

FREEMarket

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REGULATE THE BLOGGERS?

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The Federal Trade Commission announced that it has the power to regulate blogs, specifically blogs that endorse commercial products. The unelected FTC—composed entirely of Bush appointees—mandates that “bloggers who make an endorsement must disclose the material connections they share with the seller of the product or service.”

Consider a scenario. Someone gives you a CD as gift. You like it. You post on your blog that others should buy a copy but don’t “disclose” that you received a free copy. This is a violation of the new regulation. You are hit with a fine of \$11,000.

This is merely a first step toward regulating the content of blogs themselves, as anyone who offers a personal testimonial about any product will be liable, under the Federal Trade Commission Act, should the FTC disagree with your personal experiences.

If you’re wondering just how big a mess the FTC can make, consider a decision published by D. Michael Chappell, the FTC’s chief administrative law judge. Judge Chappell caught FTC prosecutors in a blatant attempt to lie their way out of a bad situation arising from yet another misguided attempt to micromanage the World Wide Web. It’s a case that demonstrates the FTC’s unique combination of stupidity and narcissism.

The FTC has been waging war against small retailers of medicinal herbs. This rampage is directed against any website that dares to even suggest there may be some benefit to the use of herbs in treating diseases like cancer. The FTC is emphatic: No individual may speak about the health benefits of a product—even a legal product—without the express consent of the federal government. All speech not permitted is forbidden.

In this case, the FTC targeted William Isely, a retired 84-year-old engineer living in North Carolina. Since the 1970s, Isely has operated a small, home-based business selling dietary supplements. In 1993, he registered a trade name—Gemtronics—with the State of North Carolina solely for the purpose of collecting income taxes.

According to Judge Chappell’s opinion, after Isely was diagnosed with prostate cancer in 1999, “he began experimenting with using dietary supplements to help manage his symptoms and learned about the agaricus mushroom from Brazil.” Isely →



purchased the mushroom from Takesun through its website, www.agaricus.net. Isely's contact at Takesun was George Otto, a German national living in Brazil. Starting in 2000, Isely began ordering Takesun products wholesale from Otto for distribution to Isely's existing client base. Isely remained a sole proprietor and never entered into any formal distribution agreement with Takesun or Otto.

According to Judge Chappell's opinion: "In 2001, Isely agreed to share his prostate cancer story with people who were interested and gave Otto permission to use a small synopsis of Isely's experience, including his medical condition, his use of Takesun products, and his use of vitamins. Isely prepared a short statement that Otto was to use. In addition, Isely required Otto not to use Isely's real name, but instead to use the pseudonym 'Henry.' Isely gave Otto factual information reflected in Isely's medical records, so Isely was not concerned about misuse for advertising purposes."

Otto did not use the pseudonym, however, but Isely did not complain. This proved to be problematic later.

From 2000 until 2002, Takesun provided Isely a free webpage to help market products. According to Judge Chappell, "Isely's Webpage was not a separate website, but was a page linked to www.agaricus.net." After the FDA contacted Otto about the website, Isely decided to establish his own, separate website at www.our-agaricus.com.

According to the Judge, "Isely had no understanding of the technicalities of

registering websites or controlling their content," so he permitted Otto to do most of the work for him.

The principal function of Isely's website was the sale of RAAX11, a type of agaricus mushroom juice marketed as a dietary supplement. Isely's website directly competed with Otto's, even though Otto handled all of the back-end credit card transactions for both sites, since Isely lacked that capability. Most of Isely's sales of RAAX11 came via telephone order; only 2.5 percent came via his website. Also, Isely occasionally made "drop shipments" of RAAX11 for Otto; this meant Isely would fill an order for one of Otto's U.S. customers, with Otto receiving the payment. Again, this only constituted about 2.5 percent of Isely's business.

Isely did not advertise his website, relying instead on a lowest-price strategy. Otto, his supplier and retail competitor, did advertise, however, using Isely's name without his permission. Otto's website—www.agaricus.net—marketed RAAX11 as part of a protocol for the treatment of cancer. One page said individuals living in the U.S. should "just call Mr. Isely and he will explain how it works." Several pages also list Isely's phone number as a U.S. contact. Another page offered the testimonial that Isely *pseudonymously* gave Otto in 2001. None of these uses of Isely's name or telephone number on Otto's webpage were authorized by Isely.

This brings us to the Federal Trade Commission. In mid-2007, the Food and Drug Administration contacted Michael

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Liggins, an investigator in the FTC's Atlanta regional office. The FDA provided Liggins with printouts of Otto's website along with a WHOIS search that listed Isely as the registrant for the www.agaricus.net domain.

By his own admissions at trial, Liggins made no effort to investigate Otto, Takesun, or even the other U.S. distributors of RAAX11 mentioned on Otto's website. Instead, he focused all of his energies on Isely. In January 2008, Liggins conducted his own "undercover" operation, purchasing RAAX11 from Otto's website under a false name, Riece Miles. Miles—er, Liggins—was actually ordering from Takesun, not Isely. Takesun processed the credit card information Liggins provided, and Takesun received the payment. Per Otto's informal arrangement with Isely, however, Isely agreed to make a "drop shipment" to "Riece Miles" from Isely's own stock. According to Judge Chappell, the Miles order was the only drop shipment Isely made on Otto's behalf "in the preceding two years."

