

# Language and discourse in the *Copyright Act* review



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## Who we are

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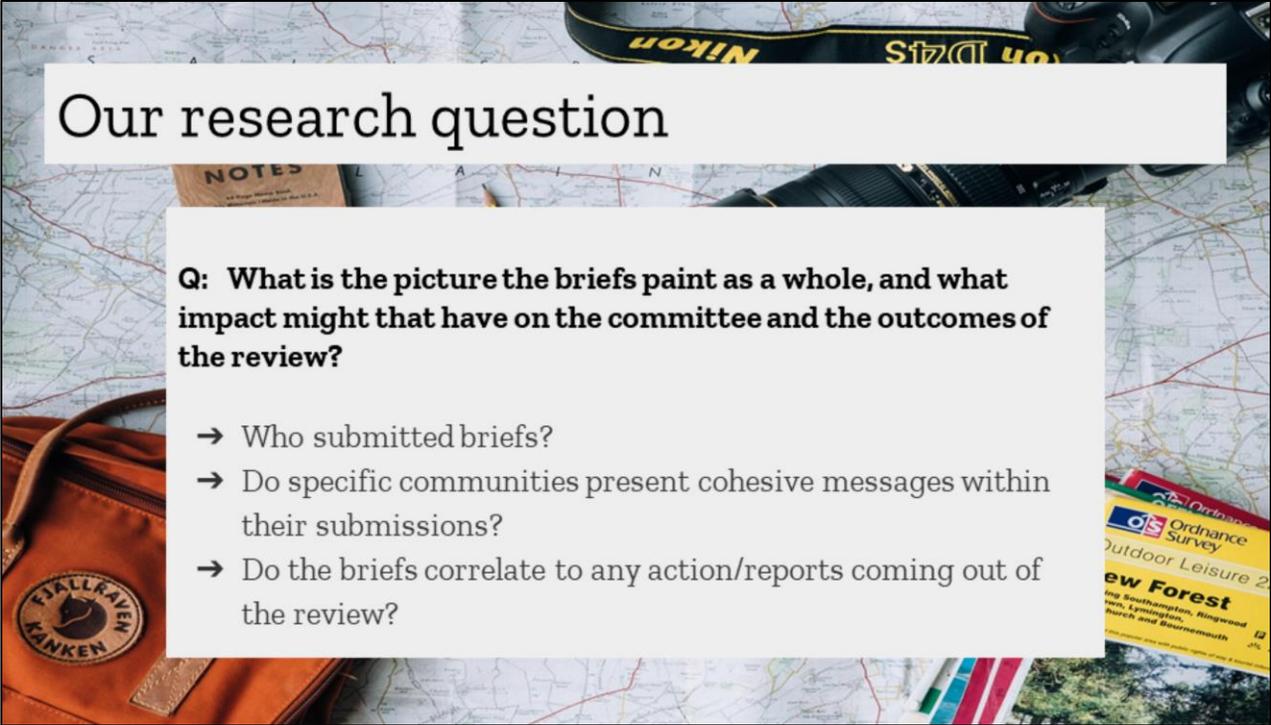
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# Our research question

**Q: What is the picture the briefs paint as a whole, and what impact might that have on the committee and the outcomes of the review?**

- Who submitted briefs?
- Do specific communities present cohesive messages within their submissions?
- Do the briefs correlate to any action/reports coming out of the review?

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STEPH

This research project arose out of personal experiences working with our institutions to engage with and contribute to the Copyright Act Review process. Across our institutions we know that many hours were spent compiling data, drafting reports, working with legal counsel and other University stakeholders, preparing both written and in-person submissions etc. in order to ensure that our community's perspective was given consideration and accurately represented in the Review process.

Reflecting on the work that went into these submission, we were curious to know what impact we could hope to see from them. This, and our general interest in knowing what other communities and interests were also hoping to influence the outcome of the Review, drove us to undertake the project.

