

VAN GOGH ICELAND: Artists Must be Compensated and Credited -- Copyright and AI -- A Response to Meta, Google, Microsoft, Anthropic, Adobe, Andreessen Horowitz, Hugging Face, Stability AI, and Apple *et al.*

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VAN GOGH ICELAND: © Dr. Elliot McGucken

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Introduction

A most remarkable feature of Big Tech's letters regarding AI and Copyright (summarized by The Verge here: <https://www.theverge.com/2023/11/4/23946353/generative-ai-copyright-training-data-openai-microsoft-google-meta-stabilityai>) is that none of them cite the Constitution nor its most concise and eloquent Copyright Clause:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

As one of the most awarded and most viewed fine art photographers of my generation, I must admit that "exclusive Right," has a nice ring to it. Nor do any of the Big Tech folks cite or celebrate the words inscribed in the ornate frieze above the Supreme Court: EQUAL JUSTICE UNDER LAW. Nor do any of them cite *The Declaration of Independence*:

We hold these truths to be self-evident, that all men are created equal,
that they are endowed by their Creator with certain unalienable Rights,
that among these are Life, Liberty, and the pursuit of Happiness.

Were Big Tech to add these simple principles, their essays could be vastly improved. For in Law, as in Physics and Mathematics (from where Law inherited much of its formal, Euclidean logic), theories are only as good as the principles they are based upon. So it is that without citing and saluting the foundational principles at the center and circumference of Natural Rights, Human Rights, Copyright Law, and Property Rights, Big Tech's theories fall short of the Enlightenment's Ideals which foster the Wealth of Nations.

And here too you can see why I pursue art in nature. For the humble pursuit of Fine Art Landscape Photography affords me the rugged wealth and supreme honor gained by creating in the service of humanity and Natural Law—a form of honor which would be hard to gain while working for behemoths who profit by discounting Natural Law and exploiting the Artist. Fine Art Photography allows me to short Big Tech while investing in eternal art—to hedge against the madness of the tech-bro crowd, and go long on Epic Poetry. Photography affords me a battlefield where, like Achilles, I can receive honor from Zeus himself—that which the King Agamemnons and “AI” CEOs can never take away, even though they will seize Achilles' rightful prize time and again, as they did on the first page of Homer's *Iliad*, for such is the nature of their character.

It should be noted that the Constitution, much like *The Declaration of Independence*, was constructed upon the Natural Laws and Moral Principles studied and set forth in the Great Books and Classics, from Homer, Moses, and Euclid on down. Liberty's prime poet—Thomas Jefferson—noted, “as we advance in life, they all fall off, one by one, until we are left with Virgil and Homer, and perhaps Homer alone.” So it is that Big Tech needs to train not only their so-called “AI” on the epic texts, but the souls of their CEOs too. Elon Musk recently proclaimed that we will have an AI God by the time all the AI copyright cases are resolved, and if so, that AI God, in its supreme Lockean, Dantean, Homeric, Mosaic, Jeffersonian wisdom, will immediately fire Musk for not respecting the Constitution nor Artists' Natural Rights.

Let us examine how Big Tech's commentary on AI and Copyright might be improved and exalted so as to serve the higher spirit of Art and Entrepreneurship, and promote the progress of the arts and sciences that enriches, inspires, and benefits all of humanity.



