If there’s a legal way of using the photograph, then it should be included especially since it would be a great addition to the exhibit of retired U.S. senator Cyrus B. Worthington, especially since it’s one of the only images in which he is smiling. The problem is that this photograph has nothing to do with the Rural Electrification and Decentralization Act (REPDA) of 1995. It’s just a nice photograph of Worthington.

Since the photograph is downloaded from Google images but there’s no caption or citation and I have no idea who the photographer is, I could cite it as an image from Tomorrow’s Happy Citizens (THC) and even try and get in touch with them to ask their permission to use it in the exhibit. If I chose to only use the image in the online exhibit, I could use a thumbnail and link it to THC. I do have the potential of downloading the image, print it and frame it and place it in the exhibit, but I’m not just using the image as a thumbnail on a website although I could do that since the exhibit is both online and in hard copy.

My first question would be, is this exhibit for commercial use or non-profit? It is to be used to enhance the reputation of Sagamore State Archives, or to generate publicity for the organization? Is there any way this exhibit could lead to a cash influx for the archive? If so, would that deem the photographic show a commercial enterprise?

If that line of enquiry leads to a dead end and I get no response from THC and I chose to use the image anyway, first off, it would be wise to consult an attorney if Sagamore State Archives has the budget for it. Otherwise, I would look at the copyright - 1976 Fair Use Act and see if there’s a precedent for using images captured from Google.

In the case of, *Kelly v. Arriba Soft Corp.*, 280 F. 3d 934 (9th Cir. 2002), an internet search engine downloaded Kelly’s photographs off the internet and converted them to thumbnails that would link to a full-size copy of the photo. It was concluded that the thumbnails did not violate fair use but the full-size image did. With this in mind, if I use the thumbnail image from THC and link it back to their website then this seems like this usage falls under the fair use act.

Another act of the 109th CONGRESS 2d Session, Orphaned Works Act of 2006, H.R. 5439, could also be cited as a reason to use the image. The U.S. Copyright Office defines
these works as those whose owners are difficult or even impossible to locate, and states in it’s Notice of Inquiry (NOI) that, "the public interest may be harmed when works cannot be made available to the public due to the uncertainty over its copyright ownership and status, even when there is no longer any living person or legal entity claiming ownership of the copyright or the owner no longer has any objection to such use." It also acknowledges, "the uncertainty surrounding ownership of such works might needlessly discourage subsequent creators and users from incorporating such works in new creative efforts or making such works available to the public." This act could also be used to justify the use of the photograph especially since the exhibit is honoring a former U.S. senator.

With regard to one of the senator’s staff members being visible and her nametag legible, this goes into the realm of privacy. Does this person have a right to privacy since she was a public employee who worked for a U.S. senator? Did the taxpayer pay her salary? Is she considered a civil servant? Does she have a right to privacy if the definition is such as this: the right to be left alone, the right of an individual (or corporation) to withhold himself and his property from public scrutiny? Could the senator’s staff member be considered a public official or a private person?

To use the photograph doesn’t seem to be an invasion of privacy. The purpose of the exhibit is to honor Worthington and is not to intrude upon this staff member’s seclusion or solitude or delve into their private affairs. It is not to be used to embarrass them or place them in a false light.

Since she appears to be a federal employee, her personal data would be available on request including her name, date of hire, job title, so these records could be easily available online or through contacts of Senator Worthington. Would her name appear in public records relating to Worthington?

If she can be located, it would be a good idea to ask if she would allow her image to be used alongside Worthington in this particular photograph or would she wish to have her name tag retouched so that it is not visible.

If she cannot be located, then since she was an aid to Senator Worthington, I would not retouch the photograph but use it as is.

Of course, this still leaves the issue of who took the photograph and what are their rights regarding the image. Again, I would consult with THC to see if anybody at the organization knows who the photographer could be. If I were fortunate to find a name, I would make every effort to contact this person to get permission to use the image as part of the hard copy exhibition, as it would be good to see the senator in a light-hearted moment.

NOTE: I used the information from Theme 4’s lecture, Copyright and Privacy, to answer this essay question.