Chapter IX

Loaded Metaphors: Legal Explanations on Monitoring the Workplace in Spain

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Abstract

The main aim of this chapter is to analyse the contradictions among several verdicts in Spain about the legality of digital monitoring in the workplace, more specifically, the legal viability of reading workers’ e-mails. These contradictions arise mostly because of the use of two incompatible metaphors: e-mail as a company instrument and e-mail as a system to deliver letters. Nevertheless, the existence of these two metaphors is not mostly due to the judges’ lack of knowledge about digital media, but to political interests towards completely informating the workplace. If my analysis is correct, Spanish legal background does not allow the company instrument reading of the situation. E-mail as a letter is the only interpretation that should prevail.
Introduction: E-Mail Monitoring Goes to the Spanish Courts

Since 1999, digital monitoring of the workplace has been highly debated in court in Spain. There have been several sentences that have tried to decide whether and under which conditions monitoring workers’ e-mail is a legal activity. These sentences can be broadly filed under these two general readings:

1. **Instrumental reading.** Computers, networks, and usually even the e-mail account have been provided by the company. Therefore, they are company instruments, and so the company is allowed to monitor them anytime they want.

2. **Communication reading.** No matter who owns the instruments, e-mail is an instrument of personal communication; therefore, it is protected by the Spanish Constitution against any monitoring which has not been previously approved by a judge.

In this chapter, I plan to show that, due to the specific nature of the Spanish legislation, reading (1) is not sustainable at all, and the unique interpretation that should prevail is reading (2). Considering that reading (1) is argued by talented judges with enough computer and telecommunications knowledge, the only interpretation left is that we are at the beginning of the fight between two heavily politically loaded metaphors. The final outcome of this fight may determine the future of total informating of the workplace in Spain. The second section will present the legal context in Spain, including Constitution, criminal code, workers code, and doctrinal sentences. The third section will describe and analyse several recent sentences in order to establish the consistency and relevance of readings (1) and (2), arguing that only the second one holds. Special dedication will be devoted to sentence 402/2002, *E.G.G. v. Servicios Avanzados de Telecomunicaciones y Telemática SL* that more clearly aims at establishing legislation. Section 4 will briefly present and discuss the political agendas behind this fight among metaphors, establishing the main conclusions.

Background: Spanish Legislation Related to E-Mail Monitoring

This section does not aim to be a legal analysis of Spanish legislation. Instead, it is a layman’s presentation of the main involved principles in order to understand
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Darko Galinec (2010). *International Journal of Human Capital and Information Technology Professionals* (pp. 44-60).
[www.igi-global.com/article/human-capital-management-process-based/39058?camid=4v1a](www.igi-global.com/article/human-capital-management-process-based/39058?camid=4v1a)

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Raj Selladurai (2014). *Servant Leadership: Research and Practice* (pp. 360-362).
[www.igi-global.com/chapter/albanese-confectionery/106132?camid=4v1a](www.igi-global.com/chapter/albanese-confectionery/106132?camid=4v1a)