JEN

what overall impression would the INDU committee have after reviewing these? What

types of organizations and individuals submitted briefs? Were they as black and white, for and against as they were coming across in some of the media and in the impressions many of us were getting? What specific recommendations were being made, and what reasons or arguments were being put forth—and would these have a noticeable impact on the committee evidenced in their final report? We can't address that last question yet, but are working towards the big picture painted by the briefs.

# Methodology

## Theoretical Framework

### Grounded Theory

- Starts without a hypothesis
- Theories emerge as data is analyzed and coded
- An iterative process

## Process

1. Google Docs and Sheets
  - Identified and categorized submitting parties
1. NVivo - qualitative data analysis tool
  - Uploaded submissions and encoded with identified themes

JEN

We used a grounded theory approach, which consciously starts without a hypothesis and lets the data create the theories. Because we were both involved in preparing briefs for the committee, and because we're so clearly connected to one side of what has been a contentious, polarizing discourse, grounded theory let the briefs present us with their perspectives while encouraging us to set aside any biases.

This is an iterative process, and we definitely found as we went through the briefs that some of our early codes were too broad, while others could be consolidated, and that reconsideration is an ongoing process. We'll come back to this when we talk about some of the challenges we've run into.

STEPH

In terms of the actual process that we used to access and analyze the submissions, we started by collecting all of them in a Google Drive. As I'm sure you all know, the individual submissions are made available for public viewing on the INDU Committee website and we were able to download them and then upload them as Google Docs. Among other things, we did this to insure their continued availability, as we know from

other similar calls for public feedback, often this material is not made available in perpetuity. From there we created a Google Sheet to track basic information about each submission including who authored it and what perspective they were coming from - more on that shortly. The second phase of the process involved uploading the submissions into Nvivo, a common qualitative data analysis software package that both SFU and UBC has access to. This tool allowed us to highlight sections of the submissions and tag or code them with relevant “nodes”. Nvivo also has fairly sophisticated analysis capabilities, but we are not yet at the stage where we have much use for these features.

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Grounded theory starts without a hypothesis, and lets the data create the theories. Because our initial question was so open-ended - essentially, “What is the picture the briefs paint as a whole, and what impact might that have on the committee and the outcomes of the review?” - Grounded theory lets the briefs paint this picture for us without preconceived notions.

Grounded theory is “the discovery of theory from data - systematically obtained and analysed in social research” (Glaser, B.G., and Strauss, A.L. (1967) *The Discovery of Grounded Theory: Strategies for Qualitative Research*. Chicago, IL: Aldine.)

Key characteristics:

- “the main purpose of GTM is *theory building*
- as a general rule, researchers should make sure that they have *no preconceived theoretical ideas* before starting their research
- analysis and conceptualisation are engendered through the core process of *constant comparison*, where every slice of data is compared with all existing concepts and constructs, to see if it enriches an existing category (by adding to/enhancing its properties), forms a new one or points to a new relation
- ‘*slices of data*’ of all kinds are selected by a process of *theoretical sampling*, where researchers decide, on analytical grounds, where to sample from next.”

(Urquhart, C., Lehmann, H., and Myers, M. (2010) ‘Putting the theory back into grounded theory: Guidelines for grounded theory studies in information systems,’ *Information Systems Journal*, 20(4): 357-81.)

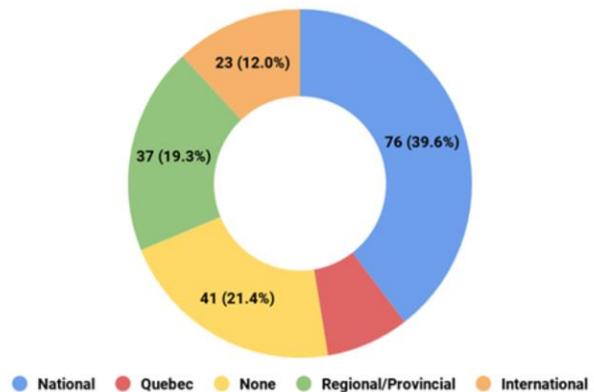
# Who submitted briefs?

