

# The Concept of Originality and Prior Art in First to Declare: A Strategy to Prevent Unilateral Claims on Traditional Cultural Expressions

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## ARTICLE INFO

### Keywords:

Traditional Cultural Expressions (TRE);  
Intellectual Property Rights;  
Legal Protection;

### Article history:

Received 2025-04-27

Revised 2025-05-22

Accepted 2025-07-31

## ABSTRACT

The protection of Traditional Cultural Expressions (TREs) within the framework of the modern Intellectual Property Rights system faces significant challenges, primarily due to the dominance of individualistic principles and formal mechanisms based on registration and specifically copyright ownership registration. The first-to-declare system, which initially emphasized recognition of the party who first announced a work or creation, has in practice shifted towards a system that prioritizes formal registration by the first party at the Directorate General of Intellectual Property (DJKI). This article examines the application of the concepts of originality and prior art within the framework of the first-to-declare system, and analyzes their relevance in preventing unilateral claims on TREs by unauthorized parties through the registration mechanism at the DJKI. This research uses a normative juridical approach with an analysis of laws and regulations, international documents, and related case studies. The research results indicate that systemic reforms are needed, including the recognition of collective rights, the development of a TRE database, and the strengthening of the sui generis regime, as preventive measures against TRE misappropriation on the global stage.

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## 1. INTRODUCTION

The issue of legal protection for Traditional Cultural Expressions (TREs) now occupies a strategic position in the dynamics of the development of the Intellectual Property Rights (IPR) regime amidst increasingly intense globalization. As a representation of cultural identity inherited collectively within indigenous communities, TREs are often vulnerable to exploitation by external parties who have no authentic connection to the tradition. The rapid development of information technology has also acted as a catalyst in accelerating the spread of TREs into the global space, but on the other hand, it has created new opportunities for misappropriation and the submission of unilateral ownership claims over cultural heritage by unauthorized parties. (Alyandi et al., 2022)

This condition is further exacerbated by the IPR legal system which is still oriented towards an individualistic paradigm, where the principle of personal originality and administrative formality aspects are the main pillars in the copyright protection process. (Kansil & Sulistio, 2024) This system

tends to ignore the communal and collective nature inherent in the process of creating renewable energy, so that indigenous communities are often in a disadvantageous position before existing legal mechanisms.

One of the fundamental problems in this context lies in the application of the first to declare system, which is an implication of the principle of automatic protection in copyright, where legal protection for a work is obtained directly from the time the work is published for the first time. (Omry et al., 2022) As a form of authentication, copyright holders register their copyrights, so legally the term used is copyright registration, not copyright registration. In practice, the concept of originality is often interpreted narrowly as a product of individual creativity, while the existence of prior art as an instrument of proof of novelty is often inadequate to protect renewable energy that has not been officially documented in the IPR database. As a result, certain parties can exploit this registration loophole to claim legal ownership of renewable energy, which is substantially the collective property of indigenous communities, resulting in the takeover of rights that is morally illegitimate even though legally valid.

This issue reflects a structural imbalance in the IPR legal architecture, which has not fully accommodated the unique characteristics of renewables as a living and evolving collective cultural asset. Furthermore, efforts to prevent illegal claims against renewables still face various obstacles, including regulatory weaknesses, challenges in proving prior art, and the lack of adequate legal recognition of the collective rights of indigenous peoples as legal subjects.

Thus, an in-depth critical study is needed to re-examine how the concepts of originality and prior art should be interpreted contextually within the framework of the first to declare system, especially when faced with the reality of Traditional Cultural Expressions (TREs) which have collective characteristics and are passed down from generation to generation. The rigid and individualistic conceptual interpretation in the conventional Intellectual Property Rights (IPR) system must be reviewed to accommodate the complexity of TREs which cannot be separated from the social, spiritual, and cultural identity values of indigenous communities as creators and legal owners. (Murjiyanto, 2017)

The need for an effective legal strategy design is becoming increasingly urgent given the recurring practice of unilateral claims to renewable energy by unauthorized parties, both through administrative loopholes in registration and the manipulation of pseudo-originality parameters. Such a legal strategy must not only be repressive (taking action after a violation has occurred), but must also be designed preventively by establishing a legal recognition system that is capable of preventing misappropriation from the outset. This includes strengthening community-based prior art recognition mechanisms, verifying the authenticity of the registrant's cultural relationship to the submitted work, and developing a legal framework that provides space for the legitimacy of collective rights.

Efforts to reform the IPR system at the national level are an important starting point, by expanding the scope of legal protection for EBT through the implementation of a special protection regime (*sui generis*). (Rohaini, 2016) This regime is specifically designed to address legal gaps that cannot be addressed by conventional IPR systems, by taking into account the principles of cultural justice, respect for the rights of indigenous communities, and adaptive protection mechanisms to the dynamic character of EBT.

However, national efforts will be ineffective without international policy harmonization. Given the cross-border nature of renewable energy protection issues, cooperation between countries in building international understanding and binding regulations is crucial. This policy harmonization includes international recognition of indigenous peoples' collective rights to renewable energy, mechanisms for protecting against cross-jurisdictional misappropriation, and the establishment of a global prior art database accessible to intellectual property rights institutions in various countries as a reference in the registration verification process.

