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CRIMEN EXTRAJUDICIALE: ETHICS OF PLAGIARISM AND ERUDITE SOCIABILITY IN J. THOMASIUS AND J. C. SCHWARTZ

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This article deals with the ways of approaching plagiarism in the early modern Europe, mostly in the writings of two German intellectuals, J. Thomasius and J. C. Schwartz. The phenomenon of plagiarism is treated not only as an instrument of "symbolic violence" and "policing force of knowledge" in the Republic of letters, but primarily as a point of intersection of different discourses of the erudite culture: jurisprudence, moral medicine, Ciceronian rhetoric, hermeneutics and simultaneously – as a touchstone revealing the various dimensions of rival models of scientific knowledge (Protestant Aristotelianism, Barock eruditism, enlightened rationalism).

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Characterizing the ethical conditions of living in the virtual early modern Republic of letters, the famous Pierre Bayle wrote in his *Historical-Critical dictionary* in somewhat exaggerating manner which reminds us simultaneously the Evangelical *ipsissima verba* and the Ovid's *Metamorphoses*: "Friends ought to be on their guard against friends, Fathers against children, Fathers-in-law against their sons-in-law, as in the Iron Age; *non hospes a hospe tutus, non socer a genero* (…) Everybody there is both Sovereign and under every body's jurisdiction"[3]. This invidious climate of universal suspicion and rivalry in the *orbis literatorum* triggered the erudite reflection on the political-juridical status of their across-borderlines republic and stimulated the emergence of the policing agencies searching to tame the deviating forms of conduct within the community of intellectuals. Already in 16th century we can find the claims of the necessity of "fair competition" in the scientific field[4], warning that otherwise the erudite "impetus will grow cold" (*alioqui frigescat impetus*). The cloud-castle of the erudite utopia sought the way to the embodiment: in the same time, the citizen rights in the *Respublica Litteraria* balanced between literary fancy, moral economy and juridical regulation[5]. This community, animated by the "learned universalism", was described by the philosophers of science in terms of *Gefühls- und Denkkollektiv* (L. Fleck, L. Daston, M. Füssel). It elaborated a sophisticated, but in the same time fuzzy language of self-description and a vague form of political self-consciousness: thus, in 1737, the author of an anonymous German treatise rouse the question of the political form of the Republic of letters, though presented it as one not yet resolved.

The problems of moral economy, social graces, and rules of communication in the *Respublica litteraria* were toughly intertwined with that of the "policing force of knowledge" and juridical status of the erudite *delicta*. We can find a broad array of writings, scourging the erudite vices, at the turn between the 17th and 18th century: let us remember, e.g., the bilious speech *Charlatanerie der Gelehrten* (*Charlateneria eruditorum*, 1715) by Johann Burchard Mencke. One of the most striking and harmful misdeeds coming under fire in these texts was that of the plagiarism (defined as a vice specific for the erudites[6]); to use the Jakob Thomasius words, "not infrequent in our century, and so enormous that it could be touched with hands" (*nec infrequens seculo nostro, & sic abnormis, ut facinus ejus prope manibus queat palpari*).

The reflection on plagiarism in the Western intellectual culture certainly does not lack extravagant assertions, starting from the Molière's provocative motto "*je prends mon bien où je le*

3 Quoted after: *Füssel M.* "On the Means of Becoming Famous in the Learned World": Practices in Scholarly Constitution of Status and the Emergence of a Moral Economy of Knowledge in the Eighteenth Century // Scholars in Action: the Practice of Knowledge and the Figure of the Savant in the 18th / Holenstein A., Steinke H., Stuber M. (eds.). Leiden: Brill, 2013. P. 127.

4 "Itaque Reipublicae non minimum interest, ut qui in hoc, ut ita dicam, campo exercentur, & et excurrunt, virtute & industria invicem, non fraude, & malitia certent" (*Duarenus F.* De plagiariis et alienorum scriptorum compilatoribus epistola [1592] // Idem. Opera omnia. Lucae: Typis Josephi Rocchii, 1768. P. 374).

5 *Fleßenkämpe I.* Considerations - Encouragements - Improvements. Die *Select Society* in Edinburgh, 1754–1764. Berlin: Akademie Verlag, 2010. S. 37.

