How Little Human Control Is Too Little For Copyright Claims in the AI Age?

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[Abstract]

In some jurisdictions and courts, only certain forms of human–AI interaction are permitted to establish human control over AI-generated content. As a result, a user's copyright claim over AIGC may be rejected for lack of "sufficient control," even where the user's creative contribution is substantial.

The essential problem with control theory lies in its inconsistency with the incentive theory of copyright. According to incentive theory, all other factors being equal, the more complex and information-rich the content becomes, the stronger the case for recognizing the human user's authorship, because such outputs are likely to embody greater human creative contribution. Under control theory, however, the opposite conclusion follows. As outputs become more complex, the user's relative degree of control is deemed to decline, since any increase in human contribution is outweighed by the even greater increase in machine-generated content. The more complex the output, the less likely the user is to succeed in an authorship claim.

The tension between control theory and incentive theory is irresolvable because the two approaches ask fundamentally different questions. Under incentive theory, the relevant inquiries are whether creative activity requires incentives and whether copyright protection would impose significant costs on the public domain. For complex content, whose creation is highly improbable and for which perhaps only thin copyright protection is sought, the answers will be "yes" and "no," respectively. Incentive theory therefore favors protection.

Control theory, by contrast, replaces the assessment of incentive necessity with an assessment of human control. At the same time, it pays little attention to whether the resulting copyright claim would in fact pose a meaningful threat to the public domain. By substituting a proxy for the underlying objectives of copyright law, control theory risks producing results that diverge from the very goals copyright seeks to achieve.

The denial of copyright claims by AI systems should speak in favor of, rather than against, copyright claims by human users. At the *de facto* level, the "traditional elements of authorship" embodied in AI-generated content are jointly produced by human users and AI systems. The choice among labeling them as "human-made," "machine-generated," or "jointly produced" is not an ontological determination but a *de jure* judgment. Where recognizing users' claims would provide meaningful incentives without posing a substantial threat to the public domain, copyright law should favor recognition rather than denial.

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By rejecting control theory, copyright law could save substantial cognitive resources that would otherwise be spent on the mandatory disclosure of the creative process. Instead, it could focus on the scope of protection. Courts should adopt a claim-based approach. The broader the protection sought, the heavier the burden on the user to separate human contributions from machine-generated contributions and to prove that the claimed subject matter falls within the scope of the human contribution.

There are at least two additional benefits to rejecting control theory. First, copyright law would maintain its theoretical coherence. Second, there is no need to introduce *sui generis* protection or to retreat to broad general clauses outside copyright law.

References:
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