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What Is n Art Collection?

Cos'è una collezione d'arte?

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ABSTRACT. The ubiquity of art collections is not a new phenomenon. There are many reasons for that: personal interest, aesthetic pleasure, investment, study, social prestige, decoration and, of course, safeguarding cultural heritage. Despite the indisputable relevance of art collections to culture and the economy, collections have not been studied a lot in the legal literature. Protecting collections and providing them with legal support requires, first of all, that law understand and conceptualize them, considering the key elements that characterize them and allowing them to be granted the most effective status possible. This text is on the importance of the legal concept of art collection and, by using a comparative law approach, examines it in various legal systems. This article also explores the possibility of protecting art collections as works of the spirit.

ABSTRACT. L'ubiquità delle collezioni d'arte non è un fenomeno nuovo. Le ragioni sono molteplici: interesse personale, piacere estetico, investimento, studio, prestigio sociale, decorazione e, naturalmente, salvaguardia del patrimonio culturale. Nonostante l'indiscutibile importanza delle collezioni d'arte per la cultura e l'economia, le collezioni non sono state molto studiate dalla letteratura giuridica. Proteggere le collezioni e fornire loro un supporto legale richiede, prima di tutto, che il diritto le comprenda e le concettualizzi, considerando gli elementi chiave che le caratterizzano e consentendo loro di ottenere lo status più efficace possibile. Questo testo si occupa dell'importanza del concetto giuridico di collezione d'arte e, utilizzando un approccio di diritto comparato, lo esamina in diversi sistemi giuridici. L'articolo esplora anche la possibilità di proteggere le collezioni d'arte come opere dello spirito.

KEYWORDS / PAROLE CHIAVE: Collection; Art; Art Law; Comparative Law; Intellectual Property / Collezione; arte; diritto dell'arte; diritto comparato; proprietà intellettuale

## What Is an Art Collection?

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«O todo sem a parte não é todo,  
A parte sem o todo não é parte,  
Mas se a parte o faz todo, sendo  
parte,  
Não se diga, que é parte, sendo  
todo»

Gregório de Matos

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### 1. *Introduction*

The most valuable object of any art collection is the time of the person, who devotes themselves to it by planning, building, maintaining, conserving, expanding, interpreting, and giving it life and wings. This is the very reason why it is so saddening to hear news about thefts, fires, depre-dations, looting, *deaccessions or deaccessioning*, splitting or dilapidation of either public or private collections<sup>1</sup>. This text is, first of all, a writing about the time invested by collectors such as Assis Chateaubriand, Calouste Gulbenkian, Peggy Guggenheim, François Pinault or Gianni Agnelli; time spent passionately collecting objects saved from dispersion and forming an art body based on any principle or a singular relationship among the collectible items.

One of the first individual collectors identified in history was Noah, the Abrahamic hero, to whom it fell, according to Genesis (6:19-20), to

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<sup>1</sup> Charney (2018), *passim*.

collect and select «of every living thing of all flesh, [...] two of every sort [...]; male and female [...]»<sup>2</sup>. The multiple senses of passion – at the same time love and rapture but also anguish and torment – reflect well Noah’s work in those days before the flood, in his incessant attempt to complete his collection. However, Noah was certainly not the first collector ever. The phenomenon of collecting, in fact, has been verified in all human societies since the Upper Paleolithic, albeit in a more rudimentary form<sup>3</sup>. Archaeologist André Leroi-Gourhan discovered, in excavations in the Arcy-sur-Cure caves, in the French department of Yonne, a series of eccentric objects arranged in a sacred place that anticipated links with aesthetics, even if they were located in a religious site<sup>4</sup>.

The rich tombs of the Valley of the Kings in ancient Egypt show that Egyptians already held a paradoxical belief in human transience and the durability of beautiful material things. Collecting of some sort was a reality in Egypt and Mesopotamia. Five hundred years before Christ, Hecataeus of Miletus described an Egyptian temple that contained a vast library at whose entrance it could be read: «a place of recreation of the soul»<sup>5</sup>. Similarly, at the grandiose Library of Alexandria, founded in the third century before the Christian Era, it could be read: «the place for the cure of the soul»<sup>6</sup>. The Hellenic-Romanesque-Byzantine contribution to collecting *ante litteram* was also quite relevant, with their many temples and offerings; decorated tombs with pieces of furniture in them; sacred objects and relics; loots and spoils of war displayed as true trophies for the glory of the houses of people who had the power<sup>7</sup>.

The universality of collecting is due to the ancient relationship between the visible and the invisible world, since all human societies, since *Homo sapiens*, have traded with that which cannot be seen, whereby each

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<sup>2</sup> Elsner/Cardinal (1997), p. 1.

<sup>3</sup> Pomian (2001), p. 9.

<sup>4</sup> Pomian (1987), pp. 40-41.

<sup>5</sup> Taylor (1954), pp. 17-54.

<sup>6</sup> Sax (1990), p. 1167.

<sup>7</sup> Pomian (1987), pp. 20-41.

society has drawn their own way the line that separates those two realms. In other words, collections embody the sense of sacrifice, as they intermedicate the contact between the visible spectators and those who inhabit the invisible world. This is a crucial point capable of homogenizing things as heteroclitic and unique as collections<sup>8</sup>.

For Krzysztof Pomian, we behold a sacrifice when a visible object, usually inserted in the sphere of utilitarian activities for keeping alive the members of a given society or reproducing its material equipment, as well as ensuring the durability of society itself, is removed from the aforementioned routine to be driven to the entities that inhabit the invisible domain, or when the object has been produced with that purpose. Then, the sets of offerings to the deities and the funerary furniture, to cite two examples, represent gifts from the visible dimension to the invisible sphere, which, in turn, pours blessings over that first dimension<sup>9</sup>.

Each society builds their collections based on the characteristics of their history, structure, technique and way of life, in such a way that all collections are different from each other due to aspects such as their composition; the places, contexts, and social hierarchies that serve as background for the collection and the language used to speak of it; the way of exhibition, the audience, and the behaviors required from those who exhibit and those who look at or appreciate the collections<sup>10</sup>.

Pomian teaches that the first type of collection of the medieval western world, existing since the 6th century, but with much earlier roots, are the treasures, which subdivided into two species: the ecclesiastical and the royal<sup>11</sup>. The power achieved by the Church and the royalty made it possible for their members, in their different hierarchies, to accumulate wealth, gather objects, especially precious metals and stones, which symbolized the divine or nearly divine power of that person gathering such

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<sup>8</sup> Pomian (2003), pp. 7-9.

<sup>9</sup> Pomian (2003), pp. 8-10.

<sup>10</sup> Pomian (2003), pp. 7-9.

<sup>11</sup> Pomian (2001), p. 9.

treasure<sup>12</sup>. Owned more by an institution than by an individual, those collections depicted power and wealth, signs of divine protection, and their items could serve both for religious rites – to trade with the invisible world, and object of inevitable admiration of believers – and as a means of payment, as sometimes objects were melted down to mint coins<sup>13</sup>.

In Middle Ages Europe, for example, Benedictine monasteries became centers of conservation, research, and dissemination of European culture, with their libraries, illuminations, iconographies, murals, stained glass, and tapestries. However, the history of collections took a turn with the capture of Constantinople by the Crusaders and the consequent exchanges with Byzantium, a context that allowed the intensification of interest and the massive influx of objects and remains of Ancient times. The Italian Veneto was home to the first modern private collection ever recorded: Oliviero Forzetta (1300-1373), a notary engaged in the trade of precious objects and in relations with Venetian artists, gathered for more than three decades a collection of marble, bronze, ancient coins, sculptures, and drawings; he also owned a library. Despite Forzetta's pioneering spirit, it was the influence of Petrarch (1304-1374) in the world of letters and in his dialogue with the princes that spurred the growth of private collections in Venice and Florence in the first half of the 14th century. There was then another attitude towards collections, which made them different from treasures; their constitution and content were more connected with social status and the owner's individuality receded into the background<sup>14</sup>. Something new began to emerge in the way of collecting that ascended in that scenario:

un lien fort commence à unir le collectionneur à sa collection, qui devient, pour lui, une partie et un prolongement de lui-même et, pour les autres, son autoportrait composé d'objets qu'il a choisis et exposés, l'expression

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<sup>12</sup> Pomian (2001), p. 9; Pomian (2003), pp. 9-10.