273 organizations and/or individuals were represented in 192 briefs.

In an attempt to contextualize the briefs we recorded information about the parties including:

- Perspective
- Sector
- Community
- Region

Region



JEN

We started by looking at contextual information about the submitters of the briefs, and we've done this now for all of the briefs submitted to INDU. 273 parties submitted a total of 192 briefs between March and December 2018. Many of the briefs were submitted by groups of individuals or organizations, and in a few cases one individual or organization was involved in multiple briefs; for these contextual pieces we looked at each brief as a single entity, whether it had one or multiple authors.

We looked at whether each brief presented a clearly user-oriented or creator-oriented perspective; whether the submitter represented a non-profit, public, or industry sector, or none of these; what community they represented (and we'll talk about what we mean by community in a moment); and what region their scope encompassed.

This chart shows the region each brief represents. The yellow slice is briefs by individuals, which we categorized as not representing a specific region. The rest are by all different types of organizations. The majority of these, in blue, are by national bodies, followed by regional or provincial bodies—outside Quebec—in green; we included universities as “provincial.” We thought it might be relevant or interesting to separate out Quebec-based submissions, so they are in red. And finally, in orange, are briefs by international organizations including truly international bodies, such as IFLA, as well as any organization based outside of Canada, such as an American company or Australian association.

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192 briefs submitted between April and December 2018 (available at <https://www.ourcommons.ca/Committees/en/INDU/StudyActivity?studyActivityId=9897131>)

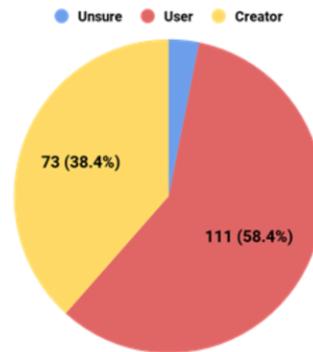
273 individuals and orgs represented in briefs [some briefs by multiple indivs/orgs; some indivs/orgs represented on multiple briefs] (list: <https://docs.google.com/spreadsheets/d/16dfLXN9N2A2mMhHwEWObYFcYiSpRmFtbxNJ4yI51B6w/edit?usp=sharing>)

# Who submitted briefs?

Of initial interest was the general perspective represented in the briefs.

Perspective

Briefs were coded as either **User-centred**, **Creator-centred**, or **Unsure**, if the brief did not appear to represent either perspective or we were unable to determine which view dominated the submission



Which perspective do you think was presented in the largest number of briefs?

## STEPH

One of the first questions we were interested in answering was what broad perspective - user or creator - was most represented across the briefs.

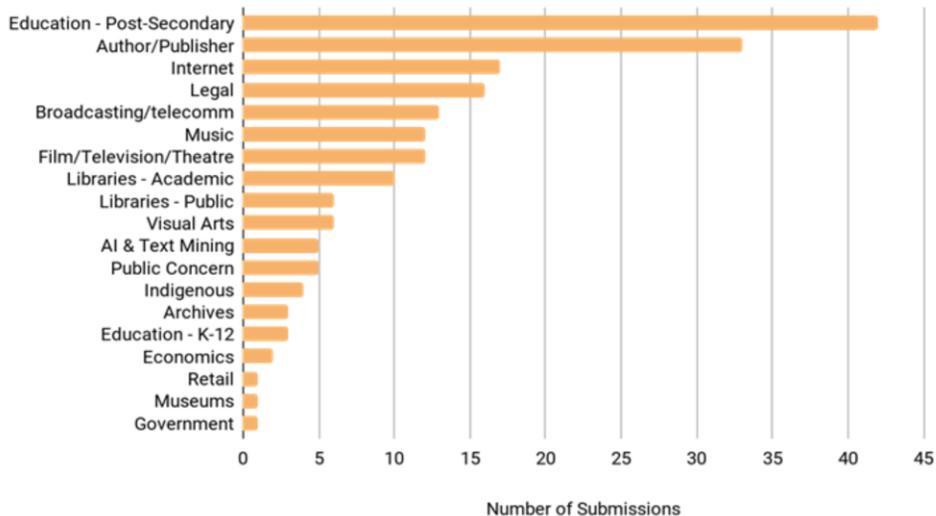
[poll the audience]

