Three Propositions About Source Code and Criminal Cases

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1. Source code that is irrelevant should not be disclosed.

2. Source code should be treated like other sensitive evidence, not privileged.

3. We can protect source code with protective orders.

1. Source code that is irrelevant should not be disclosed.

- Information that is irrelevant is not admissible at trial, and not subject to criminal subpoena.

- A **judge** decides whether information is relevant or irrelevant in any given case.

2. Source code should be treated like other sensitive information, not privileged.

- Criminal cases routinely implicate sensitive information; if it is relevant, it is subject to subpoena.
- If producing sensitive information would impose an “undue burden,” judges have discretion to deny subpoenas on a case-by-case basis.

2. Source code should be treated like other sensitive information, not privileged.

- Privilege is different—it raises the burden on the defense from establishing relevance to establishing *necessity*.
- There is no good reason to privilege source code—or other trade secrets—in criminal cases.

2. Source code should be treated like other sensitive information, not privileged.

- Trade secrets law is about commercial competition, not cross-examination.

3. We can protect source code with protective orders.

- Judges can protect sensitive information with protective orders, which are stronger than NDAs because they are enforceable by contempt sanctions.
- Source code is routinely disclosed in civil cases under a protective order, and routinely disclosed in industry contexts under an NDA.