

**Before the Copyright Office
Library of Congress**

In the Matter of Rule Making)
) Docket No. RM 2005-11
Exemption to Prohibition on Circumvention of)
Copyright Systems for Access Control)
Technologies)

Comments of the American Foundation for the Blind

Class: Literary Works

Summary: The American Foundation for the Blind proposes continuation of the exemption for the class of works defined as "literary." We propose continuation of this exemption because currently deployed anti-copy technology still does not support the fair use intended by Congress for this class of works.

Introduction

These comments are submitted in response to the Copyright Office's Notice of Inquiry, with respect to proceedings mandated by the Digital Millennium Copyright Act ("DMCA"), seeking further comment to determine whether there are particular classes of works as to which users are, or are likely to be, adversely affected in their ability to make non-infringing uses due to the prohibition on circumvention.

AFB is an advocacy organization that works with corporations, policy makers, and a wide range of service providers--from teachers to rehabilitation professionals--to make information, technology, and products accessible so people with vision loss can live full and independent lives.

These proceedings, mandated by the DMCA, are of critical importance to the lives of people who are blind or visually impaired. Information in digital formats provides the opportunity for people who are blind or visually impaired to have access to and use of information at the same time and in the same manner as all users of that information. This type

of access represents a constitutionally-based right, recognized by Congress and continuously upheld.

Technological measures to control access to copyrighted works have been developed and deployed in ways that prevent access to and fair use of this material by people who are blind or visually impaired. The Librarian recognized this reality in the last similar rule making in 2002 (the “2002 Rule Making”). In the 2002 Rule Making, the Librarian provided the exemptions needed to maintain fair use access for blind or visually impaired people. At that time, AFB noted that copy protection technology often significantly abridged the fair use access rights of blind and visually impaired people. AFB demonstrated that such abridgement posed threats to ability of blind or visually impaired people to pursue work activities, education and such leisure activities as reading and entertainment. Now, three years later, copy protection continues to prevent access for people who are blind or visually impaired.

The same hindrances and threats still exist today because copy protection measures continue to be implemented in ways that bar access by blind and visually impaired people. In the absence of accessibility progress, the Librarian must continue the current exemption to ensure that blind and visually impaired people are not excluded from the digital revolution in education, information and entertainment.

Notwithstanding its access concerns, AFB, as a producer of conventional and electronic media and a holder of copyrights, understands, and remains firmly committed to, protecting copyrighted works. However, we are equally committed to insuring non-infringing, fair use of materials so that technological measures to control access do not deny the access by blind and visually impaired people.

In these comments we address the class of all literary digital publications, such as e-books. We assert that Congress clearly intended that fair use provisions not be sacrificed in efforts to secure digital content. Nonetheless, publishers and the technology industry have simply

designed anti-copy technologies with precious little effort to preserve fair use. Instead of working toward accessibility, many providers seem inclined to seek market dominance by closely linking published titles to particular technologies from particular vendors. This is not, we believe, an approach likely to preserve fair use. It certainly cannot preserve the rights of people who are blind or visually impaired to use their synthetic speech and screen magnification software, as well as Braille devices to access secured content.

As shown herein, the digital publishing industry's current approach fails to provide such access. Even when mainstream technology companies have claimed that access is provided, in practice, access is often denied. This situation has not changed since the 2002 Rule Making. Consequently, it is inappropriate for publishers and technology companies to seek shelter against circumvention technologies when the technology used undermines the clear legislative goal of the DMCA – and the entire copyright regime – to facilitate fair use access by blind and visually impaired people. We ask the Librarian, therefore, to maintain the current exemptions for all literary digital content until security measures are developed that will preserve fair use rights and recognize the need for people who are blind or visually impaired to read e-books, electronic text books and similar digital offerings.

To the industry, we suggest standard use of well known technologies that can both protect works from piracy and allow for fair use, such as “Public Key Incryption (PKI)” technologies. Unfortunately, the digital publishing industry's record in maintaining fair use access for blind and visually impaired people has not demonstrated a commitment to access. Therefore, until fair use access for blind and visually impaired people becomes the industry standard, the Librarian must maintain current exemptions.