According to our assessment, there were substantially more user-centred briefs than creator-centred with user focused briefs accounting for almost 60 percent of the submissions and creator focused accounting for the majority of the remaining 40 percent. An additional 6 briefs - a total of 3.1% were categorized as “unsure” because we either were unable to categorize their position or felt it was too balanced to place in either of the two.

Another note about this - each brief was assigned only one perspective, although we acknowledge that many displayed aspects of both user and creator concerns. For example, many libraries and academic institutions advocated for additional protections for traditional knowledge, which we viewed as creator-focused, yet the

overall tenor of the briefs were still more focused on user rights.

## Who submitted briefs?



### STEPH

Aside from wanting broad information about the perspectives represented in the briefs, we were also interested in what communities the briefs were coming from. Obviously we were aware that the Post-Secondary/Academic Libraries and author/publishing sectors were well represented in debates around the Review, but we were unsure to what degree other industries were engaged and/or advocating for changes to the Act. In an attempt to capture this information we assigned a community to each brief that we thought reflected their perspective and interest in the Review. In total we accounted for 19 communities across the 192 briefs. As expected, Education- Post-Secondary was represented in the largest number of briefs at 42, with Author/Publisher coming in second place with 33. After these two groups, there are several communities clustering around the 10-15 briefs mark including Music, Broadcasting/telecommunications, Film/Television/Theatre and Academic Libraries. Again, to complicate this a bit I will say that we realize it is possible for submissions to fall into multiple communities. For example, one of the submissions we tagged as

“economics” was submitted by an economist, who was also an academic, and specialized in remuneration models for the music industry. While his submission could potentially fit into multiple categories we chose to assign him to economics because that was the predominate lens through which he was making recommendations.

JEN

I’m going to talk about the Internet and Legal communities we identified, which each represent a fairly significant number of briefs.

We categorized seventeen briefs as “Internet.” We included here parties whose briefs primarily address copyright as it affects creators or users working online, such as Google Canada, Open Media, Internet Archive Canada, and Creative Commons. About half of these internet-focussed submissions were from individuals, talking about how they use and create online content.

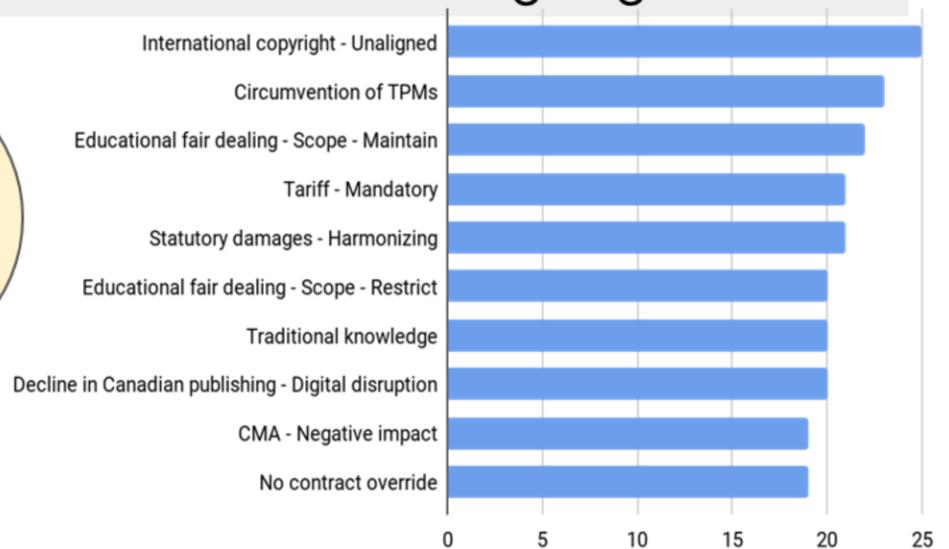
Recommendations from this group include things like permitting circumvention of TPMs for legal purposes or not enacting site blocking legislation; however, not all of the briefs in this category are on the same page—some do call for site blocking or reduction of exceptions to copyright as they relate to working online.

