Aggressive Lobbying or Legalized Form of Political Corruption?: How Money is Shaping the Direction of U.S. Copyright law

합법적인 과도한 로비가 정치부패의 온상인가?: 로비자금이 저작권법의 입법화에 미친 영향

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미국의 로비정책은 등록 절차와 신고 제도를 걸쳐 합법적인 활동이며 특히 “Lobbying Disclosure Act of 1995″를 통하여 이를 규제하고 있다. 미국의 로비활동은 합법적인 것이지만 본 저자는 오히려 최근 들어 지나친 로비가 정치부패까지 초래한다고 본다. 개인들의 로비보다는 기업들이 중심이 되어 입법자들이 기업에 유리하도록 법을 제정하도록 로비를 하고 있다. 이 논문에서는 미국 저작권법 분야에서 실예를 들고 있다. 미국 저작권법 중에서도 ”Sonny Bono Copyright Extension Act″ 과 “Digital Millennium Copyright Act″는 저작권 소유자들 즉, 대기업들의 로비활동으로 편파적으로 저자권 소유자들에게 유리하도록 입법화되었다. 이는 미국 헌법에 명시되어있는 미국 저작권법의 목적에 반대되는 입장을 취하고 있다. 저자는 이러한 미국 로비활동이 정치부패의 온상을 만들며 저작권법에 미치는 영향에 대해 쓰며 이에 대한 경각심과 주의를 주장하고 있다.

Keyword : Lobbying, Political Corruption, Copyright Law

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Ⅰ. Introduction

The faces of corruption has been the subject of numerous articles and research, which has produced substantial amount of definitions, theories, explanations, and typologies. Corruption, for instance, has been referred to as cancerous disease, phenomenon, and even as an 'iceberg'. This attempt is to capture some of the many-faceted concepts of corruption. Since the phenomenon of corruption encompasses many forms, actors and consequences, any discussions involving it will be complex and diverse.

This article will narrow its discussion on political corruption and more specifically, lobbying. Lobbying in the U.S. plays a vital role in the legislative process. Behind major enactments lie large associations or industries, fiercely projecting their views and opinions to the legislatures, in order to enact a legislation that will be beneficial their industries. In many cases, political contributions, and campaign contributions, in particular, are provided to push the legislator's votes favorable to their side. Lobbying for the copyright act has become extremely aggressive where the stakeholders spend millions of U.S. dollars to pass a bill favorable to their interests.

Lobbying, without a doubt, is aggressively done in various social issues and in areas of copyright law as well. Aggressive lobbying by major media industries and copyright holders, however, has placed U.S. Congress to exceed its power and to disregard the goal of intellectual property, and U.S. copyright law, in particular.

In this paper, the author argues that the lobbying activities have nearly attained a legalized form of political corruption. Although lobbying is legal is the U.S., the influence of lobbying on decisionmakers are causing this act to gain a status of political corruption. The specific area of focus will be the copyright law of the United States. Two U.S. legislation in the area of copyright law will be examined as an example of political corruption. For the purposes of this article, although there are various forms of corruption, the main focus will be on political corruption. In part II of this paper, some primary definitions of corruption will be explored. This paper, in part III, will examine two U.S. copyright legislation as examples of extensive lobbying that has

created . Furthermore, in part IV, the discussion will consist of the exceeded power of Congress and how lobbying has forced Congress to compromise the goal of the U.S. copyright law as enumerated in the U.S. Constitution.

Ⅱ. Definitions of Corruption

Many definitions of corruption reflect a public power or authority in relation to the state. Corruption, in Nye's classic and widely used version, is "behavior which deviates from the formal duties of a public role because of private-regarding (personal, close family, private clique) pecuniary or status gains; or violates rules against the exercise of certain types of private-regarding influence."[1] In other words, this definition reflects the state-society relation, where the individuals who have been bestowed authority to act on behalf of the state misuses it for private benefit. This, of course, includes politicians, civil servants, and bureaucrats.

Some scholars like Nye argue that from a functional view, corruption can be beneficial. According to Nye, he argues that "corruption can be beneficial to political development, by contribution to the solution of three major problems involved: economic development, national integration, and governmental capacity."[2]

In particular, the definition of political corruption encompasses transactions between actors from both private and public sector through which collective goods are illegitimately converted into private-regarding payoffs.[3] (Heidenheimer et. al. 1993: 6). A stricter definition of political corruption distinguishes the involvement of political decision-makers. Futhermore, political corruption occurs when "laws and regulations are more or less systematically abused by the rulers, side-stepped, ignored, or even-tailored to fit their interests" (Amundsen 1999:3).