Background

We provide the following information in support of our introductory comments. This information is the basis for our specific responses to this Notice.

Congress has historically recognized that the broad class of copyrighted works should, with respect to fair use, be accessible to and usable by people who are blind. The legislative history of the Copyright Act of 1976 states that:

Another special instance illustrating the application of the fair use doctrine pertains to the making of copies or phonorecords of works in the special forms needed for the use of blind persons. These special forms, such as copies in Braille and phonorecords of oral reading (talking books), are not usually made by the publishers for commercial distribution. While making multiple copies or phonorecords of work for general circulation requires the permission of the copyright owner, a problem addressed in section 710 of the bill, the making of a single copy or phonorecord by an individual as a free service for a blind person would properly be considered a fair use under section 107. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. (1976).

Moreover, in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 714 (1984), the Supreme Court stated that copying “of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying.” *Id.* at 456, n. 40.

The Copyright Act imposes other specific limitations on the exclusive rights of copyright owners to ensure access for blind and visually impaired individuals. Section 110(8) excludes performances specifically designed for and directed to people who are blind or visually impaired using particular facilities; Section 121 (the Chaffee amendment) allows authorized entities to reproduce copyrighted materials and convert these materials to accessible formats for the use by blind or other persons with disabilities.

As more information flows faster in rapidly multiplying digital formats, access to the information contained in digitized literary works is ever more critical to citizenship, education and overall participation in society. The Librarian must continue to ensure that the DMCA’s “Circumvention of Copyright Protection Systems” provisions do not undermine the nation’s historic commitment to fair use rights that enable such participation by blind and visually impaired people. Unless the Librarian renews the current exemption, severe sanctions await

blind or visually impaired readers – or anyone else – who devises means to circumvent copy protection measures to allow blind or visually impaired people access. The Librarian can simply not allow this to occur.

Access Issues for People Who Are Blind or Visually Impaired

Copyright protection measures continue to significantly impair access by blind and visually impaired people to works presented in new digital content formats. This occurs despite the existence of the current exemption. Eliminating the current exemption will make matters even worse, as it will bar efforts to circumvent copy protection, even if such efforts take place purely in the interest of fair use access by blind and visually impaired people.

In some instances, without such circumvention, blind and visually impaired people are completely prohibited from access, as the content may only be available in digital formats. As digital publishing matures, this situation can only grow worse. This is why the Librarian must issue an unambiguous reaffirmation of long established rights of fair use to repurpose content into accessible formats. As it is possible to maintain fair use access in the broad class of copyrighted works in such a manner that the exemption would not allow wholesale copyright infringement, there is no public interest justification to take any action except to continue the current exemption.

For people who are blind or visually impaired, the foundations of access in the digital age are the rights to access and appropriately manipulate any use-level controls; the fair use deconstruction of protected material in order to repurpose content into accessible formats, and; clear demarcation of media in a manner which allows a consumer to know that his or her use may be restricted.

After conducting an evaluation in 2005, we find that these needs continue to go unmet in much of the marketplace. Our review of materials for purchase at Amazon.com in the fall of 2005 provides compelling evidence of the adverse effects that copy protection measures have,

even today, on access to the general categories of authorship specified in Section 102. As noted such inaccessibility occurs despite the current exemption. Such built-in inaccessibility also ignores the historic fact that alternative methods of reading lawfully-acquired works are, in fact, the precise kind of non-infringing uses long permitted to allow blind and visually impaired people access to the science and useful arts specified in the U.S. Constitution. To allow the legal lock-up of content would deprive blind and visually impaired people of a major constitutional goal of copyright: “to foster the growth of learning and culture for the public welfare.” H. Rep. No. 2222, 60th Cong., 2d Sess. (1909).

We purchased several e-books from Amazon.com using a laptop with reasonably up-to-date software. We used a computer with Windows XP SP2, Internet Explorer with updates, Adobe Acrobat version 7.0.5 (available free from the Adobe Web site), and GW Micro's Window-Eyes version 5.0. Users of Window-Eyes, the screen reading software, can download a very recently-released upgrade, version 5.5, but this user had not yet installed the upgrade. It is not expected that an upgraded version of Window-Eyes would have affected the e-book reading experience.