Van Gogh Iceland © Dr. Elliot McGucken

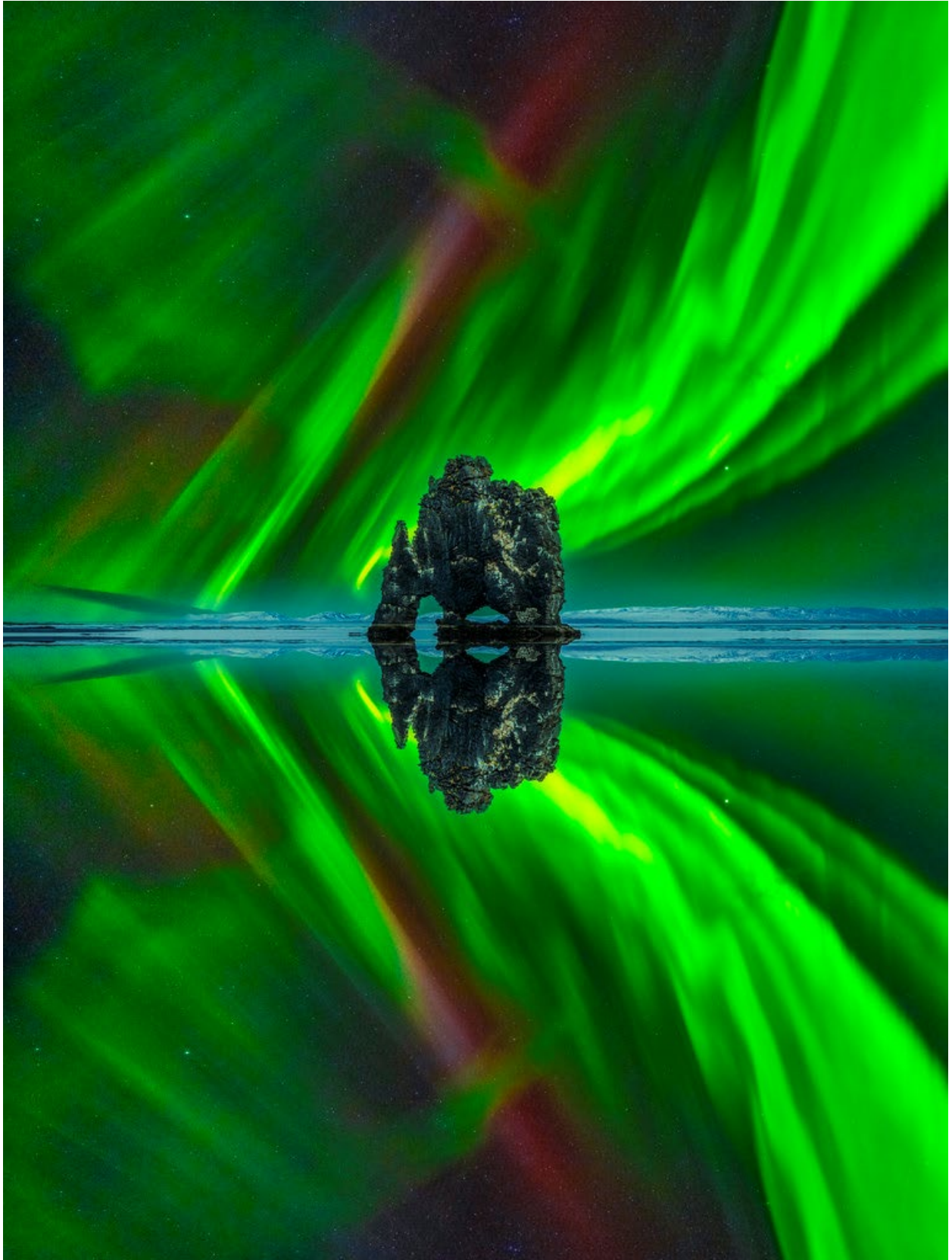
Meta: Copyright holders wouldn't get much money anyway

Imposing a first-of-its-kind licensing regime now, well after the fact, will cause chaos as developers seek to identify millions and millions of rightsholders, for very little benefit, given that any fair royalty due would be incredibly small in light of the insignificance of any one work among an AI training set.

<https://www.documentcloud.org/documents/24117934-meta>

Dr. McGucken: Throughout the history of all civilization, prices have ever been naturally set by the property owner, not by the thief. By beginning their essay with the foundational, commonsense principles upon which both Copyright and Natural Rights are based, Meta will quickly recognize the simple moral logic at the heart of both capitalism and civilization, and by extending the glorious logic, they will much improve their essay. Meta ought open their essay as follows:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.



