Copyright or

Stanford Law Professor Lawrence Lessig believes that a recent extension of copyright terms is unconstitutional. Now he just has to convince the Supreme Court. The case has involved some of the nation's top lawyers—including faculty and alumni from Stanford Law School.

WHEN LAWRENCE LESSIG COMPLETED HIS FIRST-EVER oral argument before a federal appeals court panel nearly two years ago, he couldn't have been happier. The three judges seemed to understand his contention that a once-obscure law extending the terms of copyrights was unconstitutional. They had kept him on his feet for more than an hour, engaging in just the kind of intellectual exchange that many legal academics dream of but rarely experience. The Sonny Bono Copyright Term Extension Act (CTEA), a law that Lessig, plaintiff Eric Eldred, and many others viewed as an egregious example of Big Media stepping on free speech, would soon be history.

It didn't quite turn out that way. When the Court of Appeals for the Washington, D.C., Circuit handed down its decision four months later, it upheld by two to one a lower-court ruling dismissing Eldred's challenge to the CTEA. Lessig, the head of Stanford Law School's Center for the Internet and Society and the world's most prominent thinker in the burgeoning field of cyber law, was sure he'd blown it. "I was really depressed," says Lessig. "This was a winning case—what had I done wrong?"

But Lessig's depression turned to elation early one morning in February when he was awakened by a call from Geoffrey Stewart, a partner at Jones Day who had been working Eldred's case pro bono. The Supreme Court, to the astonishment of most observers, had agreed to hear the case. The stage is thus set for a dramatic showdown over intellectual property rights in the Internet age—and for the most important argument of Lessig's spectacular and controversial career.

Eldred v. Ashcroft turns on a couple of seemingly simple issues, and on its face has little to do with the Internet. The law simply extends the terms of copyrights by 20 years, something proponents say is necessary to align U.S. copyright laws with European laws and assure filmmakers, musicians, writers, and others a fair return on their creative work. Eldred operates a website, Eldritch Press, that publishes online versions of books whose copyrights have expired, and he wants access to more and newer books.

But for Lessig, Stanford Law School Dean Kathleen M. Sullivan (who is Lessig's co-counsel before the Supreme Court), and a diverse group of free-speech advocates, economists, Internet executives, and renegade artists and lawyers, the stakes are much higher. This group believes that the CTEA, another controversial law known as the Digital Millennium Copyright Act, and the various ways in which existing copyright and patent laws are being applied are subverting the promise of the Internet. Rather than facilitating the free exchange of ideas, new information technologies are being regulated in a way that is fundamentally hostile to free speech.

"Copyright has been expanding in two ways—in scope and in duration," says Lessig. "We now have an incredible concentration of copyrights in a few entities. Never has there been a point where more of our culture has been controlled by fewer people."

To entertainment and media industry executives—and to their allies in Congress

Copywrong?

BY JONATHAN WEBER

who passed the CTEA and are now considering a raft of new laws to combat online piracy—this is mostly high-minded nonsense. To begin with, they say, copyrights are distributed throughout society, from the largest corporations to struggling artists. The real issue, they contend, is the health of an intellectual property industry that is worth billions of dollars—and that is in mortal peril from digital copying. The recorded music industry is already bearing witness to what happens when copyrights are routinely flouted: worldwide compact disc sales were down 5 percent last year, largely because of illegal copying. Movie executives are terrified that their industry is also about to be "Napsterized."

"A lot of Lessig's advocates ought to be a little more sensitive about theft," says Jack Valenti, the influential chairman of the Motion Picture Association of America. While allowing that he considers Lessig, with whom he has engaged in a series of public debates, to be "a fine lawyer and an extraordinarily graceful and gracious man," he adds: "There is a thing called private property. We see a lot of people who have scant regard for copyright, and who are disdainful about [the problem of] people taking things for free."

