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Intellectual Property Equality

Margaret Chon¹

I. INTRODUCTION

Three hundred years ago, the first major Anglo-American copyright statute, often referred to as the Statute of Anne, went into effect.² Copyright scholars have been and will be commemorating this occasion throughout this calendar year, although one could argue that our celebration may have inadvertently frozen the origin story of copyright.³ A slightly different critique is that while we commonly refer to this act as the “Statute of Anne,” it was more precisely entitled: *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.*⁴ I suppose we can forgive ourselves for almost always referring to the Statute of Anne by its abbreviated form, but we should not forget that this act wrested control of books from the bookbinders, booksellers, and printers (or the “Company of Stationers,” as they were then called). The Statute of Anne destroyed their prior monopolies by limiting the term of copyright to fourteen years for books not yet published, twenty-eight years total if the author renewed for an additional fourteen-year term, and twenty-one years for books already in print.⁵

At first glance, the links between the origins of copyright in the United Kingdom and the origins of equality norms in the United States seem tenuous. One ambiguous connector is Thomas Jefferson who, as our first secretary of state, was also one of the first three administrators of the Patent Act of 1790.⁶ As everyone familiar with U.S. history surely knows, Jefferson, a slaveholder who would not free his slaves, referred to equality as a fundamental value of the as-yet incipient republic, stating that: “all men are created equal, that they are endowed by their Creator with certain

unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”⁷ Jefferson was not involved in drafting the Constitution, as he had been elected by the Continental Congress to be a diplomat to France while the Constitutional Convention was convened.⁸ According to at least one biographer, he was so devoted to technology transfer (as we call it now) that during his travels throughout Europe during this time, he smuggled a sack of rice out of Lombardy, Italy, despite the fact that there was a penalty of death for anyone caught taking this particular variety of rice out of the country.⁹ And there is correspondence between Jefferson and James Madison suggesting that Jefferson was ambivalent about “the benefit even of limited monopolies”¹⁰ of intellectual property at the time our Constitution was drafted—a Constitution that did include a copyright and patent clause, but did not include, at least not at first, an equal protection clause.¹¹

Intellectual property and equality: these two areas are often not mentioned in the same paragraph, much less the same sentence. Both fields, like most areas of law, are rife with legal fictions, social constructions, and historical accidents carrying with them material consequences to real people within imagined communities. They have different discourses and epistemic pedigrees. Nonetheless, I have come to view these separate scholarly inquiries as one, in what I now call *intellectual property equality*.

The better public policy choices in intellectual property should always keep at the forefront the optimal distribution and not just the absolute amount of knowledge (or “learning” in the vernacular of Anne). What intellectual property law does—what the Statute of Anne did, for example—is to create an artificial scarcity in the form of an exclusive right. Prior to the Statute of Anne, the Crown had used its prerogative—its royal power, its printing patents or privileges, and its stationers’ copyright—to control the directions of knowledge in ways that were top-down, hierarchical, nontransparent, ad hoc, and predictably, distributionally unequal.¹² The government also repressed religious dissent by providing licenses to print only the kinds of books that the Crown deemed suitable.¹³

We cannot lose sight of the fact that the Statute of Anne, passed by Parliament against these abuses, was a model for our own U.S. constitutional copyright clause and subsequent statutes.¹⁴ *An Act for the Encouragement of Learning* created a *temporary* artificial scarcity and thus a public domain of knowledge once the time for exclusive rights expired after fourteen, twenty-one, or twenty-eight-year terms.¹⁵ When the Statute of Anne went into effect, copyright (through carefully limited terms) was redesigned so as to promote the diffusion of knowledge.

As others have persuasively argued, the constitutional copyright and patent power of Congress is intimately intertwined with the free speech and expression clauses of our First Amendment, which provide a powerful basis for access to learning and knowledge, balanced against the exclusionary rights of intellectual property.¹⁶ However, the kind of freedom represented by equality—the freedom of human flourishing through access to education, for example—has been underexplored in intellectual property literature when compared to the freedoms of expression and speech. And it goes without saying that the converse is true as well—intellectual property and its normative commitment towards knowledge diffusion has been underrepresented in the equality literature.

