

**DISSEMINATING INDECENT MATERIAL TO MINORS
FIRST DEGREE
(D Felony)
PENAL LAW 235.22
(Committed on or after March 19, 2007)¹**

The _____ count is Disseminating Indecent Material to Minors in the First Degree.

Under our law, a person is guilty of Disseminating Indecent Material to Minors in the First Degree when, knowing the character and content of the communication which, in whole or in part, depicts or describes, either in words or images 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, and by means of such communication he or she intentionally² importunes, invites or induces a minor to engage in sexual intercourse, oral sexual conduct or anal sexual conduct, or sexual contact with him or her, [or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his or her benefit].

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,” [“benefit”] and “intentionally.”³

¹ This charge was revised to add the words “or describes in words or images” as required by a statutory amendment, effective March 19, 2007. L.2007, c.8. See also *People v. Kozlow*, 2007 WL 1213697 (N.Y. Court of Appeals).

² The word “intentionally” has been added to comport with *People v. Foley*, 94 N.Y.2d 668 (2000).

³ The definitions of the terms “sexual intercourse,” “oral sexual conduct,” “anal sexual conduct,” “sexual contact,” “sexual performance”

MINOR means any person less than seventeen years old.⁴

SIMULATED means the explicit depiction or description of the conduct described which creates the appearance of such conduct.⁵

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.⁶

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.⁷

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.⁸

HARMFUL TO MINOR 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

and "obscene sexual performance" may be found in Penal Law §§ 130.00(1), 130.00(2)(a), 130.00(2)(b), 130.00(3), 263.00(1) and 263.00(2) respectively, and may be included in the charge as appropriate.

⁴ Penal Law § 235.20(1).

⁵ See Penal Law § 235.00(6).

⁶ Penal Law § 235.20(2).

⁷ Penal Law § 235.20(3).

⁸ Penal Law § 235.20(5).

(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.⁹

“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.¹⁰

[BENEFIT means any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary.¹¹]

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 conscious objective or purpose is to do so, and a person INTENTIONALLY importunes, invites or induces a minor to engage in sexual activity when that person’s conscious objective or purpose is to do so.¹²

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; or

⁹ Penal Law § 235.20(6).

¹⁰ Penal Law § 235.20(4).

¹¹ See Penal Law § 10.00(17).

¹² See Penal Law § 15.05(1).

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; or

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; or

the defendant in good faith established a mechanism such as labelling, segregation, or other mechanism enabling 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.]¹³

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 six [seven] 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 or described, either in words or images actual or simulated nudity, [sexual conduct] or [sado-masochistic abuse];

3. That the defendant knew the character and content of

¹³ See Penal Law § 235.23(3).

that communication;

4. That the communication was harmful to minors;

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

6. That by means of such communication the defendant intentionally importuned, invited or induced (specify) to engage in sexual intercourse, oral sexual conduct or anal sexual conduct or sexual contact with him/her, [or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his/ her benefit]; [and]

[NOTE: If applicable, select appropriate paragraph(s) negating a defense, as element number 7, etc.:

7.

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 as labelling, segregation, or other mechanism enabling 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.]

Therefore, if you find that the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of the crime of Disseminating Indecent Material to Minors in the First Degree as charged in the _____ count.

On the other hand, 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 First Degree as charged in the _____ count.