These two vastly different views of copyright law will be tested on October 9, when Lessig and Solicitor General Theodore B. Olson argue their respective cases before the Supreme Court. The *Washington Post* describes it as "the most important copyright case of our time," and it has inspired 34 amicus briefs, from a veritable who's who of scholars, practitioners, and elected officials. While some writers have described the case as Hollywood v. Silicon Valley, the coalitions supporting each side transcend any black-and-white division and have produced some strange bedfellows. Floyd Abrams, a staunch defender of freedom of speech, contributed an amicus brief saying that the CTEA does not violate the First Amendment. So did Senator Orrin Hatch (R-UT) and Representative John Conyers (D-MI), who is not generally considered a friend to big business. In turn, Kenneth Arrow and Milton Friedman, two Nobel Laureate Stanford economists from opposite ends of the political spectrum, joined 15 of their colleagues in a brief supporting Lessig, as did writer Wendell Berry and Phyllis Schlafly, the founder of the Eagle Forum Education and Legal Defense Fund.

The unusual divide can be seen among the faculty and alumni of Stanford Law School, whose lawyers are on the front lines of the case. Jeffrey Lamken '90, assistant to the Solicitor General and a coauthor of the government's brief, studied copyright law with the most cited scholar in the field—Paul Goldstein, Stanford's Stella W. and Ira S. Lillick Professor of Law. Over the summer Goldstein worked with Carey Ramos '79 in the writing of an amicus brief for the American Society of Composers, Authors, and Publishers; Broadcast Music Inc.; and other groups that support the government's position. Just up the stairs from Goldstein's Law School lair is the headquarters for the other side—Lessig's office, where some of the 30 Stanford Law School students who

Jonathan Weber was the editor of the *Industry Standard,* for which Lawrence Lessig was a columnist.

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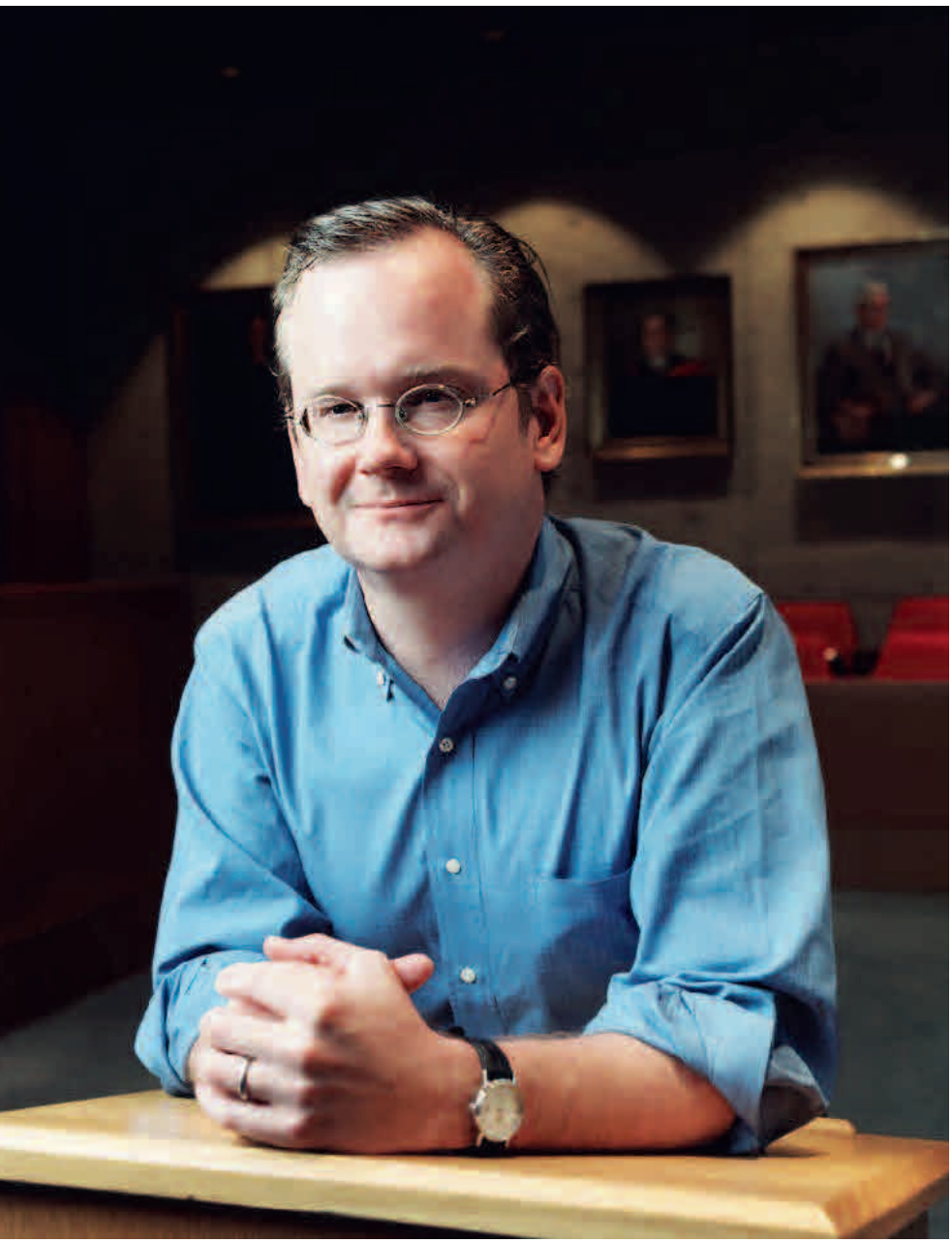

