

#### Libraries and Archives in the Law

- Special Allowances for Reproduction
  - Section 108: Reproduction by libraries and archives
  - Section 109: First Sale
  - Section 107: Fair Use
  - Section 121: *Print Disabled*
  - Section 504(c): *Remedies for Infringement*
  - Digital Millennium Copyright Act (DMCA)



Powerful opening provision....
"A Library Super Power"



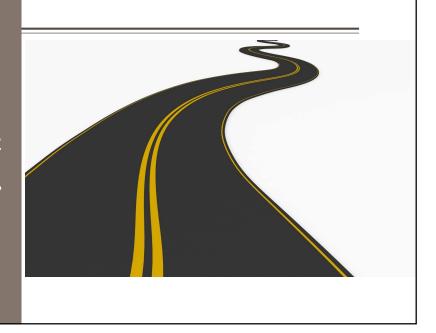


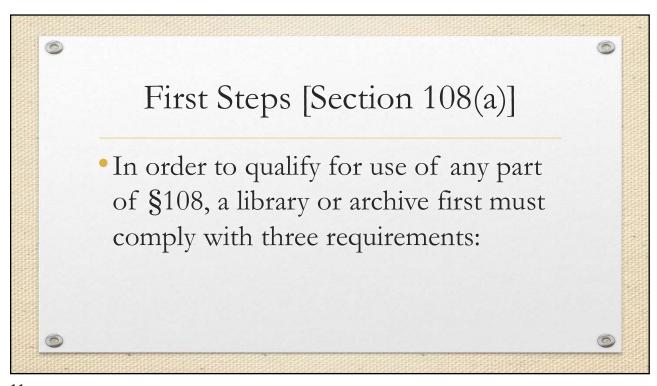
"Notwithstanding the exclusive rights of the owners of copyright, section 108 provides that under certain conditions it is not an infringement of copyright for a library or archives, or any of their employees acting within the scope of their employment, to reproduce or distribute....

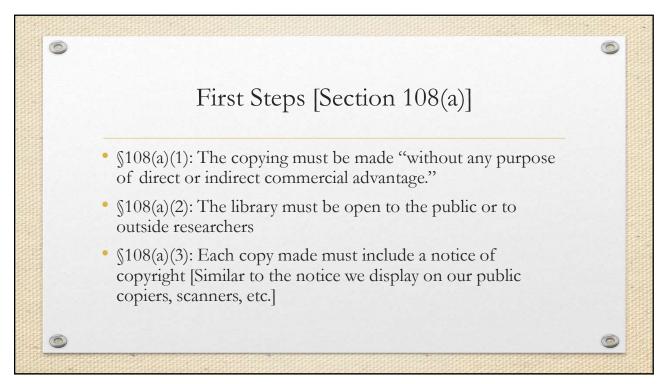
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#### The many faces of Section 108

- Save It!
  - Preservation/Copy
- The Scholar's Delight
  - Document Delivery
- "Get Out of Jail Free"
  - Reproducing Equipment
- Ye Olde Loane
  - Interlibrary Loan





