

## **Chapter 5b Sexual Exploitation Act**

### **Part 1 General Provisions**

#### **76-5b-101 Title.**

This chapter is known as the "Sexual Exploitation Act."

Enacted by Chapter 320, 2011 General Session

#### **76-5b-102 Legislative determinations -- Purpose of chapter.**

- (1) The Legislature of Utah determines that:
  - (a) the sexual exploitation of a minor is excessively harmful to the minor's physiological, emotional, social, and mental development;
  - (b) the sexual exploitation of a vulnerable adult who lacks the capacity to consent to sexual exploitation can result in excessive harm to the vulnerable adult's physiological, emotional, and social well-being;
  - (c) a minor cannot intelligently and knowingly consent to sexual exploitation;
  - (d) regardless of whether it is classified as legally obscene, material that sexually exploits a minor, or a vulnerable adult who does not have the capacity to consent to sexual exploitation, is not protected by the First Amendment of the United States Constitution or by the First or Fifteenth sections of Article I of the Utah Constitution and may be prohibited; and
  - (e) prohibition of and punishment for the distribution, possession, possession with intent to distribute, and production of materials that sexually exploit a minor, or a vulnerable adult who lacks the capacity to consent to sexual exploitation, is necessary and justified to eliminate the market for those materials and to reduce the harm to the minor or vulnerable adult inherent in the perpetuation of the record of the minor's or vulnerable adult's sexually exploitive activities.
- (2) It is the purpose of this chapter to prohibit the production, possession, possession with intent to distribute, and distribution of materials that sexually exploit a minor, or a vulnerable adult who lacks capacity to consent to sexual exploitation, regardless of whether the materials are classified as legally obscene.

Renumbered and Amended by Chapter 320, 2011 General Session

#### **76-5b-103 Definitions.**

As used in this chapter:

- (1) "Child pornography" means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:
  - (a) the production of the visual depiction involves the use of a minor engaging in sexually explicit conduct;
  - (b) the visual depiction is of a minor engaging in sexually explicit conduct; or
  - (c) the visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

- (2) "Distribute" means the selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, or otherwise transferring or presenting child pornography or vulnerable adult pornography with or without consideration.
- (3) "Identifiable minor" means a person:
  - (a)
    - (i) who was a minor at the time the visual depiction was created, adapted, or modified; or
    - (ii) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and
  - (b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a birthmark, or other recognizable feature.
- (4) "Identifiable vulnerable adult" means a person:
  - (a)
    - (i) who was a vulnerable adult at the time the visual depiction was created, adapted, or modified; or
    - (ii) whose image as a vulnerable adult was used in creating, adapting, or modifying the visual depiction; and
  - (b) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a birthmark, or other recognizable feature.
- (5) "Lacks capacity to consent" is as defined in Subsection 76-5-111(1).
- (6) "Live performance" means any act, play, dance, pantomime, song, or other activity performed by live actors in person.
- (7) "Minor" means a person younger than 18 years of age.
- (8) "Nudity or partial nudity" means any state of dress or undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below the top of the areola, is less than completely and opaquely covered.
- (9) "Produce" means:
  - (a) the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography or vulnerable adult pornography; or
  - (b) the securing or hiring of persons to engage in the photographing, filming, taping, directing, producing, creating, designing, or composing of child pornography or vulnerable adult pornography.
- (10) "Sexually explicit conduct" means actual or simulated:
  - (a) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
  - (b) masturbation;
  - (c) bestiality;
  - (d) sadistic or masochistic activities;
  - (e) lascivious exhibition of the genitals, pubic region, buttocks, or female breast of any person;
  - (f) the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person;
  - (g) the fondling or touching of the genitals, pubic region, buttocks, or female breast; or
  - (h) the explicit representation of the defecation or urination functions.
- (11) "Simulated sexually explicit conduct" means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.
- (12) "Vulnerable adult" is as defined in Subsection 76-5-111(1).
- (13) "Vulnerable adult pornography" means any visual depiction, including any live performance, photograph, film, video, picture, or computer or computer-generated image or picture, whether

made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where:

- (a) the production of the visual depiction involves the use of a vulnerable adult engaging in sexually explicit conduct;
- (b) the visual depiction is of a vulnerable adult engaging in sexually explicit conduct; or
- (c) the visual depiction has been created, adapted, or modified to appear that an identifiable vulnerable adult is engaging in sexually explicit conduct.