Stanford Law Professor Lawrence Lessig says that Congress has abused its constitutional power to extend copyright terms, giving vast control of our culture to a select few.

helped research his arguments often gather. Elsewhere in the building sit Sullivan and another author of the petitioner's brief: Alan Morrison, a visiting fellow at the Law School and cofounder of Public Citizen Litigation Group in Washington, D.C. The list goes on and on.

All see this case as a turning point for copyright law. Those who favor the government's position fear that a system they believe has benefited the country is about to be turned on its head. Lessig and his supporters describe that same system as a monster out of control. Do we live in an era of unprecedented access to a wide range of information, or one of ominous threats to long-held free speech rights? Lessig believes the balance between copyright and free expression—a tension long recognized in Congress and in the courts—has recently tipped dramatically in favor of protection. He is determined to tip it back.

In the wake of the dot-com boom and the dot-com bust and the corporate world's on-again, off-again obsession with all things technological, it's almost hard to remember that the Internet was for many years viewed as a noncommercial medium. Born in academe, it came of age under the tutelage of people who saw in it the opportunity to rearrange the information power structure. Anyone—not just those who owned transmitters or printing presses—might be a broadcaster or a publisher. "Information wants to be free," or so the saying went, and the tools to make it so were available to everyone.

These noble sentiments—which still dominated Internet culture as late as the mid-1990s—were brushed aside during the dot-com gold rush. But they never really went away, and those who viewed the Net as something bigger than a business tool have retained more than a little influence. Organizations such as the Electronic Frontier Foundation and the Electronic Privacy Information Center, nonprofit projects such as the Internet Archive and Eric Eldred's Eldritch Press, websites such as Slashdot, and countless mailing lists and Web "blogs" have kept the debate alive, arguing for policies and protocols that they believe uphold the rights of individual and noncommercial users of the Net.

Lessig, soft-spoken and scholarly, would not have been the most obvious champion for this crowd. His first forays into public policy were as the head of the Pennsylvania Teenage Republicans; as a sophomore at the University of Pennsylvania he was managing an important state Senate campaign (his candidate lost). His political views had begun to change by the time he got to Yale Law School, but he still

clerked for two of the country's most renowned conservative jurists—U.S. Supreme Court Justice Antonin Scalia and federal appellate court Judge Richard Posner.