6 According to the Jakob Thomasius' sixth theorem, "plagium literarium est furtum eruditorum seu eruditis proprium".

trouve" to the Christopher Ricks denial of the very possibility of the history of plagiarism – he put forward the idea of plagiarism as of a "transhistorical category"; according to this literary critic, the historization of the notion of literary theft inevitably entails the ethical relativism. In the early modern Europe the complex phenomenon of plagiarism was involved in a number of institutional transformations and discursive shifts; it "reflects the changes that took place in the early modern university[7]" and the predominance of the competitive principles in the interaction between intellectuals in the European academy. The invention of printing resulted in an unprecedented rise of the intellectual production which led to the blurring of the authorial identity and stimulated an exponential proliferation of *pseudoepigrapha* of all sorts. The 17th century has become a watershed which witnessed the emergence of the craft corporations of book-printers, book-sellers and stationers, bound up with each other by informal obligations and "ideology of possessive individualism". The legal restrictions, connected with censorship or protection of the copyright, existed in England at least since the second half of the 16th century: the special corporations issued patents on common law books, dictionaries and encyclopedias, and the infringements of the copyright laws were fined. The first-rank intellectuals participated at this juridical settlement of intellectual property – thus, John Locke was one of the first to set forth the idea to "limit the property to a certain number of years" after the death of the author in his *Memorandum* on the 1662 Act[8].

While the English copyright laws are thoroughly studied[9], and the most part of the research literature is concentrated on the "formal legal history" of this phenomenon, in our study we will shift the focus on the continental version of plagiarism, developed mostly in Leipzig[10]. In the second half of the 17th century a number of German intellectuals tried to provide a detailed account of plagiarism, to reveal its anthropological, ethical, juridical, social dimensions – the set of issues nearly glossed over after the intervention of the purely legal discourse. In Germany the legal-practical resolution of this problem, based primarily on commercial interest, was substituted by an erudite deduction[11]; in a series of treatises the intellectuals from Leipzig and the neighboring Halle: Jakob Thomasius (1622–1684), Friedrich Geißler (1636–1679), later Johann Conrad Schwartz

7 *Kivisto S*. The Vices of Learning: Morality and Knowledge at Early Modern Universities. Leiden: Brill, 2014. P. 118.

8 *Deazley R*. On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth Century Britain (1695-1775). Oxford: Hart Publishing, 2004. P. 4.

9 *Feather J*. From Rights in Copies to Copyright: The Recognition of Authors' Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries // The Construction of Authorship: Textual Appropriation in Law and Literature / Woodmansee M., Jaszi P. (eds.). Duke UP, 1999. P. 191 – 210.

10 On the erudite theory of plagiarism, see: *Hummel P*. Moeurs érudites. Étude sur la micrologie littéraire (Allemagne, XVIe-XVIIIe siècles). Paris: Droz, 2002. P. 135–315; *Jaumann H*. Öffentlichkeit und Verlegenheit. Frühe Spuren eines Konzepts öffentlicher Kritik in der Theorie des *plagium extrajudiciale* von Jakob Thomasius (1673) // Strukturen der deuthscen Frühaufklärung, 1680–1720 / H. E. Bödeker (hrsg.). Göttingen: Vandenhoek & Ruprecht, 2008. S. 99–118; *Mulsow M*. Practices of Unmasking: Polyhistors, Correspondence, and the Birth of Dictionaries of Pseudonymity in Seventeenth-Century Germany // Journal of the History of Ideas. Vol. 67. No. 2 (Apr., 2006). P. 219–250.

11 "Es handelt sich um den Fall, dass eine Institution, die es praktisch gar nicht gibt, durch gelehrte Deduktion als zwingend notwendig postuliert wird" (*Jaumann H*. Critica. Untersuchungen zur Geschichte der Literaturkritik zwischen Quintilian und Thomasius. Leiden: Brill, 2004. S. 248).

(1676–1747) – sought to conceptualize the category of plagiarism, collocating it at an intersection of various disciplinary discourses, from jurisprudence and ethics to rhetoric and politics. Sometimes they even warned against paying too much attention to this learned vice, in order not to unveil the infamous *arcana* of this abominable practice and instigate the pullulating of the plagiarism cases[12]. The authors of the anti-plagiarism and anti-cryptonymity writings were far from being narrow-minded pedants – their learned efforts made part of different ambitious erudite projects. Thus, Vincent Placcius (1642–1699), the author of the tremendous volume *Theatrum anonymorum et pseudonymorum* (1708), designed a comprehensive history of ethics and, even more important, compiled a pivotal guide-book of erudite bookkeeping, which is to be considered against the background of early modern commonplace learning and combinatorial art, the book, titled *De arte excerpendi* (1689). Placcius also nourished the idea of a "moral medicine" (*medicina moralis*), commented the Bacon's *On the Advancement and Proficiency of Learning*, and wrote the *additamenta* to the Jakob Thomasius' treatise (*Additiones ad Thomasium de plagio litterario*). He owned a design of a chest similar to the Leibniz's *Exzerpir*-Schrank which embodied the idea of the "arc of memory" (*scrinium inventionis, arca studiorum*), intended for keeping the excerpts from different books[13].