<sup>13</sup> Pomian (2001), p. 9.

<sup>14</sup> Pomian (2001), pp. 9-10.

tant de son statut et de sa richesse que de son intériorité: de son savoir, de sa sensibilité, de ses aspirations, ses intérêts et ses goûts<sup>15</sup>.

Given this scenario, some royal treasures converted into private collections, and figures such as the French King Charles V, the Wise (1334-1380), and the noble Jean de Berry (1340-1416) entered the spectrum of true modern collectors<sup>16</sup>. Despite this new era of collecting, it is worth considering that private collections appeared before, independently, two other times in history: in ancient China, then Japan; and in Rome, two centuries before Christ, lasting for about three hundred years until they were obscured in the 1st century of the Christian Era<sup>17</sup>. The rebirth of private collections only took place in the 14th century, in northern Italy and France<sup>18</sup>, notably in two environments: among the literate people and in the royal courts<sup>19</sup>.

The collection of Cardinal Pietro Barbo (1416-1471) gained important fame with his election to St. Peter's chair under the name of Paul II, whereby he became the first collecting Pope and influenced collecting within the Church, even if involuntarily<sup>20</sup>. It is also undoubted that the birth of capitalism renewed the interest in collecting, thanks, among other families, to the Medici, the Stuart, the Bourbon, and the Habsburg.

A new wave of private collections increasingly moved away from the sacred, as the holy relics and precious objects were replaced by works of identifiable human authors, in a clear sign of devotion to the humanism typical of the Renaissance<sup>21</sup>. The new collections were gradually exhibited in private and profane places, without participating, or taking part only minimally in the religious liturgy. Private collections *ab initio* were

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<sup>15</sup> Pomian (2003), p. 11.

<sup>16</sup> Pomian (2001), p. 10.

<sup>17</sup> Pomian (2003), p. 10.

<sup>18</sup> Pomian (2003), p. 10.

<sup>19</sup> Pomian (2001), p. 11.

<sup>20</sup> Pomian (2001), pp. 10-11.

<sup>21</sup> Pomian (2001), pp. 11-12; Pomian (2003), p. 11.

separated from the treasures by their antiquity. In the second half of the 15th Century, pictures and paintings were the basic elements that set such as distance<sup>22</sup>:

L'entrée des tableaux renforce de ce fait la tendance à une séparation de la collection composée des œuvres d'art qu'on expose au regard, fût-ce celui des courtisanes, du trésor dont font partie des objets cérémoniels et rituels qui, en général, restent enfermés sous bonne garde. Ce sont les collections d'antiquités mais surtout de tableaux qui, plus que toute autre chose, témoignent dorénavant du goût et du savoir de leurs propriétaires<sup>23</sup>.

In that very period, rare and curious natural objects, such as certain plants, bones or stuffed animals began to constitute yet another category of items that were added to private collections. Those collections differentiated themselves according to their content and orientation, constituting sets of different types – each type with different variants – that intertwine and that, from the 16th century on, have related to an architectural structure that optimizes its presentation, such as the gallery for statues and paintings; the garden and the *folies* for some works of ancient or modern art and living plants; the studio or the cabinet for products of art or nature and small objects<sup>24</sup>.

Still in the 16th century, as capitalism grew stronger, there arose in Europe the *Wunderkammern*, or cabinets of curiosities, repositories of exotic and interesting objects that, gathering from antiques to natural elements, from rarities to extraordinary things – the so-called *rariora* and *curiosa* –, consubstantiated in «expressions d'une curiosité encyclopédique qui vise à ouvrir au regard le tout de la création, [...] à enfermer l'univers entier dans l'espace d'un studio adapté à cet effet par son architecture et plus encore par son décor»<sup>25</sup>, resorting to astrology, hermetic traditions and ancient beliefs to classify the objects in those cabi-

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<sup>22</sup> Pomian (2001), pp. 11-12; Pomian (2003), p. 11.

<sup>23</sup> Pomian (2001), p. 12.

<sup>24</sup> Pomian (2001), p. 12.

<sup>25</sup> Pomian (2001), p. 13.



nets and thus show that no category was left out. In the words of Francis Henry Taylor, «la Wunderkammer fu lo sviluppo della camera di sicurezza, del tesoro del castello in cui era riposto ogni oggetto di valore»<sup>26</sup>. To some extent, the *Wunderkammern* were the predecessors of contemporary museums.

The rise of a kind of science anchored in the use of instruments of measurement and observation, in method and comparison, as well as a new history, with the aim of knowing the past by means of ancestral traces living through the present, made the unsystematic cabinets of curiosities, from the final decades of the 17th century, *démodés*, since «la curiosité se voit de plus en plus canalisée et subordonnée à des questions qui s'originent non dans d'anciennes croyances mais dans la recherche d'un savoir utile»<sup>27</sup>. This brought about modifications not only in relation to the content of the collections but also in the way they were exhibited, analyzed and classified<sup>28</sup>.

With regard to these private collections, the old notion of sacrifice that Pomian spoke of continues to exist and consists precisely in the sums that the collector devotes to his/her collection, which are immobilized for long periods of time, sometimes for generations, instead of being used in production or the commercial trade of collection items<sup>29</sup>.

When they first appeared, private collections were mostly inaccessible to the public, although they belonged to public persons<sup>30</sup>. Then, in 1471, pontiff Sixtus IV restored to the people of Rome ancient sculptures that were in the papal residence in the Lateran for them to be shown in the Capitolium; the pope inaugurated a hitherto unknown model of collection, whose works were not in temples or palaces, but were made available to the public in a privileged space – that was, in fact, the first muse-

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<sup>26</sup> Taylor (1954), p. 134.

<sup>27</sup> Pomian (2001), p. 14.

<sup>28</sup> Pomian (2001), p. 14.

<sup>29</sup> Pomian (2003), p. 12.

<sup>30</sup> Pomian (2001), p. 15.

um ever<sup>31</sup>. At the beginning of the 16th century, other museum collections began to appear in Italy; two hundred years later, museums multiplied across other European countries and, in the 20th century, they became an almost ubiquitous phenomenon worldwide<sup>32</sup>.

Quite a lot of time, a lot of effort and big money are spent on making, interpreting, acquiring, collecting, preserving, exhibiting, reveling in, and studying art<sup>33</sup>. The existence of thousands of museums around the planet; record-breaking audiences in shows and exhibitions; tens of thousands of art traders and galleries; hundreds of thousands of collectors, fairs, auctions and other forms of art trade, including digital forms; national and international culture agencies; university departments of art, archeology and anthropology; specialized academic journals are solid evidence that people and their institutions care about artistic-cultural objects<sup>34</sup>. According to Alessia Zorloni, this widespread interest in art – not only of large corporations, but also of individuals, various types of companies, public institutions and cultural institutions – basically pursues four types of goals:

1. The first model is linked to cultural-interest motivations and stems from a completely inner, aesthetic need, in which the consumer's emotive side predominates.
2. Secondly there is the model which proceeds from a decorative need, connected to the necessity of establishing a pleasant working environment: the functional aspect takes the upper hand here.
3. A third model is based on speculation, bringing together passion for artworks and the need to invest savings beyond the reach of currency fluctuations and fiscal risks: here economic criteria are the most important ones.
4. Lastly, societal motivations are those that consider the collector's activity not as an end in itself, but as a source of social prestige able to respond to need in the symbolic domain<sup>35</sup>.

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<sup>31</sup> Pomian (2001), p. 16.

<sup>32</sup> Pomian (2001), p. 16; Pomian (2003), p. 10.

<sup>33</sup> Merryman (1989), p. 344; Chechi (2014), pp. 10-11.

<sup>34</sup> Merryman (1989), p. 343; Chechi (2014), pp. 10-11.

<sup>35</sup> Zorloni (2013), p. 119.