Amended by Chapter 290, 2013 General Session

## **Part 2 Sexual Exploitation**

### **76-5b-201 Sexual exploitation of a minor -- Offenses.**

- (1) A person is guilty of sexual exploitation of a minor:
  - (a) when the person:
    - (i) knowingly produces, possesses, or possesses with intent to distribute child pornography; or
    - (ii) intentionally distributes or views child pornography; or
  - (b) if the person is a minor's parent or legal guardian and knowingly consents to or permits the minor to be sexually exploited as described in Subsection (1)(a).
- (2) Sexual exploitation of a minor is a second degree felony.
- (3) It is a separate offense under this section:
  - (a) for each minor depicted in the child pornography; and
  - (b) for each time the same minor is depicted in different child pornography.
- (4) It is an affirmative defense to a charge of violating this section that no person under 18 years of age was actually depicted in the visual depiction or used in producing or advertising the visual depiction.
- (5) In proving a violation of this section in relation to an identifiable minor, proof of the actual identity of the identifiable minor is not required.
- (6) This section may not be construed to impose criminal or civil liability on:
  - (a) any entity or an employee, director, officer, or agent of an entity when acting within the scope of employment, for the good faith performance of:
    - (i) reporting or data preservation duties required under any federal or state law; or
    - (ii) implementing a policy of attempting to prevent the presence of child pornography on any tangible or intangible property, or of detecting and reporting the presence of child pornography on the property;
  - (b) any law enforcement officer acting within the scope of a criminal investigation;
  - (c) any employee of a court who may be required to view child pornography during the course of and within the scope of the employee's employment;
  - (d) any juror who may be required to view child pornography during the course of the person's service as a juror; or
  - (e) any attorney or employee of an attorney who is required to view child pornography during the course of a judicial process and while acting within the scope of employment.

Amended by Chapter 116, 2016 General Session

**76-5b-202 Sexual exploitation of a vulnerable adult -- Offenses.**

- (1) A person is guilty of sexual exploitation of a vulnerable adult if the person:
  - (a)
    - (i)
      - (A) knowingly produces, possesses, or possesses with intent to distribute material that the person knows is vulnerable adult pornography; or
      - (B) intentionally distributes or views material that the person knows is vulnerable adult pornography; and
    - (ii) the vulnerable adult who appears in, or is depicted in, the vulnerable adult pornography lacks capacity to consent to the conduct described in Subsection (1)(a); or
  - (b) is a vulnerable adult's legal guardian and knowingly consents to, or permits the vulnerable adult to be, sexually exploited as described in Subsection (1)(a).
- (2) Sexual exploitation of a vulnerable adult is a third degree felony.
- (3) It is a separate offense under this section:
  - (a) for each vulnerable adult depicted in the vulnerable adult pornography; and
  - (b) for each time the same vulnerable adult is depicted in different vulnerable adult pornography.
- (4) It is an affirmative defense to a charge of violating this section that no vulnerable adult was actually depicted in the visual depiction or used in producing or advertising the visual depiction.
- (5) In proving a violation of this section in relation to an identifiable vulnerable adult, proof of the actual identity of the identifiable vulnerable adult is not required.
- (6) This section may not be construed to impose criminal or civil liability on:
  - (a) any entity or an employee, director, officer, or agent of an entity, when acting within the scope of employment, for the good faith performance of:
    - (i) reporting or data preservation duties required under any federal or state law; or
    - (ii) implementing a policy of attempting to prevent the presence of vulnerable adult pornography on any tangible or intangible property, or of detecting and reporting the presence of vulnerable adult pornography on the property; or
  - (b) any law enforcement officer acting within the scope of a criminal investigation.