Lessig began to build a name for himself in cyber law as a professor at the University of Chicago Law School. But his first 15 minutes of fame came when he was appointed special master in the Microsoft antitrust case, only to be abruptly dismissed from that post after Microsoft dug up e-mail messages that allegedly showed bias. In 1999 he published *Code and Other Laws of Cyberspace*, a highly original work that cemented his reputation as a creative thinker on some of the most important new issues in the legal field—and made him a star in the fractious world of new media policy.

In *Code*, Lessig argued that the regulation of technology is taking place through the way in which software is written and hardware is constructed. In effect, the (software) code is the law, and we'd better start paying attention to how that code is built. These arguments were music to the ears of people who worry that the Internet—and technology in general—is being shaped (read: warped) by large corporations that want control and ownership and that fear the messiness that would come from real creativity.

In his second book, *The Future of Ideas: The Fate of the Commons in a Connected World*, Lessig builds on his earlier argument, contending that corporations are using the code—as well as the legal and legislative systems, or "East Coast Code"—to stamp out innovations that might threaten their commercial interests. The latest incarnations of copyright law, in his view, are part of a broad and dangerous trend.

The CTEA was enacted in 1998, thanks to a strong push from the entertainment industry and a big shrug from almost everyone else. Proponents, led by Disney (whose copyright on Mickey Mouse stories was about to expire), argued that the United States needed to align its copyright terms with those of European countries, lest one of the nation's biggest export industries be damaged. The Clinton administration, which had close ties to the entertainment industry and a broader agenda for harmonizing intellectual property laws around the world, strongly supported the bill.

Lessig, then a professor at Harvard, immediately saw an important case in the making. With the support of Geoffrey Stewart and Jonathan Zittrain, now an assistant law professor at Harvard, he set out to find someone involved in public domain publishing who could mount a legal challenge. Meanwhile, on an Internet mailing list devoted to electronic publishing, a similar discussion arose. Eric Eldred volunteered to be the plaintiff. Before long, he and Lessig found one another.

Initially, Lessig saw the case revolving solely around the copyright clause of the Constitution, which authorizes Congress "To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress has used that authority many times, first establishing a copyright term of 14 years, and extending it repeatedly over the years. Lessig believed that the repeated extensions meant that Congress was violating the "limited times" requirement, and that the retroactive extensions that were part of the law meant it was not "promoting the progress of science."

But there is another important dimension to the case, one first suggested by Dean Sullivan. A longtime admirer of Lessig, she had been trying to recruit him to the Stanford faculty, and the two were lunching together at the Charles Hotel in Cambridge when she raised the idea that there was a First Amendment issue in the *Eldred* case. Traditionally, the courts have held that the First Amendment does not trump copyright. In upholding the CTEA, the appeals court—relying on an important 1985 case in which the Supreme Court ruled that *The Nation* had no First Amendment right to publish the memoirs of Gerald Ford—stated that copyrights are "categorically immune from challenge under the First Amendment." But Sullivan, and Lessig, believe that finding is wrong.

It's the free speech argument that gives the *Eldred* case so much resonance among the liberals and libertarians in the Internet community. The Net was supposed to enhance the free flow of information. Instead, they fear, a host of laws and proposals, not just the CTEA, are stemming it. The Digital Millennium Copyright Act makes it illegal to crack any encryption scheme, and thus any use of an encrypted, copyrighted work—even one traditionally permitted, such as making a personal copy for later viewing or listening—is now a crime. Entertainment companies are now pushing Congress to mandate copy-protection technologies for all electronics products. They're challenging the right of TV watchers to use recording devices such as Replay TV and TiVo, contending that it may be a crime to skip commercials. They're even proposing that companies be permitted to hack into the computers of alleged copyright infringers.

"It used to be that every general consumer-level use of a work was outside the scope of copyright law," says Fred von Lohmann '95 (AB '90), senior attorney at the Electronic Frontier Foundation. "If I bought a book, I could resell it, or rip the pages out of it, I could read it as many times as I wanted, and copyright law would have nothing to say about it. Now copyright is invading a consumer's life like never before."