We’ve categorized sixteen briefs as “legal,” including submissions from organizations such as the Canadian Legal Information Institute and the Canadian Bar Association, as well as from individuals including Michael Geist, Meera Nair, and Barry Sookman. Because lawyers and legal scholars are in a position to address the Act in comprehensive and nuanced ways, a very wide variety of recommendations are made by this community—they touch on rights reversion, notice and notice, Crown copyright, fair dealing, and many others. And like the internet category they are not all in agreement on each of these.

So those contextual pieces reflect the submitters for all 192 briefs...

## What issues did the briefs highlight?

**100/192  
briefs  
coded**



JEN

...But we've only coded the actual *content* of about half of the briefs. At the moment we've arrived at 57 codes for different recommendations, based on those 100 briefs we've looked at so far. So these are the top ten most-used codes so far, each applying to 20-25% of the briefs we've looked at.

"International copyright – unaligned" is our most-used code, applying to about a quarter of the briefs so far—and when we started using that code it indicated that the brief argued that Canada should be more aligned with legislation in other jurisdictions, but now we think we've seen enough different reasons for invoking this international disconnect that we'd like to go back and take another look and maybe be more specific about how those recommendations break down.

STEPH

It seems pretty clear that the top ten nodes also reflect the concerns of the communities most well represented in the submissions. Given that Post-Secondary institutions, Authors/publishers and academic libraries rank among the communities

that submitted the most briefs, it makes sense that their concerns would show up high on the list in number of times they are mentioned. To give you a better sense of the scope of recommendations, I'll just point out a few nodes that are only in one submission mention them:

- Moral rights (1)
- Limiting statutory damages (1)
- Maintaining an up to-to-date registry of internet numbers (1)
- New category of IP for research outputs (1) - John Willinsky
- Blanket license regime "administered by a next-generation collection society" (1) - Cory Doctorow

100 files coded (+ 3 coded for containing no specific recommendations), out of 192

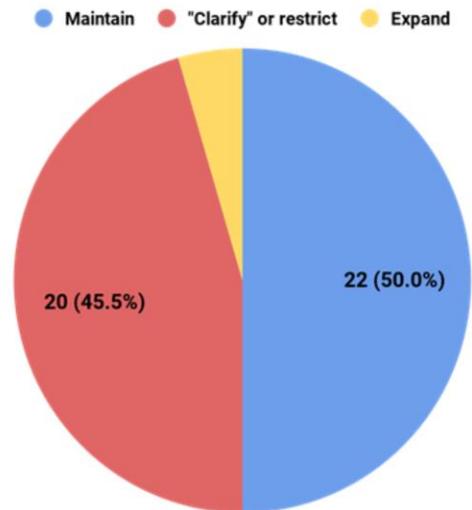
Top nodes:

1. International copyright - Unaligned (25 files)
2. Circumvention of TPMs (23 files) [also needs sub-coding]
3. Educational fair dealing - Scope - Maintain (22 files)
4. Tariff - Mandatory (21 files)
5. Statutory damages - Harmonizing (21 files)
6. Educational fair dealing - Scope - Restrict (20 files)
7. Traditional knowledge (20 files)
8. Decline in Canadian publishing - Digital disruption (20 files)
9. CMA - Negative impact (19 files)
10. No contract override (19 files)
11. Length of copyright term - Stay same (17 files)
12. License opt out (17 files)