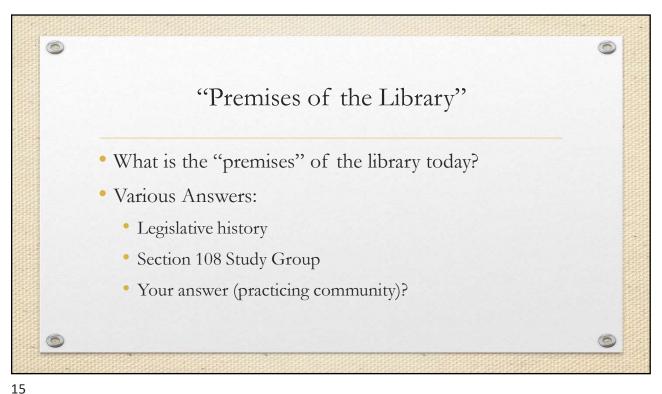


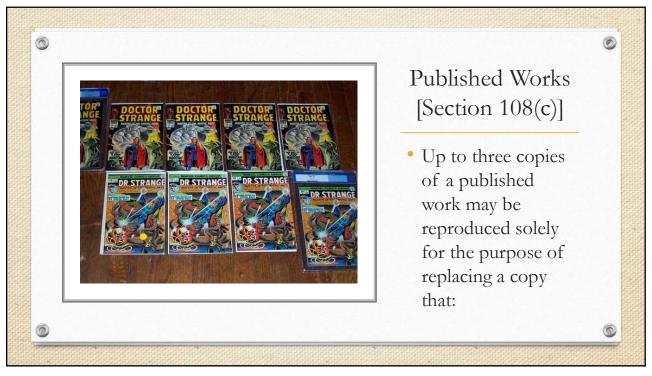
Unpublished Works [Section 108(b)]

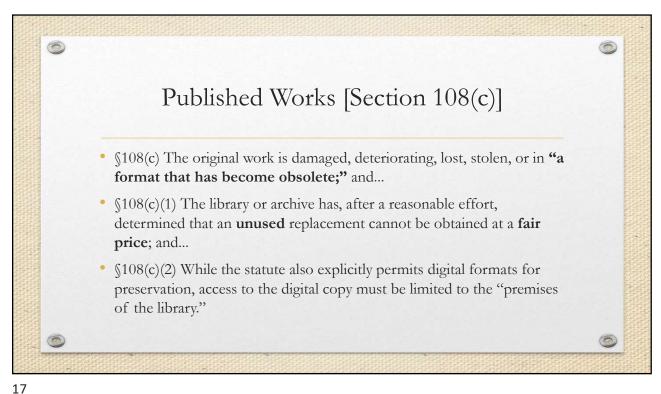
- Different requirements for published and unpublished works.
- 108(b) outlines the conditions for making three preservation copies of unpublished materials: rare, unique, hazard of loss, and can't be replaced on open market (the conditions for making preservation copies are significantly less rigorous)
- The following conditions must be met:

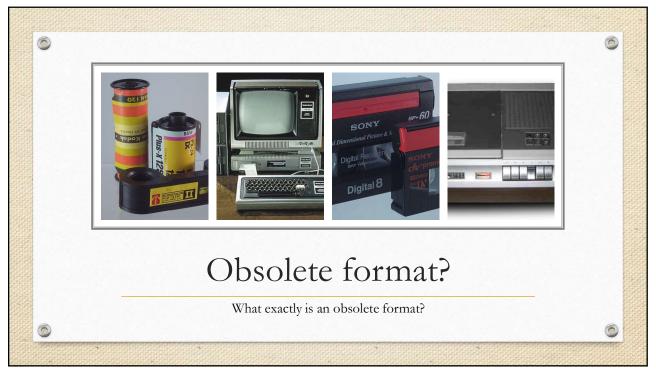
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# Unpublished Works [Section 108(b)] • §108(b) The copy is solely for preservation or security purposes (or for deposit at another library for research); and.... • §108(b)(1) The work is currently in the collection of the library making the copy. • \* Less rigorous requirements for copying for preservation, but if one of the copies is digital, however, that copy may not be used "outside the premises of the library or archives."