We downloaded five E-books created in either Adobe ".PDF" or Microsoft Reader ".Lit" formats. Two PDF books and three Microsoft Lit format books were tested. Of the five books, only one was accessible – that is, only 20 percent of the works were accessible. During our tests, help was often required from sighted individuals.

Preliminary Activities

Before beginning to download content, we downloaded and installed the Microsoft Reader product. In addition, after unsuccessfully attempting to access the first Microsoft Lit format book, the Microsoft text-to-speech component was downloaded and installed, but it did not improve the accessibility experience.

Examples of Digital E-books User Experiences

Title: *Richard Edward Connell's "The Most Dangerous Game": A Study Guide from Gale's "Short Stories for Students"*

This Adobe PDF study guide, designed to accompany the short story, opened in Acrobat, but content was not accessible. The screen reader voiced an extended string of question marks.

Choosing the "accessibility quick check" on the "document" menu provided feedback, voiced by the screen reader. We were told that the "document's security settings prevented access by screen readers." This check also indicated that this document is not structured, so even if a screen reader could access the content, the user might be required to modify settings related to reading order preferences. The document cannot be saved as a text file.

Title: *The Amber Spyglass (His Dark Materials, Book 3)*
Author: Philip Pullman

This popular book in a children's series was not accessible in the Microsoft Lit format. The work proved even less accessible than either of the Adobe PDF books as no messages were spoken with a screen reader. In fact, the Microsoft Reader software did not function fully with the screen reader, i.e. no menus were spoken or accessible using the keyboard. Only when a sighted assistant used a mouse to click on "help" did a message indicate that the content was not accessible with text-to-speech.

Title: *The Business of Software: What Every Manager, Programmer, and Entrepreneur Must Know to Thrive and Survive in Good Times and Bad*
Author: Michael A. Cusumano

Our experience was virtually the same as the other Microsoft Reader digital books. The screen reader provided no feedback, and "tweaking" yielded no help to us when we tried to access the content independently. Sighted help was required to display the message in the screen shot but it did not speak.

Title: *The Imitation of Christ*
Author: Thomas A. Kempis

This book is a public domain book in the Microsoft Reader Lit format. It is one of the three books tested in 2002, by AFB, when preparing comments in the prior rule making related to this provision of the DMCA. Today, the book still remains inaccessible – this is true whether or not Microsoft's text-to-speech product is installed.

Title: *Patent, Copyright & Trademark in Intellectual Property, 7th edition*
Authors: Stephen Elias and Richard Stim

This book, created using Adobe PDF, was the only one of the five that was accessible. The book opened easily in Acrobat version 7.0.5. We were permitted to choose options for processing and presenting the book in an accessible fashion.

Although using the "accessibility quick check" indicated that the document was not tagged to provide structure, we were encouraged to try different reading order preferences, as necessary, in order to improve the reading experience. The "save as text" dialog box was disabled. Nonetheless, this 570-page book seemed to be accessible after a quick skim through some pages using the "infer reading order" option.

Related Issues

A number of critical issues became apparent as we conducted real-world testing in an effort to gain access to digital e-books. Concerns include:

- The Amazon.com site does not indicate, in advance, whether content will be accessible.
- Messages provided by the Microsoft Reader software indicating that content cannot be accessed by a screen reader are not voiced by either a screen reader or by Microsoft's text-to-speech supplementary software. Sighted assistance is required to confirm that content cannot be read.

- Users who purchase content but then find that they cannot read it will need to negotiate Amazon.com's return process. Users may return content within 30 days, but we did not test this process to determine whether Amazon.com's approach is accessible. Other companies' return policies may vary, so users should assess return policies prior to taking the risk of purchasing potentially inaccessible digital content.

Conclusion

In sum, any measure that excludes an identifiable part of the population from such clearly stated constitutional goals is not in the public interest. Therefore, the Librarian must extend the current exemption so that blind and visually impaired individuals are not excluded from the exponential growth of learning and culture in today's increasingly digitized universe of literary works.

