

REDACTED VERSION

ACCESS COPYRIGHT
EXHIBIT AC-9

Witness Statement of Don LePan

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WITNESS STATEMENT OF DON LEPAN

September 11, 2013

1. Don LePan is the founder, President and Chief Executive Officer of Broadview Press ("Broadview"), an independent Canadian publishing company.

2. The within witness statement is based on the personal knowledge, information and belief of the witness.

A. Broadview Press

3. Broadview is an independent Canadian academic publisher. Broadview handles production and distribution of its books through its Peterborough, Ontario facility and sales and editorial acquisitions are carried out through its offices in Guelph, Ontario, Wolfville, Nova Scotia, Calgary, Alberta, and Nanaimo, British Columbia. The company has approximately 500 titles in print and is currently publishing approximately 40 new titles per year.

4. Broadview was incorporated in 1985. Since then the company has grown substantially and now employs more than 25 people, primarily at its Calgary, Peterborough, Wolfville, and Guelph locations. Annual sales revenue is now more than [REDACTED]. Freehand Books, a literary publisher of fiction, poetry, and creative non-fiction, is a Broadview imprint.

5. Broadview is a "for-profit" corporation, but making a profit is not its only reason for existence; its goal is for its books to make a genuine contribution, intellectually as well as pedagogically. Broadview salaries range from the \$30Ks to (in the witness's own case) \$79,000 as President and CEO — at age 59, after 35 years working in the industry.

6. Broadview earns revenues from unit sales of books and other revenues related to its book sales, including royalty payments received as an affiliate of Access Copyright. Since 2008 Broadview has shown a profit for four of those five years; the bottom line for the company has ranged from [REDACTED] to [REDACTED]. For most of those years Broadview has received Access Copyright payments of approximately [REDACTED] per year. In most years, Access Copyright payments are the difference between scraping by with a tiny profit and either breaking even or losing money.

B. Broadview's Catalogue and Contribution to Canadian Pedagogy

7. Broadview's catalogue includes a number of anthologies published specifically for the Canadian post-secondary educational market. These anthologies include:

- "Across Cultures/Across Borders: Canadian Aboriginal and Native American Literatures", a collection of critical essays, interviews, and other writings by twenty-five established and emerging Canadian Aboriginal and Native American scholars and creative writers.
- "Native Poetry: A Contemporary Anthology", an anthology that brings together the poetry of many authors whose work has not previously been published in book form alongside that of critically-acclaimed poets, thus offering a record of Native cultural revival as it emerged through poetry from the 1960s to the present;
- "Unhomely States: Theorizing English-Canadian Postcolonialism", the first and only collection of foundational essays of Canadian postcolonial theory. The essays approach broad issues of Canadian culture and society and represent the impassioned conflicts, dissonances, and intersections among postcolonial theorists in English Canada; and
- The Broadview Anthology of Poetry, a general anthology of poetry from Chaucer to the twenty-first century, intended for undergraduate use. As well as the poems themselves the anthology includes headnotes, annotations, a 22-page introduction to "Reading Poetry" and a 12-page glossary of literary terms. Among anthologies of comparable size aimed at the undergraduate market, Broadview is the only one to include a generous selection of Canadian material; over a third of the poems are by Canadians.

8. Broadview also publishes a number of uniquely Canadian titles written by Canadian authors, including "Fair Liberty's Call" written by Sharon Pollock, a play about a United Empire Loyalist family fleeing from Boston to New Brunswick during the American Revolution and "Pink Snow: Homotextual Possibilities in Canadian Fiction" by Terry Goldie, a provocative critical perspective on homoerotic themes in Canadian literature.

9. Broadview is not aware of any other books covering these uniquely Canadian topics on the market today.

C. AUCC and ACCC Policies

10. Broadview is aware that the Association of Universities and Colleges of Canada ("AUCC") and the Association of Canadian Community Colleges ("ACCC") have recently adopted policies regarding what they claim constitutes "fair dealing." The ACCC "fair dealing" policy dated August 30, 2012 is filed as Exhibit AC-2JJ to the witness statement of Roanie Levy et al (the "Levy Witness Statement") Exhibit AC-2 and the AUCC "fair dealing" policy, which is substantively identical to the ACCC's policy, is filed as Exhibit AC-2KK to the Levy Witness Statement. Together, the policies are referred to herein as the "Policy".