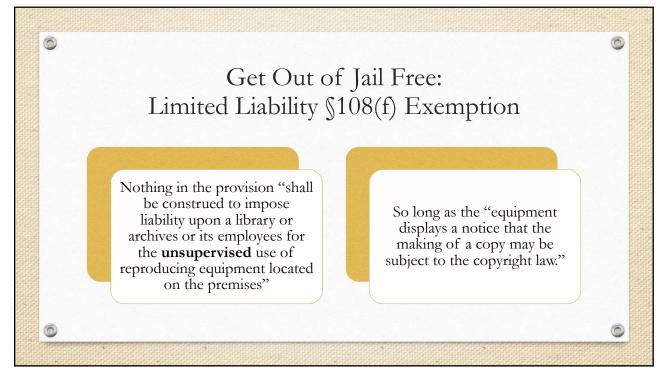


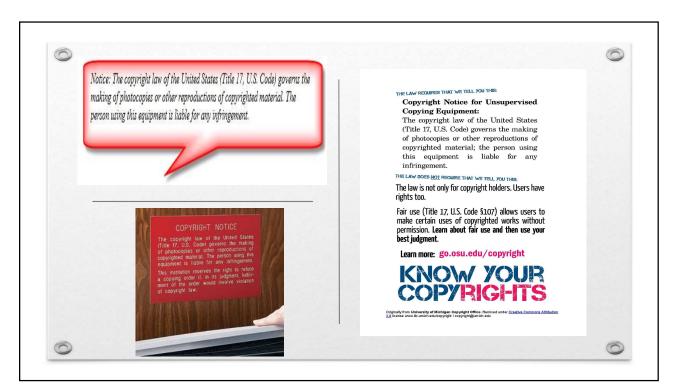






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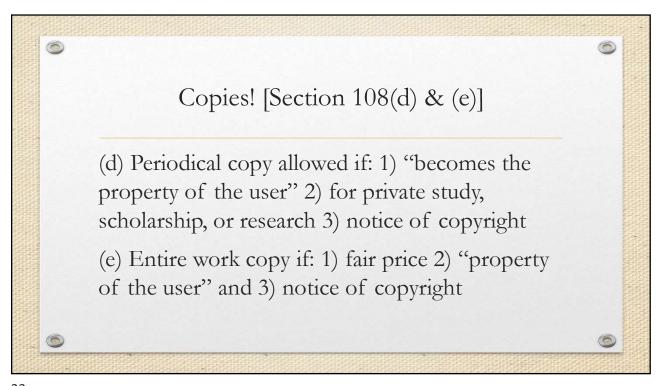


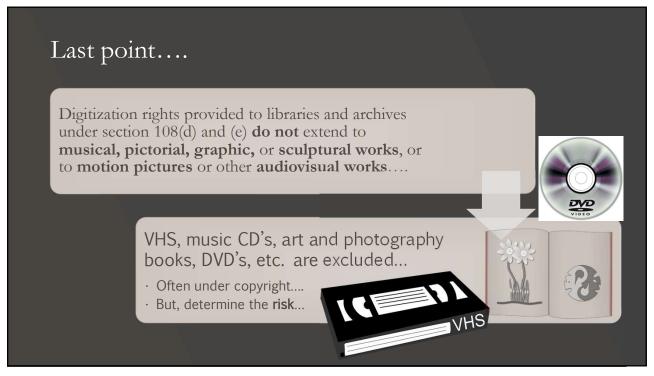


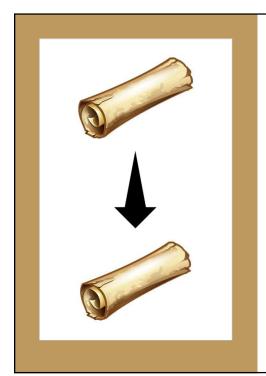
#### The Scholar's Delight: Document Delivery

Librarians can make copies for a patron, reproducing single articles for "private, noncommercial use" or reproducing an entire work where a replacement copy cannot be found for a fair price [§ 108(e)]

Permits lending of reproductions of copyrighted works to users in other libraries for private, noncommercial use [§ 108(a), (d)]







#### Ye Olde Loane: Section 108 and Interlibrary Loan

- •Interlibrary Loan is one of the few library jobs that has a federal statute!
- Section 108(g) attempts to balance the interests of publishers and libraries regarding interlibrary loan arrangements

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- During the years preceding amendment of the copyright law in 1976, publishers lobbied hard for strongly worded anti-ILL clauses
- Libraries, fairly certain that such language would prevent normal and customary ILL arrangements, lobbied hard for additional language

Publishers and 108 ILL

## Libraries fight back! Section 108(g)(2) Section 108(g) proviso: Provided, that nothing in this clause prevents a library or archives from participating in interlibrary loan arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so

in such aggregate quantities as to substitute for a subscription to or

purchase of such work.

