Reader Question: One of my postdoc students is preparing his first paper for a science journal. On reviewing his draft, I am concerned about the amount of direct quotation, and even paraphrasing, he has used from prior publications by others. I am happy he has at least done a thorough search of the previous literature, but what is the dividing line between "fair use" and plagiarism?

Expert Comments: Given the importance of building on previous work, it is inevitable that researchers and academicians will use in their articles a great deal of direct quotation and paraphrasing from previous literature. Thus, it is important for them to understand the boundaries of fair use. Put simply, fair use is a defense to copyright infringement when an author incorporates the original, creative works of others into his or her own work. Further, the determination of what is fair use is not strictly a quantitative analysis of "how much has been copied or borrowed."

The "fair use" doctrine, which is clearly delineated by statute, states as follows: "the fair use of a copyrighted work .... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect of the use upon the potential market for or value of the copyrighted work"


While the statutory language includes "scholarship" and "research" as likely purposes for "fair use", an author should not conclude that use of the work of others for these purposes will always constitute fair use, for it may not. Rather, determination of fair use is made by a case-by-case, fact-intensive inquiry balancing the four listed factors (as well as any others that a court may deem relevant). As such, it is difficult to say, before the fact, what specifically will be fair use. With regard to the citation or paraphrasing of the work of others in academic work, however, there are a few things that we can say with some certainty.

With respect to the first factor - the purpose and character of the use - the key issue is whether the prior material has been used in a transformative way. Has the material merely been copied verbatim, or has it been changed (i.e. transformed) into something new by the author's addition of new material, expression, information, or meaning? With regard to new scholarship, if the author cited portions of previous works in order to review, comment on, or critique them, such use would probably be transformative and would weigh in favor of a finding of fair use.

Concerning the second factor - the nature of the copyrighted work - a key issue is whether the work being quoted or copied is factual or fiction. Because dissemination of factual information in various forms benefits the public, courts give more leeway to the use of factual materials than they do for the use of fictional materials. This, likewise, would weigh in favor of the fair use finding.

The third factor - the amount and substantiality of the portion of the work used - a rule of thumb is that the less of the original work used, the more likely it is that the use will be deemed fair. However, if even a small portion used is the "heart" of the work, then this factor may weigh against a fair use finding.

The fourth factor - the effect of the use on the potential market for the copyrighted work - refers to whether an author's use of material created by another cuts into new or potential markets for the copied or borrowed material. This is likely a less important factor for science journal papers.
In summary, given their factual nature, scholarly and scientific works are generally ones for which fair use is given wide latitude; however, fair use should never be assumed. Nor should it be thought to allow blanket use or wholesale copying. In short, only necessary portions of the work of others should be quoted or copied, and proper citation and attribution, though it will not protect from copyright infringement claims, is a must. Fortunately, many universities, libraries, and other institutions have established guidelines for fair use, and although these guidelines do not have the weight of law, they can provide examples and assistance. As such, they should be consulted whenever an author or investigator is uncertain about whether use of others' work constitutes fair use, or whether it crosses the line into plagiarism.

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The foregoing has been legal information only and should not be considered legal advice on a specific issue. For legal advice, the reader should contact legal counsel of his or her choice.