Enacted by Chapter 320, 2011 General Session

**76-5b-203 Distribution of an intimate image -- Penalty.**

- (1) As used in this section:
  - (a) "Distribute" means selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, providing access to, or otherwise transferring or presenting an image to another individual, with or without consideration.
  - (b) "Intimate image" means any visual depiction, photograph, film, video, recording, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, that depicts:
    - (i) exposed human male or female genitals or pubic area, with less than an opaque covering;
    - (ii) a female breast with less than an opaque covering, or any portion of the female breast below the top of the areola; or
    - (iii) the individual engaged in any sexually explicit conduct.
  - (c) "Sexually explicit conduct" means actual or simulated:
    - (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;
    - (ii) masturbation;
    - (iii) bestiality;

- (iv) sadistic or masochistic activities;
  - (v) exhibition of the genitals, pubic region, buttocks, or female breast of any individual;
  - (vi) visual depiction of nudity or partial nudity;
  - (vii) fondling or touching of the genitals, pubic region, buttocks, or female breast; or
  - (viii) explicit representation of the defecation or urination functions.
- (d) "Simulated sexually explicit conduct" means a feigned or pretended act of sexually explicit conduct that duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.
- (2) An actor commits the offense of distribution of intimate images if the actor, with the intent to cause emotional distress or harm, knowingly or intentionally distributes to any third party any intimate image of an individual who is 18 years of age or older, if:
- (a) the actor knows that the depicted individual has not given consent to the actor to distribute the intimate image;
  - (b) the intimate image was created by or provided to the actor under circumstances in which the individual has a reasonable expectation of privacy; and
  - (c) actual emotional distress or harm is caused to the person as a result of the distribution under this section.
- (3) This section does not apply to:
- (a)
    - (i) lawful practices of law enforcement agencies;
    - (ii) prosecutorial agency functions;
    - (iii) the reporting of a criminal offense;
    - (iv) court proceedings or any other judicial proceeding; or
    - (v) lawful and generally accepted medical practices and procedures;
  - (b) an intimate image if the individual portrayed in the image voluntarily allows public exposure of the image; or
  - (c) an intimate image that is portrayed in a lawful commercial setting.
- (4)
- (a) This section does not apply to an Internet service provider or interactive computer service, as defined in 47 U.S.C. Sec. 230(f)(2), a provider of an electronic communications service as defined in 18 U.S.C. Sec. 2510, a telecommunications service, information service, or mobile service as defined in 47 U.S.C. Sec. 153, including a commercial mobile service as defined in 47 U.S.C. Sec. 332(d), or a cable operator as defined in 47 U.S.C. Sec. 522, if:
    - (i) the distribution of an intimate image by the Internet service provider occurs only incidentally through the provider's function of:
      - (A) transmitting or routing data from one person to another person; or
      - (B) providing a connection between one person and another person;
    - (ii) the provider does not intentionally aid or abet in the distribution of the intimate image; and
    - (iii) the provider does not knowingly receive from or through a person who distributes the intimate image a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute the intimate image.
  - (b) This section does not apply to a hosting company, as defined in Section 76-10-1230, if:
    - (i) the distribution of an intimate image by the hosting company occurs only incidentally through the hosting company's function of providing data storage space or data caching to a person;
    - (ii) the hosting company does not intentionally engage, aid, or abet in the distribution of the intimate image; and

- (iii) the hosting company does not knowingly receive from or through a person who distributes the intimate image a fee greater than the fee generally charged by the provider, as a specific condition for permitting the person to distribute, store, or cache the intimate image.
  - (c) A service provider, as defined in Section 76-10-1230, is not negligent under this section if it complies with Section 76-10-1231.
- (5)
- (a) Distribution of an intimate image is a class A misdemeanor except under Subsection (5)(b).
  - (b) Distribution of an intimate image is a third degree felony on a second or subsequent conviction for an offense under this section that arises from a separate criminal episode as defined in Section 76-1-401.

Enacted by Chapter 124, 2014 General Session

### **Part 3 Miscellaneous**

#### **76-5b-301 Determination whether material violates chapter.**

- (1) In determining whether material is in violation of this chapter, the material need not be considered as a whole, but may be examined by the trier of fact in part only.
- (2) It is not an element of the offense of sexual exploitation of a minor that the material appeal to the prurient interest in sex of the average person nor that prohibited conduct need be portrayed in a patently offensive manner.
- (3) It is not an element of the offense of sexual exploitation of a vulnerable adult that the material appeal to the prurient interest in sex of the average person nor that prohibited conduct need be portrayed in a patently offensive manner.

Renumbered and Amended by Chapter 320, 2011 General Session

#### **76-5b-302 Lack of knowledge of age not a defense.**

It is not a defense to an offense described in this chapter that the accused did not know the age of the victim.

Enacted by Chapter 320, 2011 General Session