In spite of the systematic use of the juridical metaphors, the fight against plagiarism made part rather of the section of the *historia litteraria* called *notitia auctorum*, which aimed, among other things, at detecting pseudonymity. Therefore Johann Conrad Schwartz claimed that plagiarism "endangers the truth of the literary history, which is wanted to be the most safe and unharmed for the reason of its highest usefulness"[14]. This dangerousness caused the necessity of the establishment of "certain censors of writings, not only those to be popularized, but also those to be recited" (*certi censores scriptorum, non modo vulgandorum sed interdum et recitandorum*), to use the Thomasius' words[15]. Still, the European polyhistors preferred to the formal legal resolution of the problem of dissimulated authorship the idea of an informal court, an erudite arbitrage, "intended to settle the quasi-juridical matters"[16]: that's why the famous "friendly invitation", *invitatio amica*, by Vincent Placcius, was addressed to the "most illustrious and glorious leaders, patrons and sages of the Republic of Letters and books" (*Illustres et Clarissimos Reip. Litterariae atque librariae Proceres, Fautores, Peritos*). But this trial was by its very nature indefinite, and it remained unclear where

12 "Neque si eam copiose persequaris, rem valde utilem et salutarem egeris. Etenim malitiae generibus patefactis, periculum est, ne fraudes evadant usitatiores" (*Schwartz J. C.* De plagio literario liber unus. Lipsiae: Apud Jacobum Fritsch, 1706. P. 106)

13 Om this topic, see: *Cevolini A.* Teoria e storia della schedatura // Storiografia. 2006. Vol. 10. P. 51 – 76.

14 "Veritas historiae litterariae periclitatur, quae, propter summam utilitatem, quam maxime salva et incolumis optanda sit" (*Schwartz J. C.* De plagio literario... P. 103).

15 *Thomasius J. (praes.), Reinelius J. M. (resp.)*. Dissertatio philosophica de plagio literario Lipsiae: Ch.-E. Buchta, 1679. S. 43.

16 *Malsow M.* Op. cit. P. 11.

and when it may take place and of whom it may consist (*indefinitum, hoc est, nullo temporis, loci, personarum certo ambitu aut numero circumscriptum*).

The most substantial, sophisticated and influential theoretical treatise on plagiarism, *Dissertatio de plagio litterario,* was written in 1673 by Jakob Thomasius (Thomas, 1622 – 1682), a widely known representative of the German *Schulphilosophie* and Leibniz's first teacher – Leibnitz probably owed his particular concern with the ethos and history of *Respublica litteraria* to his teacher. It is not a case that Thomasius was represented on the front page of *De plagio* as *praeses* of the Leipzig university – as if he intended to visualize his institutional authority, anatomizing the plagiarism crime. In Thomasius the fight against plagiarism was connected with his historical-philosophical project titled *Schediasma historicum* — the project that aimed at restoration of Aristotelianism in its pure form, free from any admixture; as Thomasius famously claimed, "we prefer to serve truth and not syncretism"[17]. The relationship between denunciation of plagiarism and expurgation of Aristotelianism in Thomasius results obvious from his view of the history of philosophy: according to the Leipzig professor, the *novatores* always prone to the eclecticism contaminated the purity of the old philosophical schools, peripatetic first of all. Though recognizing it necessary to admit the scholastic mixture from Christian doctrine and Stagirite's philosophy, Thomasius openly stated, that the borderlines between different philosophical sects should be maintained and should not be ignored: he believes it impossible, *quos Aethiopes video, cygnos aliis coner persuadere*.

On the first pages of his anti-plagiarism *opus magnum* features a long list of those who anticipated him on the way of battling this erudite vice, starting from Antiquity till the contemporary epoch: this list is provided with detailed footnotes, proving the seriousness of the author and his adherence to his own scientific-ethical criteria[18]. The huge work by Tomasius, full of terminological ramifications and sophisticated dichotomies, is divided into three parts: Theoretical, Historical, and Practical. The plagiarism was put on trial on two stages: *forum politicum* and *forum ethicum*, so that the sanctions for violating the rules of literary borrowings in two *fora* varied[19]. In the very beginning Thomasius lists the main objects of plagiarism: "acute invention, explanations of an obscure thing, expulsion of an inveterate error, many-sided lecture, emendation of the corrupted places in the ancient writers, elegance and brilliance and other similar properties"[20]. Discriminating between the "vulgar" and the "philosophical" definitions of plagiarism, Thomasius coins the following formula:

17 *Santinello G*. Jakob Thomasius (1622–1684): Scediasma historicum // Models of the History of Philosophy. Vol. I: From Its Origins in the Renaissance to the "Historia philosophica" / G. Santinello et al. Kluwer: Dordrecht, 1993. P. 415.

18 *Thomasius J*. Op. cit. P. 1–2.

19 "Plagii literarii genus proximum in definitione philosophica est mendacium justitiarium seu falsum, justitiae particulari & quidem commutativae oppositum" (*Thomasius J*. Op. cit. P. 15).

