Choose two of three of the following essays, and remember to use the IRAAC method.

1. Conglomerate Software Inc. (CSI) is through merger and internal growth responsible for some 60% of the computer software sold in the United States. CSI sells Trapdoor, the dominant operating system, with over 95% of the installed base. It also has market shares ranging from 40% to 90% in all of the major application system markets. CSI permits competing applications programmers to write applications for its operating system, but only if they agree not to enter the operating system market. CSI also reserves the right to refuse anyone access to its applications program interfaces (APIs) for any reason, and on one notable occasion refused to provide APIs for an important application, announcing that it was “reserving that market to itself” because it considered the functionality of its program to be “too close” to the core function of the Trapdoor operating system. Without access to the APIs, it is essentially impossible to write an applications program that will run flawlessly on Trapdoor.

Hackbert is an expert programmer who has long written code for operating systems that compete with Trapdoor. Frustrated by the low demand for programs that won’t work with the dominant operating system, Hackbert writes Defenestration, an operating system that runs the same applications Trapdoor does. To do this, Hackbert buys a copy of the most recent version of Trapdoor. He reverse engineers the object code of the program through decompilation, producing a rough estimate of the source code of Trapdoor.

In the course of reverse engineering, Hackbert clicks “I agree” to a five-page screen of terms that pops up when he first loads the program. Hackbert testifies that he did not read the terms, that no one he knows has ever read the terms, and that he believed the terms to contain “the usual unenforceable gobbledygook.” In fact, the terms claim to be a license to use the Trapdoor program provided that the user “will not reverse engineer the program, will not compete with CSI in any of its businesses, and agrees to keep all aspects of the Trapdoor program secret forever under all circumstances.” It is undisputed that the only way to run the Trapdoor program is to click “I agree” when presented with this language, and that hundreds of millions of consumers have done so in the last five years.

Having created a variation of the Trapdoor source code on his own computer through reverse engineering, Hackbert spends several months analyzing the code to determine where the program interfaces with applications. Once he has identified the APIs, Hackbert copies the code that implements those APIs into Defenestration. The code copied from Trapdoor constitutes only about 1% of the
total code of either Trapdoor or Defenestration. The rest of Defenestration is an open-source operating system that Hackbert has the right to use, coupled with some source code he wrote himself. The result is a program that runs all the same applications programs Trapdoor does, though some applications run more slowly on Defenestration than they do on Trapdoor.

Hackbert markets Defenestration as “Trapdoor plus more – the next thing in operating systems.” His promotional materials emphasize that Defenestration is “compatible with every applications program that runs on Trapdoor.” They also state quite clearly that “Defenestration is a product of Hackbert Ltd. and is not affiliated with CSI. Trapdoor is a trademark of CSI.”

How will courts likely resolve the inevitable lawsuit?

2. Utilize, Inc. is a software company in the business of making computer-aided design (CAD) tools embedded with active objects. The basic CAD software allows users to design a wide variety of potential products, including cars and buildings, by constructing a virtual model in software and seeing how it looks. Competing CAD software has been on the market for a number of years, and the basic ideas of CAD are in the public domain.

Utilize’s improvement on existing CAD systems is to allow the user to introduce small applications programs, called “applets” or “active objects,” into the CAD environment. By writing her own applets or acquiring them from others, the user can create moving parts and changes in the CAD environment. This may serve either a decorative purpose (allowing the image to appear more realistic) or a functional one (allowing “motion” to test certain aspects of the design). The idea of applets is well known, and has already been implemented in several Internet-related programs by companies such as Sun Microsystems and Microsoft.

Utilize obtained patent 7,000,001 (“the patent”) on its invention. The only claim relevant to this case reads:

A computer program encoded in a computer-readable medium which includes

a computer-aided design module;

means for linking active objects into said computer-aided design module, such that said active objects interoperate with said design module; and

display means for outputting the results of the design.

The specification recites that CAD modules and display monitors are well-known in the art, and points to several sources of off-the-shelf CAD programs, including Utilize’s own program. The specification also provides generalized descriptions of
its program for linking active objects from outside sources into its CAD module, and “pseudo-code” (code written specifically for the patent application, and not used in the actual product) for part of the linking means. The specification does not, however, provide any of the actual source code written by Utilize.