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If the CTEA originally passed without much fanfare, the same cannot be said for the Supreme Court case. Lessig was profiled in September in *Wired* magazine, was the subject of a cover story in the *Los Angeles Times* Sunday magazine, and was cited in dozens of other publications. The Stanford Center for Internet & Society is among the petitioners, and so is Harvard's Berkman Center for the Internet and Society (where the case was born). Yale Law School recently tried *Eldred v. Ashcroft* in a moot court (Eldred won). Ad hoc groups, such as "53 intellectual property law professors" and "15 library associations," have formed to submit amicus briefs supporting Lessig's case. There's even a website that teasingly proclaims "Free Mickey!"—and another that offers "Free the Mouse" bumper stickers.

There is plenty of legal firepower on the other side, too. Working on the brief with Stanford Law Professor Goldstein and Carey Ramos, a partner at Paul, Weiss, Rifkind, Wharton & Garrison, was Yale Law Professor Drew Days III, the former Solicitor General who is also of counsel to Morrison & Foerster (as is Goldstein). A host of other Stanford lawyers have weighed in, including Karl ZoBell '58, who worked on an amicus brief on behalf of his client, Dr. Seuss Enterprises. Most copyright law practitioners—as opposed to law professors—come down on the side of the government, to the point where the American Bar Association's intellectual property section at one point proposed that the group weigh in to defend the CTEA. (That effort was quashed in the wake of vociferous objections from anti-CTEA forces.)

Goldstein and other defenders of the CTEA believe there are already plenty of free speech protections built into the copyright law, protections that are unaffected by the term extension. "This picture that some critics of copyright create, of an impermeable vessel that offends the First Amendment, is totally false," says Goldstein, whose article, "Copyright and the First Amendment" *(70 Columbia Law Review 983* [1970]), framed many of the key issues that are still being debated today. "One looks at copyright law and sees any number of safety valves."

Most important, Goldstein notes, copyright does not protect ideas, only the expression of ideas, and thus can hardly be said to impede the free flow of ideas. There are also exceptions for "fair use"—they allow a book to be quoted by a book reviewer, for example, or a TV show to be recorded for later viewing—and for educational uses of copyrighted material. In the music business there is a whole regime of compulsory licensing, which assures that copyrighted works can be used by others on a non-discriminatory basis.

"Copyright, over more than 200 years of its history, has grown up alongside the First Amendment—the concerns that underlie the First Amendment are the same ones that underlie copyright," says Goldstein. "It's an ongoing balance that Congress seeks to maintain. . . . In historical terms, it has worked out reasonably well." He does allow, though, that certain provisions of the Digital Millennium Copyright Act are problematic.

Ralph Peer (MBA '68 AB '66), chief executive of the music publishing company Peermusic, notes that this is not just an academic discussion. His company was planning a new push to popularize the music of Hoagy Carmichael, for example; that project would not go forward if the CTEA were struck down.

"I would argue that works in copyright enjoy a greater chance of dissemination than works in the public domain," adds Peer. "The idea of the public domain is that works can be disseminated without charge. But the mere posting of a work doesn't get you very far."

Lessig, he notes, chose to have his latest book published by Random House, a commercial publisher owned by the German media conglomerate Bertelsmann. "He knew full well that by going with a commercial firm it would be much more widely disseminated than if it was just posted on a website."

Easy access to public domain works is a major issue no matter what happens to the CTEA, and that's the impetus behind a new nonprofit organization known as the Creative Commons, which Lessig, Eldred, and other leaders in cyber law helped to establish (it is housed at Stanford Law School). The group's aim is to reinvigorate the public domain by making it easier for creators to share and disseminate their work, and easier for the public to find and use it.

Something like the Creative Commons, Eldred says, is what he was after all along. "If I win, it's not like me winning," he says. "It will free everyone to make derivative works, and to use the Internet to share."