While equality jurisprudence has focused on the development of antidiscrimination norms outside of intellectual property, one enormous area of inequality has been the realm of knowledge, whether at basic levels or in areas of advanced scientific research and development. Can copyright, which is the primary focus of this essay, be leveraged through equality norms to further encourage its goal of learning? I claim here that the copyright and patent clause bears an intimate relationship to the equality values in our constitutional tradition, despite the fact that these sections of the Constitution were not contemporaneously drafted. The regulation of knowledge can be calibrated as well to equality norms developed in other contexts, such as human development and sustainable development, which

are increasingly prominent in global governance regimes. My argument will begin with development and proceed to equality.

II. INTELLECTUAL PROPERTY FRAMED BY DEVELOPMENT

Knowledge governance through intellectual property is now being framed more and more by the concept of *development*, whatever that is—mostly a floating signifier, conveniently left abstract so that people believe that they agree about it. One of its eloquent academic deconstructionists describes it as “a perception which models reality, a myth which comforts societies, and a fantasy which unleashes passions.”¹⁷ Nonetheless, it is one of the main conceptual vessels deployed to address asymmetry within the global trade system and other legal regimes.

The grand experiment of this development age of intellectual property is whether the norms of intellectual property will result in outcomes addressing issues relevant to the so-called bottom billion¹⁸ of the world’s 6.8 billion and growing population. The major intellectual property legal regimes are now tasked with implementing development objectives. The World Trade Organization (WTO), since November 1991, has been engaged in the so-called Doha Development Round, including debates over the terms of access to medicine—the relation of patents to public health and traditional knowledge. And since September 2007, the World Intellectual Property Organization (WIPO) has been implementing the Development Agenda, originally proposed by Argentina and Brazil and pushed through at the behest of developing countries.¹⁹ As a United Nations (U.N.) agency since 1967, WIPO is presumably committed to the various Millennium Development Goals (MDG) adopted by the U.N. in September 2000 (they range from halving extreme poverty to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015) as “a blueprint agreed to by all the world’s countries and all the world’s leading development institutions.”²⁰ The MDG align, of course, with human rights norms such as the Right to Development.²¹

In the midst of this major move towards global development, intellectual property is driven by what I have described as a divide. This divide is written into the very structure of the WTO, as expressed by certain countries of the Global South, who insist on actual stated objectives and principles of this treaty which reference development goals other than purely economic ones.²² For example, Article 8 of the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPS) (entitled "Principles") refers to member states' ability to "adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socioeconomic and technological development."²³ This explicit reference to "public interest" had never been articulated in an intellectual property multilateral framework prior to TRIPS. And this Article 8 language of "public health" was used by developing countries and their NGO allies to argue in favor of creative regulatory solutions to provide access to patented antiretroviral drugs during what continues to be the largest public health pandemic—the AIDS crisis—which has already killed more than twenty-five million people, most of them in very poor countries.²⁴

Extrapolating from this compelling example of access to medicine, which is clearly a public health objective, I have argued elsewhere that a link between intellectual property and equality is a model focused on development conceptualized as freedom.²⁵ Derived from Amartya Sen's now famously entitled 1991 book *Development as Freedom*,²⁶ this approach is a powerful vehicle to incorporate equality norms into the regulation of knowledge goods because it focuses on human capabilities to achieve certain objectives such as education, health, and other basic development goals essential to human flourishing. Both intellectual property and development are mostly faith-based (rather than evidence-based) endeavors, and their relation to each other is framed in terms of correlation rather than causation.²⁷ Nonetheless, we have enough information to make some

judgments about what to do and what not to do about intellectual property as it relates to emerging development norms implicating equality.

As it is presently structured, the main thrust of intellectual property law assumes that economic growth is the principal and only valid means to development. But growth per se without access to the social welfare dividends can tear away at the ensuing pie of greater overall wealth. Knowledge has value for many purposes, and so we need to pay attention to how it is distributed throughout society for those various uses. Knowledge has a strong public goods, or common pool resources, or non-market goods, or public domain, or commons aspect. (The various terms addressing this alternative space to private market mechanisms are definitionally fuzzy and overlapping, so I will refer to them all here as “public goods”—to be contrasted with “private goods.”).

