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The Impact of Digital Technology on Child Pornography Laws

Digital Technology and Child Pornography

- Between 1996 and 2005 there was a 2,026% increase in the number of such cases opened by the FBI.
- In the UK, the number of child pornography prosecutions increased from 93 in 1994 to 1,890 in 2003.
- The distribution of child pornography is increasingly organised.



Digital Technology and Child Pornography

Digital technology facilitates the production and distribution of illegal images in a number of ways:

- no need for external processing;
- images can be replicated easily and cheaply;
- huge storage capacity and portability;
- anonymity;
- integration of computing and communication technologies; and
- potential audience of millions.



A Global Problem: Council of Europe Convention on Cybercrime

- The first multilateral instrument drafted to address the problems of cybercrime.
- Article 9 requires parties to criminalise, in relation to child pornography contained in computers or transmitted using computer systems:
 - producing for the purpose of distribution;
 - offering or making available;
 - distributing or transmitting;
 - procuring; or
 - possessing.

Possession of Child Pornography: s.70(1) *Crimes Act* 1958 (Vic)

- A person who knowingly possesses child pornography is guilty of an indictable offence (Level 6 imprisonment (5 years) maximum).
- *Child pornography* means ‘a film, photograph, publication or computer game that describes or depicts a person who is, or appears to be, a minor engaging in sexual activity or depicted in an indecent sexual manner or context.’

Some Legal Challenges

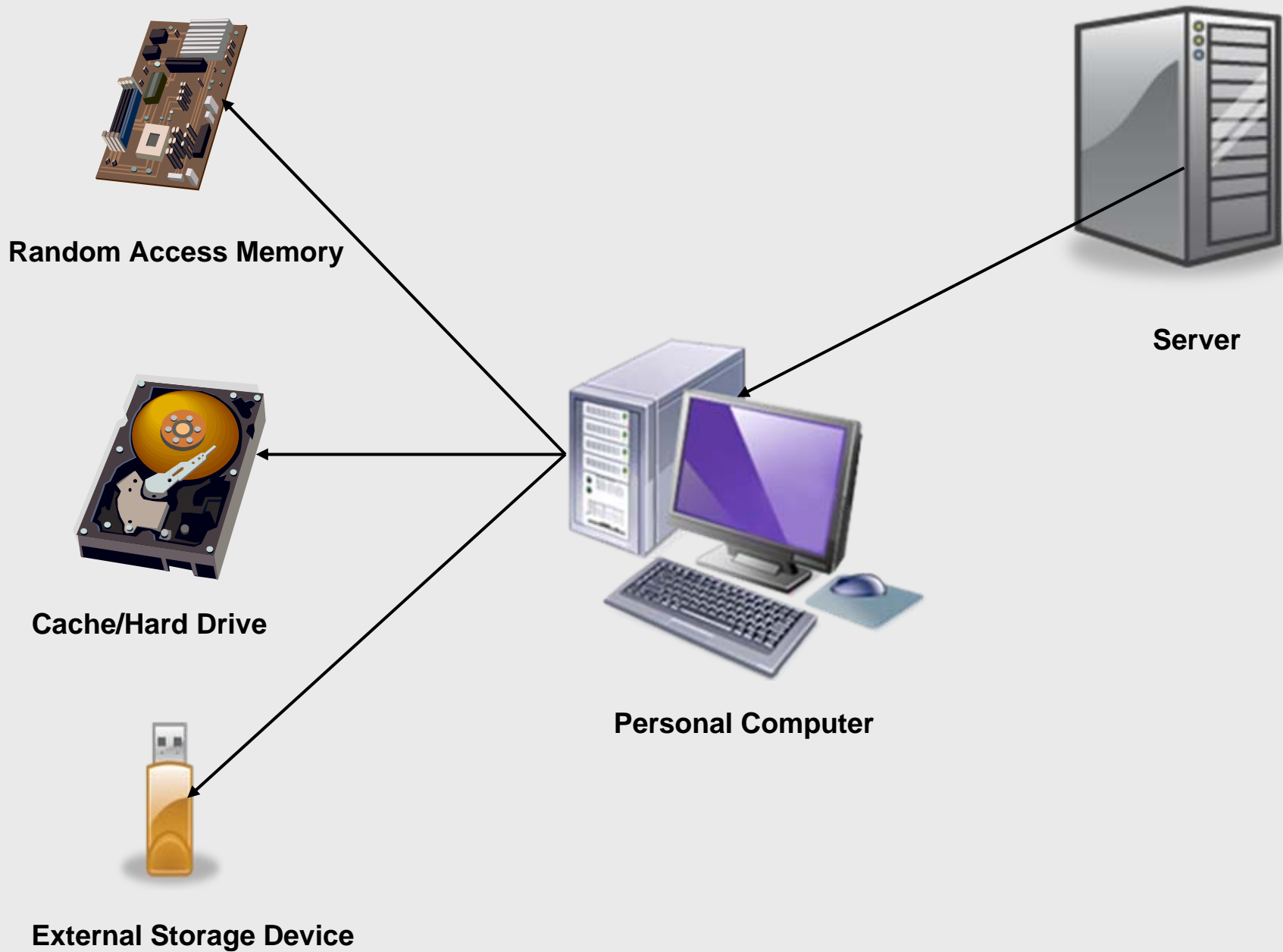
- *Minor* means a person under the age of 18 years. This definition varies between jurisdictions.
- How does the court determine when a person ‘appears to be’ a minor.
- What is ‘an indecent sexual manner or context’? (Conduct is indecent if it is ‘contrary to the ordinary standards of morality of respectable people within the community.’)