For further information, contact:

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Respectfully submitted,

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APPENDIX TO REPORT: PRINTOUTS OF ACTUAL COMPUTER SCREEN MESSAGES DEMONSTRATING LACK OF ACCESSIBILITY

Patent, Copyright & Trademark: An Intellectual Property Desk Reference

by Stephen Elias, Richard Stim

Copyright 1996, 1997, 1999, 2000, 2002, 2003, 2004

Digital (Adobe Reader)

Accessible with a screen reader with a few tweaks

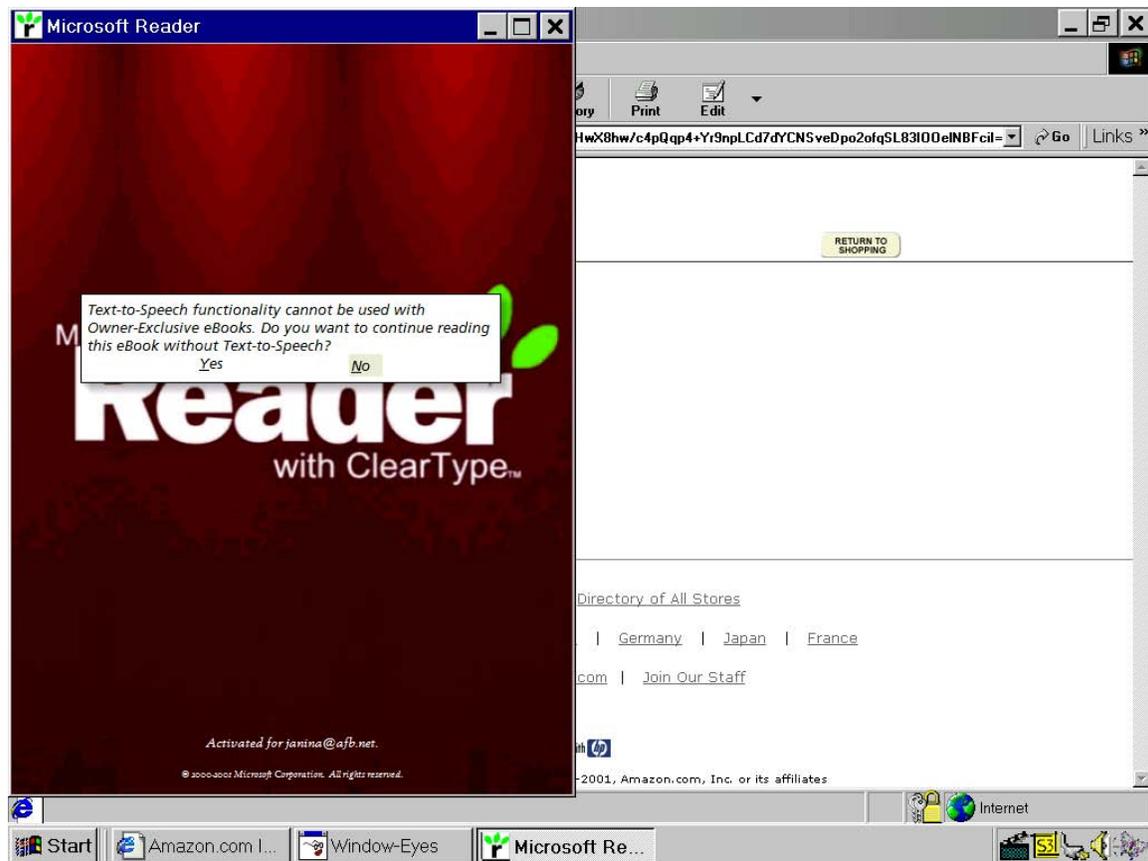
The Imitation of Christ

by Thomas A Kempis

In the public domain

Digital (Microsoft Reader)

Inaccessible with screen readers



IMITATION OF CHRIST OPENED IN MICROSOFT READER BEFORE INSTALLING TTS PLUG IN

The Imitation of Christ (continued)