20 "...acuta inventio, rei obscurae explicatio, inveterati erroris depulsio, multijuga lectio, locorum in priscis scriptoribus corruptorum emendatio, dicendi elegantia & nitor, atque alia his cognata" (Ibid. P. 47).

Plagium literarium est mendacium justitiae commutativae oppositum quo quis debitam alteri opinionem eruditionis, cogitata ejus pecularia quomodocunque ad se delata maligne proferendo pro suis, mentionemque alterius, ubi ea fieri debeat, intermittendo, quaerit[21].

This definition introduces the pivotal notions for dealing with plagiarism: fame (here – *opinio eruditionis*), lye and commutative (rectifactory) justice[22]. The use of the Aristotelian notion of *justitia commutativa* implies the idea of equality of the citizens in the Republic of Letters; thus, the dignity or authority of a person is no more considered as a plausible reason for putting his/her name on the title of an other person's book, and no possibility for ascribing one's writings to the authoritative "big names" is conceded. Then, the plagiarism is considered as a breaking of the balance, of the economy of fame or reputation, distributed among the European erudite community.

It seems that the borrowings excluded from the list of the plagiarism cases are particularly characteristic for the singular model of the erudite science represented by Thomasius and his followers. According to Thomasius, there are a number of cases exempted from the accusation of plagiarism, though in the contemporary opinion on the subject-matter they would be considered as such; thus, picking up minor elements of scientific discourse should not be treated as plagiarizing, stated that "the smallest things should not be treated by Praetor" (*minima non curari a Praetore*[23]). Besides, the authors of the centons are freed from any accusation of plagiarism, as well as the humanist followers of the *imitatio*-principle under condition that they confess it openly (*saltem eos excipi opportere, qui aperte Ciceronianos aut aliorum huic similium imitatores se profitentur*[24]). One of the main problems the Thomasian theory of plagiarism sought to resolve was that of the relationship between the Renaissance ideology of imitation and the claim for originality launched by the newly-baked policemen of the Republic of letters. The singular case of *imitatio* represented the Ciceronianism which experienced a series of revivals in the course of the 16th century[25]. Thomasius resumes the *Quatrocento* Ciceronian quarrels: though the peak of the most heated discussions on Ciceronianism were already left behind, the exemplary status of the Cicero's style for the scientific writing remained uncontested. In *De plagio* "the Ciceronian" is represented as an

21 Ibid. P. 54.

22 The category of *justitia commutativa* (τὸ διορθωτικόν) dates back to *Aristotle*, Nicomachean ethics, V, 1131b.25 – 1132a7: "The remaining one is the rectifactory, which arises in connection with transactions both voluntary and involuntary. (...) the justice in transactions is a sort of equality indeed, and the injustice a sort of inequality; not according to that [geometrical] kind of proportion, however, but according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it".

23 Ibid. P. 54.

24 Ibid. P. 58.

25 A less common example, cited by Thomasius, is that of the school of Melanchton, the members of which considered all their literary production as common property.

idiom of a social stratum, a kind of erudite inalienable *koine*, which us receive by the intellectuals in the same way as the simple people learns their mother tongue[26].

Characteristically enough, the use of the wordy "garments" of Ciceronian rhetoric is not supposed to vehicle the cogitations involved in it – this idea is connected with one of the most important terminological distinctions of plagiarism in Thomasius, the discrimination between the "subtle" and the "coarse" *plagium*: "bare thoughts are the object of the subtle plagiarism, and those wrapped in words – of the coarse one" (nuda cogitata objectum esse plagii *subtilis*, vestita *crassi*)[27]. The relationship between the style and the content of cogitations was on of the central issues in the discussions around the place and function of rhetoric in the humanist dialectic: for the most part of Ciceronians, the "copious" expression was the most convenient for expressing truthful statements. Thus Thomasius somehow approaches the quarrel on whether the rhetoric could be reduced to the ornamental use only (in the form of *elocutio*— tropes and other embellishments), or behind pure eloquence it conveys some mental infrastructure and important civil (political) meanings. So Thomasius passes by the famous Poliziano's argument, opposing the "expressing of Cicero" and "expressing myself" in 1490s, relying upon the idea of the "expressive potential of the personal self"[28].

