described materials, which involved any appropriate measures to restrict minors from access to such communications, including any method which was feasible under available technology.

the defendant restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number.

the defendant in good faith established a mechanism such that the labeling, segregation, or other mechanism enabled such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant did not otherwise solicit minors not subject to such screening or blocking capabilities to access that material or to circumvent any such screening or blocking.⁹]

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 (*specify*)

⁸ See Penal Law § 15.05(1).

⁹ Penal Law § 235.23(3).

elements:

1. That on or about (date), in the county of (county), the defendant, (defendant's name), intentionally used a computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another;

2. That the defendant did so to initiate or engage in a communication with a minor which, in whole or in part, depicted actual or simulated nudity, sexual conduct or sado-masochistic abuse;

3. That the defendant knew the character and content of that communication;

4. That the communication was harmful to minors; and

5. That the defendant initiated or engaged in that communication with (specify), and (specify) was a minor;[and]

[NOTE: If applicable, select appropriate paragraph(s) negating a defense, as element number 6, etc.:

6.

That the defendant did not make a reasonable effort to ascertain the true age of the minor.

That in the defendant's effort to ascertain the true age of the minor, the defendant was not prevented from ascertaining the age of the minor as a result of actions taken by the minor.

That the defendant did not take, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to the described materials.

That the defendant did not restrict access to such materials by requiring use of a verified credit card, debit account, adult

access code or adult personal identification number.

That the defendant did not in good faith establish a mechanism such that the labeling, segregation, or other mechanism enabled such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening.

That the defendant solicited minors not subject to established screening or blocking capabilities to access that material or to circumvent any such screening or blocking.

[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 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, it is an affirmative defense to this charge of Disseminating Indecent Material to Minors in the Second Degree that the persons to whom the allegedly indecent material was disseminated, or the audience to an allegedly obscene

performance, consisted of persons or institutions having scientific, educational, governmental or similar justification for disseminating or viewing the same.¹⁰

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

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.]

¹⁰Penal Law § 235.15(1).