The screenshot shows a Microsoft Internet Explorer browser window displaying the Amazon.com Digital Locker page. The address bar shows the URL: <http://www.amazon.com/gp/locker/002-7675469-52296477%5Fencoding=UTF8&sort=order%7C0002-0672651-8754437>. The page content includes a search bar, a greeting "Hello, Jennifer Sutton. We have 1", and a section titled "Your Account > Digital Locker > Your purchased and bonus downloads". Below this, there is a confirmation message: "All your downloads added in order 002-0672651-8754437". The order details are: Order Date: November 18, 2005; Order #: 002-0672651-8754437; Product Type: e-Book or Document. A small image of the book cover for "The Imitation of Christ" is visible. To the right, a Microsoft Reader window is open, displaying a "Library" view. The library contains several items, including "Microsoft Reader Help" (opened on Friday, November 18, 2005) and "The Amber Spyglass" (not yet opened). A dialog box is overlaid on the Reader window, asking: "Text-to-Speech functionality cannot be used with Owner-exclusive eBooks. Do you want to continue reading this eBook without Text-to-Speech?" with "Yes" and "No" buttons. The Windows taskbar at the bottom shows the Start button, Windows-Eyes, and several open applications including Amazon.com, Amazon.com iREdge site, and Microsoft Reader. The system clock shows 2:08 PM.

IMITATION OF CHRIST OPENED IN MICROSOFT READER AFTER INSTALLING TTS PLUG IN

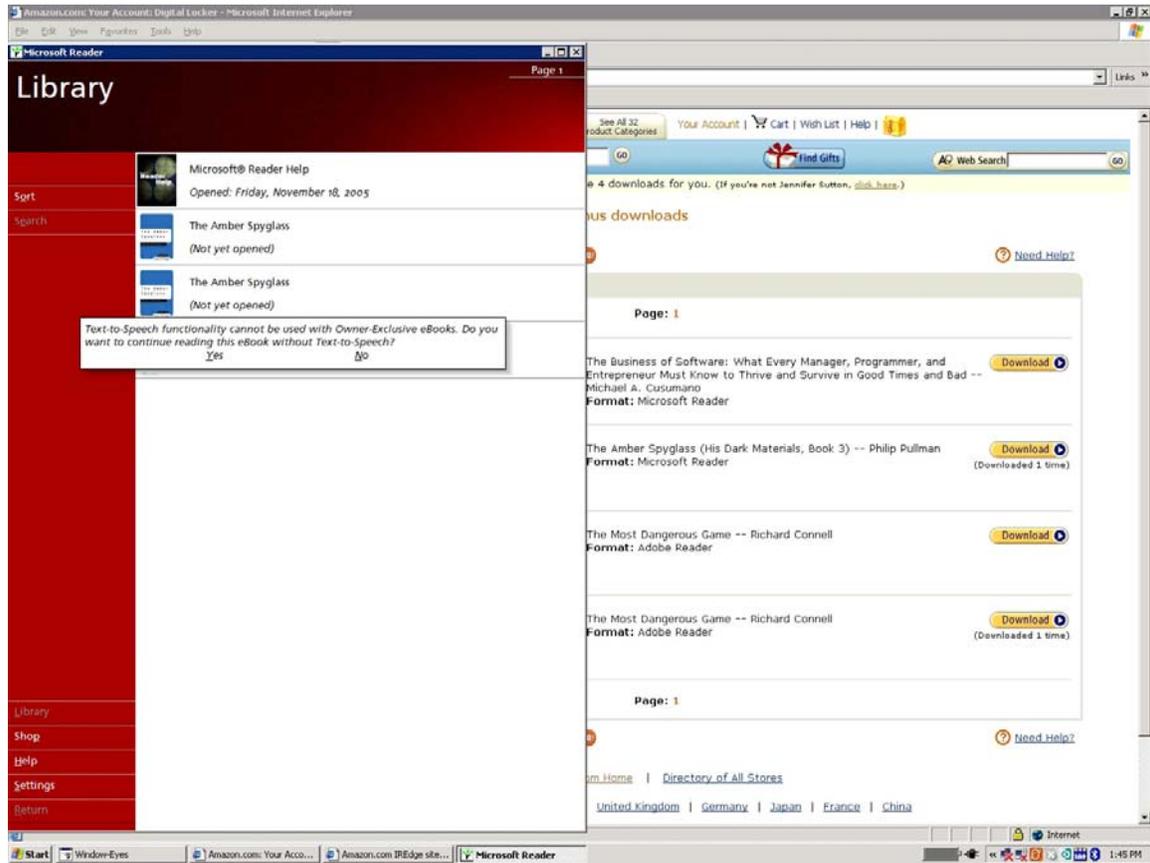
The Business of Software: What Every Manager, Programmer, and Entrepreneur Must Know to Thrive and Survive in Good Times and Bad