Ⅲ. The Thinning Line between Lobbying and Political Corruption

Under the First Amendment of the U.S. Constitution, every individual has a right “to petition the government for a redress of grievances” and the act of

lobbying incorporates this constitutional right. In the U.S., lobbying is regulated through federal statutes or laws of individual states but must not interfere with the right to petition for a redress, specified in the First Amendment. Although the definition of lobbying varies widely, the most general definition of lobbying includes any attempt by individuals or private interest groups to influence the decisions of government. Its original meaning, however, referred to efforts to influence the votes of legislators and the lobby outside the legislative chamber. Lobbying does not necessarily correlate to money spent on political campaigns. It may involve the simple form of writing letters or calling public officials. In addition, lobbying includes indirect forms such as shaping public opinion. The direct form of lobbying, of course, could be the contributions made to political campaigns or elections.

As a safeguard, the Lobbying Disclosure Act of 1995 was enacted to strengthen public confidence in the government.[4] Lobbyist and their activities are regulated through the registration of lobbyists and required filing of semiannual reports by registered lobbyists.[5] More specifically, the Lobbying Disclosure Act of 1995 sets forth requirements for professional lobbyists: to register; to file reports identifying their clients regularly and semiannually; and to disclose issues and compensation on which they lobby. All lobbyists, except for elected officials or organizations of elected officials, are required to register under the Lobbying Disclosure Act of 1995. This act includes any attempts of individuals or groups to have influence in government decisions.

While lobbying is inevitable in the political process, allegations of corruption in lobbying do occasionally occur. Often the allegations of corruptions are made by opponents of campaigns. The difficulty lies in measuring the precise level of the corruption incidents that takes place. In majority of the cases, reported allegations rarely provide a whole picture of the corruption that actually occurs. Since attempting to measure the corruption level is almost impossible, we must rely on indexes to at least grasp the degree of corruption in a country. The most widely accepted index is the Corruption perceptions Index (CPI) of Transparency International, which provides basic indicators of the level of corruption. According to the index, the U.S. is a relatively transparent country. In 2003, the U.S. scored 7.5 and ranked 18th out of 133 countries in the corruption perception index.[6] This index, however, does have its weakness

since the score is measured according to the people polled and their perceptions of corruption.

Recently, it is the author's view that the excessive lobbying occurring in the U.S. has reached a point of political corruption. For various interest groups, access to the legislature is of crucial importance that can assure some form of favorable action. Media and entertainment industries and copyright holders alike use lobbying as a main strategy to maintain their control over the copyright legislation.

There is a thin line between excessive lobbying with billions of dollars being used and the political corruption occurring. When lobbying is performed on behalf of associations or organizations, politicians regularly vote to represent interests of those providing financial contributions. Although this could be perceived as the mere act of lobbying, in a sense, it gives rise to greater chance of politicians acting according to the interest of those who offer contributions. In all, the risk of political corruption increases.

Ⅳ. Supporting Cases

Lobbying has become extremely extensive where the stakeholders are spending unprecedented amounts of money to have their interests protected. Through these activities, the copyright law of the United States is being formed into legislation that favors major media companies and copyright holders. According to Political Moneyline, a website that tracks lobbying expenditures, some of the top lobbying sectors are health care, communication and technology, finance and insurance, and business retail and services.[7] For first half of 2004, the leading industries spent more than one billion dollars for federal lobbying. In recent years, as associations and industries spend staggering amounts to lobby for their interests, Congress by enacting laws in favor of these industries is jeopardizing fundamental concepts of U.S. copyright law.

Lobbying as a form of political corruption can be found in recent enactments of U.S. copyright law. To exemplify the author's contention, two copyright laws, Digital Millennium Copyright Act (DMCA) and the Sonny Bono Copyright

Term Extension Act (CTEA), will be discussed.

A. The Copyright Owners Prevail in the Digital Millennium Copyright Act of 1998

The DMCA, adopted in 1998, was enacted in order to adapt copyright law to the changes brought about by digital technology. This Act is "one of the most important piece of legislation to be considered by Congress,"[8] and embodies tremendous importance to the U.S. copyright law.