The relevance of collecting and the symbiotic relationship between the public and the private realms is such that, according to the eminent professor Elina Moustaira, nowadays, more than a passion, collecting is «un progetto intellettuale»:

I collezionisti privati usano spesso termini come “innamorarsi” delle opere d’arte che [vogliono] acquisire. Eppure, in diversi Paesi, negli ultimi anni i collezionisti privati fanno interventi sempre maggiori in favore del pubblico, sicché in tutto ciò l’elemento razionale sembra essere il centro dell’attenzione, a discapito della passione. Collezionare sembra ormai un progetto intellettuale<sup>36</sup>.

Caring for collections, however, cannot be limited to the isolated consideration of the objects that make it up. It is necessary to take care of the art collections as a whole, since the provision of satisfactory solutions for safeguarding them requires a specific legal treatment, which address those collections completely as an entity. Properly protecting art collections requires as much care for the collections as a whole as for each of the goods that comprise them. Legally protecting art collections requires, first of all, assessing as accurately as possible what the object of guardianship is, while the success of this mission, in turn, presupposes a key element: law’s definition of art.

## 2. *The Concept of Art Collection According to Comparative Law*

A collection differs from a random gathering of items, that is, a random set of gathered art objects that can be considered an art collection. About that, Fabrizio Lemme states: «Esistono ‘raccolte d’arte’, esistono ‘collezioni d’arte’»<sup>37</sup>. Therefore, to better protect art collections, it is clear that law needs to consider not only each object of a collection but also to visualize and protect the collection under a second prism, as it is

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<sup>36</sup> Moustaira (2020), p. 61.

<sup>37</sup> Lemme (2019).

in effect: an autonomous thing, distinct from the elements that compose it.

The word ‘collection’ originates from the Latin word *collectio*, which, in turn, comes from the verb *colligere*<sup>38</sup>, which means, in an evident pleonasm, ‘to gather together’<sup>39</sup>. The etymology of *colligere* – derived from *legere*, which has Greek roots in λέγειν<sup>40</sup> – makes us infer, then, that a collection presupposes joining many elements<sup>41</sup> that can and must be ‘read’ as a whole or entirely.

As we follow Ophélie Coste-Gouzes, we realize that collections have a particular structure, with two necessary and cumulative components – physical and intellectual – that interconnect to form a single whole. On the physical plane are the things that give consistency, substrate, basis to the collection, and they are only admissible goods in a collection<sup>42</sup>. To constitute a collection, things need to meet two cumulative criteria; they must be distinct – therefore, individualized –, although they may be of the same nature or of a different nature; and they must be up for appropriation, which leads to the logical conclusion that they are trade goods<sup>43</sup>.

Then, it is usually the case that the things that make up a collection are corporeal, however, there are incorporeal collections, such as digital, photographic, cinematographic, sound, or videographic collections; collections of unpublished texts, performances, know-how, and many of those collections accessible electronically. It should be noted, however, that although an intangible collection does not have a physical support, digitization enables, to some extent, the materialization of incorporeal elements<sup>44</sup>. In addition, although most collections are constituted of in-

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<sup>38</sup> Moustaira (2015), p. 1.

<sup>39</sup> Coste-Gouzes (2017), p. 24.

<sup>40</sup> Moustaira (2015), p. 1.

<sup>41</sup> Coste-Gouzes (2017), p. 24.

<sup>42</sup> Coste-Gouzes (2017), p. 24.

<sup>43</sup> Coste-Gouzes (2017), pp. 24-32.

<sup>44</sup> Coste-Gouzes (2017), p. 26.

consumable things, there are also ephemeral collections composed of consumable goods, such as works of art created from natural resources such as water, earth, sand, wood, and stones<sup>45</sup>.

Since a collection is a set par excellence, its origin presupposes the gathering of the elements that compose it to consubstantiate a totality<sup>46</sup>. Nevertheless, the set-collection is not just a whole, but a whole in order<sup>47</sup> or, to quote Mireille Delmas-Marty on the interactions between legal sets, a «pluralisme ordonné»<sup>48</sup>. Therein lies the second indispensable facet of every collection: the intellectual component<sup>49</sup>.

At the intellectual level, the focus falls on the bond of unification, capable of synthesizing the diversity of physically heterogeneous elements to obtain a legally homogeneous structure. According to Ophélie Coste-Gouzes<sup>50</sup>, the collector has a double connection with his collection: on the one hand, the object-collector relationship in that the objects belong to the collector; on the other, the connection that the collector establishes among the elements based on criteria, interests or objectives previously chosen according to the will of the collector and common to all the goods that constitute the collection, which conceives a classification, an order, a harmonization of the things selected according to the previously elected principles, based on the collector's intellect. In view of this, the collector's will exerts a vertical legal relationship over the elements, which, in turn, are connected horizontally through de facto ties<sup>51</sup>.

In fact, the things that make up a collection are not physically connected: it is the collector's will that connects them. In this sense, it is necessary to mention the lessons of Cristiano Chaves de Farias and Nelson Rosenvald about the classification of legal goods into singular and collec-

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<sup>45</sup> Coste-Gouzes (2017), pp. 25-26.

<sup>46</sup> Coste-Gouzes (2017), pp. 38-40.

<sup>47</sup> Coste-Gouzes (2017), p. 39.

<sup>48</sup> Delmas-Marty (2006), pp. 951-957.

<sup>49</sup> Cf. Coste-Gouzes (2017), p. 22.

<sup>50</sup> Coste-Gouzes (2017), pp. 51-52.

<sup>51</sup> Coste-Gouzes (2017), p. 52.

tive. Singular things are «those things that, despite being together, must be considered individually, independently of the other things that compose it», and they can be simple – when referring to «goods that form a homogeneous whole, whose parts, united by nature or human ingenuity, do not need determination of law», like an animal – or compound – «formed by the conjunction of simple things that, as a consequence, lose autonomy», whether goods are of «material order (as in the construction of a building, for example) or immaterial (such as goodwill)»<sup>52</sup>. Collective or universal goods have been «added to a set, constituted by several singular things, to form a single individual whole that is distinct from its components»<sup>53</sup>.

These things subdivide into: universality of law, as understood in the text of art. 91 of the Brazilian Civil Code of 2002, «the complex of a person's legal relations, which have economic value»; and universality de facto, constituted, in the words of art. 90 of the Código Reale, by the «plurality of singular things that belong to the same person and have a single destination», where the goods that form it may «be the object of specific legal relations». About the *universitas facti*, Farias and Rosenvald warn that they must not be confused with composite singular things, due to the autonomy of things that constitute de facto universality<sup>54</sup>. The Italian civil code, art. 816, also provides for the *universalità di fatto*.

The classificatory activity undertaken by the collector according to their will<sup>55</sup>, through an intellectual construction, leads to the unification of the set, as well as allows an object that no longer shares one or more common interests used as a selection and organization criterion to regain

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<sup>52</sup> Farias/Rosenvald (2017), p. 539.

<sup>53</sup> Farias/Rosenvald (2017), p. 539.

<sup>54</sup> Farias/Rosenvald (2017), p. 539.

<sup>55</sup> Many are the criteria that can be used to undertake the classifying activity. Lemme (2019) mentions a few: «identità tematica (ad esempio nature morte o paesaggi), [...] identità storica (ad esempio Barocco napoletano), [...] identità di formazione/origine (ad esempio i dipinti raccolti dal cardinale Albani prima della sua elezione al Soglio Pontificio)».

its individual autonomy as it leaves the coexistence of other goods, in favor of the coherence of the collection itself<sup>56</sup>. According to Coste-Gouzes, the collection's unity is a fiction arising from the collector's will, amid several elements, to achieve a common goal, *id est*, to construct a federate thing taken as a single legal reality<sup>57</sup>.

