

DISSEMINATION OF A VISUAL IMAGE OF A NUDE OR PARTIALLY NUDE PERSON OR THE SEXUAL OR INTIMATE PARTS OF A PERSON OR A CHILD UNDER OR AROUND THEIR CLOTHING

G.L. c. 272, § 105(c)

Use the instruction below where the visual image is alleged to depict a nude or partially nude person or the sexual or intimate parts of a person under or around their clothing. G.L. c. 272, § 105(c), ¶ 1.

Use the instruction beginning on page 6 where the visual image is alleged to depict the sexual or intimate parts of a child under eighteen under or around their clothing. G.L. c. 272, § 105(c), ¶ 2.

**Visual Image Depicting a Nude or Partially Nude Person or the Sexual or Intimate Parts of a Person Under or Around Their Clothing
G.L. c. 272, § 105(c), ¶ 1**

The defendant is charged with dissemination of a visual image of (a nude or partially nude person) (the sexual or intimate parts of a person under or around their clothing). To prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

***First:* That the defendant disseminated a visual image of another person without that person's consent;**

***Second:* That the visual image depicted (a nude or partially nude person) (the sexual or intimate parts of a person under or around their clothing);**

***Third:* That the visual image was obtained illegally; and**

***Fourth:* That the defendant knew that the visual image was obtained illegally.**

To prove the first element, the Commonwealth must prove that the defendant disseminated a visual image of another person without that person’s consent. The word “disseminate” means to distribute, sell, exhibit, display, print, produce, publish, manufacture, import, or lease.

See G.L. c. 272, § 31. It is sufficient if the image is disseminated solely to the person depicted, and dissemination does not require receipt by a broad audience or a public or commercial character. See *Commonwealth v. Ubeda*, 99 Mass. App. Ct. 587, 595-596 (2021); *Commonwealth v. Dodgson*, 80 Mass. App. Ct. 307, 211 (2011).

To prove the second element, the Commonwealth must prove that the visual image depicted (a nude or partially nude person) (the sexual or intimate parts of a person under or around their clothing).

General Laws c. 272, § 105(c) penalizes the dissemination of a visual image obtained in violation of G.L. c. 272, § 105(b), while § 105(b) penalizes the violation of privacy associated with recording that visual image. *Commonwealth v. Cooper*, 100 Mass. App. Ct. 345, 349 (2021). Accordingly, the harm proscribed by § 105(c) is the visual image itself, as opposed to the conduct of recording the visual image proscribed by § 105(b). See *id.* (citing G.L. c. 272, §§ 29A, 29B, 29C, and *Commonwealth v. Oakes*, 407 Mass. 92, 97 (1990)).

(“Partially nude” means the exposure of a person’s genitals, buttocks, or pubic area, or the exposure of a female breast below a point immediately above the top of the areola.)

(“Sexual or intimate parts” are the genitals, buttocks, pubic area, or female breast below a point immediately above the tip of the areola, whether naked or covered by clothing or undergarments.)

G.L. c. 272, § 105(a).

To prove the third element, the Commonwealth must prove that the visual image was obtained illegally.

(A visual image of a nude or partially nude person was obtained illegally when the visual image was:

- **Intentionally secretly recorded using a camera, video camera, cellular phone, computer, or other electronic device;**
- **Recorded without the person’s knowledge and consent; and**
- **Recorded under circumstances where the person had a reasonable expectation of privacy in not being recorded.)**

See G.L. c. 272, § 105(b), ¶ 1; Instruction 6.530 (Secretly Photographing or Videotaping a Nude or Partially Nude Person).

(A visual image of the sexual or intimate parts of a person under or around their clothing was obtained illegally when the visual image was:

- **Intentionally secretly recorded using a camera, video camera, cellular phone, computer, or other electronic device;**

- **Recorded without the person’s knowledge and consent;**
- **Recorded to view or attempt to view the person’s sexual or intimate parts; and**
- **Recorded under circumstances where a reasonable person would believe that their sexual or intimate parts would not have been visible to the public.)**

See G.L. c. 272, § 105(b), ¶ 2; Instruction 6.535 (Secretly Photographing, Videotaping, or Electronically Surveilling a Person’s Intimate Parts Under or Around Clothing).

In determining whether the visual image was intentionally secretly recorded, consider that we must often decide what was intended based on the actions of others. You are to decide whether the visual image was intentionally secretly recorded from the evidence, together with any reasonable inferences that you draw from it.

To prove the fourth element, the Commonwealth must prove that the defendant knew that the visual image was obtained illegally.

(This means that the Commonwealth must prove that the defendant knew that the visual image of a nude or partially nude person was intentionally secretly recorded, without the person’s

knowledge and consent, and under circumstances where the person had a reasonable expectation of privacy in not being recorded.)

(This means that the Commonwealth must prove that the defendant knew the visual image of the sexual or intimate parts of a person under or around their clothing was intentionally secretly recorded, without the person's knowledge and consent, in order to view or attempt to view the person's sexual or intimate parts, and under circumstances where a reasonable person would believe that their sexual or intimate parts would not have been visible to the public.)