This public goods aspect was at least implicitly recognized by the English Parliament when it gave the title to the Statute of Anne: “*An Act of the Encouragement of Learning . . .*,” and it was again implicitly recognized by the House of Lords when it held in the 1774 case of *Donaldson v. Beckett* that the Statute of Anne superseded any common law right (or natural right) of the author to the printing, publishing, and vending of his or her work.²⁸ And Thomas Jefferson recognized this public goods aspect when he wrote: “He who receives an idea from me receives [it] without lessening [me], as he who lights his [candle] at mine receives light without darkening me.”²⁹

III. EQUALITY OF KNOWLEDGE GOODS

Is social welfare through knowledge diffusion, whether global or domestic, maximized more by via private or public means, or some desirable mix of both?³⁰ Exclusive rights through intellectual property may overstate the benefits of private investment incentives and underestimate social costs. Many policymakers involved in knowledge governance,

including through intellectual property, fail to appreciate the full implications of distributional justice in this realm.

As stated earlier, knowledge goods are public goods. I cannot prevent you from reading a book, once I am done with it. Often the policy conclusion drawn from this observation is that these goods then *must* be privatized, for there is no way to prevent others from reaping this “free” benefit from the good—or “free-riding” in economic parlance. However, that is not an inevitable policy choice—again, in economic jargon, these kinds of knowledge goods have positive spillover effects:³¹ if I read something, it benefits not only me but also you and others through my increased capacity to help people other than myself.

Some may remember the “Free Mickey” buttons circulating when *Eldred v. Ashcroft*, the case involving the constitutionality of the Copyright Term Extension Act, was being argued before the Supreme Court in 2002.³² Those buttons were a reference to Mickey Mouse, who was going to be locked up for another twenty years—for a total of ninety-five years from the date that his copyright was originally secured.³³ The Free Mickey website states that “ironically, many of Disney’s animated films are based on nineteenth-century public domain works, including Snow White and the Seven Dwarfs, Cinderella, Pinocchio, The Hunchback of Notre Dame, Alice in Wonderland, and The Jungle Book (released exactly one year after Kipling’s copyrights expired).”³⁴ Disney’s ability to access and build upon these earlier works is a type of freedom of development that relates directly to copyright’s goal of encouraging learning, so as to address inequality of access to knowledge. Ponder the consequences of the current ninety-five year term in the 1976 Act, compared to the original fourteen, twenty-one, or twenty-eight-year terms of protection in the Statute of Anne.

Knowledge goods contribute to public policy goals other than innovation, and creativity. If I read something, I may not only *create* something from my knowledge (such as this article), I might also be happier in general (to which Thomas Jefferson aspired for us all),³⁵ and so may my family,

friends, and community, especially if I am a woman. This is positive from a pure economic growth perspective as well as a distributional justice perspective. Why? Well, here is what we do know—despite the lack of evidence generally about intellectual property for optimal development—the World Bank, the United Nations Development Program (UNDP), and even Goldman Sachs³⁶ agree that gender equality is critical in combating global poverty. Women’s empowerment raises economic productivity, reduces infant mortality, improves health and nutrition, and improves household welfare through multiple channels, such as through higher wages and better jobs, lower fertility, lower maternal mortality, entrepreneurial success, intergenerational benefits, and greater female employment rates.³⁷ There is a growth premium from gender equality in education, and lots of data to support this.

And if I read something, I may be healthier, happier, and thus, contribute to the decrease of public “bads”—which have negative spillovers such as communicable disease—as well as the increase of other global public goods that are high on the list of the MDG (and desirable for all countries to achieve).³⁸ These public goods include equality. Among other things, we know that there is a strong correlation between income inequality and educational inequality.³⁹

Intellectual property professors are fond of pointing out that knowledge goods are inputs to the production of other public goods. This is a point about intergenerational distribution as well. The term “sustainability” is kind of overused these days, but this is a critical point about intellectual property: knowledge is needed to create more knowledge. Overcontrol of knowledge is like a tax on creating and consuming by others who do not have access. Some of the early printing patents prior to the Statute of Anne were on ABC readers.⁴⁰ These were very lucrative copyrights for the printers, but think about the impact of these perpetual exclusive rights on the ability of people to learn how to read and, ultimately, upon general social welfare. As Sir Isaac Newton said in 1676 (who himself was

paraphrasing Bernard de Chartres in 1159 with respect to scientific knowledge), “*If I have seen further it is by standing on ye sholders of giants.*”⁴¹ It is hard to stand on “sholders,” or even shoulders, if one does not have the benefit of access to the giants of the past at all, due to illiteracy.

