

ONLINE PIRACY: JAYWALKING OR THEFT?

Alex Beamish wrote this case solely to provide material for class discussion. The author does not intend to illustrate either effective or ineffective handling of a managerial situation. The author may have disguised certain names and other identifying information to protect confidentiality.

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In September 2009, Brian Lee purchased a computer game developed by a major company and, like some other customers, was experiencing difficulty running it. The source of the problems was a highly restrictive system of digital rights management (DRM),¹ which, while more or less universally disliked, was causing serious technical problems for a minority of users. Lee began to share his experience on the company's message board and was soon engaging in a debate about online piracy with a company representative. He was curious about piracy in the file-sharing age and wondered why it would be wrong to download a pirated version of the game with the DRM circumvented.

THE DIALOGUE

Brian: I have been a loyal supporter of your company for over a decade, but that is going to change. I pre-ordered your newest game and since it arrived a week ago, I have tried repeatedly to run it but my DVD-ROM drive will not recognize the disc. Updating drivers at the request of technical support did not fix the problem. In fact, technical support insinuated that I must be using a pirated version, which is outrageous. Many people on this message board are experiencing problems running the game and yet for the most part our computers are perfectly capable according to the box's specifications. It seems that many of the difficulties customers are experiencing result from the new system of DRM employed by the game. When it was announced months ago that the game would use this form of DRM, some were skeptical, particularly because it entailed an installation limit of five times. Yet we all expected to play the game through at least once! The retailer from which I purchased the game will not issue a refund or allow an exchange for a different game. It did permit me to swap for another copy of the same game in case the first copy was defective, but I did so and my problems remained. Also, when I tried to sell the game, I discovered that the used computer games market is now virtually non-existent due to DRM. Thus, I am out \$60 and hours of time and I will never give business to your company again.

¹ DRM is a broad term for methods of controlling access to digital material. Examples of DRM include FairPlay for iTunes, which prevented songs purchased from the iTunes Store from playing on competitors' digital music players; region codes on DVDs; installation limits and online activation requirements in computer games; and copying and printing restrictions in e-books.

Customer Support: Dear Brian, we regret that you are experiencing this problem. It has come to our attention that a minority of users (approximately two per cent) are having trouble running the game because of DRM conflicts. We encourage you to stay in touch with technical support until a solution is reached. We are aware of the unpopularity of what seems like a draconian anti-piracy system and can assure you that our decision to use it was not taken lightly. We deemed it necessary after our games were pirated 50,000 times in 2008. That equates to 50,000 stolen games — 50,000 lost sales! We deeply regret the problems our customers face due to DRM, but we believe their frustration is better directed at the pirates who have forced us to take these measures.

Brian: Technical support has stopped replying to my e-mails. Nonetheless, I would like to respond to one of your points; namely, where you claim you lost 50,000 sales in 2008 after your games were “stolen” 50,000 times. It is incorrect to equate an illegal game download with a game stolen off a store shelf, because in the latter instance each game stolen represents a physical and likely irretrievable loss for the company, whereas software piracy entails illegal duplication. While piracy certainly cuts into your company’s profits, you cannot assume that each user of a pirated software program would have purchased the retail version if a pirated version was unavailable.

Customer Support: I acknowledge that an illegally downloaded piece of media does not equate perfectly with a lost sale. However, I will in turn point out a misconception that many piracy advocates believe — that if they are morally obligated to pay for content, it should merely be the materials cost (e.g. a couple dollars for a DVD, booklet and case). But this neglects to factor in all the labor involved in the creation of the content and it suggests that intellectual property itself is worthless. How is a record company supposed to pay salaries if it receives money for the raw materials cost of CDs but not also for the creativity on the CDs? As Mark Helprin writes in *Digital Barbarism*: “The advocates of ‘music sharing’ think that, because the Beatles, half of whom are dead, have hundreds of millions, or perhaps even billions of dollars, and the people who would filch a song or two may have to buy their salad one tomato at a time and use milk crates as chairs, these expropriations are somehow mathematically justified. They aren’t, and not merely because their cumulative effect has destroyed the music industry.... It doesn’t matter if you steal a lot or a little, or if you get away with it, or not: theft is ugly.”² I regret your problems, but I stand firm in my belief that piracy is always wrong.