Based on the WHOIS registration data and the fact that Isely fulfilled Otto's order to Liggins, the FTC jumped to the conclusion that Isely was really the owner of Otto's website and that he was responsible for "disseminating" claims that RAAX11 treats cancer. Accordingly, the FTC followed its standard operating procedures.

Even after Isely's attorney presented documentation that proved Isely was not the owner of www.agaricus.net, the FTC still issued a complaint and forced the case to trial before Judge Chappell. As Isely's attorney noted, "the prosecution of this case was precipitated entirely on false information that could have been corrected with a telephone call."

The FTC tried several other avenues to impose legal liability on Isely for Otto's website. Judge Chappell shut them all down, deriding the Commission for

"drawing inferences from incomplete facts," "overstat[ing] the evidence," and trying to establish "guilt by association."

From start to finish, FTC staff—particularly in the Atlanta office—did a shoddy job of investigation and prosecution. Lead investigator Liggins, the prosecution's only live witness aside from the defendant, testified that he did little actual investigation. He made no attempt to discover the true owner of [agaricus.net](http://www.agaricus.net), and the lead prosecutor admitted during closing arguments that, "I don't even know if Mr. Otto exists."

So, to sum up, the FTC dragged an 84-year-old small business owner through two years of litigation because a foreign website made statements about a legal product that mid-level staffers at the FTC personally disapproved of.

These same staffers couldn't be bothered to ascertain the actual owner of a website before spending tens of thousands of taxpayer dollars to ruin a man who earned a few thousand dollars in a completely legal manner.

These are the people who now claim the unrestricted authority to regulate every corner of the internet, including blogs, in the name of "consumer protection."

At a minimum, the FTC should end this case, but that's unlikely. Since Judge Chappell is only an "administrative" judge, his findings are subject to appeal . . . to the Federal Trade Commission itself. In previous cases, the Commissioners have a 100 percent reversal rate when the ALJ rules against the staff. And there's no time limit on internal appeals, so the FTC could drag Mr. Isely through another two years of administrative process before ultimately ruling against him—and establishing a binding precedent that an individual is personally liable for statements made about his product on *other* people's websites. Not exactly an optimistic future. ■

MICHAEL MOORE KILLS CAPITALISM

Michael Covel

Michael Covel is the author of *Trend Following* and *The Complete TurtleTrader*. His first film, *Broke: The New American Dream*, premiered October 12, 2009. (www.michaelcovel.com/contact-michael-covel/)

A friend recently invited me to a private screening of Michael Moore's new film, *Capitalism: A Love Story*. I was excited to see a "mainstream" film that was backed by big Hollywood bucks conclude capitalism is "evil." Arguably the most successful documentarian ever—a man who has made untold millions of dollars—was going to legitimately make the case that there was an alternative to capitalism. I sat down in a packed Mann's Bruin Theatre in Westwood, California, eager to see how his vision could possibly flesh out.

Moore is a rather simple guy. He is likable. He sees the world as good guys (people with no money) and bad guys (people with money). His Flint, Michigan, union-worker upbringing is his worldview. If you did not have that upbringing or if your life started less severe than his, you are an evil capitalist. If, on the other hand, you are a laid-off factory worker with a sixth-grade education, you are a true hero.

I don't care one way or the other that he has that view and I am not knocking union workers, but Moore sees the world through a class-warfare lens resulting in a certain agenda: force wealth to be spread amongst everyone regardless of effort.

Within minutes it was clear where *Capitalism: A Love Story* was headed.

We listen to heartbreaking stories of foreclosed families across America—but we don't learn why the foreclosures

happened. Did these people treat their homes as piggy banks? Was there refinancing on top of refinancing just to keep buying mall trinkets and other goodies with no respect to risk or logic? We don't find out.

We meet one family that is so desperate for money that they were willing to accept \$1,000 for cleaning out the house that they were just evicted from. Was it sad? Yes. But should we end capitalism due to this one family in Peoria, Illinois?

We are introduced to a guy whose company, called Condo Vultures, is buying and selling foreclosed properties. Since he acted like a used car salesman, the implication was that he was an evil capitalist. However, Moore doesn't tell us if his buyers were "working-class" people making smart buying decisions after prices had dropped.

We listen to Catholic priests who denounce capitalism as an evil to be eradicated. What would they put in its place and how would the new system work? The priests don't tell us.

We learn that Walmart bought life insurance policies on many workers. We are then told to feel outrage when Walmart receives a large payout from an employee death while the family still struggles with bills. I saw where Moore was heading here, but is this a reason to end capitalism?