Google: AI training is just like reading a book

If training could be accomplished without the creation of copies, there would be no copyright questions here. Indeed that act of “knowledge harvesting.” to use the Court’s metaphor from Harper & Row, like the act of reading a book ‘and learning the facts and ideas within it, would not only be non-infringing, it would further the very purpose of copyright law. The mere fact that, as a technological matter, copies need to be made to extract those ideas and facts from copyrighted works should not alter that result.

Dr. McGucken: The way “AI” “reads” is extremely different from how humans read. An experiment—give Google’s AI every work of literature available up until Shakespeare. Then ask Google to write *Hamlet and Shakespeare’s Sonnets*, and perhaps the *Tempest*, *Macbeth*, *Love’s Labor Lost*, and *Romeo & Juliet*. Similarly give google every painting and work of art produced up until Van Gogh. Then ask Google to paint a self portrait as well as sunflowers. See what you get. These are easy experiments which could readily be conducted.

Unlike artists, poets, painters, prophets, and scientists, “AI” is incapable of Creative Logos and journeying beyond Plato’s Cave, and thusly also incapable of returning on home with the newfound knowledge. AI is incapable of the classic hero’s journey that enriches all of humanity. AI is incapable of that Galilean “spark of reason” from where the vast wealth of the sciences hath arisen, as Galileo noted, “for in the sciences the authority of thousands of opinions is not worth as much as one tiny spark of reason

in an individual man.” LLM “AI” is nothing more than yesteryear’s “thousands of opinions.”

So it is that Google’s essay could be vastly improved by opening with the Constitution’s Copyright Clause, as well as perhaps a couple quotes from Van Gogh:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Van Gogh professed: “It is good to love many things, for therein lies the true strength, and whosoever loves much performs much, and can accomplish much, and what is done in love is well done.” Has any “AI” ever done anything in love?

Art and poetry and music contain far more than mere facts and data. Even though many “AI” bros refer to Beethoven’s symphonies as a “dataset,” Einstein reminds us, “It would be possible to describe everything scientifically, but it would make no sense; it would be without meaning, as if you described a Beethoven symphony as a variation of wave pressure.” The great quantum physicist Erwin Schrodinger likewise noted, “Science cannot tell us a word about why music delights us, of why and how an old song can move us to tears.”

Has AI ever been moved to tears? Like Beethoven, has AI ever fought against fate? When Beethoven learned he was growing deaf, he wrote:

“Oh, if I were rid of this affliction I could embrace the world! I feel that my youth is just beginning and have I not always been ill? My physical strength has for a short time past been steadily growing more than ever and also my mental powers. Day by day I am approaching the goal which I apprehend but cannot describe. It is only in this that your Beethoven can live. Tell me nothing of rest. I know none but sleep, and woe is me that I must give up more than to it than usual. Grant me but half freedom from my affliction and then — as a complete, ripe man I shall return to you and renew the old feelings of friendship. You must see me as happy as it is possible to be here below — not unhappy. No! I cannot endure it. I will take fate by the throat; it shall not wholly overcome me. Oh, it is so beautiful to live — to live a thousand times! I feel that I am not made for a quiet life.”

Shortly thereafter, Beethoven wrote his fourth symphony—*Eroica*—*The Heroic Symphony*—and revolutionized classical music with the likes of an exalted story that had never been told before by music alone—the Achillean acceptance of fate by the triumph over fate in immortal, epic poetry. Music was where he could set his soul free for all of eternity. Creative Art was the beauty that kept Beethoven and Van Gogh sane, and Fine Art Landscape Photography is the vast battlefield and canvas where I too have found bliss.

“AI” is incapable of coming anywhere close to the exalted, soulful glory of Beethoven, Shakespeare, or Van Gogh, much like those who market “AI” as something that it is not. In addition to never having studied Beethoven and Van Gogh, it seems that the “AI” marketers have yet to train their souls on the simple, moral beauty of the *US Constitution* and *The Declaration of Independence*. These wonderful documents set forth the civil ideals that the creators of art must be compensated and credited, and their consent must be sought, for there is no checkbox that opts one’s art of the Constitution. By beginning their essay with the simple, commonsense foundational principles upon which Copyright and Natural Law are based, Google will much improve their essay.