Another significant context which is relevant for the Thomasius' reflection on plagiarism is that of the freshly coined problematic of the general hermeneutics. In the 1630s the Strasbourg scholar Johann Conrad Dannhauer in his *Idea boni interpretis et malitiosis calumniatoris* set forth the conditions making it possible to transform hermeneutics into a "philosophical science" (*scientia philosophica*). But hermeneutics could only pretend to become a "philosophical science" in case if it systematizes (*economia*) all the interpretative means it disposes (*media interpretationis*). Dannhauer was the first to determine the goal of hermeneutics as that of analysis of the "truthful sense" (*verus sensus*) of the text, in contrast to logic which deals with the truth (*veritas*). The authors such as the Cartesian Johann Clauberg proposed the distinction between genesis and analysis, thus involving the hermeneutical problematic in the sphere of logic. On the level of the plagiarism, this problem took the form of the question of the possibility to "steal the sense" (*sensum furari*), stated that

Plagiarius nec cerebrum alienum, qui proprie *nudorum* locus est, ingredi valet, neque si intra sui cerebri angustias abscondita furta contineat, unquam hac via perventurus est ad illam, cujus adipiscendae gratia furatur, gloriam[29].

26 "Non magis furti reus est eruditus, si vel singlulas phrases justo imitandi labore mutuatus est e Cicerone, Tullium tamen nuspiam nominet, quam homo plebejus, si vulgariter loquens non addat, a matre aut nutrice ita se fuisse assuefactum" (Ibid. P. 67).
27 Ibid. P. 56.
28 *Moss A.* Renaissance Truth and the Latin Language Turn. Oxford: Oxford University Press, 2003. P. 262.
29 *Thomasius J.* Op. cit. P. 55.

As far as the immediate penetration in the other's brains is impossible, Thomasius specifies his definition, arguing that the *plagium subtilis* has to do not with the bare thoughts as such; the question is of the taking off of the "genuine wordy garments" of the ideas, substituting them by the new ones. In Thomasius we can see how the particular plagiarism issue brings together the epistemological, hermeneutic, stylistic problem of relation between verbal form and mental content.

Thomasius excludes from the number of plagiarism-cases the notions shared by the community of the learned – both words and things – *communia verborum* and *communia rerum* (*koinai ennoiai* and *proverbia*), as well as the use of basic logical instruments, such as syllogism[30]. It is worth noticing that the follower of Thomasius, an early 18th century Halle scholar Johann Conrad Schwartz, adds to this list the logical and metaphysical theories of the scholastic doctors, considered as a collection of needless subtleties (*cogitationes subtiles infructuosae*). He states with the commonly shared disdain towards this scholastic *Radamantis cohors*: "but today who will not be wise enough to prefer just one science of agriculture to all the Scholastic acuity" (*sed quis est nunc paulo sapientior, quin omni Scholasticorum acumini unam agri colendi scientiam longe anteponat*)?[31] Schwartz cites one of the favorite issues many times ridiculed by humanists and protestant writers: the question, arisen in the context of the quarrels around the divine omnipotence and the necessity of incarnation – "whether the gourd was able to save the mankind"[32]. So the major subject-matters of the scholastic discussions, such as the necessity of incarnation, already derided by such authoritative persons as Martin Luther and Erasmus of Rotterdam, were regarded, juridically, as intellectual *res nullius*, and the plagiarizing of such issues, ethically, – as *adiaphora*.

Stated that the Thomasian "philosophical" definition of plagiarism introduces a crucial category of peculiarity, the author of *De plagio* sets forth the criteria of the authorial originality, making it possible to detect the literary theft: "The form of peculiarity, inherent to a book taken as a whole, consists in some most singular property, which results from the structure of both the senses and the words incommunicable by its very nature that cannot be imputed but to only one person, to the extent that if the same book will feature sometimes under the name of one Writer and sometimes under the name of another, those competent in detecting the plagiarism will necessarily and unanimously conclude that one had stolen it from another"[33]. The uniqueness of the literary production is preconditioned by the fact that the verbal material is much more copious than the mental propositions they are intended to express:

30 "Quis enim e.g. furti postulet eum, qui syllogismorum figuras memorans Aristotelis nomen, a quo primum eae ad nos pervenerunt, sileat?" (Ibid. P. 71).

31 *Schwartz J. C.* Op. cit. P. 88.

32 Ibid.

33 "Forma ergo pecularitatis integro alicui libro competentis consistit in proprietate quadam singularissima, quae resultat e sensuum pariter & verborum structura naturaliter incommunicabili, nec nisi uni homini imputanda, adeoque tali, ut si idem liber alibi huius, alias alterius nomine Scriptoris efferatur, necesse sit caeteris, qui ad plagium referuntur, simul concurrentibus, alterum esse alterius furem" (*Thomasius J.* Op. cit. P. 63).

Data mentalium propositionum justa serie, cum certum sit, si verbis eae sint efferendae, infinitis hoc modis fieri posse, impossibile est, ut, in magno praesertim opere, homines duo libri relicti eadem sensa iisdem ad minutissimum usque apicem verbis, eodem sensuum juxta & verborum ordine eloquantur. Facit enim hic impetus quidem animi eruditi, quod in effingendis hominum vultibus impetus naturae[34].