If the media coverage is any guide, Lessig is way out in front in the public relations war over free speech and the Internet. Nearly all the reviews of his books have been favorable. Numerous publications, including the *New York Times* and the *Washington Post*, have editorialized against the copyright term extension. And Lessig has achieved a level of personal notoriety that is rare for any lawyer this side of Johnny Cochran.

Stanford Law Professor Paul Goldstein points out that copyright and free expression have co-existed for more than 200 years, with Congress deftly balancing the two interests.

Websites extol his brilliance. Students clamor to offer him research assistance. Dean Sullivan considers stealing him from Harvard and keeping him from Yale to be one of the signature achievements of her tenure.

There are some who consider Lessig an ivory tower intellectual who blithely ignores the practical importance of copyright law—and there are some, inevitably, who are jealous of his extraordinary success. He is popular among students, though like many intellectuals he can be impatient and demanding. He does not cut an imposing figure around campus, where he often can be seen wearing black jeans and a rumpled oxford shirt. What he is, by all accounts, is very, very smart, and a truly creative legal thinker. Geoff Stewart, accustomed to massive legal egos, wonders: "How can a person be so nice and also be so brilliant?"

Of course, niceness and brilliance in themselves don't cut much mustard with the Supreme Court, nor does favorable press coverage. Media industry lawyers remain confident that the CTEA will be upheld, and it's not hard to see why. The Copyright Clause, after all, does seem to give Congress the authority to establish copyright terms, and Congress has used that power many times over the past two centuries. The courts have rejected the argument that the "to promote progress" phrase in the Constitution's Copyright Clause limits the kind of term that can be established, and the appellate court in Eldred went further, holding that CTEA could indeed be found to promote progress if that were required.

The First Amendment claim is also anything but a slam dunk for Lessig and his team. Their argument is that any law that limits speech must be held to a higher standard of scrutiny, and that the government thus must show that the CTEA both satisfies a compelling state interest and is the least restrictive way to satisfy that interest. In the past, though, the courts have held that the idea/expression distinction, combined with the fair use doctrine, have essentially removed the First Amendment from any discussion of copyright. And even if the high court revisits that issue and agrees that the CTEA must be subject to "intermediate scrutiny," it would still need to find that the law was too onerous a means of addressing a real policy issue.

Still, the fact that the court decided to hear the case is certainly a good sign for Lessig, Sullivan, Eldred, and company; if the justices didn't see any merit in the arguments they could easily have let the appeals court decision stand. And Sullivan suggests that the ideological makeup of the court might work to her side's advantage. "This is a wonderful case for uniting different factions of the Supreme Court," she says. "The originalists and the states' rights advocates should be concerned about Congress exceeding its powers. The liberals ought to be drawn to the First Amendment arguments."

A Supreme Court victory is the ultimate achievement for a constitutional lawyer, but even a win would leave Lessig and his allies with many battles yet to fight. Congress, always eager to curry favor with those who own TV stations and movie studios and printing presses, seems more inclined than ever to tighten the screws on copyright. Civil libertarians have a lot of issues on their plate, and copyright doesn't arouse a lot of public passion. Legal wins are one thing, and political wins are something else again. Lessig will have to figure out how to succeed at both.

Intellectual Property Rights

ONE SIZE DOESN'T FIT ALL

The world has been moving toward uniform standards for patents and copyrights. A new study warns that the poorest nations are likely to suffer unless that trend is stopped.

BY SHEILA KAPLAN

EIGHT YEARS AFTER THE URUGUAY ROUND of trade talks, there's a growing sense that the developing nations cut a bad deal, particularly on intellectual property rights. The latest critique comes from a high-powered commission, chaired by Stanford Law School Professor John Barton '68, that calls on the World Trade Organization (WTO) to extend the deadline for the poorest Third World countries to have adopted these rules—by at least 10 years, to 2016 at the very earliest.

That's just one of several dozen recommendations from the Commission on Intellectual Property Rights, an independent task force established and financed by the British government. Its report, issued in September, quickly created a buzz among top trade officials, with the director generals of both the WTO and the World Intellectual Property Organization (WIPO) attending the publication's official release in Geneva. The report's overarching theme is that the world's intellectual property rights system needs to take account of development concerns and that the present arrangement often costs more than the benefits it produces for the poorest nations.