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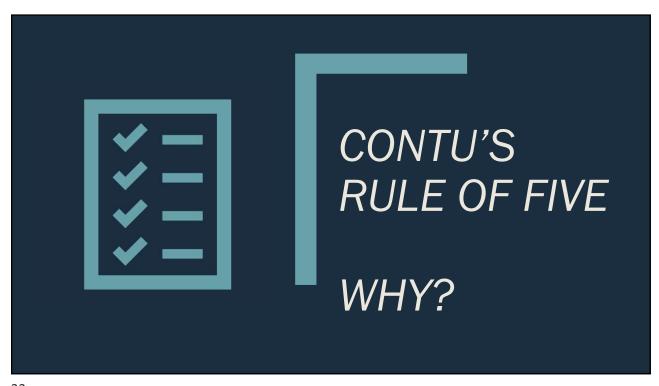


## CONTU is not law. It is a cluster of recommendations made by a commission appointed by Congress The commission was not supposed to make law, but interpret judicial decisions to make easy-to-follow guidelines. It has more weight than your average guidelines because of the commission – but again, they offer guidance, not law.

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#### CONTU is law....??

- The "law" of ILL is in Section 108
  - Libraries are allowed to engage in ILL arrangements, so long as the arrangements "do not have, as their purpose or effect, that the library or archives receiving such copies ...for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."



#### Legislative History

- H.R. Rep. No. 94-1773 (1976)
  - "The conference committee understands that the guidelines are not intended as, and cannot be considered, <u>explicit rules or directions governing any and all cases</u>, now or in the future..... [T]hey are not intended to be limiting or determinative in themselves or with respect, to other situations, and that they deal with an evolving situation that <u>will undoubtedly require their continuous reevaluation and adjustment</u>."

### "[W]ill undoubtedly require their continuous reevaluation and adjustment." 1978 CONTU Data vs. 2016 Journal Data

Estimated Average Costs			
	1978	1978 Cost Adjusted for Inflation	Actual Cost in 2016
Business journal	\$21.09	\$77.63	\$944
History journal	\$13.71	\$50.47	\$466
Physics journal	\$108.22	\$398.37	\$4,180
Political Science journal	\$15.62	\$57.50	\$776
Psychology journal	\$34.21	\$125.93	\$942
ILL borrowing	\$9.50	\$34.97	\$43-\$48
Copyright fee	\$1.25	\$4.60	\$15-\$35

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#### Conclusion?

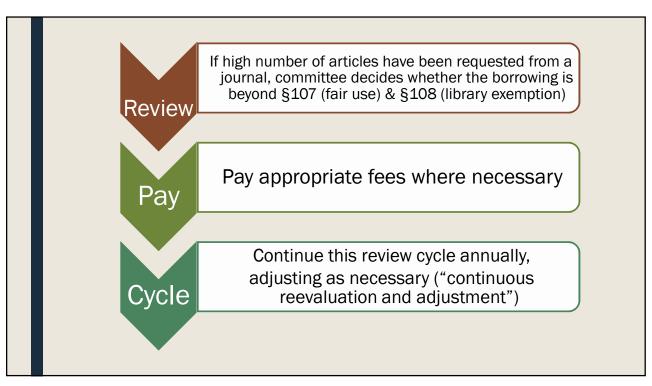
- CONTU guidelines interpret 1970's economics of scholarly publishing, acquisitions, & ILL.
- Modern changes: journals pricing structure\*, new acquisition methods, new library budget allocation\*, and copyright fees
- CONTU, which was never law, is no longer a rational guideline for ILL and © compliance.

#### Why CONTU when we have the LAW?

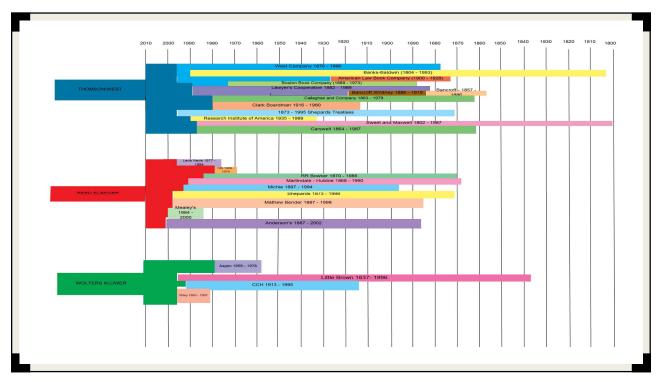
- Section 108(g)(2) sets out an appropriate standard: that interlibrary loan arrangements should not be a "substitute for a subscription to or purchase of such work."
- Yes, copying must not substitute for a subscription or purchase – but the law is WAY more flexible and rational standard than the "rule of five" that was adopted in the guidelines

