

**PROMOTING A SEXUAL PERFORMANCE BY A CHILD**  
**Penal Law § 263.15**  
**(Committed on or after Nov. 1, 2003)<sup>1</sup>**  
**(Revised June, 2013)<sup>2</sup>**

The (*specify*) count is Promoting a Sexual Performance by a Child.

Under our law, a person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs or promotes any performance which includes sexual conduct by a child less than seventeen years of age.

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

PROMOTE means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.<sup>3</sup>

[Images stored in the cache of a computer may constitute evidence of images that were previously viewed. However, viewing computer images of a sexual performance by a child on a computer does not by itself constitute promotion of such

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<sup>1</sup> The instruction for this crime which was in effect prior to Nov. 1, 2003 is set forth in the section on Instructions for Certain Former Crimes.

<sup>2</sup> The 2013 revision was for two purposes. The first was to include in the definition of "promote," the Court of Appeals interpretation of that term with respect to images stored in the cache of a computer (*see People v Kent*, 19 NY3d 290 [2012]). The second purpose was to incorporate the statutory modification of the definition of "promote," which excluded liability for an attorney in certain circumstances (*see* Penal Law § 263.00 [9], added by the L 2012, ch 456, § 3).

<sup>3</sup> Penal Law § 263.00 (5); *See also People v Keyes*, 75 NY2d 343, 348 (1990) ("procure" includes the "acquisition of child pornography, whether for personal consumption or for distribution to others.")

images. Rather, some affirmative act, such as printing, saving, downloading or the like, is required to show that defendant in fact exercised dominion and control over the images that were on his or her screen.]<sup>4</sup>

Add if appropriate:

The term “promote” shall not include conduct by an attorney when the performance was provided to such attorney in relation to the representation of a person under investigation or charged with a Penal Law offense or as a respondent pursuant to the Family Court Act, and was limited in use for the purpose of representation for the period of such representation.<sup>5</sup>

PERFORMANCE means any play, motion picture, photograph or dance. [“Performance” also means any other visual representation exhibited before an audience.]<sup>6</sup>

SEXUAL CONDUCT means actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.<sup>7</sup>

“Simulated” means the explicit depiction of any sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.<sup>8</sup>

“Oral sexual conduct” means conduct between persons consisting of contact between the mouth and the

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<sup>4</sup> See *People v Kent*, 19 NY3d 290 (2012).

<sup>5</sup> See Penal Law § 263.00 (9), added by the L 2012, ch 456, § 3.

<sup>6</sup> Penal Law § 263.00 (4); See also *People v Fraser*, 96 NY2d 318, 328 (2001) (a photograph includes a digital computer image).

<sup>7</sup> Penal Law § 263.00 (3).

<sup>8</sup> Penal Law § 263.00 (6).

penis, the mouth and the anus, or the mouth and the vulva or vagina.<sup>9</sup>

“Anal sexual conduct” means conduct between persons consisting of contact between the penis and anus.<sup>10</sup>

“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>11</sup>

*[Add where appropriate:*

In order to determine whether the person who participated in a sexual performance was under the age of seventeen years, you may make such determination by

*Select appropriate alternative(s):*

personal inspection of the child,

inspection of a photograph [or motion picture] which constituted the sexual performance,

oral testimony by a witness to the sexual performance as to the age of the child based upon the child’s appearance,

expert medical testimony based upon the appearance of the child in the sexual performance.<sup>12]</sup>

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<sup>9</sup> Penal Law § 130.00 (2) (a).

<sup>10</sup> Penal Law § 130.00 (2) (b).

<sup>11</sup> Penal Law § 263.00 (8), Penal Law § 235.20.

<sup>12</sup> Penal Law § 263.25. That statute also authorizes proof of the age of the child by “any other method authorized by any applicable provision of law or by the rules of evidence at common law.”

*[Add where the affirmative defense 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 child was less than seventeen years of age.<sup>13]</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, both of the following two elements:

1. That on or about (date), in the County of (County), the defendant, (defendant's name), produced, directed, or promoted a performance which included sexual conduct by a child less than seventeen years of age; and
2. That the defendant knew the character and content of such performance.

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

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

If you find the People have not proven beyond a reasonable doubt either one or both 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 either one or both of those elements, you must find the defendant not guilty of the crime of Promoting a Sexual Performance by a Child.

If you find that the People have proven beyond a reasonable doubt each of those elements, you must consider an

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<sup>13</sup> Penal Law § 15.05 (3).

affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Promoting a Sexual Performance by a Child, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge of Promoting a Sexual Performance by a Child that

*Select appropriate alternative:*

the defendant in good faith reasonably believed the person appearing in the performance was seventeen years of age or older.<sup>14</sup>

or

the defendant was a librarian engaged in the normal course of his/her employment, a motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter or in any other non-managerial or non-supervisory capacity in a motion picture theatre; provided he/she has no financial interest, other than his/her employment, which employment does not encompass compensation based upon any proportion of the gross receipts, in the promotion of a sexual performance for sale, rental or exhibition or in the promotion, presentation or direction of any sexual performance, or is in any way responsible for acquiring such material for sale, rental or exhibition.<sup>15</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>14</sup> Penal Law § 263.20 (1).

<sup>15</sup> Penal Law § 263.20 (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 both of the elements of Promoting a Sexual Performance by a Child, 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 Promoting a Sexual Performance by a Child.]