In the equality space, critical legal scholars have articulated their dual consciousness regarding law’s potential for achieving justice, as well as its use as a tool for oppression.⁴² In a slightly different vein, however, we require multiple vocabularies to convey the pluralities in which many of us now live.⁴³ Rather than the myopic focus on intellectual property’s capacity to encourage innovation or creativity, is there another way to speak in intellectual property? Can we broaden its focus to include the production of other global public goods such as equality, education, health, food security, climate change and other areas deeply implicated in a “development as freedom” model, where human capacity for flourishing requires basic freedoms such as the ability to read, to eat, to be free from disease, and so on? These freedoms are the prerequisites of a functioning knowledge society that formal intellectual property regimes already assume.

Some of the tools I have used to articulate intellectual property equality come from critical theory, which has a rich vocabulary for exploring equality norms, such as “looking from below,”⁴⁴ simultaneity⁴⁵ or intersectionality,⁴⁶ and interest convergence.⁴⁷ At around the same time that U.S. law professors were mapping out a new approach to law called “critical race theory,” development economists at the UNDP were articulating the human capabilities paradigm of development.⁴⁸ What strikes me is not how different these parallel approaches are but how similar they are. Critical race feminists’ insights about women of color disproportionately experiencing violence that is invisible to others echoes Amartya Sen’s claim in the New York Review of Books from around the same time period that globally “100 Million Women are Missing” due to a

lack of health care and attention, correlated with a lack of gainful employment and education.⁴⁹

This asymmetry persists today. What if we took seriously in intellectual property an equality analysis on a global level that focused on these missing women, their lower literacy rates, their higher mortality rates, their lower employment rates, and other forms of structural, representational, and political violence that they experience? What intellectual property policies contribute to these missing women, and how would we want to restructure our intellectual property laws, both internationally and locally, to address this type of structural violence?

For example, experienced observers have noted that the diffusion of health technologies depends more on the absorption of knowledge on the part of agents, and less on the embodiment of new technologies, especially at low levels of development.⁵⁰ Additionally, overwhelming evidence points to the importance of a mother's education in determining infant and child mortality.⁵¹ Thus, in regard to the MDG, paradoxically, copyright policy may lead more directly to better health measures than patent policy, especially at lower levels of development, because changes in educational access affected by copyright laws may also affect maternal and child health more than the health technologies incentivized by patent laws. Yet, the disproportionate focus in the global health debates has been on technical fixes, such as access to medicines (pills and vaccines) rather than on access to education.

Another less gender-specific example is that, as observed earlier, the fundamental human right of free speech undergirds the copyright regime.⁵² However, free expression norms are not being exported at the same rate as the economic norms of copyright holders to other countries through multilateral and bilateral treaties.⁵³ Taking just one of the tools and insights of critical theory, a focus on basic education or freedom of expression in development would result in very different norm-setting environments for copyright—an approach “From Below.”⁵⁴

IV. CONCLUSION

Just as the Statute of Anne emerged not long after the printing press, future forms of knowledge production and governance will emerge with new technologies. Students in my Intellectual Property and Development Seminar this semester are debating, for example, how education can be fostered through open licensing of content created through digital-networked technologies. In countries like South Africa, where there are eleven official languages and an average of one textbook for every five students⁵⁵—and in the United States, for that matter, where we are facing declining educational budgets in the face of economic stress—we need creative approaches and open minds to copyright.⁵⁶ Borrowing from the past, the Statute of Anne provided public access through libraries.⁵⁷ It also contained a civil action for unfair pricing,⁵⁸ demonstrating that access to affordable knowledge was a concern even three hundred years ago when this first major statute was enacted. What are the twentieth century equivalents of these provisions analogous to those in Google Books Settlement,⁵⁹ for example?