The DMCA had been meticulously lobbied for by numerous industries that ranged from software, communications and entertainment industries to consumer groups, researchers and library associations. Many have criticized the DMCA as an imbalanced regulation, describing the DMCA as a battle of lobbying between Hollywood and Silicon Valley[9] or a balancing of interests between copyright owners and users, scholars, equipment manufacturers and OSPs.[10] Pamela Samuelson further comments on the lobbying by both entertainment and software industries as, "by colorful use of high rhetoric and forceful lobbying, Hollywood and its allies were successful in persuading Congress to adopt the broad anti circumvention legislation they favored…"[11] One insider describes the settings of lobbying as the following:

> Copyright interest groups hold fund raisers for members of Congress, write campaign songs, invite members of Congress (and their staff) to private movie screenings or soldout concerts, and draft legislation they expect Congress to pass without any changes….In my experience, some copyright lawyers and lobbyists actually resent members of Congress and staff interfering with what they view as their legislation and their committee report.[12]

Although the Department of Commerce's First Annual Report claimed the DMCA as achieving a balance between interests, yet very few are persuaded by this view.[13]

The legislative process of Digital Millennium Copyright Act, compared with prior copyright laws, involved such diverse stakeholders as online service providers, internet services and other industry copyright owners to educational

and research institutions. Greater number of parties represented further varied interests in the legislation process of the DMCA. In February 2000, during the time when the initial comments were due for the exemption from the anti circumvention provisions, there were 235 written comments submitted to the Copyright Office. Statements submitted to the Librarian of Congress from the anti circumvention hearings came from scholars, library associations, motion picture associations, software companies, digital future coalition, and internet and broadband technology company. Their views differ from one end of the spectrum to the other.

The industry representatives and their forceful lobbying in the DMCA is further characterized by Pamela Samuelson as consequential to the legislative process: "Copyright industry lobbyist deserve the credit for the masterful job they did in persuading congressional committees that broad anti circumvention regulations were absolutely essential to prevent piracy on the internet" (emphasis added).[14] The legislative history of the DMCA reveals the intensity of the debates and hostility among the stakeholders.[15] Generally, in the legislative process, the greater the number of interested parties, the more incoherent the statute may become. Certainly the DMCA is no exception to this general rule. For the most part, extremely broad rights were granted to copyright owners with very few exemptions to anti circumvention provisions. A speaker from the House Judiciary Committee, in an effort to soften the debates, stated: "We are not helped by rhetoric. We know you are important. We don't invite many unimportant people. We know your industry is wonderful. We know you make an enormous contribution to economics, commerce, the health of the world."[16]

The lobbying of industry strength copyright owners is also demonstrated in the legislative history of the DMCA. Scholars such as David Nimmer draws attention to this influence by noting, "this method of proceeding seem to rely on a new theory of legislation - have a specific company write a letter to an individual legislator about its current fees, and create elaborate laws accordingly" (emphasis added).[17] This is demonstrated by the statement of Congress, when in explaining the provisions of anti circumvention regulation, singled out specific companies such as Yahoo! and Macrovision. In explaining Section 512 of the Act, Congress sets forth another specific company, Yahoo!, as an example:

Information location tools are essential to the operation of the Internet; without them, users would not be able to find the information they need….The Yahoo! directory, for example, currently categorizes over 800,000 on line locations and serves as a "card catalogue" to the World Wide Web, which over 35,000,000 different users visit each month. Directories such as Yahoo!'s usually are created by people visiting sites to categorize them. It is precisely the human judgment and editorial discretion exercised by these cataloguers which makes directories valuable.[18)]

B. Disney Lobbies for Extension of Copyright Term: The Sonny Bono Copyright Term Extension Act

The year 1998 marked as a "hallmark" in the history of U.S. copyright law. In 1998, the Sonny Bono Copyright Term Extension Act (CTEA) was enactment along with the greatly important Digital Millennium Copyright Act (DMCA). The CTEA was the product of extensive lobbying and petitioning for a bill. Along with DMCA, CTEA exemplifies lobbying achieving a form of political corruption.

In 1998, the Walt Disney Company and other representatives from the entertainment industry lobbied extensively for the extension of protection term for copyrighted works. This, eventually, lead to the enactment of CTEA. Before the enactment the CTEA, copyrighted works by individuals were protected for the life of the author plus 50 years after his death. The 1998 Act, however, would add an additional 20 years to the protection. Therefore, works copyrighted by individuals were protected for the period of life of the author plus 70 years.