Overall, behind the collector's organization endeavor are both the desire to achieve the totality of the collection, «[the] closure/completion/perfection»<sup>58</sup>, and the potential impossibility or enormous difficulty of seeing such an aspiration come true<sup>59</sup>. The fear sometimes gets in the way, «for if one is a collector and there is nothing left to collect, who is one then?»<sup>60</sup>. Collecting is an eternal adventure, and in the words of Jean Baudrillard, «through collecting, the passionate pursuit of possession finds fulfilment and the everyday prose of objects is transformed into poetry, into a triumphant unconscious discourse»<sup>61</sup>. The ideal of having everything of something really goes the way of the monstrosity and uselessness of this type of project, like a map so large and detailed that would have the size of the real thing.

Faced with such a scenario, and since it is not possible to have the objects of a collection portray the totality of a reality, the collector is urged to organize, classify, select, elect the items that will integrate their set, those that, in the collector's mind, are worth more than others and that, when added to the collection, will be resignified in this new collective environment<sup>62</sup>.

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<sup>56</sup> Coste-Gouzes (2017), p. 56.

<sup>57</sup> Coste-Gouzes (2017), p. 62.

<sup>58</sup> Danet/Katriel (1994), p. 231.

<sup>59</sup> Cf. Moreira (2015a), *passim*. Coste-Gouzes' text we have referred to mentions several times the tension between 'totality' and the collection's 'impossibility' of being complete, and she makes it very clear on p. 173: «The relationship between the project to collect the totality of things and being aware that it is impossible».

<sup>60</sup> Belk (1994), p. 324.

<sup>61</sup> Baudrillard (1996), p. 87.

<sup>62</sup> Moreira (2015b), pp. 1-5; Moreira (2015a), pp. 168-170, 173-174.

Now that the contours of the physical and intellectual components have been outlined, it should be emphasized that the originality and actual unity of a collection are due to the duality of its unique structure<sup>63</sup>: a collection exists as such only through a true combination or ‘*liaison*’ – and not the mere juxtaposition – between the intellectual and physical planes, so that the collection does not stand if one of them is not present<sup>64</sup>. This is the scenario for Coste-Gouzes to state that a collection concomitantly represents *container*– as it involves the elements and defines the lines of its common space due to the collector’s will – and *content* – since it is the things that make up the collection that confer existence on it –; it cannot be admitted to speak of a collection if one of those is missing<sup>65</sup>. Further emphasizing the interdependence between the two components, it is the intellectual prism that allows creating and, later, maintaining the physical prism of each collection<sup>66</sup>.

However, this intimate and necessary interrelation does not prevent us from asserting that the collection is a new thing, a good in itself, in which the whole has its own autonomy, distinct from the elements that compose it<sup>67</sup>. This way, Coste-Gouzes<sup>68</sup> states that the collection, as a new good, must also enjoy a specific legal regime different from that applicable to the elements that form it. The items in the collection do not lose their individual autonomy, but it is considered that it remains only ‘dormant’ while they are in the collection and, as soon as they leave this special set, they regain their individual autonomy once suspended, their particular legal discipline from before<sup>69</sup>.

Then, the collection can be seen as a universality *de facto*, however, a

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<sup>63</sup> Coste-Gouzes (2017), pp. 45, 65.

<sup>64</sup> Coste-Gouzes (2017), p. 45.

<sup>65</sup> Coste-Gouzes (2017), pp. 42, 45.

<sup>66</sup> Coste-Gouzes (2017), p. 45.

<sup>67</sup> Coste-Gouzes (2017), pp. 57-59.

<sup>68</sup> Coste-Gouzes (2017), p. 58.

<sup>69</sup> Coste-Gouzes (2017), p. 58.



specific manifestation<sup>70</sup>, since it does not exist without the relationship among its elements and the contours of the criteria adopted by the collector according to his/her will; it remains as something distinct from the various goods that constitute it, though<sup>71</sup>. In turn, the different things that integrate a collection are not devoid of their individual autonomy, which is suspended, only to be recovered if the good is separated from the collection<sup>72</sup>.

Relying on these theoretical observations it is possible to conduct a brief comparative study of the definition of collection within some legal orders in which art law has achieved relevant development.

According to Marie Cornu, except for the cases in which the notion of collection intertwines with that of a museum or identifies the activities of a museum<sup>73</sup>, French law, until the beginning of the 2010s, did not propose a definition of collection, while the goods that integrate such a *universitas rerum* were protected in a singular form without due concern for the whole<sup>74</sup>. Decree No. 2011-574 of 24 May 2011<sup>75</sup>, changed that situation by altering the chapter regulating the circulation of cultural goods of the *Code du patrimoine* (CP)<sup>76</sup>; art. R. 111-3<sup>77</sup> has been added, and it lays out, *in verbis*:

Pour l'application de l'annexe 1 du présent code, constitue une collection, un ensemble d'objets, d'œuvres et de documents dont les différents élé-

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<sup>70</sup> Coste-Gouzes (2017), p. 61.

<sup>71</sup> Coste-Gouzes (2017), pp. 42, 45, 59-62.

<sup>72</sup> Coste-Gouzes (2017), p. 58.

<sup>73</sup> Art. L. 410-1 of the *Code du patrimoine* (2004), for example, provides that: «Est considérée comme musée, au sens du présent livre, toute collection permanente composée de biens dont la conservation et la présentation revêtent un intérêt public et organisée en vue de la connaissance, de l'éducation et du plaisir du public».

<sup>74</sup> Cornu (2012), p. 315.

<sup>75</sup> *Décret n. 2011-574 du 24 mai 2011 relatif à la partie réglementaire du code du patrimoine (livres Ier à VI)*.

<sup>76</sup> *Code du patrimoine*, 2004.

<sup>77</sup> Chatelain/Taugourdeau (2011), p. 182; Cornu (2012), p. 315.

ments ne peuvent être dissociés sans porter atteinte à sa cohérence et dont la valeur est supérieure à la somme des valeurs individuelles des éléments qui le composent. La valeur et la cohérence de la collection s'apprécient en fonction de son intérêt pour l'histoire ou pour l'histoire de l'art, des civilisations, des sciences et des techniques.

As a matter of fact, this legislative change was inspired on a decision concerning the export of 114 plaster sculptures and 32 metal reliefs by the Franco-German artist Hans Arp, intercepted by the French customs authorities at Mortagne-du-Nord on 22 May 1996, on their way into German territory<sup>78</sup>. Brought before the Tribunal Correctionnel of Valenciennes on a charge of export of cultural property without a mandatory certificate, the defense of the transporters and The German foundation Hans Arp-Sophie Taeuber claimed they were unsigned and unfinished objects, not entered in the repertoire list, or were working material for casting<sup>79</sup>.

In the absence of a definition of collection in French law, the Tribunal Correctionnel<sup>80</sup> and then the Cour d'Appel of Douai<sup>81</sup> relied on expert reports to decide that the set's coherence and historical relevance allowed them to consider it a collection to be protected<sup>82</sup>, the export of which, under those conditions, was illegal. If Arp's objects were viewed in isolation, some could be exported without a certificate, since their value did not reach the threshold over which issuing an export certificate is mandatory<sup>83</sup>. However, the Court, *in casu*, took the collection as an entity, which implied another level of value, then higher, which would prevent the export of the set without a certificate, since the Arp collection ex-

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<sup>78</sup> Chatelain/Taugourdeau (2011), p. 182; Cornu (2012), p. 315.

<sup>79</sup> Chatelain/Taugourdeau (2011), p. 182.

<sup>80</sup> In a decision of 20 January 2000. Cf. Bellet (2000).

<sup>81</sup> 6th Chamber, in a decision of 6 March 2001. Cf. France, Cour de Cassation, chambre criminelle. *Pourvoi n. 01-85840*. 8 janv. 2003.

<sup>82</sup> Chatelain/Taugourdeau (2011), p. 182.

<sup>83</sup> Cornu/Mallet-Poujol (2006), p. 254.

ceeded this level of financial amount corresponding to a whole collection<sup>84</sup>.

Although CP's art. R. 111-3 implies that a collection covers only movable property, art. L. 410-1 lays out that the permanent collection that characterizes a museum consists of 'goods', without making a distinction between movable and immovable things<sup>85</sup>. In turn, CP's art. R. 442-3 mentions that the inventory of collections may include immovable goods<sup>86</sup>. Therefore, we can affirm that a collection can be composed of both movable and immovable property<sup>87</sup>.