11. The Policy allows post-secondary educational institutions to communicate and copy "short excerpts" of copyright-protected works for use as class handouts, posting to a course management system and as part of a coursepack. The Policy defines "short excerpt" to include up to 10% of any copyright-protected work or one entire chapter from a book; an entire single article from a periodical or newspaper; an entire artistic work from

a collection of work; and an entire poem from a work containing other poems. By permitting the copying of entire poems, articles and chapters of books into coursepacks or onto course management systems, the Policy allows a professor to create, in effect, his own anthology of works without payment to the copyright owners.

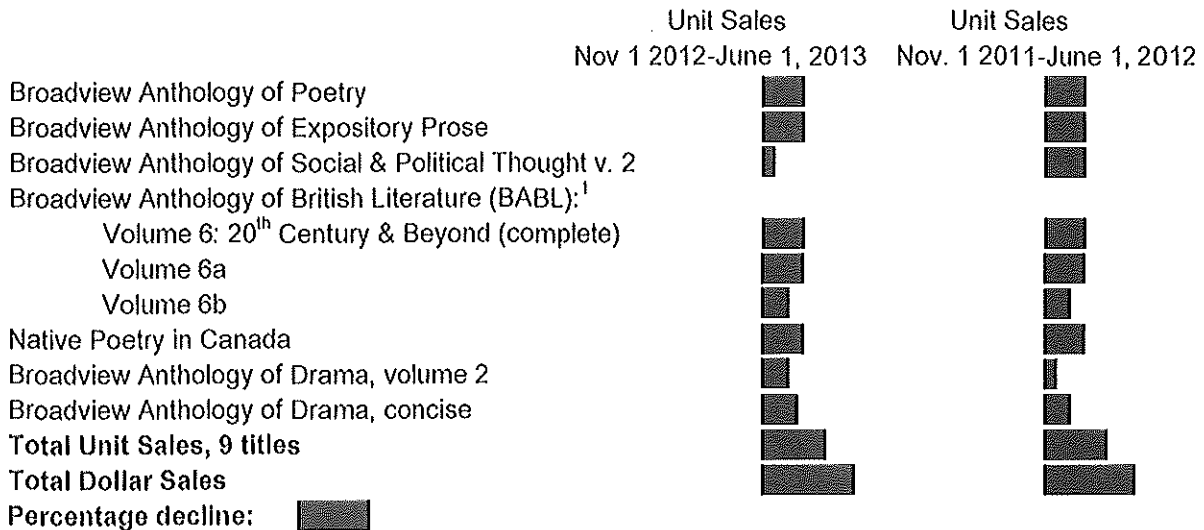
D. Immediate Impact on Broadview

12. Broadview is also aware that a number of the universities and colleges that have implemented the Policy have also stopped paying royalties to Access Copyright. Although only some institutions have stopped paying Access Copyright, this has already had a significant negative impact on Broadview. Given the relatively recent implementation of the new Policy, Broadview has been able to assess the impact for the Winter (January-April) 2013 term only.

13. The sales cycle for the Winter 2013 term, as is typical of all winter terms in previous years, was as follows: instructors' decisions on which textbooks would be used would have been made by the end of October 2012. Orders would have been placed with Broadview by the institutions' bookstores in November and December, 2012. Broadview would have delivered the books in time for the January 2013 start date. By June 2013, the cycle for the Winter 2013 term would be complete, with all returns having been processed. (Orders for the Fall [September-December] 2013 term would normally not be placed until well into June, 2013; that term's cycle is completed when all returns are processed—typically by the end of October.)

14. The following nine titles are books that include a large number of separately authored, copyright-protected works (e.g., anthologies of poetry, collections of essays designed for composition classes). The following table shows the sales for the nine titles for the Winter 2013 term compared to the Winter 2012 term:

Sales Comparison, Nine Titles Identified as Particularly Sensitive:



¹ The 20th and 21st century volumes of BABL were included in a marketing plan involving special price reductions during this period.

15. Excluding these nine titles, total unit sales for the rest of the Broadview stable of books for the same period declined by [REDACTED]. These nine titles declined by [REDACTED]—an additional [REDACTED] over the period.