# Fair dealing for education

"[F]air dealing as it stands now offers a proper balance of rights and exceptions... Interpretations of what constitutes a dealing that is fair should continue to be left to the context." Canadian Association of Law Libraries

"[T]he Copyright Act [should] be amended such that the fair dealing exception for the purposes of research, private study and education not apply to educational institutions in respect of works that are commercially available." Access Copyright

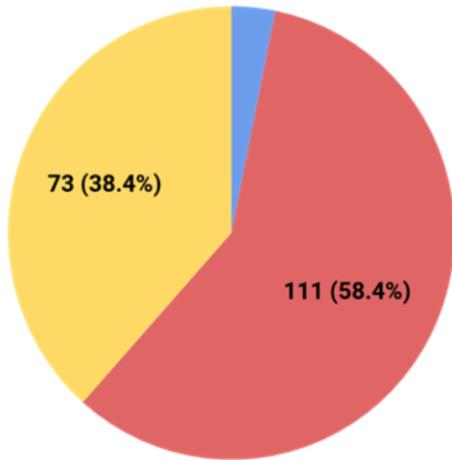


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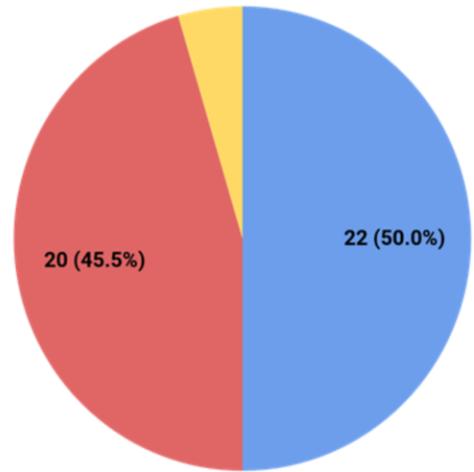
We all know that the education purpose for fair dealing was a much-discussed and highly contentious part of the Act throughout the review, so we knew this would be a key issue for us to look at. 44 of the 100 briefs we've looked at make recommendations related to the education purpose. Half of these call for the preservation of fair dealing for education as it currently stands. Nearly half call for outright removal of education as a fair dealing purpose, or for what many call "clarifications" to be specified in the Act, such as restricting the education purpose to individuals rather than institutions, or making the use of the education purpose void if a license is available. A very small number recommend expanding fair dealing in some way that would benefit education, either by adding specific purposes, or by moving to a fair use or "such as" model.

# Fair dealing for education

● Unsure ● User ● Creator



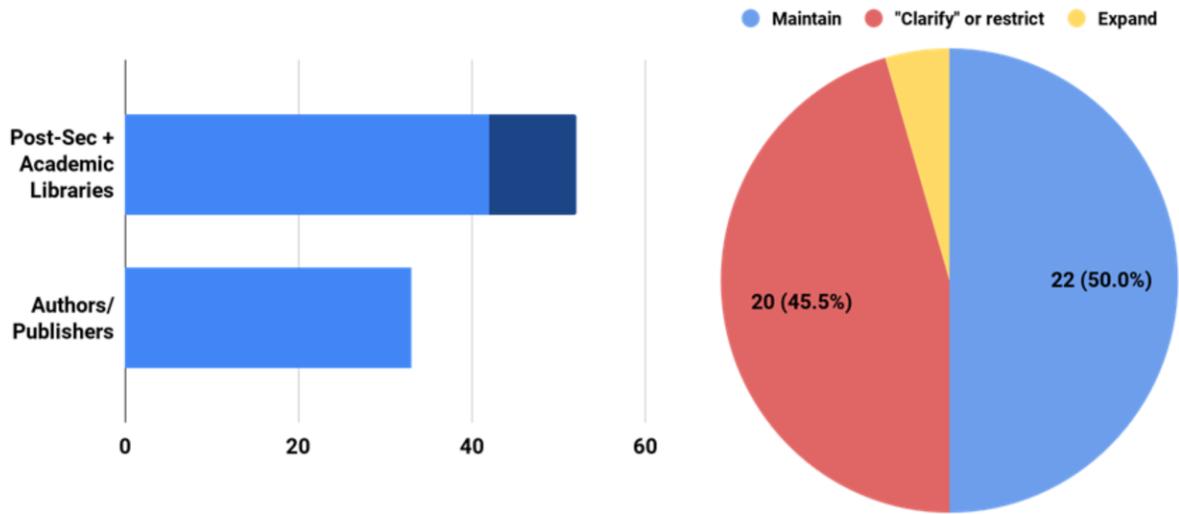
● Maintain ● "Clarify" or restrict ● Expand