by Michael A. Cusumano

Copyright 2004

Digital (Microsoft Reader)

Inaccessible with a screen reader



BUSINESS OF SOFTWARE OPENED IN MICROSOFT READER AFTER INSTALLING TTS PLUG IN

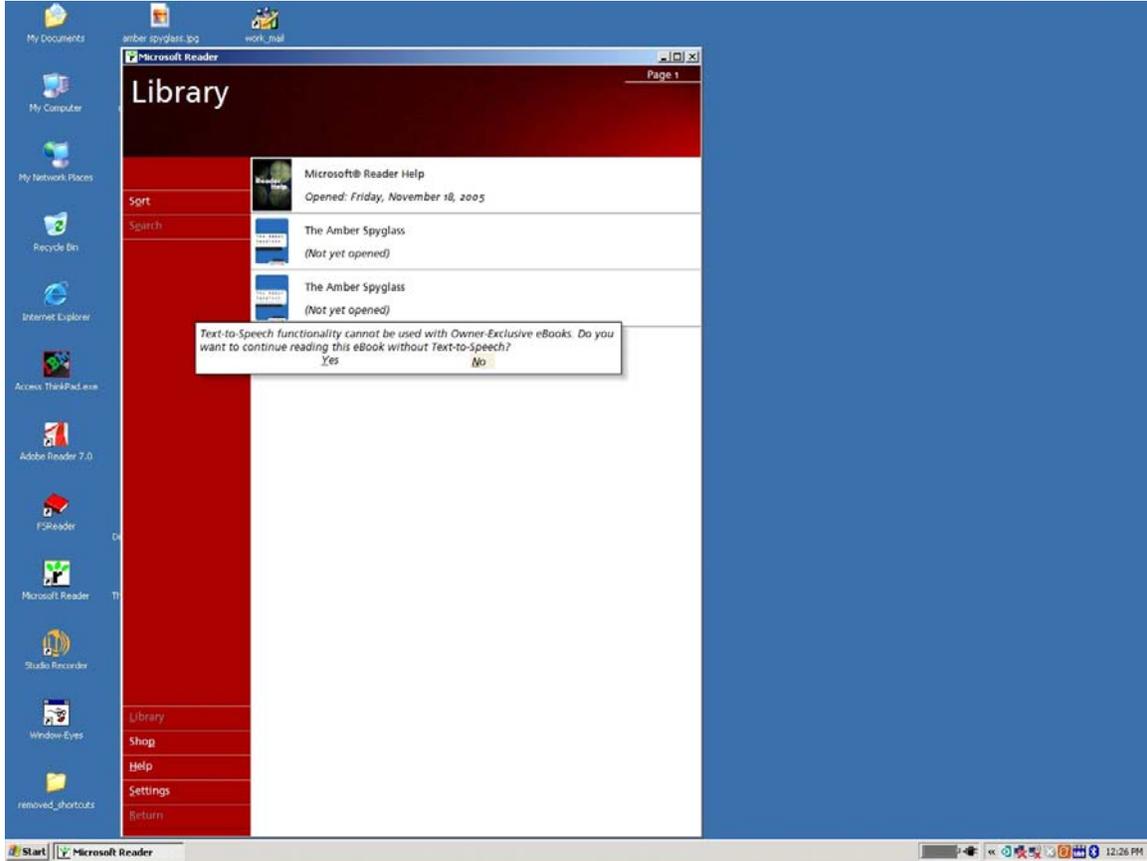
The Amber Spyglass (His Dark Materials, Book 3)

by Philip Pullman

Coopyright 2000

[DOWNLOAD: MICROSOFT READER]