16. Broadview believes sales of these nine titles have declined in large part as a result of implementation of the Policy at unlicensed post-secondary institutions; the nature of these anthologies makes them particularly susceptible to copying under the thresholds specified by the Policy. Whereas taking up to 10% of a novel, for example, may not normally be an attractive proposition for coursepack inclusion and course text use, taking up to 10% of an 1,100 page poetry anthology — up to 110 pages — might in itself be enough to provide the basis for a course. Since the Policy permits the creation of coursepack anthologies, the Policy encourages the creation of free products that directly compete with, and supplant the need to purchase, Broadview's anthologies, for which Broadview has paid substantial amounts to clear permission. (In the case of the second edition of The Broadview Anthology of Poetry, published in 2009, the publisher paid over [REDACTED] to poets and their representatives for the rights to re-publish poems in copyright.)

17. These nine titles are representative of the sort of book that is likely to be particularly susceptible to increased copying under the Policy. But the impact on these nine titles over one term does not, of course, represent the impact of the implementation of the Policy over the course of a full year, and over Broadview's full list of titles. At a minimum, it would be difficult to imagine that the aggregate effect on Broadview's other 450-odd titles would not be at least as great as its effect on these nine titles deemed especially susceptible. But let's say the effect on 450 titles is no greater than the effect on nine; that would still represent approximately [REDACTED], bringing the total impact over one term to approximately [REDACTED]. That would cover the first academic term affected by the implementation of the Policy at these universities. Revenues for the June 1 to November 1 period are typically at least as large as those for the November 1 to June 1 period, so for a full year one might expect the full effect on Broadview's revenue to be [REDACTED] rather than [REDACTED].

E. Potential and Likely Impact on Broadview

18. In addition to the above, one further calculation needs to be made. The above figures only represent the impact as a result of some of the colleges and universities' having implemented the Policy. If the practice were to be implemented at all Canadian universities and colleges, the impact would be compounded.

19. The figures above represent a conservative estimate of the net effect on Broadview's sales revenues resulting from instructors switching from bound books to coursepacks, now declared to be "free" of any copyright permissions charges. To that must be added the loss of Access Copyright revenues where instructors were already using coursepacks of copyright material, and payment was being made to authors and publishers. At unlicensed universities following the Policy, no such payments are now being made. In the January to June period in 2012, Broadview received a total of [REDACTED] from Access Copyright; over the same period this year, Broadview received only [REDACTED]. Over a full calendar year, Broadview has in most years received between [REDACTED] from Access Copyright for post-secondary educational institution copying. Under the Policy such payments are quickly disappearing. If the impact of the loss of these revenues is put together with the impact of reduced book sales as a result of instructors switching to coursepacks deemed by the Policy to be free-of-charge so far as

copyright is concerned, the total annual loss of revenue to Broadview can be estimated as a minimum of [REDACTED]/year.

20. To put this number in perspective, in a typical year Broadview posts a profit of between approximately [REDACTED] on sales of roughly [REDACTED]. If the new definition of "short excerpt" were implemented at all post-secondary institutions, Broadview would begin to post substantial losses almost every year. This would not be sustainable.

F. Works that are Susceptible to the Policy Will No Longer be Published

21. Native Poetry in Canada: A Contemporary Anthology ("Native Poetry"), which is included as one of the nine titles discussed above, is an anthology comprising an extensive collection of poetry and pedagogical material. Sales of Native Poetry fell from [REDACTED] units in the Winter 2012 term to [REDACTED] units in the 2013 Winter term.

22. According to Exhibit AC-2EE to the Levy Witness Statement, Kwantlen University Polytechnic ("Kwantlen") opted out of the Interim Tariff on September 1, 2012 and has not entered into a licence with Access Copyright. According to its website, Kwantlen has adopted the Policy [See "What Can I Copy?" at http://libguides.kwantlen.ca/print_content.php?pid=318095&sid=2603401&mode=g].

23. The coursepack for Kwantlen's course, CRWR 1110 (Introduction to Creative Writing 1110), for the Spring 2013 term, provided in answer to Interrogatory 107, is filed as Exhibit AC-2SS to the Levy Witness Statement. The coursepack includes five pages (pages 311-313 and pages 315-316) from Native Poetry, including the introduction section about and four entire works (i.e., poems) by Joseph Dandurand. Neither Broadview nor Dandurand has authorized Kwantlen to copy these works.