Intellectual property and equality are fundamentally intertwined in these governance challenges and endeavors as we adapt to new technologies for disseminating knowledge, some mechanisms of which we can learn from giants before us, and some of which we must dare to imagine, standing on their “sholders.”

¹ This essay is adapted from a speech given on March 4, 2010, at the installation of the inaugural Donald and Lynda Horowitz Professor for the Pursuit of Justice at Seattle University School of Law. I thank Seattle University President Steven Sundborg, S.J., Provost Isaiah Crawford and former law school interim Dean Annette Clark, as well as Professor Ruth Okediji, Professor William Prosser at the University of Minnesota Law School, for their gracious observations during the installation ceremony; Donald and Lynda Horowitz; the faculty and staff at Seattle University; my colleagues at other universities, including Dean Kellye Testy; alumni and current students; and especially my family, for their many forms of support; Therese Norton, class of 2010 and Amy Nguyen,

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² Statute of Anne, 1710, 8 Ann., c. 19 (Gr. Brit.); An Act for the Encouragement of Learning, *infra* note 4.

³ Copyright in England can be traced to at least the beginning of the sixteenth century through printer's privileges. See *Primary Sources on Copyright*, ARTS & HUMAN RES. COUNCIL (1450–1900), http://www.copyrighthistory.org/database/identityhtml/static_1ink_core_uk.html (last visited Oct. 3, 2010); See also Oren Bracha, *Owning Ideas: A History of Anglo-American Intellectual Property* 117, available at <http://www.obracha.net/oi/OI3.pdf> (tracing history of printing patents and stationer's copyright, and reviewing secondary sources).

⁴ For the official statute, see An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Ann., c. 19 (Gr. Brit.) [hereinafter An Act for the Encouragement of Learning].

⁵ *Id.*

⁶ *Graham v. John Deere*, 383 U.S. 1, 5–11 (1966).

⁷ The Declaration of Independence, available at: <http://www.ushistory.org/DECLARATION/document/index.htm>. The Statute of Anne predated our American Declaration of Independence by about sixty-six years, but by the time of its enactment, there were already about four hundred thousand people in the American colonies, including slaves and indentured servants, but not including native tribes outside the jurisdiction of the colonies. See Quintard Taylor, *United States History: Timeline: 1700–1800*, http://faculty.washington.edu/qtaylor/a_us_history/1700_1800_timeline.htm (last visited Nov. 9, 2010).

⁸ THOMAS JEFFERSON, THOMAS JEFFERSON'S EUROPEAN TRAVEL DIARIES 9 (1987) [hereinafter JEFFERSON'S TRAVEL DIARIES].

⁹ *Id.* at 19.

¹⁰ *Graham*, 383 U.S. at 5–11.

¹¹ U.S. CONST. art. I, § 8.

¹² L. Ray Patterson & Stanley F. Birch, Jr., *A Unified Theory of Copyright*, 46 HOUS. L. REV. 215, 244–50 (2009). As Benjamin Kaplan observed after recounting the origins of copyright in England, "copyright has the look of being gradually secreted in the interstices of the censorship." BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 4 (1967).

¹³ Patterson & Birch, *supra* note 12.

¹⁴ U.S. CONST. art. I, § 8. ("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."); Copyright Act of 1790, 1 Stat. 124, Ch. 15 ("An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies during the times therein mentioned.").

¹⁵ See generally An Act for the Encouragement of Learning, *supra* note 4.

¹⁶ Patterson & Birch, *supra* note 12; Neil W. Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1 (2001). *See generally* DAVID LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* (2008).

¹⁷ WOLFGANG SACHS, *THE DEVELOPMENT DICTIONARY: A GUIDE TO KNOWLEDGE AS POWER I* (1992).

¹⁸ PAUL COLLIER, *THE BOTTOM BILLION* (2007).

¹⁹ WORLD INTELLECTUAL PROPERTY ORGANIZATION, *Development Agenda for WIPO*, <http://www.wipo.int/ip-development/en/agenda/> (last visited Oct. 7, 2010).