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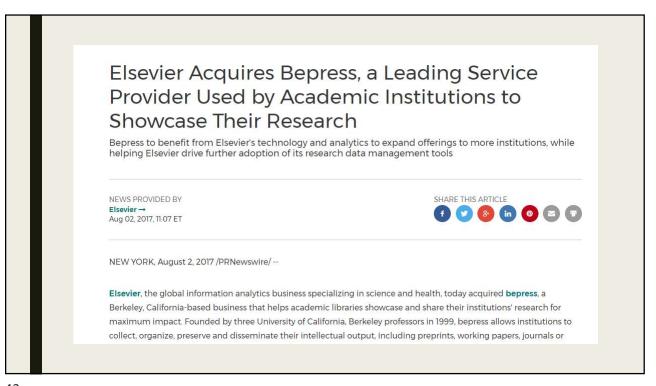
# Potential new ILL workflow? ILL transactions check CCL (compliance with copyright law) rather than CCG (compliance with copyright guidelines) Generate annual list of all articles in calendar year Review titles for which ILL borrowing is done "in such aggregate quantities as to substitute for a subscription to or purchase of such work." [§108(g)(2)]





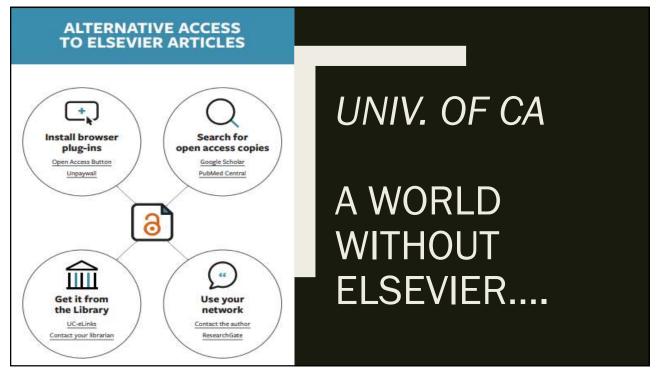


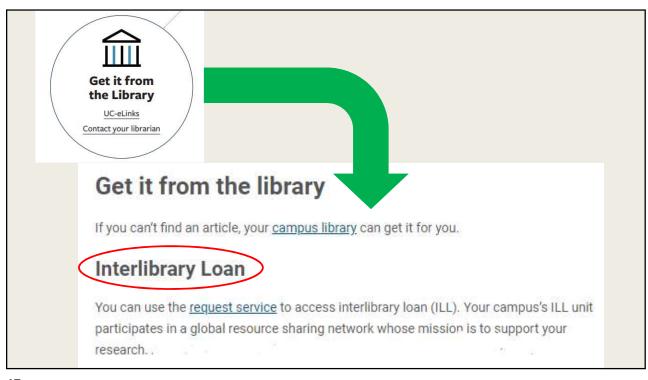














#### Our place at the table... Access

- Millions of ILL transactions annually that place significant, rare, priceless, and valuable information directly in the hands of researchers
- Patrons get access even to materials that are not available locally

We know as much about "access" as open access advocates

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#### Our place at the table... Financial

- ILL transactions are some of the most effective and financially efficient ways to receive critical resources (including books, journals, thesis, dissertations, special collection, ephemera, etc.)
- Can aid in Collection Development decisions