Utilize sells its program in object code form. So far, it has sold about 1500 copies. The program contains sophisticated technological measures to prevent copying of the object code, and is formatted in a way designed to make it more difficult to reverse engineer the object code to generate source code. Utilize protects its source code jealously. Only three copies exist, and all are under lock and key. Utilize also sells a “starter package” of applets for use with its program. The CAD program is only sold with the starter package; the total price for both is $3,500 plus a continuing 0.5% royalty on sales of designs made with the software.

Utilize does not sell its program without obtaining a signed standard form contract from each customer. The contract includes the following provisions:

(a) Buyer agrees not to reverse engineer, decompile, or disassemble the program.

(b) Buyer agrees that the object code contained in the disk is a trade secret, and that Buyer will not use or disclose that code without Utilize’s express written consent. The license does not permit the use of the code for internal purposes on the Buyer’s computer network so long as the license remains in force.

(c) Buyer agrees to grant a nonexclusive, royalty-free license to Utilize allowing Utilize to copy and sell any applets Buyer develops for use with the Utilize program.

Question 5a: Is the patent valid? Why or why not?

Question 5b: Has Utilize violated the antitrust laws? Why or why not?

Question 5c: Is the no-reverse-engineering clause enforceable? Why or why not?

Question 5d: Assume that once the patent expires, Utilize demands that its customers continue to pay royalties for the right to continued use of its trade secrets. Can Utilize enforce its trade secrets claim against Buyer?

3. The Commonwealth of Massachusetts is considering passing a law to control the availability of obscene materials on the internet to its residents. The proposed law, S. 1117, would provide:
Section 1. Preventing Access to Obscene Matter. An internet service provider shall prevent the access of persons residing within this Commonwealth to obscene matter available on or accessible through its service.

(a) Compliance Through Technical Measures. An internet service provider that implements appropriate technical measures that block or filter access to obscene matter shall be deemed to comply with this statute.

(b) Order to Remove or Disable Access to Items. If the Attorney General of this Commonwealth finds that obscene matter is available on or is accessible through the service of an internet service provider in a manner accessible to persons within this Commonwealth, the Attorney General shall apply to the court of the county wherein the items have been discovered for an order directing the internet service provider to remove or disable access to the obscene matter. Such application shall identify the Uniform Resource Locator or other address from which such matter is accessible. Upon an ex parte determination that the material constitutes obscene matter within the meaning of section 2(b), the court shall direct the internet service provider to remove or disable access to the material. An internet service provider’s compliance with such an order shall be deemed to be compliance with this statute with respect to the material covered by the order. An application for an order to remove or disable access to obscene matter, and any further application necessary to ensure compliance with that order shall constitute the sole means of enforcing this statute.

Section 2. Definitions.

(a) The term “internet service provider” means an entity that provides a service that enables users to access content, information, electronic mail, or other services offered over the internet.

(b) “Obscene matter” is matter that:

(i) the average person, applying contemporary community standards of this Commonwealth, would find, taken as a whole, is designed to appeal to, or is designed to pander to, the prurient interest;

(ii) depicts or describes, in a patently offensive manner, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value.
(c) An “appropriate technical measure” is a specific technology that blocks or filters access to obscene matter.

You serve as a legislative aide to a Massachusetts state senator. The senator has heard that several groups, including providers of internet content and internet users from Massachusetts and other states, are prepared to file an immediate challenge in federal court to the constitutionality of S. 1117 if it is enacted. The senator considers you an expert on internet issues, and has asked you to write a memorandum discussing the federal constitutional claims that are likely to be raised in such litigation and analyzing how a court might resolve them.

For purposes of your analysis, you may assume that there are two open factual questions that the state legislature is wrestling with: (1) whether an internet service provider that filters out or disables access to certain sites can preserve access to those sites for subscribers residing outside Massachusetts; and (2) whether any of the “technical measures” that an internet service provider could implement to block obscene matter will lead to overblocking or underblocking. To be very clear, the senator does not expect or want you to attempt to resolve these factual issues. Rather, he would like you to discuss how the different possible resolutions of these factual issues would be relevant to a court’s analysis of the constitutional issues.

Because the senator is only interested in the substantive merits of S. 1117, he asks you to assume for purposes of your analysis that any constitutional claims are raised by parties with standing and that the case would otherwise be justiciable. In addition, because he relies on other aides for analysis of non-internet issues, he asks you to confine your analysis of S. 1117 to matters pertinent to your Cyberspace & the Law class.