

## Private Censorship

### -Fighting Suppression of Speech by Non-Governmental Actors

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Government censorship in the Internet age has been a consistent focal point for free speech advocates. Recent examples of censorship by the American government can be egregious, including the curtailment of First Amendment rights through mass surveillance, overregulation of disfavored speech, criminal prosecution, and outright bans on books, movies, and websites. However, the First Amendment has always provided a potential legal recourse through the judicial system in cases of illegal government censorship. What happens, however, when censorship occurs not at the hands of a government actor, but through the application of policies imposed by powerful, private persons or corporations? What recourse is available in the case of “private censorship”?

[Scout Willis](#), the daughter of actors Bruce Willis and Demi Moore, recently received substantial press coverage when she walked topless through the streets of New York City in an effort to bring attention to Instagram’s censorship of women’s nipples. Willis used the hashtag #FreetheNipple as part of her Twitter-based protest of Instagram’s policies. The hashtag, as well as an upcoming film of the same name, is the brainchild of filmmaker [Lina Esco](#). The photo-sharing social media website has imposed a [policy of censoring](#) not only images that it deems inappropriate, but offensive [hashtags as well](#). For example, Singer Rihanna has been on the [receiving end of Instagram’s censorship](#) policies and has had her account suspended for nudity. Instagram later entirely disabled the account, but claimed it was a mistake made by one of their [“automated systems.”](#)

Instagram isn’t the only social network under fire for its censorship policies: [Facebook](#) has routinely incensed users with its censorship of not only images of [breastfeeding](#), but [political posts and pages](#), as well.

The banking and financial sector routinely delivers its own potent dose of “private censorship” as well. In recent months, adult film stars have [reported](#) having their bank accounts systematically closed by JP Morgan Chase, for no other reason than their connection with adult entertainment. This flavor of private censorship however, may be more insidious than it first appeared. Imposing censorship through denial of banking services may actually have been [motivated](#) by the U.S. Department of Justice, which created a leaked program dubbed [“Operation Choke Point,”](#) designed to pressure banks into denying service to certain disfavored industries.

Payment processors [PayPal and WePay](#) have also been known to shut down accounts of bloggers involved in the adult entertainment industry. [Visa and MasterCard](#) have historically imposed higher standards for adult websites for payment processing as well, including higher-than-normal transaction fees, penalties, and charge-back rates. American Express categorically [prohibits](#) its cards to be used for things like adult websites or WikiLeaks donations. [Content restrictions](#) imposed on adult websites by merchant banks and processors are well-known to the site operators, although the rules are rarely made public, and can change without notice. Credit card companies are under increasing pressure to become the Internet's content police, and some have recently [given in](#) to pressure to stop processing payments for "mugshot" removal websites.

Even Google; one of the most vocal crusaders for Internet freedom, appears to have hopped aboard the "private censorship" bandwagon, at least in terms of the parts of the Internet it deems "offensive." [Google has lately made waves](#) for prohibiting adult material on its powerful advertising network; AdWords. Although Google claims the policies are not new, many in the adult industry disagree. There has been much speculation that [pressure from conservative groups](#), especially Morality in Media, caused Google's sudden crackdown on adult advertisements. Although Google has refused to confirm the connection, this alleged kowtowing to a family values group would be shocking from the search engine giant, which previously claimed it was strongly committed to free expression. Additionally, it [has been reported](#) that Google has pushed adult content down in its organic search results, and even allows the first page of results for adult-oriented search terms to be dominated by less relevant, non-adult links.

These instances of private censorship, and many like them, are not subject to First Amendment protection since they are undertaken at the behest of corporate directors, and not governmental agencies. But the results can often be even more devastating. With no constitutional restrictions to rein them in, giant, multi-billion dollar companies end up making critical decisions on what content the general public can see, read, and hear – especially online. The corporations making these decisions are now more powerful than most countries – at least when it comes to being the gatekeepers of communication. The censorial power wielded by social networking platforms like Twitter and Facebook is readily confirmed by the knee-jerk [reaction](#) by governments under national revolt to immediately shut them down, although the effort is not always [successful](#).

If the government is involved with, or encourages censorship by private parties, such as with Operation Choke Hold, legal remedies may be available under federal civil rights conspiracy laws. However, members of the general public are often confused about where their constitutional First Amendment rights end and where unrestrained "private censorship" begins. Part of this confusion may result from the ability to invoke the First Amendment defenses against defamation claims involving purely private parties. Some "[SLAPP suit](#)" statutes, again governing private disputes, are also grounded in First Amendment principles, thus adding to the confusion. However, these are narrow exceptions to the general rule that prevents individuals from relying on First Amendment rights when they are censored by private entities. Powerful online media entities like Google, Facebook and Twitter can, and do, routinely censor speech

that they find offensive or which violates their acceptable use policies. Application of these policies may be arbitrary, inconsistent, or even discriminatory. But for now, the actions remain legal and constitutional.

The good news is that overly-restrictive policies by private entities create opportunities for others who are willing to permit the activity, or take some risk. Notably, when virtual monopolies begin to develop, such as the Visa/MasterCard merchant banking system, Google's search engine rankings and ad policies, or Facebook/Twitter social networking platforms, dissenters are often left with few alternatives. However, the consumer's voice still matters. Upstarts like KIK messenger, or Tumblr photo sharing system, are often created to fill the void created by restrictive policies implemented by larger competitors. Even the once invincible merchant banking system is [sweating bullets](#) as consumers take to virtual currencies like BitCoin to make purchases that might otherwise be unavailable due to policies imposed by conglomerate financial institutions. The Internet, it seems, remains quite adept at routing around censorship – even the private kind.

So what's the public's answer to the growing problem of private censorship? Many have struggled with this very question, and thus far, no perfect solution has been proposed. Imposing First Amendment restraints on private businesses would be antithetical to America's capitalist, free-market system, and could lead to greater problems than it solves. With a growing number of companies willing to deviate from the conservative policies of their perhaps larger and more established competitors, consumers have become empowered to choose services that share their views on freedom of expression. Some of those consumers will go on to form their own businesses, mobile applications, websites – even currencies – that serve the online users who were flippantly discarded by their predecessors. For now, the best and likely most effective response to private censorship is to “vote with your dollars, and do business with like-minded online service providers.

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