As H. Jaumann justly observed, the erudite detractors of plagiarism readily used the legal metaphors as a basis for theoretical-juridical definition of this practice. The early modern theoreticians of the literary ethos sought to subsume the phenomenon of plagiarism under various juridical terms, such as the "loan not to be returned" of "theft in the proper sense of the word" (*mutuum non reddendum*, *furtum proprie dictum*). In Friedrich Geißler, e.g., the plagiarism is ranked among the most awkward and terrifying crimes, such as rape or violation of tomb:

PUBLICORUM CRIMINUM variae sunt species, puta Majestatis laesio, de qua IX. Cod. Tit. 8. Adulterium & stuprum tit.9.10.11 Violentia t.12. Raptus t. 13. Homicidium t.14.15.16 Parricidium t.17. Incantationes t.18. Sepulchri violatio t.19. Plagium t.20. FALSI crimen, quod committitur vel quoad Statum personae t.21. vel in Testamentis t.22.23. vel in Moneta t.24. vel etiam in Nomine, hinc tit. Noster XXV.

The major Roman legal sources for the juridical transcriptions of plagiarism were two Republican laws: the *Lex Fabia de plagiis*[35] and the Cornelius Sulla law from 81 a.C. "on poisoners and killers" (*de veneficis et sicariis*)[36]. The metaphorical use of the term "plagiarism", dating back to the Martial's *Ad Fidentinum*, made it possible for the erudite policemen of the *Gelehrtenrepublik* (at least since 16th) to play on the ambivalence of the notion, actualizing its criminal background and pointing at its political dangerousness:

Sed extra jocum, tametsi ob injuriam privatim acceptam, non multo factus sim commotior, eamque animo aequo, non solum forti, feram, tamen ut de istis Plagiariis quod sentio libere eloquar, hos ego publico odio, & coercitione dignos censeo, quod multum noceant studiis, & et non minus Rempublicam laedant, quam ii, in quos lege Fabia animadvertitur[37].

34 Ibid. P. 63 (Theorem VII).

35 Let us quote the digest of the articles of this law by Ulpianus at length: "1. qui civem Romanum ingenuum libertinumve servumve alienum celaverit vendiderit vinxerit comparaverit. 2. Et olim quidem huius legis poena nummaria fuit, sed translata est cognitio in praefectum urbis, itemque praesidis provinciae extra ordinem meruit animadversionem. Ideoque humiliores aut in metallum dantur aut in crucem tolluntur, honestiores adempta dimidia parte bonorum in perpetuum relegantur. 3. Si servus sciente domino alienum servum subtraxerit vendiderit celaverit, in ipsum dominum animadvertitur: quod si id domino ignorante commiserit, in metallum datur" (Coll. 14. 3).

36 "Praeterea tenetur, qui hominis necandi causa venenum confecerit dederit: quive falsum testimonium dolo malo dixerit, quo quis publico iudicio rei capitalis damnaretur: quive magistratus iudexve quaestionis ob capitalem causam pecuniam acceperit ut publica lege reus fieret".

37 *Duarenus F*. Op. cit. P. 374.

But what exactly does the *extrajudicial* mean in the early modern jurisprudence? For the contemporary man this category is associated with such abominable practices as coercive psychiatry, torture or unlawful killings and refers primarily to the human rights discourse. We will try to outline the area in which the notion of extrajudicial was used in the Early Modern Times, and the categories it was associated with. The most frequently this term in the juridical treatises was used in connection with the categories of duel and torture. It would be insightful to quote some representative examples of different types of the extrajudicial crimes. The extrajudicial regime of duel is due to a particular state of the soul, characterized by the predominance of the unbridled affects (*odio exalescente, virulentis injuriis lacessitus et irritatus*)[38]; in this case the duel is considered as "much less tolerable" (*multo minus tolerandum*), and the victim is not exempted from the guilt and punishment. J. Schwartz lists the causes of the "extrajudiciality" of duel:

Duellum: *Extrajudiciale* suspici potest ob defectum judiciorum: unde ortum est jus manuarium, Das Faust Recht. 2. Ob publicam utilitatem inter summos Imperantes. 3. Ob defensionem vitae. 4. Bonorum. 5. Honoris. 6. Ob ostentationem. 7. Vindictam[39].