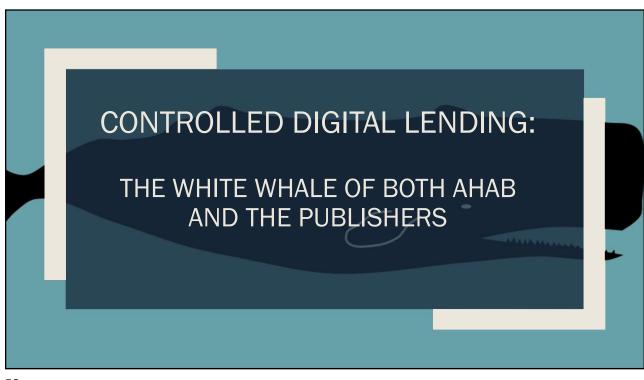
#### Our place at the table... Law

- We have a federal statue in Title 17 (Copyright) of the U.S. Code that outlines the parameters of our services.
- We "touch" copyright in EVERY SINGLE ILL transaction and we have extensive knowledge in licensing
- Result: We care and understand (are more willing to learn) about copyright than most units inside a traditional library.
- Secondary Result: Copyright experts continually emerge from our ranks and we serve as "hubs" of both copyright and licensing at our institutions

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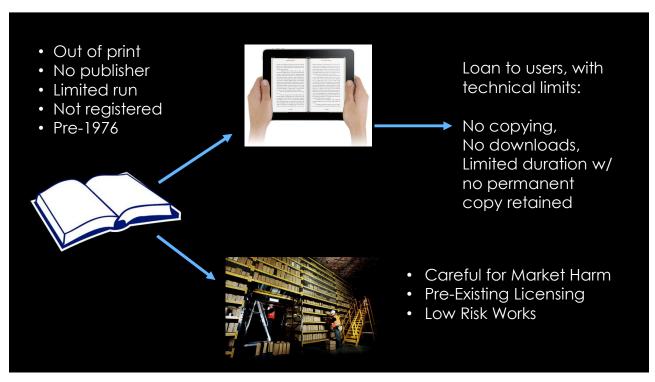
### Our place at the table..... Policy & Future of Open Access

- We share the same values on access to information with the open access movement
- However, ILL staff have the best and most unique experiences with information access, including law, policy, researcher needs, data, collection development, preservation, vendors, licensing, technology, and cost.



#### CDL: Fair Use Meets First Sale in the Library

A library is acting within fair use if it digitizes and lends to users the full text of a copyrighted book, provided it does so within carefully implemented limits and safeguards (i.e. all the tech details), and provided that the library's primary purpose for making and using the digitized book is limited to uses that are within the distribution and related rights that all libraries have under the first sale doctrine as applicable to the original book in the collection.



#### Controlled Digital Lending is not new!

- Origins: Michelle Wu, "Building a Collaborative Digital Collection: A Necessary Evolution in Libraries"
- Internet Archive created the "**Open Library**: **Digital Lending Library**" CDL-like system running for the past 8 years.
- Now 16 libraries have harnessed a CDL system to loan their digital copies of books.
  - Boston Public Library
  - Allen County Public Library (genealogical collection)
  - Georgetown Law Library
  - MIT Press (selected back catalog)
  - Houghton Mifflin Harcourt (entire back catalog)
  - And more....

#### For CDL, Libraries Should

- (1) ensure that original works are acquired lawfully;
- (2) apply CDL only to works that are owned and not licensed;
- (3) limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintain an "owned to loaned" ratio);
- (4) lend each digital version only to a single user at a time just as a physical copy would be loaned;
- (5) limit the time period for each lend to one that is analogous to physical lending; and
- (6) use digital rights management to prevent wholesale copying and redistribution.

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#### THANK YOU

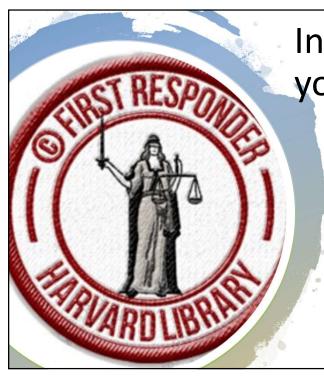
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Interested in forming your own CFR?

- Initial Training
- Best Practices
- Curriculum
- Private Listserv
- Certificates, Patches, etc.
- Me!

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