It's too soon to say what impact the commission's research will have, but its work includes some strong remedies. For one, the report suggests that poor nations have not been well advised on the flexibility that they have in enacting copyright and patent laws, and that they do not necessarily have to use the United States and Western Europe as models. "Many developing countries are not aware of the options they have under these rules," says Barton, the George E. Osborne Professor of Law. The commission believes that developing nations still need to adopt IP regimes, but not the cookie-cutter approach that has been followed.

A case in point is patenting in agricultural biotechnology. While most developed countries permit this, the report recommends that the poorest countries, at the very least, should restrict such patenting. And the report adds that developing nations can do this and still be in compliance with the Uruguay Agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPS, which developing nations are supposed to have implemented by 2006.

Of course, some argue that loosening such rules will slow the spread of new technology. Take the corporate giant Monsanto, which refuses to sell certain of its patented bioengineered cottonseeds in India, out of concern that Indian law allows them to be replicated. "It's a detriment to us to take the technology there if there isn't a legal system," says Gary Barton, a company spokesman (not related to Stanford's Barton).

This business perspective heavily influenced the talks in Uruguay, but the evidence that John Barton has helped to marshal reveals that a rigid global standard actually hinders technological growth in the Third World. The report points out that the United States in the 19th century, while it was developing into the most technologically advanced nation in the world, did not play by Europe's intellectual property rules (printers, for instance, were permitted to copy freely foreign books and sell them throughout the country). Similarly, South Korea and Taiwan, during their growth years, had few restrictions on producing knock-offs of imported high-tech items.

The recent scandals involving the unaffordably high prices of patented AIDS drugs—while the disease reached epidemic proportions in Africa, Asia, and Latin America—have already changed the way the rules are followed. A consensus has recently emerged that in the event of medical crises, patents should be waived, and countries encouraged to buy cheaper generic versions of brand-name drugs. Now Barton and his colleagues on the commission, comprised of an Argentine economist, a top Indian government official, a leading British barrister, and two British scientists, are essentially recommending that the envelope be pushed a bit further.

PHOTO BY STEVE GLADFELTER

The British asked John H. Barton '68, George E. Osborne Professor of Law, to chair the Commission on Intellectual Property Rights.

Barton is no stranger to contentious international debates. He has been an arbitrator in dumping disputes between Canada, Mexico, and the United States. He has overseen studies for the World Bank on intellectual property and biotechnology. And he has researched the legal implications of the trade of genetically engineered rice. He was, however, surprised when Clare Short, a member of parliament and Britain's Secretary of State for International Development, asked him out of the blue to join the commission and be its chairman. Over the last 18 months, he has overseen the commission's work, which includes running a series of workshops with leading scholars, reviewing working papers, and interviewing top officials in at least seven nations as well as representatives from WIPO, WTO, the European Union, business groups and nongovernmental organizations. (The report, titled *Integrating Intellectual Property Rights and Development Policy*, is available at www.iprcommission.org)

The commission ultimately concludes that the TRIPS agreement may not always be in the best interest of poor countries. In addition to highlighting ways that TRIPS and other international arrangements can be friendlier to the Third World, the report also suggests that developing countries be given more time to adhere to the First World's IP regimes. They were cheered on in their work by the WTO's new director general, Supachai Panitchpakdi, who told them that he was troubled by the "conspicuous similarity" between the language in the final TRIPS agreement and the language that was submitted by private associations and corporations.

In an interview, Barton does not focus on the role of the business lobby, but acknowledges that international IP negotiations often have one side with vastly more resources than the other. That apparently happened in the Uruguay round. "A lot of the countries didn't realize many of the details of what they were signing," Barton says. "I don't think many of the people realized how much is at stake." The new report aims to level the playing field, and regardless of its effect, officials in the Third World will have been warned to be very careful when negotiating future deals.