

## **Response to Case Seventeen: Copyright**

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### **Should you use the image? What legal and ethical issues are involved?**

Based on the SAA Code of Ethics, the ethical issues in this case include Authenticity and Integrity (related both to the actual use of the photo and on any potential alternations), Privacy (concerning on the staffer on the photo), and Law (copyright issues).

The first question is whether the archives should be using a photo that isn't a part of one of its own collections in an exhibit at all. Is this a violation of the concept of authenticity and integrity? This is probably not a big problem as long as its source is documented and attributed and as long as it is made clear that the archives does not own the photo.

### **If you decide to use the image, whom must you ask for copyright permission?**

The first point of contact on copyright should be the senator's office, since the photo was posted on his website. It may turn out that a member of his staff took the photo for promotional purposes, which would make copyright something of a non-issue. The senator's office may be able to provide clearance, or the photo may even be considered a government document, which would place it in the public domain and therefore would free the archives of any legal (but not ethical) responsibility. If, however, the office cannot provide clearance, the archives must contact the photographer or copyright holder. If one cannot be located or does not agree to the use, it would probably be in the archives' interest to err on the side of caution. While it may be possible to defend the exhibit as an "educational purpose", publishing the photo would amount to using the entirety of a published work, which might make a "fair use" defense difficult. There is also an ethical concern in addition to the legal one.

**Should you retouch the photograph to hide the aide's name or image? What right of privacy do the people in this photograph have in this case? If retouched, should it be identified as a photo illustration?**

The archives should be very careful about retouching or otherwise altering the photograph, for several reasons. First, doing so would be questionable from a standpoint of authenticity and integrity, even though the photograph is not actually a part of its collections. Another concern is the fact that the copyright holder has in most cases the right to approve significant alterations or manipulations to a copyrighted photograph; permission to publish or display is not always accompanied by permission to modify or create a "derivative work".

The privacy of the staffer, in this case, seems less of a concern. Unless her presence in the photo could be considered embarrassing or defamatory, or unless she is doing something where she should expect some reasonable level of privacy, all of which seems unlikely since this was a newsworthy public event and something of a canned "photo op", her privacy rights are somewhat questionable in this case. The senator and the governor, as public figures in a public place, also should have little expectation of privacy, particularly since this likely was something of a media event. The only issue would be if one of the individuals in the photo were able to prove that use of the photo by the archives classified as a commercial exploitation of their image, which would probably be somewhat difficult.

If the photograph is retouched or cropped, any manipulation or alteration should be very clearly noted.

**How would you cite the photograph?**

Regardless of copyright status, it is essential to document the source of the photograph and make it clear that it is not owned by the archives. If copyright clearance is obtained, the citation requested by the copyright holder should be used. If copyright is not an issue, the source (the senator's website or office) should still be noted. The notice should be visible to individuals looking at the photo.