Microsoft: Changing copyright law could hurt small AI developers

Any requirement to obtain consent for accessible works to be used for training would chill AI innovation. It is not feasible to achieve the scale of data necessary to develop responsible AI models even when the identity of a work and its owner is known. Such licensing schemes will also impede innovation from start-ups and entrants who don't have the resources to obtain licenses, leaving AI development to a small set of companies with the resources to run large-scale licensing programs or to developers in countries that have decided that use of copyrighted works to train AI models is not infringement.

Dr. McGucken: Creators are the heart and soul of all AI systems, and thus as copyright law bolsters creators by financially incentivizing creation, copyright law benefits all AI developers. Microsoft's essay would be greatly enhanced were they to base it upon the Spirit and Letter of the Law, as set forth in the US Constitution, which Microsoft hath not yet amended. Microsoft ought to begin their essay with the following simple, commonsense precept, and then weave its moral motif throughout:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.



Anthropic: Current law is fine; don't change it

Sound policy has always recognized the need for appropriate limits to copyright in order to support creativity, innovation, and other values, and we believe that existing law and continued collaboration among all stakeholders can harmonize the diverse interests at stake, unlocking AI's benefits while addressing concern.

Dr. McGucken: The words here seem fine. The challenge then becomes matching word and deed, so that the following ideals are rendered real in the "AI" business models:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

All too often Big Tech markets something as "ethical," while failing to match word and deed.

"Facta, non verba"—"Deeds, not words."



Adobe: It's fair use, like when Accolade copied Sega's code

In *Sega v. Accolade*, the Ninth Circuit held that intermediate copying of Sega's software was fair use. The defendant made copies while reverse engineering to discover the functional requirements—unprotected information—for making games compatible with Sega's gaming console.

Such intermediate copying also benefited the public: it led to an increase in the number of independently designed video games (which contain a mix of functional and creative aspects) available for Sega's console. This growth in creative expression was precisely what the Copyright Act was intended to promote.

Dr. McGucken: Adobe could vastly improve and even correct their erroneous theories by basing them on the Constitution and other forms of exalted Natural Law celebrated by the likes of John Locke, James Madison, Homer, Dante, Moses, Bogle, Mark Twain, and other Enlightenment Thinkers. Adobe ought to begin their essay with the following simple precepts, and then build their theory upon the foundational principles, in the same way that Euclid constructed the entirety of geometry upon irrefutable, self-evident axioms:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.



Anthropic: Copying is just an intermediate step

For Claude, as discussed above, the training process makes copies of information for the purposes of performing a statistical analysis of the data. The copying is merely an intermediate step, extracting unprotectable elements about the entire corpus of works, in order to create new outputs. In this way, the use of the original copyrighted work is non-expressive; that is, it is not re-using the copyrighted expression to communicate it to users.

Dr. McGucken: Indeed! Just as the hotwiring of a car is only an intermediate step in stealing the car! Anthropic could greatly improve their essay by celebrating the Spirit and Letter of the Constitution, which, once ingested and understood, would allow them to recognize that Copyright Law exists to govern and regulate the making of copies, so as to incentivize and encourage the advancement of the arts. Anthropic would do well to begin their essay with the following eloquent passage, and then use the simple, moral logic as a motif throughout their essay:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.



Andreessen Horowitz: Investors have spent 'billions and billions'

Over the last decade or more, there has been an enormous amount of investment—billions and billions of dollars—in the development of AI technologies, premised on an understanding that, under current copyright law, any copying necessary to extract statistical facts is permitted. A change in this regime will significantly disrupt settled expectations in this area. Those expectations have been a critical factor in the enormous investment of private capital into U.S.-based AI companies which, in turn, has made the U.S. a global leader in AI. Undermining those expectations will jeopardize future investment, along with U.S. economic competitiveness and national security.