Disney would spend more than 6.3 million in 1997 98 and successfully pursue Congress to pass the Sonny Bono Copyright Term Extension Act of 1998. The Walt Disney Company had special interest in extending this protection term. Since the famous Mickey Mouse first appeared in 1928 cartoon called "Steamboat Willie," its copyright was to expire in 2003 along with other Disney's well known characters such as Pluto, Goofy, and Donald Duck. Under the copyright law, when a protection term expires, the work enters the public domain. If Disney's characters were to lose its copyright

protection, it would go into the public domain and the public would be free to use such characters. This, in turn, would be profit loss for Disney. Disney, along with other industry representatives, would lobby for an extension of the copyright terms to prevent mickey mouse from entering the public domain. Through the aggressive lobbying, Disney kept Mickey Mouse from entering into the public domain until 2023.

The case Eldred v. Ashcroft, which was among the highly publicized cases in 2003, also exemplifies conglomerates succeeding in the area of U.S. copyright law. The case was argued before the Supreme Court, challenging the constitutionality of the CTEA. It was a case between the users of copyrighted works and major media companies, congressmen and copyright holders. The plaintiffs lost their case before the Supreme Court but are making an effort to make changes in the public domain area of U.S. copyright law. As major media conglomerates fight to keep their copyrighted works from entering the public domain, the idea of public domain may well disappear in the U.S. copyright law.

V. Concluding Remarks

It is no accident that the Digital Millennium Copyright Act of 1998 and the Sonny Bono Copyright Term Extension Act favors the copyright owners. Rather than treating the copyright clause of the U.S. Constitution from the Framers' original intent, Congress has sold out. It has disregarded the essential elements of copyright law of the United States and sided with the copyright owners to guard their interests. Why would politicians do this? Simply, to follow their own interests and benefits. Extensive lobbying creates an atmosphere that is ideal for political corruption to occur. Politicians may easily be persuaded by lobbyists since their political contributions and careers dependent on it.

This creates a problem since modern day copyright holders are mainly large corporations who buy rights from the creative authors. As copyright holders gain additional rights, monopolistic control increases over their industry. In that case, what prompted Congress to grant increasingly monopolistic control to the copyright holders? Lobbying is an indisputable factor. By passing the Sonny

Bono Copyright Term Extension Act in 1998, Congress has exceeded its powers as enumerated in the U.S. Constitution.[19)]

The Copyright clause of the Constitution, historically, acts as the pillar for generating economic incentives for creation and dissemination of knowledge. Upholding this notion, the legislatures of the copyright statute and judges who interpret it are left with the difficult task of articulating how much control authors should have over their created works. The Constitution, in Article I section 8 clause 8, describes the purpose and conditions for copyright: "The Congress shall have power…to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[20)] James Madison and Thomas Jefferson, who were foremost thinkers of writing the Constitution, considered monopolistic aspect of intellectual property. Therefore, the Framers wrote the creations to be "for a limited time."

From early on, the Framers envisioned copyright law should "promote the progress of science and useful arts" by granting authors "exclusive right" to their works. The goal of the copyright, as described in the Constitution and in their priority is: first, promote learning; second, maintain a public domain; and third, encourage creative works and distribution of the works by providing authors incentives.[21)] The third policy, benefiting the authors, is an instrument for achieving first and second goal of copyright. The Framers feared to repeating the history of the English copyright law where the Stationers' would gain excessive monopolistic control over the publishing industry.

The difficult and intricate attempt of balancing interests between encouraging creation of works of authorship by providing economic incentives that are not excessive and allowing access, use and distribution to the public welfare for its benefit is required. This balance of interests is not absolute. The goal of copyright law, however, in relation to this balance is not to grant authors unlimited control over their works. Until recently, copyright law often placed priority to public access. This has changed.

The tension between copyright holders and users are intensifying to a greater degree, as software makers in the beginning of 2005, requested Congress to permit easier tracking of those who copy products over the internet.[22)] Microsoft Corp. and Apple Computer Inc under the lobbying group Business

Software Alliance is requesting legislation that would require internet service providers to reveal customer names of P2P users and thus discouraging internet swapping. It has come to a point where the copyright holders and users are described as being engaged in as a 'terrorist war' where children are the terrorists.[23)]

With new technological progress occurring at exponential rates, Congress will most likely enact more legislation to adapt to the changes. An ideal copyright law would be flexible enough to adapt to social changes, especially technology, while maintaining the fundamental principles of American copyright system. The most fundamental principle that must be incorporated into the legislations is the copyright clause of the United States Constitution. One of the main difficulties is that the Constitution does not prescribe the exact formulation of the balance. Articulating the extent of control authors should have over their created works is eventually left for copyright statute and the courts. For over two hundred years, copyright has generally sided with broad public access. This is evident from public polices including the fair use doctrine, the first sale rule, the limited duration of exclusive rights, and copyright registration. The goal of copyright should not be to grant authors monopolistic control over their works without limitation.

