

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.