24. The coursepack contains a Kwantlen branded "Bibliographic Worksheet" which contains its so-called "fair dealing" policy, making it clear that it believes no payments need be made to copyright holders if the material used comprises 10% or less of the work from which it is taken. Since neither Broadview nor Access Copyright authorized the making of this coursepack, it appears that Kwantlen has relied on its policy to produce the coursepack.

25. A spreadsheet setting out the historical reporting to Access Copyright from 2010 through 2012 of copies made from Native Poetry is filed as Exhibit AC-2RR to the Levy Witness Statement. During the period from April to August 2012, while Kwantlen was paying Access Copyright under the interim tariff, Kwantlen reported and paid royalties for the copying of the same introduction and four poems by Joseph Dandurand for the same course by the same professor (see lines 822-824 in the spreadsheet Kwantlen U Apr to Aug 12). Post-September 2012, they are still being copied by the same professor for the same course but are no longer paid for. That in microcosm is what is happening all over the country.

26. As noted on the spreadsheet filed as Exhibit AC-2RR to the Levy Witness Statement, Native Poetry is copied often by post-secondary institutions across the country. If the copying of this book continues as it has historically, and if Broadview no longer receives royalties for the copying of this book, Broadview will have no financial incentive to produce any new edition of this book in the future. If present trends continue,

indeed, it may have no incentive to keep even the current edition in print. At a minimum, the result will be that the title will become outdated and the authors will not receive revenues for the publication of subsequent editions.

G. Impact on other Titles

27. The complex story "Break-in" by the young Canadian writer Ian Williams takes up 20 pages of his 220 page 2011 collection, *Not Anyone's Anything*, a publication of Broadview's Freehand Books imprint. The book itself has sold only a very few hundred copies, though it has been widely praised by reviewers and academics. That particular story, "Break-in," has been described as an excellent one for teaching to undergraduates. In the past, that could readily and fairly be done in any one of three ways: the instructor could assign the entire collection; she could assign an anthology (such as *The Broadview Anthology of Short Fiction*) that included the story; or she could include the story in a course pack, for which permissions would be cleared through Access Copyright, and payment made to the author. Under the Policy, however, any instructor wishing to teach that story to her class of first-year students can just go ahead and do so, no questions asked, no permissions cleared, no payments made. The class could be eight students, or 80, or 800; it doesn't matter—according to the Policy, there is no need for the author or publisher to receive anything.

28. Under the Policy it would be acceptable to copy the core argument from the late Bernard Suits's acclaimed philosophical study, *The Grasshopper: Games, Life, and Utopia* (widely used for Philosophy of Sport classes) without any compensation being paid to his widow. It would be acceptable to do the same with the entirety of JoAnn Wallace's superb 26-page introduction to the new Broadview edition of *Mrs. Dalloway* (comprising just under 10% of the full book), with nothing whatsoever going to the Professor Wallace for her efforts. It would be acceptable to do the same with Tomson Highway's entire play, *The Rez Sisters*; if you photocopy or scan it from *The Broadview Anthology of Drama*, volume 2, then it is "an entire artistic work ... from a work containing other artistic works". (It also takes up less than 10% of the 674 pages of the anthology volume.) According to the Policy, the complete Tomson Highway play is in this context just another "short excerpt".

29. One effect on publishers of losing the stream of revenue from copyright payments is direct and financial. The other is indirect — but also damaging in the long run to students and to academics. If neither Broadview nor its authors are compensated for the work they do, how can they be expected to continue doing it? Among publishers, those who will be particularly hard hit are smaller, independent publishers such as Broadview and Fernwood — publishers who have always strived to go beyond the conventional textbook, and to keep their prices reasonable while doing so. Such publishers cannot continue to do as they have done if the Policy prevails; they will be forced to close up shop or to turn to other forms of publishing where they can be assured of receiving at least some modest compensation. The effect will be to rob the Canadian publishing environment of its diversity — and that in turn will cause far more damage to the students of Canada than it would for them to pay a few dollars today in order to ensure that authors and publishers receive some reasonable level of compensation for material used in academic course packs and in online course management systems.