Dr. McGucken: Artists have invested that which is far greater than mere money which can be printed. Artists have invested their lives, their fortunes, and their sacred honor in their art. Art, unlike money, cannot be created out of thin air—it can only be created by bold, *relentless* actions on the frontlines of creativity.

In order to improve their essay by citing the *US Constitution* and *The Declaration of Independence*, Andreessen Horowitz would have to read the exalted documents, and they would quickly see that same Property Rights which Billionaires enjoy also protects every artist, from the highest to the humblest. Above the Supreme Court the words EQUAL JUSTICE

UNDER LAW are exalted in the classical, ornate architecture. And so it is that Andreesen Horowitz would be wise to begin their essay with:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.



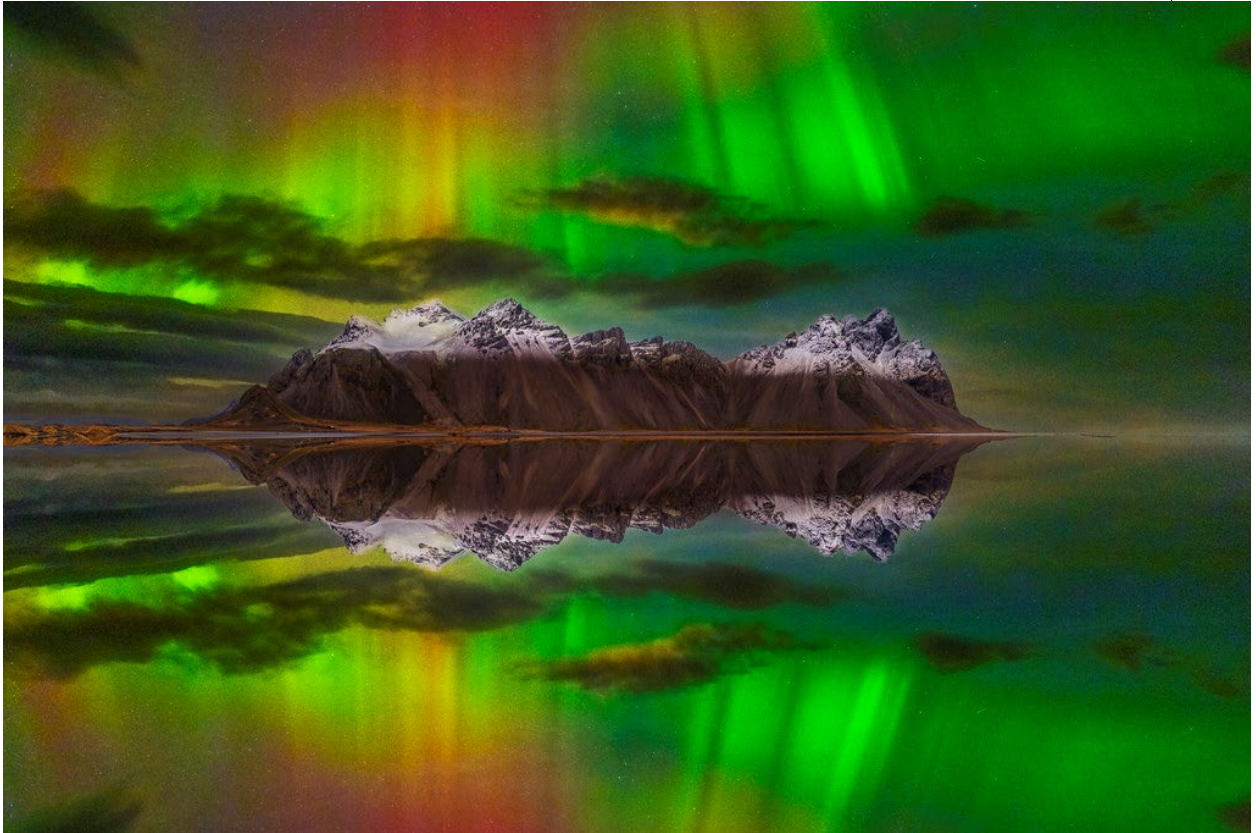
Hugging Face: Training on copyrighted material is fair use