²⁰ United Nations, UN Summit on the Millennium Development Goals (Sept. 20–22, 2010), <http://www.un.org/millenniumgoals/>; Convention Establishing the World Intellectual Property Organization, UN-WIPO, July 14, 1967, 21 U.S.T. 1749, 848 U.N.T.S. 3; *see also* Agreement between the United Nations and the World Intellectual Property Organization, UN-WIPO, Dec. 17, 1974, art. 1, *available at* <http://www.wipo.int/treaties/en/agreement/index.html> (referring to WIPO as “a specialized agency [within the UN] and as being responsible for taking appropriate action in accordance with its basic instrument, treaties, and agreements administered by it, inter alia, for promoting creative intellectual activity and for facilitating the transfer of technology to the developing countries in order to accelerate economic, social and cultural development”) [hereinafter UN-WIPO].

²¹ *See* Declaration on the Right to Development, G.A. Res. 41/128, U.N. Doc. A/Res/41/128 (Dec. 4, 1986). Through the WIPO Committee on Development and Intellectual Property, WIPO is supposed to “be supportive of the development goals agreed within the UN system, including those contained in the Millennium Declaration.” Rep. of PCDA, Sept. 17, 2007, Annex 2–3, U.N. Doc. A/43/13 (2007).

²² Margaret Chon, *Intellectual Property and the Development Divide*, 27 CARDOZO L. REV. 2821, 2870 (2006).

²³ World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 8 (1994); *see also* Peter Yu, *The Objectives and Principles of the TRIPS Agreement*, 46 HOUS. L. REV. 979, 1018–20 (2009); Henning Grosse Ruse-Kahn, *Policy Space for Domestic Public Interest Measures Under TRIPS* (S. Ctr. Research Paper No. 22, 2009), *available at* <http://ssrn.com/abstract=1542542>.

²⁴ UNAIDS, *Report on the Global Aids Epidemic 5* (2008), *available at* http://www.unaids.org/en/KnowledgeCentre/HIVData/GlobalReport/2008/2008_Global_report.asp.

²⁵ Chon, *supra* note 23.

²⁶ AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

²⁷ *See* William T. Gallagher, Book Review of *Patent Failure: How Judges, Bureaucrats, and Lawyers Put Innovators at Risk*, by James Bessen and Michael J. Meurer, 19 LAW & POL. BOOK REV. 568 (2009); JESSICA COHEN & WILLIAM EASTERLY, WHAT WORKS IN DEVELOPMENT: THINKING BIG AND THINKING SMALL 26, 96 (2009) (suggesting that even if one can show through randomized evaluations (REs) that bed nets in a particular village might reduce malaria, that result may not be generalized to the next village over).

²⁸ *Donaldson v. Beckett*, 1 E.R. 837 (HL 1774).

- ²⁹ THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 1790–1826: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 180–81 (H. A. Washington ed., Volume VI 1859) (1853).
- ³⁰ Brett Frischmann, *Evaluating the Demsetzian Trend in Copyright Law*, 3 REV. L. & ECON. 649 (2007).
- ³¹ See generally Brett M. Frischmann and Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257 (2007).
- ³² *Eldred v. Ashcroft*, 537 U.S. 186 (2003).
- ³³ 17 U.S.C. § 304(b) (2002).
- ³⁴ FREE MICKEY, <http://www.freemickey.net> (last visited Oct. 8, 2010).
- ³⁵ DECLARATION OF INDEPENDENCE [¶ 2] (1776).
- ³⁶ Sandra Lawson, *Women Hold Up Half the Sky*, GOLDMAN SACHS, GLOBAL ECONOMICS PAPER NO: 146 (2009), <http://www2.goldmansachs.com/ideas/demographic-change/women-hold-up-half-of-the-sky.pdf> (relation of gender equality in education to development).
- ³⁷ *Engendering Development Through Gender Equality in Rights, Resources, and Voice*, WORLD BANK POLICY RESEARCH REPORT (2001), available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2001/03/01/000094946_01020805393496/Rendered/PDF/multi_page.pdf.
- ³⁸ See UN Summit on the Millennium Development Goals, *supra* note 20.
- ³⁹ RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONG (2010); see also <http://www.equalitytrust.org.uk/why/evidence/education>.
- ⁴⁰ Bracha, *supra* note 3, at 102, 124 (William Seres obtained in 1553 what possibly was the most lucrative of those patents. It covered the *ABC*—the period’s elementary reading textbook.).
- ⁴¹ ROBERT K. MERTON, ON THE SHOULDERS OF GIANTS: A SHANDEAN POSTSCRIPT 31, 37 (1965).
- ⁴² MARI MATSUDA, WHERE IS YOUR BODY?: AND OTHER ESSAYS ON RACE, GENDER, AND THE LAW 6 (1996).
- ⁴³ SHARON K. HOM, CHINESE WOMEN TRAVERSING DIASPORA: MEMOIRS, ESSAYS, AND POETRY 134 (1999) (“I danced and performed for several years before ending up in law. Ironically, I think I loved dance because I didn’t have to find words, and ultimately, I left dance in part because I also needed another way to speak again, enunciations that would connect me to the world, that would ‘be of service’ and make a difference.”).
- ⁴⁴ See MATSUDA, *supra* note 42 at 22.
- ⁴⁵ ERIC K. YAMAMOTO, INTER-RACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 109–12, 122 (1999).
- ⁴⁶ See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139–67 (1989), reprinted in Kimberle Crenshaw, *A Black Feminist Critique of*