It should also be noted that the current wording of art. R. 111-3 of the *French Heritage Code* allows for a better control of big-value sets of movable property<sup>88</sup>, and it serves as a basis for extending the scope of collection protections in any disputes<sup>89</sup>. Moreover, it should be emphasized that such a legal device is capable of protecting objects without artistic or cultural value considered in isolation: what is being analyzed at this point is whether the collection itself is of interest for history, art history, civilizations, sciences, and techniques<sup>90</sup>.

On the other hand, the Italian legal system understands the collection mainly as «raccolta di beni mobili che nel loro insieme presentano un interesse storico o artistico eccezionale e pertanto sono a soggetti speciale»<sup>91</sup>. The *Codice dei beni culturali e del paesaggio* establishes in the first item of paragraph two of art. 10:

1. [...]
2. Sono inoltre beni culturali:

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<sup>84</sup> Cornu/Mallet-Poujol (2006), p. 254.

<sup>85</sup> Cornu (2012), p. 315.

<sup>86</sup> Cornu (2012), p. 315.

<sup>87</sup> Cornu (2012), p. 315.

<sup>88</sup> Cornu (2012), p. 315.

<sup>89</sup> Chatelain/Taugourdeau (2011), p. 182.

<sup>90</sup> Chatelain/Taugourdeau (2011), p. 1.

<sup>91</sup> Cornu (2012), p. 317.

- a) le raccolte di musei, pinacoteche, gallerie e altri luoghi espositivi dello Stato, delle regioni, degli altri enti pubblici territoriali, nonché di ogni altro ente ed istituto pubblico;
  - b) gli archivi e i singoli documenti dello Stato, delle regioni, degli altri enti pubblici territoriali, nonché di ogni altro ente ed istituto pubblico;
  - c) le raccolte librerie delle biblioteche dello Stato, delle regioni, degli altri enti pubblici territoriali, nonché di ogni altro ente e istituto pubblico, ad eccezione delle raccolte che assolvono alle funzioni delle biblioteche indicate all'articolo 47, comma 2, del decreto del Presidente della Repubblica 24 luglio 1977, n. 616.
3. Sono altresì beni culturali, quando sia intervenuta la dichiarazione prevista dall'articolo 13: [...]
- e) le collezioni o serie di oggetti, a chiunque appartenenti, che non siano ricompense fra quelle indicate al comma 2 e che, per tradizione, fama e particolari caratteristiche ambientali, ovvero per rilevanza artistica, storica, archeologica, numismatica o etnoantropologica rivestano come complesso un eccezionale interesse <sup>92</sup>.

It is worth mentioning that the code protects cultural collections when they present, as a whole («come complesso»), an exceptional interest, a more demanding requirement than that reserved for separate cultural property, which calls for «interesse particolarmente importante»<sup>93</sup>. In this sense, for the collection to be legally recognized by law, it must focus on to the bond that unites the assets that compose it, more than the constituent elements of the whole alone<sup>94</sup>. Moreover, Italian law makes no distinction between the owners of these sets, so that both private and public collections may be covered by the guardianship in question, provided that they are of «interesse eccezionale»<sup>95</sup>.

Italy maintains a long tradition of legal protection of cultural property, and the declared purpose «di mantenere integre le raccolte e collezioni d'arte»<sup>96</sup>. Today, art. 21, 1, c of the *Codice dei beni culturali e del paesaggio*

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<sup>92</sup> Cornu (2012), p. 317.

<sup>93</sup> Cornu (2012), p. 328.

<sup>94</sup> Cornu (2012), p. 328.

<sup>95</sup> Cornu (2012), pp. 317-318, 328.

<sup>96</sup> Barbati (2017), p. 144.

*gio* contains an explicit «divieto di smembramento non autorizzato di collezioni», worded as follows:

Articolo 21

Interventi soggetti ad autorizzazione

1. Sono subordinati ad autorizzazione del Ministero:

[...]

c) lo smembramento di collezioni, serie e raccolte;

Brazilian law has no specific legal concept applicable to collections in general. The header of the inaugural article to the *Brazilian Statute of Museums (Estatuto dos Museus, Law No. 11.904, of 14 January 2009)* states the following:

For the purposes of this law, museums are considered non-profit institutions that conserve, investigate, communicate, interpret and exhibit, for preservation, study, research, education, contemplation and tourism, sets and collections of historical, artistic, scientific, technical or any other cultural value, open to the public, at the service of society and its development.

One point must be made: this item mentions «sets» and «collections», notions that are not to be taken as the same. Sets are more flexible and less judicious structures than collections. It is a broader notion. Further on, in the sole paragraph of art. 6, the *Statute of Museums* reads:

Visitable collections are considered to be sets of cultural property conserved by a natural or legal person, which do not have the characteristics provided for in art. 1 of this Law, and which are open to visitation, even if sporadically.

Indeed, the *Statute of Museums* proposes a definition of visitable collection by opposing the concept of museum. However, it should be noted that Brazilian law conceptualizes ‘visitable collections’. In addition, the *Statute of Museums* speaks of ‘art body’, ‘collections’ and ‘sets’. Although ‘art body’ and ‘collection’ are often used as synonymous, the terms have different meanings in the museological field: ‘art body’ designates a gen-

eral plexus of elements, «with a broader body, often consisting of several collections»<sup>97</sup>. Examples include institutional or corporate art bodies, formed by more than one collection and/or fund<sup>98</sup>. Therefore, art body, names plexuses without a necessary intrinsic nexus of meaning, except for the fact that they belong to the same institution or place, for example. In turn, a ‘collection’ «regards the ‘second life’ of an object within a new context, no longer related to its use or market value, but related to its ability to produce meanings (symbolic value) – object as a semio-phore»<sup>99</sup>. In this sense, within art body X, there may be a coin collection Y and a map collection Z<sup>100</sup>.

A ‘set’ or fund implies gathered elements that have an exogenous bond of meaning but do not constitute a collection. The set is more like a simple *à-côté*. Objects from a set may come from a common region or place, from the same donor, have the same typology<sup>101</sup>; a set may have been organically produced or accumulated by an individual, family or entity, etc. «The most striking difference between a set and a collection is that a collection is assembled intentionally and goes one direction»<sup>102</sup>, it follows a guiding principle, while the set is circumstantial and exogenous. A set can be simply secreted slowly and spontaneously.

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<sup>97</sup> Enciclopédia Itaú Cultural de Arte e Cultura Brasileiras, *Acervo e Coleção*, available at <https://enciclopedia.itaucultural.org.br/termo14329/acervo-e-colecao> (accessed March 2, 2020); Vilas Boas, Carolina apud Gama, Larissa. *Ibram Response*. Message received by <mfilho@tce.pb.gov.br> on 18 August 2020. In the aforementioned message, Dr. Larissa Gama, transcribes an *e-mail* she received from Dr. Carolina Vilas Boas, Director of the Department of Museum Processes (DPMUS) of the Brazilian Institute of Museums (IBRAM), from where we have taken the aforementioned information about the distinction between the terms ‘art body’, ‘collection’ and ‘set’. Our sincerest thanks to Drs. Larissa Gama and Carolina Vilas Boas.

<sup>98</sup> Vilas Boas apud Gama.

<sup>99</sup> Vilas Boas apud Gama; Desvallées/Mairesse (2013), p. 34; Pomian (1987), pp. 42-47.

<sup>100</sup> Enciclopédia Itaú Cultural de Arte e Cultura Brasileiras, *Acervo e Coleção*.

<sup>101</sup> Vilas Boas apud Gama.

<sup>102</sup> Vilas Boas apud Gama. In the same sense: Desvallées/Mairesse (2013), p. 35.

There is no specific definition of an art collection under international law, although the term is found in several regional norms and treaties concerning cultural goods<sup>103</sup>. The 1995 UNIDROIT Convention, for example, defines public collection<sup>104</sup> in art. 3, 7, *in verbis*:

7. For the purposes of this Convention, a ‘public collection’ consists of any group of inventoried or otherwise identified cultural objects owned by: (a) a Contracting State (b) a regional or local authority of a Contracting State; (c) a religious institution in a Contracting State; or (d) an institution that is established for an essentially cultural, educational or scientific purpose in a Contracting State and is recognised in that State as serving the public interest.