We hear a story from a commercial pilot so low on money that he has to use

food stamps. Moore points out that many pilots are making less than Taco Bell managers and then attributes a recent plane crash in Buffalo to underpaid pilots. This one crash is extrapolated as yet another reason to end capitalism.

I was pleasantly surprised at Moore's attempt at balance. For example, he included a carpenter who, while boarding up a foreclosed home, says, "If people pay their bills, they don't get thrown out."

There is also a dressing-down of Senator Chris Dodd (D) by name. Moore called out a top Democrat? He sure did. He nailed him.

There is a lengthy dissertation on the evils of Goldman Sachs. He rips Robert Rubin and Hank Paulson big time, and I agree with him. In fact, I said to myself, "Moore, you should have done your whole film on Goldman Sachs!"

Throughout the various stories and interviews he also weaves a conspiracy theory (all Moore films do this). The plot goes something like this: America won World War II and quickly dominated because there was no competition (Germany and Japan were destroyed). We had great postwar success where everyone lived in union-like equality. Jobs were plentiful and families were happy. However, things started to go bad in the 1970s—here Moore uses a snippet of President Carter preaching about greed. This clip was predictably building to Moore's big reason for all of today's problems: the Reagan Revolution.

Moore sees Reagan entering the scene as a shill for corporate-banking interests. However, everyone is happy as the good times roll all the way through into the Clinton era. Moore does take subtle shots at President Clinton, but nails his right-hand economic man, Larry Summers, directly as a primary reason for the banking collapse. While Moore sees Japan and Germany today as socialistic winners where corporations benefit workers more

than shareholders, he sees America sinking fast.

So is that it? That was the proof that capitalism is an evil to eliminate? Essentially, yes, that's Moore's proof.

What is his solution? Tugging on your idealistic heartstrings of course! Moore ends his film with recently uncovered video of FDR talking to America on January 11, 1944. Looking into the camera, a weary FDR proposed what he called a second Bill of Rights—an economic Bill of Rights.

As FDR concluded and the film ended, I was shocked at the reaction. The theater of 400-plus spectators stood and cheered wildly at FDR's 1944 proposal. The questions running through my head were immediate: how does one legislate words like *useful*, *enough*, *recreation*, *adequate*, *decent*, and *good*? Who decides all of this and to what degree?

Interestingly, during the Q&A, Huffington and Moore discussed bank-failure fears during the fall of 2008. They asked for a show of hands of how many people moved money around or attempted to protect against a bank failure. I had the only hand that went up.

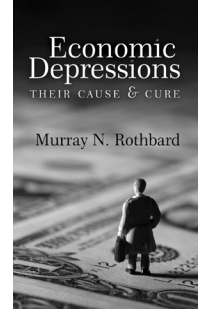
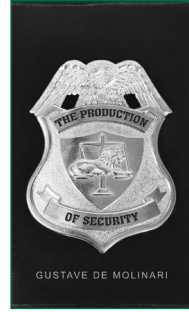
Figuring someone else must see the problems with this film, I started poking around the net for other views. One critic declared that the value of *Capitalism: A Love Story* was not in the moviemaking, but in its message that hits you in the gut and makes you angry. This film did not make me angry, but it did punch me in the gut. The people in that theater with me, including Moore, were not bad people. They just seem to all have consumed a lethal dose of Kool-Aid.

At the end of his Q&A, Moore pushed the audience to understand that while they don't have the money, they do have the vote. He implored them to use their vote to take money from one group to give it to another group. Did he really say that openly with no ambiguity? Yes, sadly. ■

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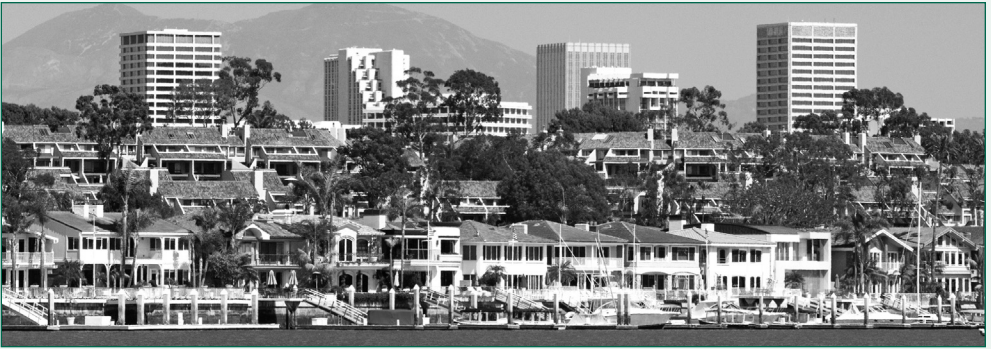
The Mises Institute is publishing many important and classic monographs in book form to make available at low prices. The latest include *The Production of Security*, by Gustave de Molinari; *The Private Production of Defense*, by Hans-Hermann Hoppe; *Economic Depressions: Their Cause and Cure*, by Murray Rothbard; *A Free Market Monetary System*, by F.A. Hayek; and *Liberty and Property*, by Ludwig von Mises. ■



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