Antidiscrimination Law and Politics, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 356–80 (David Kairys ed., 1998).

⁴⁷ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

⁴⁸ UNITED NATIONS DEVELOPMENT PROGRAMME, *A World of Development Experience*, <http://www.undp.org/about/> (last visited Oct. 8, 2010).

⁴⁹ Amartya Sen, *More than 100 Million Women Are Missing*, 37 N.Y. REV. OF BOOKS, Dec. 20, 1990, at 20.

⁵⁰ See Laurie Garrett, *The Challenge of Global Health*, FOREIGN AFFAIRS, Jan.-Feb. 2007; Rodrigo R. Soares, *On the Determinants of Mortality Reductions in the Developing World*, NAT'L BUREAU OF ECON. RES. WORKING PAPER SERIES, 2007, at 15; Michael J. Free, *Achieving Appropriate Design and Widespread Use of Health Care Technologies in the Developing World: Overcoming Obstacles That Impede the Adaptation and Diffusion of Priority Technologies for Primary Health Care*, 85 INT'L J. GYNECOLOGY & OBSTETRICS S3–S13 (2004).

⁵¹ Soares, *supra* note 50, at 32.

⁵² Patterson & Birch, *supra* note 12, at 299.

⁵³ Michael D. Birnhack, *Trading Copyright: Global Pressure on Local Culture*, in *THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES* 363 (Neil Weinstock Netanel ed., 2009).

⁵⁴ Margaret Chon, *Intellectual Property “From Below”: Copyright and Capability for Education*, 40 U.C. DAVIS L. REV. 803 (2007).

⁵⁵ Andrew Rens & Rebecca Kahn, *Access to Knowledge Research Series: South Africa Country Report v2.0*, Aug. 16, 2009, at 120, available at <http://ssrn.com/abstract=1455623>.

⁵⁶ See The Copyright Principles Project, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1 (2010). See generally Dalindyabo Shabalala, *Knowledge and education: Pro-access implications of new technologies*, INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS 250 (Tzen Wong and Graham Dutfield, eds. 2011), available at: http://www.piipa.org/index.php?option=com_content&view=article&id=99.

⁵⁷ 8 Ann. c. 19 (1710) (“nine copies of each book . . . upon the best paper . . . shall be printed and published as aforesaid . . . and delivered to the Warehouse-Keeper of the said Company of Stationers, for the time being, at the Hall of the said Company . . . for the use of the Royal Library, the libraries of the Universities of Oxford and Cambridge, the libraries of the four Universities in Scotland, the library of Sion College in London, and the library commonly called the library belonging to the Faculty of Advocates at Edinburgh respectively.”).

⁵⁸ *Id.* (“if any bookseller or booksellers, printer or printers, shall . . . set a price upon, or sell, or expose to sale any book or books at such a price or rate as shall be conceived by any person or persons to be too high and unreasonable; it shall and may be lawful for any person or persons to make complaint thereof to the Lord Archbishop of Canterbury for the time being”).

⁵⁹ *The Authors Guild, Inc., et al. v. Google Inc.*, Case No. 05 CV 8136 (S.D.N.Y. 2009).