The theme of collections has been an issue of concern for UNIDROIT in recent years. Indeed, by Note Verbale of 16 October 2015, the Permanent Mission of Mexico to the Rome-based International Organizations transmitted to the UNIDROIT Secretariat a proposal to include work on legal issues related to private art collections in the organization’s 2017-2019 Work Programme. The General Assembly endorsed this recommendation in its 75th session (Rome, 1 December 2016). In 2017, UNIDROIT organized a two-day conference on *Private Collections: Historical and Legal Perspectives* (Rome, 16-17 March 2017), when eminent professor Elina Moustaira was invited to prepare a detailed report on the state of the art of the legal regime of private collections<sup>105</sup>.

In 1998, the Council of Europe published the report *Protection of ‘incidental collections’ against dispersal*, which pontificates:

What is a collection?

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<sup>103</sup> Cornu (2012), pp. 322-323.

<sup>104</sup> Cornu (2012), pp. 322-323. On the cited page, Cornu refers to the elements of a public collection as pontificated in art. 3, item 7, of the UNIDROIT Convention of 1995; in addition, p. 330 of the *Dictionnaire* offers the definition of public collection present in the UNIDROIT Convention.

<sup>105</sup> Documento UNIDROIT 2017 C.D. (96) 9, Governing Council, 96<sup>th</sup> session, Rome, 10-12 May 2017, pp. 6-7.

4. We cannot consider the dispersal of collections without first agreeing on what we mean by ‘collection’. The basic feature must be that the collection has an underlying theme. For example, the collection was formed by an historical figure or one significant in the history of taste; or it may be that, although the creator is not important, the collection itself illustrates a particular aspect of history or taste. There are also collections associated with particular buildings and other structures. Here the theme comes from the association with, for example, a particular house.
5. The collection must be capable of being regarded as an entity in its own right. In other words, the value of a particular collection from the point of view of history, science or art must exceed that of the individual objects of which it is composed.
6. Provided there is the underlying theme, the number of objects does not matter although, for logical reasons, there would have to be at least two.
7. Nor should there be any requirement that the objects comprising a collection be kept in one place<sup>106</sup>.

The detailed analysis of how the different national and international legal systems deal with the concept of collection allows us to verify that this notion is not at all homogeneous<sup>107</sup>, so that reaching a final definition to the term becomes a problematic task. In comparative law, a collection can indicate: an activity of systematic collection, via accumulation of similar objects; an organization of several elements according to a method and a reasoning, evidencing its value or artistic, historical and/or scientific interest, for example, of the set, without necessarily referring to each of the objects that individually constitute the collection; or a set of elements or works held by an institution such as a museum<sup>108</sup>. These three conceptions can possibly and even frequently be present in the same legal system, although they entail their own legal effects, especially concerning the risk of dispersion of the set, whether this threat is seen from a strictly material prism, or from the broader perspective of law<sup>109</sup>.

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<sup>106</sup> Report *Protection of “incidental collections” against dispersal*, Doc. 8111, Council of Europe (May 6, 1998).

<sup>107</sup> Cornu (2012), p. 327.

<sup>108</sup> Cornu (2012), p. 327.

<sup>109</sup> Cornu (2012), p. 327.



As regards the nature of the goods forming part of a collection, some national laws are based on greater openness, and they consider that both movable and immovable goods can enter a collection<sup>110</sup>. In fact, despite the variations, the legal definitions of collection commonly mention qualities such as coherence, unity, and interest<sup>111</sup>.

### 3. *Art Collections as Intellectual Creations*

Most national legal systems protect only public collections or those that are part of certain special regimes, such as the regime of listing, of the *Musées de France* and historical monuments, so that several private collections are left out of proper legal guardianship. Pointing to a model that overflows the guardianship of material property to protect an intangible dimension of collections, preventing their dispersion and the destruction of any entities that correctly qualify as collections, regardless of their owner and the submission of the whole set to other safeguarding regimes<sup>112</sup>, some voices defend that the collection as an entity can be protected as a work of intellectual property, distinct from the various goods that compose it and with a value greater than that corresponding to the sum of its various constituent elements. In this hypothesis, the whole-collection would be envisioned as a creation of the human mind and, therefore, it would be under the protection of intellectual property law. Let us consider what Krzysztof Pomian says:

Chaque collection particulière peut [...] devenir [...] une expression de la personnalité du collectionneur. Elle peut traduire non seulement son savoir et son goût, mais aussi ses nostalgies, ses rêves, ses fantasmes. Elle peut être son œuvre, celle qu'il laissera à la postérité<sup>113</sup>.

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<sup>110</sup> Cornu (2012), p. 327.

<sup>111</sup> Coste-Gouzes (2017), p. 16.

<sup>112</sup> Cornu/Mallet (2006), pp. 390-391.

<sup>113</sup> Pomian (2001), p. 18.

The question was raised for the first time by the French courts in the famous Schlumpf case, in which the Franco-Swiss brothers Hans and Fritz Schlumpf ceded their collection of antique vehicles to the Association of the National Automobile Museum of Mulhouse and requested, in court, that the institution be designated exclusively as ‘Musée Schlumpf’<sup>114</sup>. The court of first instance acquiesced at the request of the brothers, and based that decision on copyright, declaring that the collection in question was «un ensemble indissociable à considérer comme une véritable création originale de l’esprit, au même titre qu’une œuvre d’art»<sup>115</sup>.

The appellate court judgment, however, held that the brothers could only enjoy an exclusive right of ownership or control over the collection, and that it could not be held on the exact terms of an ‘œuvre de l’esprit’<sup>116</sup>. At that time, the Court of Appeals of Paris proclaimed:

Si la réunion d’objets mobiliers en un lieu déterminé est inspirée par une volonté et une passion longtemps affirmée et non contestée, qui la rapproche d’une œuvre de l’esprit, il reste qu’il ne saurait lui être reconnu la protection légale instituée par la loi du 11 mars 1957 [sur la propriété littéraire et artistique], alors que le propre d’une œuvre d’art est de ne supporter aucune modification postérieure à sa création, et que les conceptions modernes de la muséologie impliquent, au contraire et de façon nécessaire, des évolutions et des présentations capables de retenir l’intérêt et l’attention des visiteurs qualifiés ou non<sup>117</sup>.

However, the judges granted the collection the right to be called exclusively ‘Schlumpf’, based on an original and *sui generis* protection: the creation of the category ‘œuvre de l’homme’, not to be confused with ‘œuvre de l’esprit’, although it was envisioned by the court as a new form

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<sup>114</sup> Cornu/Mallet (2006), p. 393.

<sup>115</sup> France, Tribunal de Grande Instance de Paris. 3<sup>ème</sup> chambre. 25 nov. 1986 apud Cornu/Mallet (2006), p. 393.

<sup>116</sup> Cornu/Mallet (2006), p. 393.

<sup>117</sup> France, Cour d’Appel de Paris, Chambre 1, Section A. N. 1988-022721, 1988-601250. May 25, 1988, in *Recueil*, Paris, Dalloz, 1988, p. 542.

of personality right similar to an author's moral right over his/her work.<sup>118</sup> According to the Court:

L'action de réunion et de collection et la passion, qui ont inspiré leurs auteurs, ont constitué et continuent de constituer un message et un témoignage dont l'initiative créatrice mérite protection comme étant l'expression d'un droit de la personnalité voisin du droit moral et la manifestation d'une action hors du commun. [...] L'œuvre de Fritz et Hans Schlumpf, née de leur initiative et de leur volonté affirmée, doit mériter, en elle-même, la protection judiciaire nécessairement inhérente à une œuvre de l'homme qui porte témoignage d'une époque déterminée ou d'un génie créateur<sup>119</sup>.