To determine whether the defendant had this knowledge, you are required to make a decision about the defendant's state of mind. It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often look to the actions of others to decide what their state of mind is. You may examine the defendant's actions and words, and all the surrounding circumstances, to help you determine the extent of the defendant's knowledge.

If the Commonwealth has proven all four elements beyond a reasonable doubt, you should return a verdict of guilty. If the

Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

**Visual Image Depicting the Sexual or Intimate Parts
of a Child Under Eighteen Under or Around Their Clothing
G.L. c. 272, § 105(c), ¶ 2**

The defendant is charged with dissemination of a visual image of the sexual or intimate parts of a child under eighteen under or around their clothing. To prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

***First:* That the defendant disseminated a visual image of a child who was under the age of eighteen;**

***Second:* That the visual image depicted the sexual or intimate parts of the child under or around their clothing;**

***Third:* That the visual image was obtained illegally; and**

***Fourth:* That the defendant knew that the visual image was obtained illegally.**

To prove the first element, the Commonwealth must prove that the defendant disseminated a visual image of a child who was under

the age of eighteen. The word “disseminate” means to distribute, sell, exhibit, display, print, produce, publish, manufacture, import, or lease.

See G.L. c. 272, § 31. It is sufficient if the dissemination is made solely to the person depicted in the image, and dissemination does not require receipt by a broad audience or a public or commercial character. See *Commonwealth v. Ubeda*, 99 Mass. App. Ct. 587, 595-596 (2021); *Commonwealth v. Dodgson*, 80 Mass. App. Ct. 307, 211 (2011).

To prove the second element, the Commonwealth must prove that the visual image depicted the sexual or intimate parts of the child under or around their clothing.

General Laws c. 272, § 105(c) penalizes the dissemination of a visual image obtained in violation of G.L. c. 272, § 105(b), while § 105(b) penalizes the violation of privacy associated with recording that visual image. *Commonwealth v. Cooper*, 100 Mass. App. Ct. 345, 349 (2021). Accordingly, the harm proscribed by § 105(c) is the visual image itself, as opposed to the conduct of recording the visual image proscribed by § 105(b). See *id.* (citing G.L. c. 272, §§ 29A, 29B, 29C, and *Commonwealth v. Oakes*, 407 Mass. 92, 97 (1990)).

“Sexual or intimate parts” are the genitals, buttocks, pubic area, or female breast below a point immediately above the tip of the areola, regardless of whether those parts are naked or covered by clothing or undergarments.

G.L. c. 272, § 105(a).

To prove the third element, the Commonwealth must prove that the visual image was obtained illegally. A visual image of

the sexual or intimate parts of a child under or around their clothing was obtained illegally when the image was:

- **Intentionally secretly recorded using a camera, video camera, cellular phone, computer, or other electronic device,**
- **Recorded to view or attempt to view the child's sexual or intimate parts, and**
- **Recorded under circumstances where a reasonable person would believe that their sexual or intimate parts would not have been visible to the public.**

See G.L. c. 272, § 105(b), ¶ 3; Instruction 6.535 (Secretly Photographing, Videotaping, or Electronically Surveilling a Person's Intimate Parts Under or Around Clothing).

In determining whether the visual image was intentionally secretly recorded, consider that we must often decide what was intended based on the actions of others. You are to decide whether the visual image was intentionally secretly recorded from the evidence, together with any reasonable inferences that you choose to draw from it.

To prove the fourth element, the Commonwealth must prove that the defendant knew that the visual image was obtained illegally.

This means that the Commonwealth must prove that the defendant knew the visual image of the sexual or intimate parts of a child under or around their clothing was intentionally secretly recorded, in order to view or attempt to view the child's sexual or intimate parts, and under circumstances where a reasonable person would believe that their sexual or intimate parts would not have been visible to the public.

To determine whether the defendant had this knowledge, you are required to make a decision about the defendant's state of mind. It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often look to the actions of others to decide what their state of mind is. You may examine the defendant's actions and words, and all the surrounding circumstances, to help you determine the extent of the defendant's knowledge.

If the Commonwealth has proven all four elements beyond a reasonable doubt, you should return a verdict of guilty. If the Commonwealth has failed to prove one or more of the elements beyond a reasonable doubt, you must find the defendant not guilty.

NOTE:

1. Reasonable expectation of privacy. “A person does not lose all reasonable expectation of privacy in his or her covered “sexual or intimate parts” simply by being in public. Instead, that expectation must be measured against current mores, taking into account the totality of the circumstances.”

Commonwealth v. Nascimento, 91 Mass. App. Ct. 665, 667 (2017). “[A]lthough location certainly is a factor to be considered in assessing what an objectively reasonable expectation would be at that particular moment, it is neither the only factor nor is it necessarily dispositive. Likewise, a person’s state of dress or undress is a factor to be considered, but it too is not dispositive.” *Id.*