JEN

This nearly 50-50 split is interesting given how many more user-oriented bodies submitted briefs compared to creator-oriented parties (it was 58% user to 38% creator)...

# Fair dealing for education



JEN

...and also remembering that 42 briefs were by post-secondary institutions, plus 10 were by academic libraries, compared to 33 from authors and publishers. But we're working with data on the recommendations of only half the briefs, and we haven't cross-referenced these two datasets yet to confirm who made which recommendations.

## Copyright term extension

"No witnesses expressed outright opposition to extending of the copyright term from 50 to 70 years after death"

- **Shifting Paradigms, pg 22**

"A term extension risks preventing a vital public sphere to the benefit of major record labels, who may further exploit an artist's work after their death but are more likely to let the work languish."

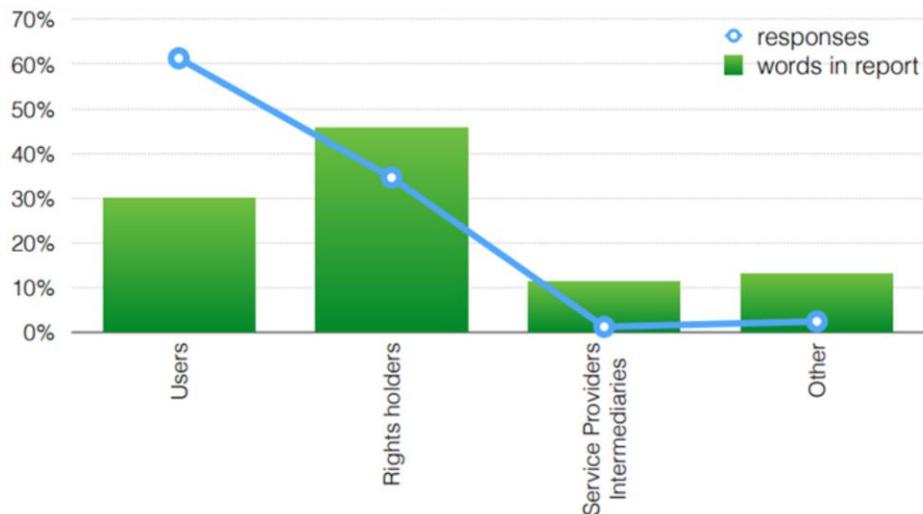
- **Cultural Capital Project (INDU Submission)**

### STEPH

While we haven't had an opportunity to compare our data against the INDU recommendations, the Canadian Heritage Committee released their recommendations for artist remuneration models on May 15th, giving us time to review them while preparing for this presentation. While looking through the Heritage Committee recommendations, we noted that with regard to copyright term extension the committee stated that "No witnesses expressed outright opposition to extending of the copyright term from 50 to 70 years after death". We thought this interesting given that our coding of the briefs submitted to INDU have so far identified 17 submissions that explicitly ask INDU to reject term extension, with many citing term extension as a risk to creators themselves, who lose access to public domain materials.