The resolution in question causes, to a certain extent, perplexity regarding the criteria and attributes established by the judges<sup>120</sup>, and some authors, such as Chatelain and Taugourdeau, criticize the legal argumentation of the decision, since «une œuvre est ou non une œuvre de l'esprit protégeable, il n'y a pas de catégorie intermédiaire»<sup>121</sup>. For others, the notion of '*œuvre de l'homme*' has fluid contours, which prevent it from being seen as the foundation of a regime of guardianship of the collection<sup>122</sup>.

Another relevant decision worth bringing up concerns the Henri Langlois Film Museum. To the same Paris Court of Appeals, the way the collection was displayed was considered an original work by its author, that is, the exhibition consisted of a true '*œuvre de l'esprit*'<sup>123</sup>:

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<sup>118</sup> Cornu/Mallet (2006), p. 393.

<sup>119</sup> France, Cour d'Appel de Paris, Chambre 1, Section A. N. 1988-022721, 1988-601250. May 25, 1988, in *Recueil*, Paris, Dalloz, 1988, p. 542; Cornu/Mallet (2006), p. 393.

<sup>120</sup> Cornu/Mallet (2006), p. 393.

<sup>121</sup> Chatelain/Taugourdeau (2011), p. 112.

<sup>122</sup> *La collection: quel statut juridique ?* in «La Gazette Drouot», Paris, 30 juin 2006, available at <https://www.gazette-drouot.com/article/la-collection-%253A-quel-statut-juridique-%253F/6441> (accessed February 23, 2020).

<sup>123</sup> Chatelain/Taugourdeau (2011), p. 112.

il ne s'agit pas ainsi d'une simple présentation méthodique d'éléments relatifs à l'histoire du cinéma mais d'une création résolument personnelle exprimant à la fois l'imaginaire d'Henri Langlois et ses conceptions propres de l'histoire du cinéma et reflétant ainsi sa personnalité<sup>124</sup>.

This time, Françoise Chatelain and Pierre Taugourdeau<sup>125</sup>, praise the decision: «On ne peut qu'approuver cette jurisprudence qui tend à protéger des collections savamment et patiemment constituées, et ont une valeur propre différente de l'addition des valeurs des objets qui les composent», in clear consonance with the provisions of CP's art. R. 111-3, whereby it comes to the definition of collection in the part that regulates the circulation of cultural goods<sup>126</sup>. For the indoctrinators<sup>127</sup>, it would be paradoxical if collections that meet these criteria contained in the aforementioned article of the CP were submitted to movement control, but not to the benefit of art. L. 111-1 of the *Code de la Propriété Intellectuelle* (CPI)<sup>128</sup>, whose first part states that «l'auteur d'une œuvre de l'esprit jouit sur cette œuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous<sup>129</sup>». Another author completes, after criticizing the decision reached in the Schlumpf case: «Dès lors, c'est peut-être l'esprit de la collection plus que sa matérialité qu'il convient de protéger. Par exemple, en lui reconnaissant la qualité d'œuvre de l'esprit»<sup>130</sup>.

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<sup>124</sup> France, Cour d'Appel de Paris. 1<sup>ère</sup> chambre. Association Henri Langlois et autres contre Cinémathèque française et autres. 2 oct. 1997, in *Recueil*, Paris, Dalloz, 1998, p. 312; Chatelain/Taugourdeau (2011), p. 112.

<sup>125</sup> Chatelain/Taugourdeau (2011), p. 112.

<sup>126</sup> In effect, the authors bring, just below their 'approval' to the decision rendered by the Cour d'Appel of Paris, following the reasoning they present, the content of CP's art. R. 111-3 (Chatelain/Taugourdeau, 2011, p. 112).

<sup>127</sup> Chatelain/Taugourdeau (2011), p. 112.

<sup>128</sup> *Code de la propriété intellectuelle*, Loi n. 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle (partie législative), 1 juil. 1992.

<sup>129</sup> Art. L. 111-1 of the CPI.

<sup>130</sup> *La collection: quel statut juridique ?*, in «La Gazette Drouot», Paris, 30 juin 2006,

On 7 March 2018, the Cour de Cassation rejected one appeal by Peggy Guggenheim's French heirs against the Solomon R. Guggenheim Foundation<sup>131</sup>. Four years earlier, the descendants of the illustrious art collector had sued the US institution on the grounds that it had not respected Peggy Guggenheim's wishes regarding the collection that she left as a legacy to the Foundation and that is kept in a palace in Venice<sup>132</sup>. Although the case is much more complex, Sandro Rumney, Guggenheim's grandson, lamented, in an interview with *The Art Newspaper*, that the Cour de Cassation did not address the argument that the collection constituted an *œuvre de l'esprit*, since lower courts had denied Rumney's defense position on the substance of the case<sup>133</sup>. In the words of the collector's grandson:

As you know, the Court of Cassation rules on the form and not on the merits. [...] We insisted that the central question at the heart of this whole process should be taken into account. It was first and foremost about recognising Peggy Guggenheim's collection as an *œuvre de l'esprit*. [...] As an *œuvre de l'esprit*, the collection could have been protected in its integrity as desired by Peggy who, in her wishes, stipulated that her collection should be presented under her name, and in the presentation she had wanted it «without addition or withdrawal». This is no longer the case today, where pieces from outside her collection have been added, and only part of the collection is now shown. [...] Unfortunately, our main request has not been taken into account [...] <sup>134</sup>.

On 12 January 2004, in a divorce decree, the Grenoble Court held that a collection of insects was the own and exclusive property of the husband, the collector, and it was not under the former couple's common property regime. The judges found that the collection had «un caractère

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available at <https://www.gazette-drouot.com/article/la-collection-%253A-quel-statut-juridique-%253F/6441> (accessed February 23, 2020).

<sup>131</sup> Bellet (2018).

<sup>132</sup> Bellet (2018).

<sup>133</sup> Ruiz (2018).

<sup>134</sup> Ruiz (2018).

personnel de sorte qu'elle constitue un bien propre par sa nature»<sup>135</sup>. In other words, each collection reveals the identity of its collector, reflecting their choices<sup>136</sup> and, in the words of Russell Belk, it is an extension of oneself:

Our self-definition is often highly dependent upon our possessions. The collection is especially implicated in the extended self because it is often visible and undeniably represents the collector's judgements and taste. In addition, the time and effort spent in assembling a collection means that the collector has literally put a part of self into the collection. [...] Because collections are seen as extensions of self, to lose one's collection is to experience a diminished sense of self<sup>137</sup>.

In his inaugural speech as an 'Académico Correspondiente' in the Royal European Academy of Doctors, in Barcelona, Janeiro 2017, Manuel Puig Costa goes in the same direction:

Varios autores de nuestro entorno, como Calvo Serraller y Artur Ramón coinciden en que «Una colección es la afirmación de una autobiografía resumida». A través de los objetos coleccionados mostramos parte de nuestra personalidad y preferencias. [...] Estos objetos que se poseen y reubicar en un nuevo espacio conforman una historia del arte personal<sup>138</sup>.

#### 4. *Final Remarks*

Erasing the past is destroying the future. Protecting public and private art collections from the many risks they run means defending a common heritage, portions of life that cannot be replaced if they are lost. As well emphasizes the *Faro Convention of the Council of Europe* (2005), protecting cultural heritage is a human right, and fundamental to all who constitute the global community, those whose works of art are an extension

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<sup>135</sup> Signorile (2020), p. 23.

<sup>136</sup> Belk/Wallendorf (1994), pp. 240-241.

<sup>137</sup> Belk (1994), p. 321.

<sup>138</sup> Costa (2017), p. 11.

of themselves, even if they do not realize it<sup>139</sup>. Fighting for safeguarding artistic and cultural manifestations is, therefore, a mission that falls, directly or indirectly, to each one of us who build and inhabit the world, whether public or private agents.