Brian: I do believe intellectual property is of monetary value, and indeed I have never used pirated content. However, this is the first time I have been unable to run purchased content. While I have been waiting (hopefully not in vain) for a patch to fix the game, I have researched online piracy and have learned some surprising facts. Your assertion that “piracy is always wrong” is probably off the mark. In *Free Culture*, Lawrence Lessig defines four different types of file sharers: a) those who “use sharing networks as substitutes for purchasing content”; b) those who “use sharing networks to sample music before purchasing it”; c) those who “use sharing networks to get access to copyrighted material that is no longer sold or that they would not have purchased because the transaction costs off the Net are too high”; and d) those who “use sharing networks to get access to content that is not copyrighted or that the copyright owner wants to give away.”³ Of course, type A is unambiguously wrong, and type D is perfectly acceptable. The grey area falls within types B and C. Some think it not unreasonable that users illegally download and “sample” a program or album before buying it and admittedly, doing so quickly eliminates many weak, overpriced products from consideration. Also, some who sample products will then buy them and a few of these converted pirates would never have known about these products had they been unavailable in pirated form. As for acquiring content no longer manufactured or commercially available

² Mark Helprin, *Digital Barbarism*, HarperCollins, New York, 2009.

³ Lawrence Lessig, *Free Culture*, Penguin Books, United States, 2005.

but still copyrighted, I see no harm in this. Waiting for content with a “dead copyright” to enter the public domain is increasingly unrealistic considering the average copyright term in the United States has ballooned from 32 years in 1973 to 95 years in 2003.⁴ In addition, it can be next to impossible to locate copyright holders of dormant works.

By the way, are there any updates on the patch?

Customer Support: We are actively working on a patch, although if we are unsuccessful we might arrange for a refund or a coupon for our products.

As for type B file sharing, I find this sense of entitlement preposterous and I doubt there is conclusive evidence that pirates often purchase works they have illegally sampled. Type C file sharing also involves a sense of entitlement. Indeed, pirates are abetted by a sense of entitlement that coincides with the new potential for massive accumulation of content and information. This sense of entitlement, Mark Helprin believes, stems from a faulty belief in endless, ubiquitous wealth; the relative youth of the anti-copyright movement and its adherents; the view that intellectual property is not property; and the expectation of paying for media not with cash, but through subjection to nonstop commercials, banners and other advertising intrusions.⁵ It is plain to see that there is a slippery slope in both types B and C. Conscientiously sampling content with a genuine willingness to buy good content turns into carelessly “sampling” everything and buying nothing. Rigorously searching the web and store bargain bins for an old underground album before downloading a pirated version as a last resort quickly degenerates into conducting a 30-second web search, conveniently concluding the album is commercially unavailable and downloading an illegal copy. Besides, there are legal means for acquiring rare content, such as EBay. The point is that types B and C quickly become type A. Ultimately, we can fret about the details but it is fair to conclude that piracy is utterly harmful not only to content creators, but also to users. Increased piracy drives up prices and necessitates measures that occasionally cause problems for paying customers such as yourself. Nobody likes intrusive DRM, but the fact remains that a mere four per cent of video games entering production will earn a profit.⁶ Worldwide, more than a third of all software used in 2007 was pirated, causing lost revenues to the software industry of approximately \$48 billion,⁷ and DRM is a logical response to this reality. Critics of DRM hold that because DRM is sometimes circumvented, it should cease to exist. By this logic, because locks on houses are often broken, we should not bother to lock our houses.⁸ The point of DRM is deterrence, and it performs this function more or less admirably.

Brian: But at what cost? DRM can undoubtedly be expensive and tricky to maintain for companies, and the drawbacks for consumers are even worse. Much of the DRM used in games, for example, is so intrusive that it remains on a user’s computer after a game is uninstalled. If it retains the potential to collect information about a user’s computer after the user has removed the program, is it much better than malware?⁹ Installation limits are also troubling. Users are constantly formatting their hard drives or uninstalling programs to free up space, and a limit of three or five installations is unfair. Of course, I am posting here simply because of the impasse DRM has brought me to and I sense that in time we will look back on most of these anti-piracy measures with disbelief. Remember DRM audio CDs? They suffered a quick demise after it was discovered that Sony BMG was including rootkits on their DRM CDs, causing

⁴ *Ibid.*

⁵ Mark Helprin, *Digital Barbarism*, HarperCollins, New York, 2009.