Given this disparity, we posit that it is not that witnesses didn't have concerns

about copyright extension, but perhaps that they didn't feel there was an argument to make against term extension, given that much of the Heritage testimony was given after the USMCA agreement was announced.



**methodology:** combined word count of summaries of the positions of the named stakeholder groups in the [Report on the responses to the Public Consultation on the Review of the EU Copyright Rules](#). 'Users' groups 'End Users / Consumers' and 'Institutional Users'. 'Rights Holders' groups 'Publishers/Producers/Broadcasters', 'Authors/Performers' and 'Collective Management Organisations'. 'Other' groups 'Others', 'Member States' and 'Public Authorities'. Word counts are corrected for summaries that are attributed to multiple stakeholder groups at once.

*Courtesy of Paul Keller, Communia*

## JEN

As an example of the kind of thing we're going for, this is from research done by Paul Keller at Communia, a Europe-based advocacy organization whose goal is to strengthen the public domain. The European Union held a public consultation on the review EU copyright rules between December 2013 and March 2014. The nearly 10,000 respondents were asked to identify their category from these options: end user/consumer; institutional user; author/performer; publisher/producer/broadcaster; intermediary/distributor/other service provider; collective management organization; public authority; member state; other.

Communia compared the number of submissions from each group to the word count in the resulting report that addressed that group's recommendations or concerns. And in this chart they've consolidated those groups into these four categories: users, rightsholders, service providers, and others, and you can see that while users provided the majority of the submissions, their concern were addressed in a much smaller percentage of the final report than rightsholders' concerns were. So this is one example of a potential output from this project.

# Challenges and next steps

## Challenges

- The number of briefs kept increasing
- Working with qualitative data
- Using NVivo, a tool we were both new to
- Encoding is an iterative process
- Scope creep...is this our whole career now???

## Next Steps

- Finish coding the rest of the briefs
- Revisit nodes, and possibly revisit already-coded briefs
- Cross reference content of briefs with data about who submitted
- Wait for outcomes of the Review and compare to data we captured

JEN

We started thinking about this and looking at the briefs in the fall, and of course they just kept coming. I think when we started thinking about this project there were maybe 80 briefs, so to watch the number keep increasing kept us continually reassessing the scope of the project.

Working with qualitative data of course always requires some thought, especially when working in a team. We started by sitting down and coding a handful of briefs together, making sure we looked at both user-perspective and creator-perspective ones. Then we each did some coding separately, but checked in regularly and talked through any questions or issues that came up. We both looked at some of each other's coded briefs to make sure we were still on the same page throughout. Related to this, we were both pretty new to NVivo—I've used it a little bit before, but definitely needed a refresher. It's pretty great, but of course the learning curve just adds time to the project.

We've mentioned how this has been and continues to be an iterative process, and at halfway through the briefs we've decided this is a good point to stop and assess and maybe rethink some things before we move forward.

And of course, we have decided to start with the briefs to the INDU committee. But, since we're interested in the discourse and the way arguments have been presented, I would really love to also look at the transcripts from the hearings. And then there's both briefs and transcripts from the Heritage committee. And then there'll be another review in 5 years...

## STEPH

While we have made significant progress on our project to date, we are still very much in the data gathering phase. As mentioned, we are just over halfway through the coding of the briefs in Nvivo and need to finish encoding the remaining briefs. We also realize that while our nodes developed in response to our methodological approach to the project, they may lack nuance and clarity in certain cases and also reflect our bias towards our own areas of interest (eg there are more nuanced nodes around educational fair dealing than redefining sound recordings). As a result we have decided that we will also need to revisit the nodes we have created and likely either qualify or at the very least better articulate some of them and possibly revisit the already coded briefs in order to insure that we have consistently captured relevant information across the submissions. After this, we plan to cross reference the information we have gathered about the content of the briefs with the data we created around the groups and individuals who submitted them. Finally, we will look for any output from the review process and look to see what, if any, correlations exist between the committee recommendations and what various communities asked for.



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