Today, when many of the objects of art are in collections and museums, whether privately- or state-owned, including companies, universities, and cultural institutions of various types, it is indisputable that the guardianship of collections must get special attention from law. However, when one realizes that the collection is more than a mere group of works of art, which, therefore, boasts a higher value than that of all the items that compose it, special attention is not enough: it requires careful and special handling, a kind of treatment that considers the collection as an entity, whose wholesomeness is considered a specific good, not to be mistaken with all the goods that form it, but non-existent without its integrating parts. Protecting the sets-collections requires recognizing their structural uniqueness, in which intellectual components make the link between the constituent physical components. In other words, safeguarding collections presupposes caring for their integrity – shielding them against undue or unwanted dispersal and against any offensive conduct – and for the particular interest, the value and coherence that legitimize efforts to preserve the unity of a collection. In addition to caring for the whole, it is worth mentioning that it is equally imperative to look zealously at each of the non-fungible works that make up the collection.

Despite that, legally protecting art collections requires, as a basic provision, that the law conceptualize these sets, and do so taking into account the essential elements that characterize collections, as well as allowing them to be protected as effectively as possible. However, defining collections without legal effects arising from the subsumption of factual reality to the law's concept of collection is almost useless, just as it is of little use to generate effects that do not imply the necessary safeguard. Indeed, a fruitful guardianship of art collections depends on the existence of a truly protective legal regime associated with its definition. In addi-

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<sup>139</sup> Belk (1994), p. 321.

tion, the operator-interpreter of law must correctly qualify the real-world event by calling the *nomen iuris* ‘collection’ only that which effectively holds the essence of such sets, lest there be the erroneous production of effects which are reserved to other legal institutions that are not on a par with the concept of collection.

However, the national legal systems rarely conceptualize collections as such. The definitions found are usually associated with specific contexts or factors, such as museums for example. In relation to collections that fit into those more specific scenarios, legal systems usually define only public collections; very few of them address a concept of collection that encompasses private collections, or have a regime especially directed to this type of collection, in such a way that they are often relegated to a legal limbo<sup>140</sup>. In such a scenario, it is urgent that law covers all collections and provide them with a dignifying and appropriate discipline.

It is true that it cannot be asserted that there is at present a perfect national law of collections, but it is a fact that the French law is one of the most mature regarding that aspect. In turn, although the Brazilian legal system offers a relatively suitable protection to the works of art, it is still incipient with regard to the effective protection of collections.

Article R. 111-3 of the French *Code du patrimoine* presents an exemplary concept, as its definition of collections utilizes factors that are crucial to their protection; for example, it mentions that the elements that form the collection cannot be dissociated without affecting its coherence; that the value of the entity taken as a whole is greater than the sum of the individual values of each good that is part of the whole; and that both the coherence and the value of the collection are appreciated according to their interest for history or for the history of art, civilizations, sciences, and techniques<sup>141</sup>. That article allows considering objects that do

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<sup>140</sup> Cf. Coste-Gouzes (2017), pp. 13-17.

<sup>141</sup> Article R. 111-3: «Pour l’application de l’annexe 1 du présent code, constitue une collection, un ensemble d’objets, d’œuvres et de documents dont les différents éléments ne peuvent être dissociés sans porter atteinte à sa cohérence et dont la valeur est supérieure à la somme des valeurs individuelles des éléments qui le composent. La valeur et



not necessarily have intrinsic artistic-cultural value, but which, when united in a coherent and particular way as a whole, lead to a higher added value of the whole, which justifies special protection since it boasts cultural interest<sup>142</sup>. It is worth mentioning that since this legal provision is in the part of the *Code du patrimoine* that regulates the circulation of cultural property, the recognition of a collection in accordance with the provisions of art. R. 111-3 of the Code is made by both customs and tax rules<sup>143</sup>. This situation, however, does not tarnish the brilliance of the concept, even if a broader irradiation of it, not restricted to the framework of exports, is more appropriate to the effective protection of collections.

On the other hand, Brazilian law does not provide a concept of collection as that advanced in the French heritage code; the Brazilian law only has the definition of ‘visitable collection’<sup>144</sup>, as opposed to the notion of museum: visitable collections are understood by law as the sets of cultural goods that do not have the characteristics of a museum and that are open to public visitation, even if sporadically. It is easy to realize that the French concept has the ability to bear more showy fruit.

In addition, the protection of art collections by intellectual property or copyright law must be brought to the fore, for this scenario is still timid in the legal system of France, despite the existence of important legal precedents. These judgments make it possible to foresee that the path will be paved for safeguarding a collection as a work of the spirit, creation of the human mind, as a kind of work of art in itself or a true *Gesamtkunstwerk*. In Brazil, there are still no trial decisions that follow this reasoning. Despite that, it seems to us to be a plausible and avant-garde protection, which tends to gain force in the future.

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la cohérence de la collection s’apprécient en fonction de son intérêt pour l’histoire ou pour l’histoire de l’art, des civilisations, des sciences et des techniques».

<sup>142</sup> Chatelain/Taugourdeau (2011), p. 1.

<sup>143</sup> Chatelain/Taugourdeau (2011), p. 146.

<sup>144</sup> Art. 6, sole paragraph, of Law No. 11.904, of 14 January 2009, the Statute of Museums.

In a world of so much material excess and so much access to consumption, it is not an easy task to choose specific objects, to choose certain targets, to select and discard pieces, to bring together very unique elements under a guiding principle, an artistic logic, a cultural reasoning. This is the great task of a collector who, by doing true self-curation, gives the collection an idiosyncratic character and establishes dialogues between pieces and artists who were often distant in time and space. In this sense, by providing constant unusual encounters between artists, between works and between collectors, the collections constitute themselves as true ‘open works’, as defined by Umberto Eco.

Much more than mechanically gathering elements, collecting is creating an innovative and singular reflection on those very elements that come together, after all «collections are essentially a narrative of experience»<sup>145</sup>. With that in mind, Hans Ulrich Obrist and Asad Raza understand collecting, ultimately, as the activity of ‘collecting knowledge’:

To make a collection is to find, acquire, organize and store items, whether in a room, a house, a library, a museum or a warehouse. It is also, inevitably, a way of thinking about the world – the connections and principles that produce a collection contain assumptions, juxtapositions, findings, experimental possibilities and associations. Collection-making, you could say, is a method of producing knowledge<sup>146</sup>.

In this sense, the collection itself is also an expression of the collector’s individual personality, an expression of the author’s nature, worthy of a note, support and legal protection: «like fiction, collections narrate world-views [...]»<sup>147</sup>. The collector is, therefore, a creator of meanings, coherences, senses, and expressions, through his/her *Gesamtkunstwerk*. So much so that the value of a work of art can change after it was part of a given collection. Also, so much so that great painters of the past such as David Teniers (the Younger), Balthasar van den Bossche, Wilhelm Schu-

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<sup>145</sup> Pearce (2005), p. 412.

<sup>146</sup> Obrist/Raza (2014), p. 39.

<sup>147</sup> Pearce (2005), p. 412.

bert van Ehrenberg, Gillis van Tilborgh, Hieronymus Janssens and Jacob De Formentrou used their own collections as *Leitmotif* of their paintings and created a new pictographic genre, the so-called ‘gallery paintings’ or ‘picture galleries’ – spectacular paintings that depict spacious halls filled with works of art; creative metalanguages of paintings on paintings.

Law no. 9.610/98, the Brazilian copyright law, opens a small space to encompass a protection of collections in art. 7, item XIII, which reads as follows:

Art. 7 Protected intellectual works are those creations of the spirit, expressed by any means or bore on any support, either tangible or intangible, either known or yet to be invented, such as: [...]  
XIII – the collections or compilations, anthologies, encyclopedias, dictionaries, databases and other works, which, due to their selection, organization or arrangement of their content constitute an intellectual creation.

Now we are particularly interested in other works which, due to their selection, organization or arrangement of their content, constitute an intellectual creation! The collection is a very selective and original ‘assemblage’. In contemporary art, artists such as Joseph Cornell, Claes Oldenburg, Marcel Broodthaers, and Hans-Peter Feldmann have made collecting their art<sup>148</sup>. Understanding a collection as a work of art was precisely what led Marilá Dardot and Matheus Rocha Pitta to create the fictitious collector Duda Miranda, whose collection (also fictitious) was exhibited at the show *A for Art – The Duda Miranda collection*, held in 2006<sup>149</sup>.

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<sup>148</sup> Grazioli (2012), *passim*.

<sup>149</sup> Miranda (2007).

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