The torture is also defined as "an extrajudicial trial" (*examen extrajudiciale*): "Ex quo resultat quod licet executio torturae non leve damnum contineat, nihilominus cum examinatio extra judicialis sit, ut docent Brutus, in *tract.de.indic. & tortur.quest. 5. parte 2. num. 53.* & *Petrus Caballus. Resolut. crimin. cas. 227.num. 19.* potest in eo fieri quod ab effectu comprobatur"[40]. Two extrajudicial misdemeanors closer to plagiarism cases are those of "impudent judgment" and "violation of fame"[41], the latter being sometimes considered as a mortal sin (*violatio famae est autem certe ex genere suo peccatum mortale*)[42]. To this list was also added the false testimony in a form reverse in respect to the plagiarism – that of *dectractio*, or "revealing of a hidden crime", special being made of the "revealing hidden writings": in a sense, the voluminous treatises detecting cryptonimity and plagiarism can also be considered as *libella famosa*, or simple denunciation (*infamantes proximum detegendo illius crimen occultum scriptura, vel signo externo dicuntur infamare per libellum*

38 "Hoc extrajudiciale, ad quod plerunque odio privato animo exalescente, & privatae ultionis causa descenditur, multo minus tolerandum erit, adeo, ut nec provocatus, quantumvis virulentis injuriis lacessitus & irritatus a culpa & poena vacet, cum injuriam non armis, sed medio ordinario ulcisci aequum sit" (*Biccius G*. Collegium iuridicum Argentoratense enucleatum. Argentorati: Impensis G.A. Dolophei, 1664. P. 941).

39 *Schwarz I.* Institutiones juris publici universalis, naturae, et gentium. Venetiis: Ex typographia Remondiniana, 1760. P. 364.

40 *Matthaeu et Sanz L*. Tractatus de re criminali, sive controversiarum usufrequentium in causis criminalibus, cum earum decisionibus, tam in Aula Suprema Hispana Criminum, quam in summo Senatu Novi Orbis. Ex Typographia Balleoniana, 1723. P. 174.

41 "Potest autem falsum testimonium extrajudiciale imponi, vel aliis narrando crimen, quod proximus non commisit, vel nobis ipsis interne judicando proximum crimen commississe, quod non commissit: & hoc dicitur judicium temerarium. (*Leander (a Sanctissimo Sacramento)*. Summa novem partium. Pampilonae: Apud Lazarum Gonzalez de Assarta, 1696. P. 768).

42 Ibid.

famosum). As claimed one of the victims of this "symbolic violence", Theodor Ludwig Lau, such practice "smells literary tyranny" and causes a number of disasters[43].

Besides the extrajudicial, the problem of plagiarism could also refer to the natural right and therefore – to the newly baked aporia of *sociability*, conceived by J. C. Schwartz as a rule, to which the natural right is applied. The very term of sociability was forged by Samuel Pufendorf in *De jure naturae et gentium*, and the reflection on the grounds and principles of sociability was one of the central issues in civil sciences, jurisprudence, theology and ethics of the 17th century. Whereas Schwartz considers plagiarism primarily as a shame (*turpitudo*), he draws a comparison between the conduct of a plagiarist and a person violating social graces: "if one is walking naked in a public place, he would behave indecently and would face a heavy punishment", but still he does not violate the natural law, because it does not do not do any harm to the sociability[44]. Likewise one who commits an error in a Greek sentence, a hypallage does not "disturb" sociability. Here we may see the contrast with the interpretations of sociability associating this category with shame – interpretation, which found the most systematic incarnation in G. Vico's *De constantia philologiae*[45].

The quasi-juridical definition of plagiarism entailed the possibility of measuring the value of the damage, caused by theft – the quantification of moral categories, which perfectly fit into the early modern discussions around the measurement of the moral quantities, in the ethical context as well as in that of "moralization of modalities" and calculation of contingencies:

Observanda hic porro sunt quaedam tum de pretio intensivo ipsius eruditionis, ex plagiarii maximo judicio spectatae, tum de damni, quod alter patitur, quantitate[46].

Johann Conrad Schwartz, though following the general lines of his predecessor Thomasius, added a number of new dimensions to the topic. One of the most curious ones – the connection between the

43 "Ast ubi solo ex odio theologico, politico, philosophico, profecta; Tyrannidem sapit literariam. Ignorantiam promovet et errores. Solidam impedit eruditionem. Rationi adversatur et veritati. Autoribus interim: tales qui patiuntur quasi-Poenas: nullum ignominiae vel infamiae inurunt Notam. Libri: gloriosum sustinent martyrium. Autores: illustres pro veritate et ratione, martyres fiunt". Quoted after: *Malsow M.* Op. cit. P. 18–19.

44 "Si quis in celebritate fori nudus ambularet, inhoneste ageret & gravissima poena dignus esset, sed jus naturae non violaret. Socialitas enim nec illo incessu, nec graeca hac sententia conturbatur. Socialitas autem est tanquam regula, ad quam res juris naturalis exigi solent & debent. Nonnulla plagia juri naturae, quaedam officiis humanitatis, alia decoro, adversari" (*Schwartz J. C.* Op. cit. P. 76).