⁶ Koroush Ghazi, “PC Game Piracy Examined,” June 2009, www.tweakguides.com/Piracy_1.html.

⁷ Note that pirated software does not include pirated music or movies. *Business Software Alliance*, “Online Software Scams: A Threat to Your Security,” October 2008, www.bsa.org/files/Internet_Piracy_Report.pdf.

⁸ Koroush Ghazi, “PC Game Piracy Examined,” June 2009, www.tweakguides.com/Piracy_1.html.

⁹ Malware, also known as malicious software, is software made to break into or disrupt a user’s computer without the user’s permission. The term encompasses viruses, trojan horses, spyware, rootkits, etc.

potential security vulnerabilities for customers' computers.¹⁰ More recently, Steve Jobs, the driving force behind Apple, has identified the folly of DRM in iTunes and has succeeded in relaying his opinion to the big four record companies, who control the distribution of 70 per cent of the world's music,¹¹ so that the iTunes Store is now DRM-free. Fairplay, iTunes's DRM, used to mean that only iPods could play tracks purchased from iTunes, that tracks purchased from iTunes would not play on competing music players, and that there were other limitations such as only being able to access purchased tracks on a maximum of five computers. Unsurprisingly, many other digital music players and online music stores employed their own systems of DRM. Yet the vast majority of worldwide music sales were still in the form of CDs and thus were DRM-free, so it was silly and overly complex for music distributed online, which comprised a small portion of music sales, to be saddled with these different forms of DRM. Even Bill Gates himself criticized DRM, saying it has "huge problems."¹²

Customer Support: DRM is not perfect, and the anti-piracy measures of the future will undoubtedly look different from those used now. But no good comes of piracy and necessary steps need to be taken to prevent it.

Brian: Is it entirely true that no good comes of piracy? While I recognize the harm caused by piracy, it has brought certain inadvertent benefits. Jeff Raikes, when he was president of the Microsoft Business Division, stated, "Our number one goal is that we want people to use our product. If they're going to pirate somebody, we want it to be us rather than somebody else. ... What you hope to do is over time you hope to convert them to licensing the software, legally licensing it."¹³ Regarding the competition in China between Microsoft Windows and Linux, a free open source operating system, Bill Gates said, "It's easier for our software to compete with Linux when there's piracy than when there's not."¹⁴ And generally speaking, have not many of the technological and cultural milestones in the West been inextricably linked to piracy? Consider Hollywood, born of pirates evading the patent laws of Thomas Edison, the inventor of filmmaking.¹⁵ What about the United States, which neglected to recognize foreign copyrights for the first hundred years of its existence?¹⁶ How about extensive "borrowing" and refining by Disney?¹⁷ It was Rupert Murdoch who said that without Napster, there was no Internet, and we can see that high-speed Internet boomed due to Napster.¹⁸ In Canada, Bell had 51,000 high-speed Internet customers when Napster launched in June 1999. By 2002, this number had jumped to 1.1 million.¹⁹ Consider the iPod now. Hank Berry, former Napster CEO, said, "Without Napster, there is no iPod, period.... Remember that the iPod launched two years before the iTunes store was around, so you have a two-year period where essentially the only source of music for people's iPods was people doing their own ripping from their own CD collection and getting things from Napster or some other service."²⁰ I could go on — Youtube, cable television, radio, VCRs, CD burners, tape recorders; all these technologies owe a debt to piracy, and many could not have thrived without it.

¹⁰ Robert McMillan, "Settlement Ends Sony Rootkit Case," *PC World*, May 23, 2006, www.pcworld.com/article/125838/settlement_ends_sony_rootkit_case.html.

¹¹ Steve Jobs, "Thoughts on Music," February 6, 2007, www.apple.com/hotnews/thoughtsonmusic.

¹² Cyrus Farivar, "CE-Oh no he didn't!..." *Engadget*, December 14, 2006, www.engadget.com/2006/12/14/ce-oh-no-he-didnt-part-xxi-gates-tells-consumers-to-ditch-dr.

¹³ *Computer Business Review*, "Microsoft admits piracy benefits," March 16, 2007, www.cbronline.com/news/microsoft_admits_piracy_benefits.

