Limiting freedom of contract, next step for Copyright Treaties?
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Freedom of contract is one of the pillars on which private law is founded. However, in some cases, freedom of contract must be restricted in order to protect certain type of individuals or the interest of society. Copyright law in many cases leave the negotiation of licences and transferences of works in the hands of contractual freedom, but there are some examples of limitations to such principle. Can those limits be based on human rights rationales? For instance, either through the constitutional introduction of the international instrument on human rights such as the ICESCR and the Universal Declaration of Human Rights, or through the judiciary of such rights as part of the main purpose of copyright. or by the decision of the Judiciary, the protection of authors’ moral and material interests has been made part of the human rights of different countries. This paper proposes first, a comparative study of some Latin American jurisdictions (Colombia, Mexico, Argentina) regarding the limitation to freedom of contracts for the transfer of copyrights in what it respects to the protection of author’s moral and material interests. Such comparative analysis will liaise with the legal traditions influencing such jurisdictions (both the Anglo-Saxon legal tradition and the Continental Civil Law tradition). Second, it will explore how the case law from those jurisdictions have analysed the need of limitations to freedom of contract, based on a constitutional perspective to protect author’s moral and material interests. It finally addresses recent developments on freedom of contract, particularly the EU Directive for copyright in the Digital Single Market and the adoption of certain rules of interpretation related to the ownership of copyright within the CPTPP (former TPP) (article 18.67.b, footnote 81). Those cases will help to observe whether the jurisdictions studied can show coincidences or not to those recent developments and explore possible trends towards proposing a legal instrument for the protection of authors in contractual relationships.