45 See, *Ivanova J. V.* Impersonality, Shame, and Origins of Sociality, Or, Nova Scientia ex constantia philologiae extracta // Investigations on Giambattista Vico in the Third Millennium. New Perspectives from Brazil, Italy, Japan and Russia / J. V. Ivanova, F. Lomonaco (eds.). Rome: Aracne editrice, 2014. P. 109–122.

46 *Thomasius J.* Op. cit. P. 58. Cf.: "Ast quantitates morales proveniunt ex impositione & aestimatione entium intelligentium & liberorum; quorum judicium atque placitum uti sub mensuram physicam non cadit; ita quod ista tanquam quantitatem sua impositione concipiunt atque determinant, ad similem mensuram revocari nequit, sed velut libertatem ac laxitatem suae originis retinet (…) Similis quoque latitudo in pretiis diversarum rerum, & actionum in commercium venientium occurrit, per quam vix aliarum rerum, praeterquam quae functionem in suo genere recipient, pretia ad unguem exaequari possunt; de caetero fere pro aequalibus habentur, prout queque hominum conventio & placitum determinavit" (*Pufendorf S.* De jure naturae et gentium libri octo. Amstelaedami: Apud Johannem Wolters, 1704. P. 25).

humoral medicine and the issue of plagiarism. In the Schwartz's opinion, the main task of any science consists in helping the mankind (*commutare generi humano*), the soul and the body alike. Stated that the scholars are especially prone to the Melancholy, the intellectual production should primarily aim at remedying "the misery of Melancholics". But a broad array of literary genres and activities, some very respectable among them – fables, enigmas and emblems, inventions and conjectures of the erudite mind, investigations of ancient inscriptions, *picturae loquentes* – are perfectly useless and even harmful on this point, because they instigate the increase of the black bile (*augent miserias Melancholicorum, non auferunt*)[47]. As far as the literary thief is defined in the terms of the humoral theory as a choleric, and the strivings of the choleric aim at exciting the others' admiration, neither does this type of "one-sided and subtle" knowledge aid the plagiarist himself[48]. By the same token Schwartz rejects the "elitiste" attitude, praising the subtleties of the sharp mind for being understandable only for the few ones (*acumina inutilia magni faciamus propter paucitatem eorum, qui ista procreant*). The tradition of treating the futile knowledge with highest respect dates back to the ancient Chaldeans – a kind of historical-philosophical *bête noire* after the fall of the *prisca sapientia*[49] and emergence of the Protestant history of philosophy. According to Schwartz, the "truthful and genuine wisdom" can be reduced to four disciplines – physics, mathematics, moral philosophy and theology[50], and all the intellectuals can be divided, consequently, either to the wise men, or to the "sellers of trifles and hallucinating subtle disputants" (*vel sapientes, vel nugivenduli et argutatores umbratiles*[51]).

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In our study we touched upon different sides of the problem of plagiarism in the early modern European intellectual culture. Taming plagiarism allowed to the early modern intellectuals to redesign the landscape of the disciplinary field and to establish the criteria for determining the value of different scientific contents: thus, J. C. Schwartz adopts a very restrictive set of scientific disciplines and uses the notion of plagiarism as an instrument for marginalizing a number of argumentative procedures and types of knowledge, treating them as worthless. His work constitutes therefore an important novelty in comparison with J. Thomasius: it represents an enlightened glance at the Barcok "erudite trifles" (*nugae*), carrying out a juridical discrimination of the rival model of scientific knowledge. The erudite reflection on plagiarism in J. Thomasius, F. Geißler and J. C.

47 "Linguarum subtilior et supervacanea consideratio, notitia plerarumque inscriptionum, antiquitates et historiolae quaedam, Geomantiae et Astrologiae defensiones vaferrimae, similiesque artes solivagae augent miserias Melancholicorum, non auferunt" (*Schwartz J. C.* Op. cit. P. 86).

48 "Acria judicia et novarum opinionum ostentatio, quibus Cholericus admirationem sui doctis hominibus injicere conatur, ejus miserias non levant (…) Ergo nec plagium huius generis rerum turpius furto esse potest" (Ibid. P. 87).

49 Ibid. P. 90.

50 "...vera et germana sapientia: Physica, Mathesis, Philosophia moralis, Theologia" (Ibid. P. 92).

51 Ibid. P. 96.

Schwartz embedded their quixotic attempt to develop a set of para-juridical means in order to detect the plagiarism, an attempt, which interacted sometimes dramatically with the established legislative practices of unmasking anonymity and unveiling pseudonymity from the part of the State or Church. In some respect we may see the connection between the early modern concern with the state-of-exception *aporia* and the conceptualizing of the extrajudicial or para-juridical sphere in the discussions around plagiarism: the common ground here is the attempt to conceptualize the periphery on both sites of the nomothetical *jus*, be it the *escessus juris* in the reason-of-state policy or the *defectus juris* in the plagiarism cases.

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