¹⁴ David Kirkpatrick, "How Microsoft conquered China," *CNN Money*, July 17, 2007, http://money.cnn.com/magazines/fortune/fortune_archive/2007/07/23/100134488.

¹⁵ Lawrence Lessig, *Free Culture*, Penguin Books, United States, 2005.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *The Globe and Mail*, "Download Decade," 2009, www.theglobeandmail.com/news/technology/download-decade.

¹⁹ *Ibid.*

²⁰ *Ibid.*

Customer Support: I cannot say I share your utopian vision of piracy. I will grant that much of the technology we use today is or was associated with piracy, but whether we should be proud of this is another question. You seem to champion piracy and imply that theft is a key driver of innovation. Indeed, there are many likeminded individuals on the web and you would find a better reception for your views at the Pirate Bay, the famous torrent²¹ indexing site. In case you were unaware, BitTorrent has taken the baton of file sharing from the older generation of peer-to-peer (P2P) programs like Napster and while there are plenty of sites from which to download torrents, none is as famous as the Pirate Bay, which is the centre of an anti-copyright, counter-culture movement touting “freedom of information” to justify facilitating massive piracy. But if you ask me, the four men who own the Pirate Bay are just masquerading as revolutionaries and their grievances about the supposed greed of corporate America lose credibility when you consider that the site racks up millions of dollars a year in ad revenues, not to mention donations. They do not simply promote and facilitate piracy, they get rich off of it. And as a result, they have been sentenced to serve a year in jail and pay millions of dollars in fines. As a matter of fact, following their sentencing the “business” has been sold to a gaming company for nearly \$8 million. The company, Global Gaming Factory X, promises that the Pirate Bay will introduce legitimate business models with which to pay content owners, but the owners of the Pirate Bay seem to tell a different story, suggesting the sale will not affect the site.²² Only time will tell. Suffice it to say, I find it repugnant to see my company’s work available on the Pirate Bay for free under the pretence of “freedom of information.” The fact that the Pirate Bay has many loyal fans hardly legitimizes it — is it surprising that people flock to its banner after using it to steal thousands of dollars of free content? You even have a Norwegian socialist party launching files harer.org, a website where users are supposed to post their mug shots to demonstrate they are “criminals” like the owners of the Pirate Bay. I doubt the pro-piracy movements, political or otherwise, offer coherent, realistic plans for intellectual property rights. What they do offer is a tired communitarian philosophy, or worse — anarchy.

Brian: Geez, why are we talking about anarchy? I’m still trying to get my computer game working.

Customer Support: Fair enough. But my little rant is due to the fact that if my company cannot generate revenues, people like me lose their job.

Brian: Nobody wants you to lose your job. But can we get back to my problem? On Google, I searched for the name of the game plus the word “torrent” and was astounded at the depth of matches. The torrent sites offer a version of the game that is complete, yet cracked, so that the DRM is removed.²³ This means that following a few hours’ download time, I could install a pirated copy of your game and it would probably play successfully (since there is no potential for a DRM incompatibility), not to mention present fewer hassles than the retail version. I am somewhat confounded that BitTorrent is resilient to the legal problems that defeated Napster, but I would wager that BitTorrent survives because the standard BitTorrent client does not feature a built-in search engine for torrents (these must be downloaded from a site like the Pirate Bay) and because torrents only contain metadata and not “real data.”

Companies do not seem to be giving enough thought to the future of the relationship between the Internet and intellectual property. In my view, this is where our focus should lie, so I have compiled a list of technological and other ways that content could be protected from piracy. In fact, I have created a new message board thread because this is such an important topic (see Exhibit 1).

²¹ A torrent is a small file that contains the metadata needed to download a larger file (e.g. a game or movie) from a network of users. BitTorrent is the protocol through which torrents function, and some sources estimate that BitTorrent traffic accounts for half of all the traffic on the Internet.

²² CBC News, “Pirate Bay site sold to Swedish gaming company,” June 30, 2009, www.cbc.ca/arts/music/story/2009/06/30/pirate-bay-sold-gaming-company.html.

²³ To crack software is to modify it in order to remove protection such as the requirement of CD checks or serial numbers.