The use of a given work in training is of a broadly beneficial purpose: the creation of a distinctive and productive AI model. Rather than replacing the specific communicative expression of the initial work, the model is capable of creating a wide variety of different sort of outputs wholly unrelated to that underlying, copyrightable expression. For those and other reasons, generative AI models are generally fair use when they train on large numbers of copyrighted works. We use “generally” deliberately, however, as one can imagine patterns of facts that would raise tougher calls.

Dr. McGucken: If it is true that “The use of a given work in training is of a broadly beneficial purpose: the creation of a distinctive and productive AI model,” then certainly Hugging Face will look forward to compensating the artists whose labor—whose blood, sweat and tears—is exploited in such a glorious venture! For the Constitution recognizes the Artists’ Natural Rights in and has made it a Law that Artists’ own the Exclusive Rights to their work, all in the magnificent spirit of encouraging artists to create more art in the service of humanity.

Perhaps their momentary greed caused them to overlook the long-term wealth creation that is encouraged by the Constitution. Hugging Face could greatly improve their essay by basing it upon those time-honored, classical enlightenment ideals exalting the Rule of Law over the whims of Kings, Priests, “AI” CEOs, and VCs. Hugging Face could improve their essay by beginning it with:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.



StabilityAI: Other countries call AI model training fair use

A range of jurisdictions including Singapore, Japan, the European Union, the Republic of Korea, Taiwan, Malaysia, and Israel have reformed their copyright laws to create safe harbors for AI training that achieve similar effects of fair use.” In the United Kingdom, the Government Chief Scientific Advisor has recommended that “if the government’s aim is to promote an innovative AI industry in the UK, it should enable mining of available data, text, and images (the input) and utilise [sic] existing protections of copyright and IP law on the output of AI.

Dr. McGucken: The simple beauty of the *Constitution* and *Declaration of Independence* hath made America a beacon for artists and entrepreneurs all around the world. There is a reason that the US is the leader in the arts and technology—a very simple reason—and that is that the risk-taker gets to own the reward. The simple precept that the risk-taker gets to own the reward rests at the center and circumference of not only capitalism and civilization, but of polite society. So it is that StabilityAI would do well to begin their essay by citing the *US Constitution* and *Declaration of Independence* which exalt those precious ideals in simple, poetic language, and the celebrating the Noble Precepts of Natural Rights throughout all of their future business documents:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited

Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

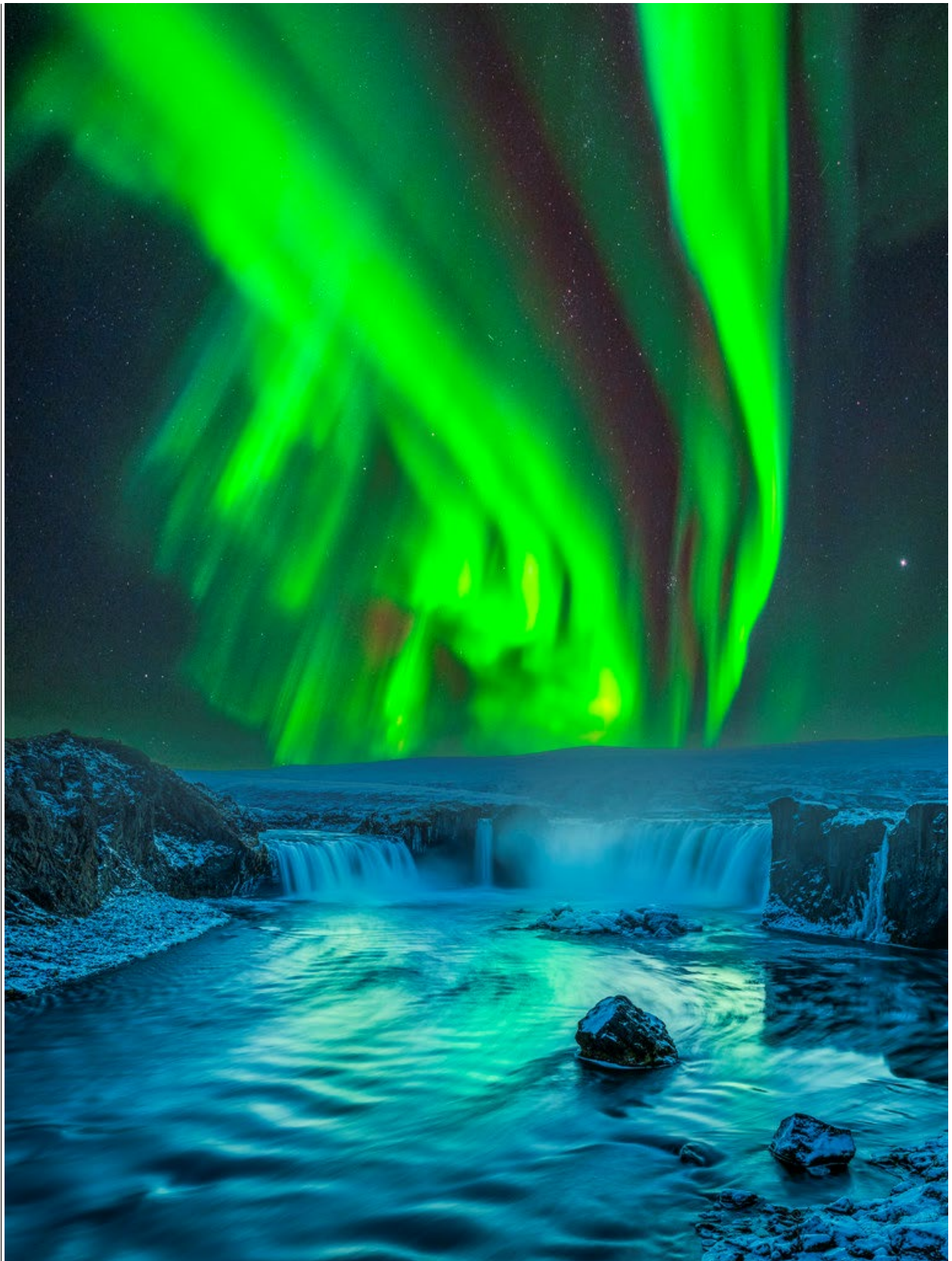


Apple: Let us copyright our AI-made code

In circumstances where a human developer controls the expressive elements of output and the decisions to modify, add to, enhance, or even reject suggested code, the final code that results from the developer's interactions with the tools will have sufficient human authorship to be copyrightable.

Dr. McGucken: Perhaps, but too, we must not forget the original authors of the code, who must enjoy the same protections of their Natural Rights exalted in the Constitution:

[the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.



Conclusion:

Big Tech relies on Intellectual Property, and thus, when it comes to protecting their own intellectual property, they will invariably cite the Constitution. Above the Supreme Court it is written “Equal Justice Under Law,” and thus every artist is also afforded the same Constitutional Rights to protect and profit from their creations. As there is no need to check a box to opt in to the Constitution, there is no need to check a box to opt out of having one’s art copied and stolen by the leviathans who are trampling upon Natural Rights for unjust and unlawful gains of profit, while simultaneously degrading the arts and directly competing with those artists whose work provides the keystone and capstone of every AI system, as well as all the soulful value in-between.

Until the Constitution is amended or abandoned, and *The Declaration of Independence* is deconstructed, and the inscription on the frieze above the Supreme Court is sandblasted away, these are the simple, exalted rules under which business must be conducted, and will be conducted:

The Constitution: [the United States Congress shall have power] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The ornate frieze above the Supreme Court: EQUAL JUSTICE UNDER LAW.

The Declaration of Independence: We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