Inaccessible with a screen reader



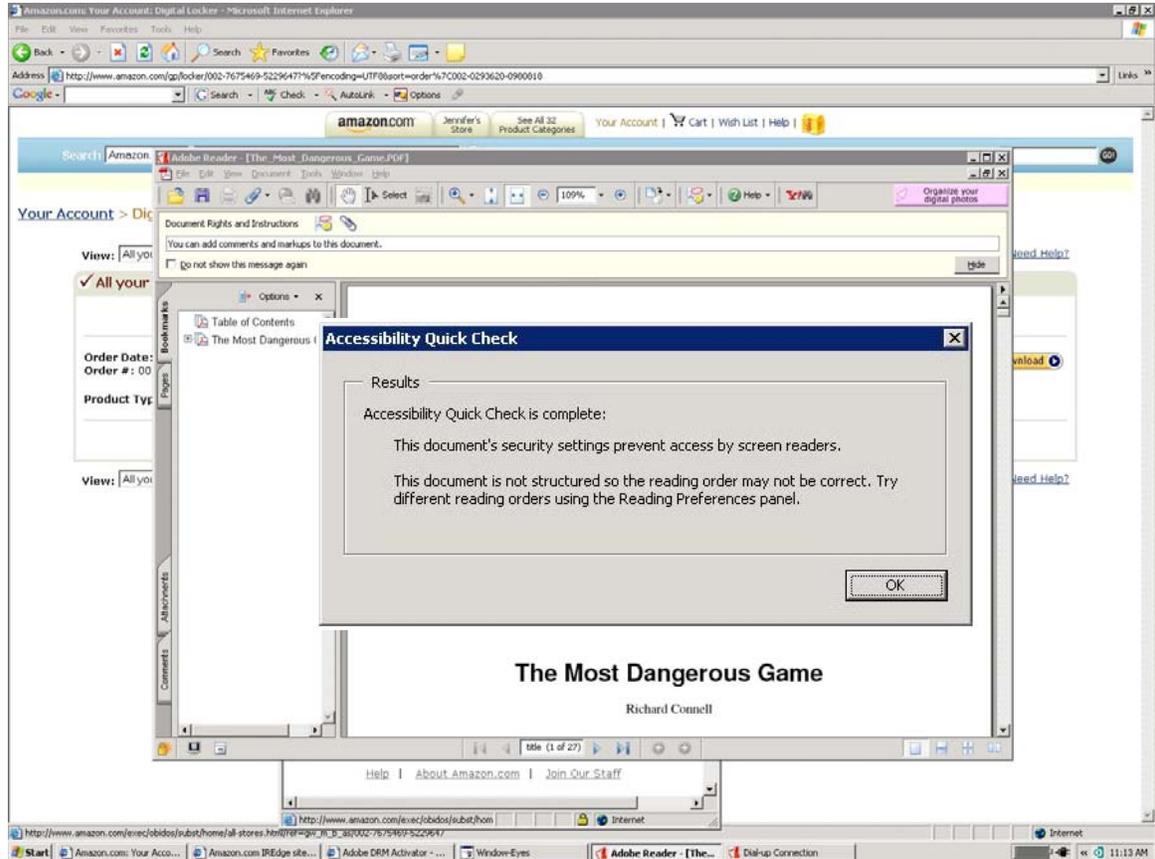
THE AMBER SPYGLASS OPENED IN MICROSOFT READER AFTER INSTALLING TTS PLUG IN

Richard Edward Connell's "The Most Dangerous Game": A Study Guide from Gale's "Short Stories for Students"

No copyright information available.

Digital (PDF)

Inaccessible with a screen reader



THE MOST DANGEROUS GAME STUDY GUIDE OPENED IN ADOBE READER AFTER ACCESSIBILITY CHECK