Ashcroft v The Free Speech Coalition

- The US *Child Pornography Prevention Act* 1996 prohibited, inter alia, sexually explicit images that appear to depict minors but which were produced without using real children.
- The US Supreme Court held that the prohibition was unconstitutional as restricting freedom of speech as guaranteed by the First Amendment.

The Meaning of 'Possession'

- For the purposes of the criminal law, possession requires proof of:
 - Physical Possession
 - Knowledge of possession.



Physical Possession

- Actual custody of digital images may be shown by:
 - physical possession of the computer or storage device;
 - control of images downloaded from the Internet.
- What of the situation where images are stored on a computer to which a number of people have access?

Physical Possession

- Where an image is deleted, whether the defendant is still in possession of that item depends on whether he still has custody and control of that item.
- For example, a defendant may still be in possession of an image in the 'recycle bin' but not if 'permanently' deleted from the computer.

Knowledge of Possession

- To be in possession the defendant must know that the item was in his or her custody or control.
- In a digital context, lack of knowledge may arise due to:
 - accident;
 - ignorance;
 - forgetfulness; and
 - deletion.

Intention to Possess

- A person may unwittingly receive an image of child pornography. For example, opening an unlabelled attachment to an email.
- There is some authority that possession also requires an intention to possess.
- A lack of intention to possess could be evidenced by immediately deleting the material.

Making vs. Possession

- There is English authority that the act of downloading child pornography can be prosecuted as the more serious offence of making child pornography.
- This offence is subject to higher levels of imprisonment and less/no defences.

An Easier Way: Access vs. Possession

- The concept of ‘access’ avoids many of the problems associated with ‘possession’.
- For example, under s.474.19(1) *Criminal Code Act 1995* (Cth) it is an offence to use a carriage service to access child pornography material.

Grooming: *US v. Wales* (10th Cir. 2005)

- caspercock (1:26:46 PM): hello, enjoying yourself?
- angelgirl12yo (1:26:53 PM): its ok
- angelgirl12yo (1:26:57 PM): kinda quiet
- caspercock (1:27:15 PM): what you doing?
- angelgirl12yo (1:27:26 PM): just chattin
- caspercock (1:27:49 PM): cool,
- caspercock (1:28:05 PM): I like your name, got a pic?
- angelgirl12yo (1:28:13 PM): no sorry
- caspercock (1:28:23 PM): that's ok.
- caspercock (1:28:28 PM): u really 12?
- angelgirl12yo (1:28:35 PM): ya
- caspercock (1:28:50 PM): that's cool
- caspercock (1:29:08 PM): I've never chatted with someone 12 on here.
- angelgirl12yo (1:29:16 PM): ok, nice meetin u tho
- caspercock (1:29:24 PM): nice meeting you too.
- caspercock (1:29:30 PM): I'm 21



“Grooming”: s.424.27 *Criminal Code* (Cth)

A person (the *sender*) commits an offence if:

- (a) the sender uses a carriage service to transmit a communication to another person (the *recipient*); and
- (b) the communication includes material that is indecent; and
- (c) the sender does this with the intention of making it easier to procure the recipient to engage in, or submit to, sexual activity with the sender; and
- (d) the recipient is someone who is, or who the sender believes to be, under 16 years of age; and
- (e) the sender is at least 18 years of age.