Even as major media companies and copyright holders fight fierce battles to retain their interests in the digital information age and in the midst of aggressive lobbying, Congress should not overlook the importance of the copyright clause in the U.S. Constitution. Congress must remind itself, as once stated in the House Report on the Berne Convention Implementation Act of 1988, that "…the constitutional purpose of copyright is to facilitate the flow of ideas in the interest of learning." And [T]he primary objective of our copyright laws is not to reward the author, but rather to secure for the public the benefits from the creations of authors."[24)] (emphasis added)

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1) J.S. Nye, "Corruption and Political Development: A Cost Benefit Analysis" in *Bureaucratic Corruption in Sub-Sacharan Africa,* edited by Monday V. Expo. Washington: University Press of America, Inc., 1979, pp. 411-433.

2) *See, Id.*

3) Heidenheimer, Arnold J, Michael Johnston, & VIctor T. LeVine (eds.), Politiacal Corruption. A Handbook. New Brunswick NJ, 1989 (third printing 1993).

4) *See,* House of Representatives, Rept. 104 339, Part 1 (1st Session, 1995).

5) *See,* Lobbying Disclosure Act of 1995, 109 Stat. 691 (1995).

6) *See,* Transparency International, available at http://www.ti.org

7) *See,* Political MoneyLine available at http://www.tray.com/cgi win/lp_sector.exe?DoFn=my&year=04

8) *See,* 144 Cong. Rec. S12375 (daily ed. Oct. 12, 1998) (Senator Hatch).

9) *See supra* note 125, at 522 523.

10) *See* David Nimmer, *A Riff on Fair Use in the Digital Millennium Copyright Act*, 148 U. Pa. L. Rev. 673, 683 (2000).

11) *See,* Pamela Samuelson, *IP and Digital Economy*, at 523.

12) *See,* Willam F. Patry, *Copyright and the Legislative Process: A Personal Perspective,* 14 Cardozo Arts & Ent. L.J. 139, 141 (1996).

13) *See Id.* at 522.

14) *See,* Pamela Samuelson, *Towards More Sensible Anti Circumvention Regulations*, 5 Cyber. Law 2 (2000).

15) *See generally,* David Nimmer, *Appreciating Legislative History The Sweet and Sour Spots of the DMCA's Commentary*, 23 Cardozo L. Rev. 909 (2002) (discussion of legislative history of DMCA).

16) *See* Report of the House Judiciary Comm., H.R. Rep. No. 105 551, Part 1 (2d Sess. 1998) at 197 (statement of Rep. Barney Frank).

17) *See,* David Nimmer, *Appreciating Legislative History the Sweet and Sour Spots of the DMCA's Commentary*, 23 Cardozo L. Rev. 909, at 946 (2002). *See e.g.,* David Nimmer, *Back from the Future: A Proleptic Review of the DMCA,* 16 Berkeley Tech. L.J. 855 (2001).

18) *See,* Report of the House Commerce Comm., H.R. Rep. No. 105 551, Part 2, (2d Sess. 1998)

19) *See,* Robert Patrick Merges and Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent Power*, Harvard Journal on Legislation (Winter, 2000).

20) U.S. Const. art. I, § 8, cl 8.

21) *See,* Patterson, *Nature of Copyright,* 49.

22) *See,* Softerware markers lobby for copyright changes, available at http://www.cnn.com/2005/TECH/internet/01/07/tech.copyright.reut (last visited January 7, 2005).

23) *See,* Lawrence Lessig sees Public Domain Sinking in a Sea of Overregulation, (referring to a statement made by Jack Valenti, the Chairman and Chief Executive Officer of the Motion Picture Association), available at http://www.international.ucla.edu/bcir/article.asp (last visited January 6, 2005).

24) *See,* Berne Convention Implementation Act of 1988, H.R. Rep. No. 609, 100 Congr., 2d Sess. 23 (1988).

저자약력 : 저자 김은실은 인디아나 주립대학교 법과대학원에서 지적재산권을 연구하였으며 현재 미국 일리노이주 변호사로 활동하고 있다.