At this juncture, I must say that it has been weeks since I first notified technical support of my problems and that the assistance I have received has been disappointing, if not unethical. When I first explained my problem, tech support provided me with a customer complaint number and asked a question about my computer hardware, then received a response, sent another question, received another response and stopped replying. When I e-mailed to ask why they stopped responding, they gave me a new customer complaint number, started asking the same questions as before and again stopped replying. They have issued four customer complaint numbers now and I suspect they keep placing me at the top of the queue so that I give up trying. They have never apologized or indicated a serious effort to fix my problem, and especially disconcerting is their suggestion that I am using a pirated version and that this must be the source of my difficulties (ironically, a pirated version would probably play fine). As a former part-time business student, I detect a weakness in your service recovery. In fact, in my view, it is so bad that it is bordering on immoral. I found an old ethics textbook which says that the minimal moral obligation of a business organization toward customers is “Accurately labeled, safe goods and services of good value. Adequate customer information. Respect promises on delivery and performance.”²⁴

Customer Support: I take issue with your claim that the company has conducted itself unethically in response to your problem. We care deeply about customers’ concerns, though unfortunately technical support is overstretched and cannot always provide immediate assistance. I can assure you we are operating in accordance with ethical standards. But remember, if users object to the glitches, installation limits and other hassles brought on by DRM in games, they should not forget that the pirates are the offending party, not us.

Brian: Whatever you say! Did you read the new thread about ways to cut down on online piracy?

Customer Support: Yes, I read it over and it’s interesting stuff. At this time I regret to inform you that due to cash flow issues, we cannot issue a refund. Furthermore, we have been unsuccessful in developing a patch. Thank you for your understanding.

²⁴ Frederick Bird and Jeffrey Gandz, *Good Management: Business Ethics in Action*, Prentice-Hall Canada Inc, Scarborough, Ontario, 1991, p. 111.

Exhibit 1

A FEW WAYS TO REDUCE PIRACY

The first way to reduce piracy is to launch an attack against file-sharing technologies such as BitTorrent. The idea of stifling technology in order to protect copyrights is not unprecedented in recent decades. Jack Valenti, when he was president of the Motion Picture Association of America, was virulently opposed to VCRs, calling them “tapeworms”: “When there are 20, 30, 40 million of these VCRs in the land, we will be invaded by millions of ‘tapeworms,’ eating away at the very heart and essence of the most precious asset the copyright owner has, his copyright.”¹ Quashing file-sharing technologies would be an overreaction, causing technological regression, and is impractical. Much more realistic is the prospect of Internet service providers (ISPs) blocking access to file-sharing sites like the Pirate Bay and, as I understand, that site is blocked in Denmark. One problem with this measure is that torrent indexing sites are almost ubiquitous; another is that some ISPs are reluctant to offer restrictive access to the Internet because it undermines the free, limitless nature of the technology. France just narrowly rejected legislation to enact a three-strikes policy whereby users who illegally download copyrighted content would be warned twice before their Internet was cut off. A common means by which ISPs reduce traffic is “throttling,” where download speeds of BitTorrent users are mitigated, and this is inadvertently an anti-piracy measure. Finally, it is evident that monitoring piracy on the Internet and then pursuing the culprits is incredibly unpopular — witness the notorious efforts of the Recording Industry Association of America to sue casual P2P users for hundreds of thousands of dollars.

There is, of course, the DRM question. DRM has arguably proven unsuccessful with digital music but is still a factor in PC games, e-books (e.g. to control copying and printing), Blu-rays and DVDs (e.g. region codes), operating systems, and even ring tones. The very fact of my writing this post speaks to one of DRM’s shortcomings — inconveniencing legitimate customers, whether through bogging down the experience or stopping it altogether. An alternative to the sort of DRM that irritates computer gamers is selling games through Steam, an online distribution system (somewhat like an iTunes for games) that requires users to log in and for some games be connected to the Internet. This could be considered “DRM-lite.” Most games sold on Steam do not use a separate system of DRM; hence, most do not have installation limits or disc checks (since Steam games are all downloaded), and do not leave remnants of DRM on the computer after removal.

