**Submission by Professor Charlotte Waelde, Professor of Intellectual Property Law, University of Exeter and Dr Abbe Brown, Reader, School of Law, University of Aberdeen to Inquiry: Creative Industries in Scotland**

**Executive Summary**

* Intellectual Property makes a valuable contribution to the creative industries in Scotland and is the subject of significant scholarly research and industry activity (in which one, other or both of us are involved), particularly regarding sharing and access in the museums sector and new practices which could be adopted.
* The balance within intellectual property, and its impact across all involved in the creative industries in Scotland, must always be reviewed, and it should not be assumed that intellectual property is an unfettered good.
* Significant differences exist in the approaches taken to disabled performers in Scotland and in England.

**2. How do the creative industries in Scotland differ from the creative industries in the UK as a whole?**

1. The Arts and Humanities Research Council funded project, **InVisible Difference: Dance, Disability and Law** (AH/J006491/1) has addressed questions concerning the making, status, authorship and ownership of disability dance, and has highlighted the almost complete absence from our cultural heritage in both Scotland and England of dance made and performed by dancers and choreographers with disabilities. Our research suggests that the reasons for this absence include a lack of audience literacy; the embryonic nature of exploitation models for dance; the lack of enforcement mechanisms with respect to human rights obligations; the entrenched nature of the medical model of understanding disability. Details of our research and publications (including Policy Briefs) can be found at http://www.invisibledifference.org.uk

2. Our research has also exposed the effects of the different approaches to cultural policymaking and disability as between Scotland and England. For the last decade Scotland has had a more proactive inclusive approach to disability in the arts (for example through the Scottish Dance Theatre’s Dance Agent for Change and Made in Scotland funding programmes, and the noted increase in disability performers in the 2015 Edinburgh Fringe). This has led our InVisible Difference partner, Caroline Bowditch, to opine that in Scotland she is not considered a ‘disabled dance artist’, she is considered a ‘dance artist’. We have also shown that disabled dance is much more likely to be the subject of professional critique in Scotland than in England, and that the critique is of the dance – rather than a disability. Although this represents progress, far beyond that experienced in England, there is still a good way to go. While Caroline Bowditch experiences good levels of equality in Scotland, it is also in Scotland that she has been the subject of excoriating criticism from an audience member: much work remains to be done around audience literacy in both Scotland and England.

* **4(a) What, if any, changes need to be made to enable the creative industries to capitalise on their Intellectual Property?**

3. Many studies exist and are underway researching and investigating the possible roles of intellectual property within the museums and libraries sector of the creative industries.

4. Two of these currently being funded by the European Commission are:

* RICHES – Renewal, Innovation and Change: Heritage and European Society http://www.riches-project.eu RICHES has received funding from the European Union’s Seventh Framework Programme for research, technological development and demonstration under grant agreement no 612789
* Europeana-Space – Spaces of possibility for the creative re-use of digital cultural content <http://www.europeana-space.eu> Europeana Space has received funding from the European Union's ICT Policy Support Programme as part of the Competitiveness and Innovation Framework Programme, under GA n° 621037

**5. RICHES** is about the changes being wrought in the cultural heritage sector as a result of digitisation and co-creation. It is looking at how the cultural heritage sector can and should be re-calibrated in the wake of new practices and new meanings of cultural heritage.

6. One task undertaken by RICHES has been to offer a new way of thinking about copyright within the cultural heritage sector. Copyright permeates the work done in this sector, and, while on the one hand there are political and economic pressures that push for commodification of our cultural heritage, using copyright as the tool, on the other hand there are other political, economic and social pressures that emphasise the importance of keeping cultural heritage as open as possible. The tool that we have suggested for this is human rights: the message is that our cultural heritage should first be thought of through a human rights lens with a focus on fulfilling the rights to culture and cultural rights as found in our international human rights framework; copyright should then be used as a tool to meet these human rights goals.

7. A full articulation of this strategy can be found in the Paper – Digital Copyright Framework, available at <http://www.digitalmeetsculture.net/wp-content/uploads/2015/02/RICHES-D2.2-Digital-Copyrights-Framework_public.pdf> and the Policy brief available at <http://www.digitalmeetsculture.net/wp-content/uploads/2015/07/EUROPEAN-POLICY-BRIEF_Digital-Copyright-Framework_final.pdf>

8. One of the consequences of adopting a copyright strategy for the cultural heritage sector through a human rights lens is that more digital artefacts may become available for re-use, including commercial re-use. At present, many institutions within the cultural heritage sector licence digital representations of objects, using the funds raised towards their running costs. A strategy based on cultural rights and the rights to culture of their users, could underpin an ‘open’ strategy to re-use of digital objects, allowing third parties to experiment with innovative ways in which our cultural heritage might be monetised.

9. While examples of the successful monetisation of cultural heritage (beyond those that are very small) are currently hard to come by, this is what Europeana Space is investigating.

10. **Europeana Space** is a project that seeks to create new opportunities for employment and economic growth within the creative industries through the monetisation of our cultural heritage. At the heart of Europeana Space are six pilot projects. These are working in the areas of dance, TV, publishing, photography, games and museums. Each pilot is seeking to innovate with cultural heritage content and tools. The aim is to develop prototype tools that have commercial potential. These are then offered at hackathons to attendees for further innovation. At the end of each hackathon three projects are chosen to attend a business-modeling workshop. One winner of the business modeling workshop – the one that has the most commercial potential (among other criteria) – is chosen to enter incubation. It is anticipated that there will be a fund-raising event at the end of incubation.

11. Intellectual property in general and copyright in particular has been a key, and fundamental, thread running throughout the project: tools have been developed to assist those participating in the project to manage their intellectual property as it is likely that IP will have an important role to play in the ultimately successful projects.

12. The intellectual property lessons learnt from Europeana Space will be carefully documented and made available for future cultural entrepreneurs. More information can be found on the Europeana Space website.

13. Both the RICHES and the Europeana Space projects have important lessons for how copyright might be managed in the cultural heritage sector in Scotland. While the legal framework poses challenges for this sector – such as the opaque boundaries surrounding fair dealing, and the narrowness of the orphan works provisions – neither calls explicitly for changes in the law. While change can and does happen and would be supported by the projects where beneficial for the cultural heritage sector, it takes time. Both projects recognise the reality of working in the ‘here and now’ and aim to develop ways in to work within the current framework.

14. More generally, intellectual property can be a key means of rewarding and encouraging the Creative Industries and this is recognised in the work of Scottish industry organisations such as Licensing Executive Society (Scotland) http://www.les-bi.org/scotland.html. Scholars and activists have also recognised, however, the limits that this can impose on the creativity of others; although within the present constitutional framework intellectual property is an unavoidable (and in our view welcome) part of the creative landscape in Scotland, we urge that a balanced and nuanced approach is taken to the exploitation of IP and that regard is had to approaches such as Creative Commons licensing <https://creativecommons.org/licenses/> and to the grown of open access which is developing through the Higher Education sector (http://www.hefce.ac.uk/rsrch/oa/).