Bundling software with new computers is an effective method of combating software piracy. Another good method is cloud computing, in which software functionality lies on a vendor’s server instead of on a local PC.² Another possibility is software asset management, which helps users keep track of software licenses. The potential rise of streaming media services offering a vast archive of high-quality media could mitigate the appeal of downloading media illegally (and perhaps with lower quality) through BitTorrent. Last.fm is an innovative Internet radio site that streams free music with ads, and offers a premium service for a small subscription fee. Spotify streams free ad-supported music to computer users and is experimenting with a subscription model for mobile phone users. These business models accept that the current generation, rightly or wrongly, feels entitled to music for free or for dirt cheap.

Moving on, there are ways to protect content that are rooted more in ideology than technology. Does overpriced content significantly increase piracy rates? Certainly some users engage in piracy out of a belief that big business does not need or deserve their money. However, the correlation between price and piracy

¹ Lawrence Lessig, *Free Culture*, Penguin Books, United States, 2005.

² Sixth Annual BSA-IDC Global Software Piracy Study, May 2009, <http://global.bsa.org/globalpiracy2008/index.html>.

Exhibit 1 (continued)

rates is difficult to gauge for general Western populations. On the other hand, many users in the developing world are simply too poor to pay for content, whether it costs \$2 or \$20, and unsurprisingly the highest software piracy rates in the world are in Georgia (95 per cent), Bangladesh (92 per cent), Armenia (92 per cent) and Zimbabwe (92 per cent), while the lowest piracy rates are in North America (21 per cent) and Western Europe (33 per cent).³ Finally, globalization means that emerging markets will increasingly value legitimate software, and will be more active in cracking down on intellectual property violations. This seems to be playing out in China right now.

It is plausible that some tweaking of copyright laws is in order. For example, Canada has not updated its copyright law since 1997, two years before the release of Napster.⁴ As well, some argue that people need to change their perceptions about piracy — should it remain illegal to download “abandonware,” that is, software no longer sold or supported and for which no one is actively asserting copyright ownership? The following system could be implemented for users who want to draw from, or publishers who want to make available, orphan works: “In the absence of a claimant, a notice could be posted on a universal copyright internet notice board. After a reasonable time and no response, a potential user or publisher could be granted permission to use or publish, with royalties held in escrow for yet another period, until they were claimed. And if they were not claimed, they could be directed to a fund of some sort, or revert to the payer. These simple steps would make orphan works available and protect the copyright holders at the same time.”⁵ Are copyright terms in general too long? In the United States, the only software that has entered the public domain due to copyright expiration is software published before 1964 that was not renewed in its copyright during its 28th year following publication; for unpublished software, the copyright lasts 70 years plus the life of the author, regardless of when it was written.⁶ Hopefully Creative Commons⁷ will grow in popularity so that content creators can conveniently permit their work to be available to others with minimal restrictions if they so desire. New possibilities for abandonware and orphan works, as well as the availability of a more flexible copyright, could reduce the scope of what is considered piracy and copyright infringement.

More sample or trial versions⁸ of software, music and movies could reduce piracy rates to a small degree. Evolving attitudes, perhaps influenced through educational initiatives, could present purchasing content as classy and pirating as reprehensible. The public should be informed that pirated content frequently comes with malware, and that unpaid taxes on pirated content can hurt communities.

To end, I would like to share a scheme proposed by Harvard law professor William Fisher to solve the problem of online piracy: “Under his plan, all content capable of digital transmission would (1) be marked with a digital watermark.... Once the content is marked, then entrepreneurs would develop (2) systems to monitor how many items of each content were distributed. On the basis of those numbers, then (3) artists would be compensated. The compensation would be paid for by (4) an appropriate tax.”⁹ Thus, users would simply download what they wanted and taxes would compensate content creators according to how much their work was downloaded. Lawrence Lessig has proposed a slight modification to this scheme.

³ *Ibid.*

⁴ *The Globe and Mail*, “Download Decade,” 2009, www.theglobeandmail.com/news/technology/download-decade.

⁵ Mark Helprin, *Digital Barbarism*, HarperCollins, New York, 2009.

⁶ Stephen Fishman, *The Public Domain: How to Find and Use Copyright Free Writings, Music, Art & More*, NOLO, 2008.

⁷ Creative Commons is a non-profit organization devoted to providing a “some rights reserved” alternative to the traditional “all rights reserved” copyright.

⁸ Trial versions generally offer limited features and/or expire after a specified term.

⁹ Lawrence Lessig, *Free Culture*, Penguin Books, United States, 2005.