Through strategic integration between legal reform at the national level, strengthening of the special protection regime (*sui generis*), and harmonization of regulations at the international level, it is hoped that a more just, inclusive, and contextual legal protection system will be formed in responding to the complexity of protecting Traditional Cultural Expressions (EBT). (Widyanti, 2020) National legal

reform is a fundamental foundation for improving the regulatory framework, which remains mired in an individualistic paradigm, by formulating legal instruments that explicitly recognize the collective rights of indigenous communities as legitimate legal subjects over renewable energy. This effort includes developing regulatory instruments that adapt to cultural dynamics, simplifying community-based renewable energy registration procedures, and strengthening the capacity of intellectual property rights management institutions to be more responsive to the specific characteristics of renewable energy.

On the other hand, strengthening the *sui generis* regime is an important pillar for providing legal protection mechanisms that are specific and tailored to the needs of renewable energy, by placing the principles of cultural justice and respect for local wisdom as a normative foundation. (Labetubun et al., 2018) This regime is expected to overcome the limitations of the conventional IPR system, which is inadequate in protecting renewable energy (RE), which is dynamic, not formally documented, and produced from a communal creative process rooted in tradition. Based on the background of the problem above, a golden thread can be drawn which is the problem in this research: How are the concepts of originality and prior art applied in the first to declare system?

## 2. METHODS

This research method uses normative juridical research with a conceptual approach and a statutory approach. (S. Sukanto, 1990) A normative juridical approach is used to examine the concepts of originality and prior art from the perspective of Intellectual Property Rights (IPR) law, particularly regarding their application in the first to declare system as a copyright registration mechanism. A conceptual approach is carried out to deeply understand the theoretical construction of the protection of Traditional Cultural Expressions (EBT) in an individualistic IPR regime, as well as to explore the need for an alternative, *sui generis*-based protection model. The legal material collection technique is carried out through library research, namely by collecting and reviewing various legal literature, laws and regulations, court decisions, and relevant policy documents. (S. and SM Sukanto, 2009)

## 3. FINDINGS AND DISCUSSION

### **Application of the Concept of Originality and Prior Art in the First to Declare System as a Copyright Registration Mechanism**

#### a. Copyright Originality

In principle, originality is the primary requirement for obtaining copyright protection. In many legal regimes, including Indonesia (Law No. 28 of 2014 concerning Copyright), a work is considered original if it is created through the creator's own ability, creativity, and intellect, without copying any pre-existing work. Originality does not necessarily mean "absolute novelty," but rather emphasizes the creator's personal touch to their work. (Wahyuni et al., 2024)

However, the application of the concept of originality in the Intellectual Property Rights (IPR) regime, particularly in copyright, becomes a problem in itself when faced with the character of Traditional Cultural Expressions (EBT) which are communal, passed down from generation to generation, and cannot be attributed to a specific individual creator. (Djaja, 2016) The modern copyright legal system, which is built on the principle of individualism, demands a clear legal subject as the creator of the work (author), so that the process of protecting rights is based on recognition of personal creativity.

However, EBT, as a result of the collective processes of indigenous communities, does not fit into the framework of originality that requires the identification of a single creator. Traditional cultural works develop through the transmission of knowledge from generation to generation, where creative contributions are not attached to a specific individual, but rather become part of a communal identity inseparable from the traditions and collective values of the community. Therefore, the concept of originality in conventional IPR is inadequate to accommodate EBT, as it fails to capture the communal dimension inherent in the creation process.

This mismatch creates a gap in legal protection, where renewables often lack proper legal recognition and are even vulnerable to exploitation by external parties who can formally claim copyright by exploiting the lack of creator attribution within the registration system. This highlights the need to revisit the concept of originality used within the IPR legal framework to better adapt it to the collective and dynamic nature of renewables creation.

In addition to the problematic concept of originality, the existence of prior art as a benchmark for novelty in the Intellectual Property Rights (IPR) protection system also raises serious issues when applied to Traditional Cultural Expressions (TRs) that have historically not been formally documented. In the IPR context, prior art serves as a reference to determine whether a work is truly a new creation or whether it already existed. However, the prior art proof mechanism commonly applied in the modern IPR system relies heavily on official documentation recorded in verified databases, such as patents, scientific publications, or official copyright archives. (Dwisvimiar, 2022)

The reality of renewable energy in indigenous communities does not align with this logic, as the process of creating and inheriting renewable energy occurs orally, is based on social practices, and lives within traditions that are not always recorded in written documentation or other formal media. Consequently, when external parties claim rights to renewable energy, indigenous communities often lack evidence that meets the formal standards of the IPR system to demonstrate that the renewable energy existed and was used collectively long before the claim was made.

The inability of the conventional prior art system to accommodate these forms of traditional knowledge that are not formally documented opens a legal loophole that can be exploited by certain parties to make unilateral claims over EBT legally, even though in substance such actions constitute a form of expropriation of cultural rights that is morally illegitimate. Therefore, the urgency to reformulate the mechanism for recognizing prior art that is more contextual to the characteristics of EBT is very important, so that legal protection for traditional cultural heritage does not solely depend on administrative standards of proof that are not in accordance with the social and cultural realities of indigenous communities.

In efforts to protect Traditional Cultural Expressions (TREs), the fundamental limitation of the existing Intellectual Property Rights (IPR) system lies in its reliance on official documentation and individual registration procedures. This concept is inconsistent with the nature of TREs, which are passed down orally and managed collectively by indigenous communities. Therefore, strengthening community-built and managed prior art databases is needed as an alternative solution to conventional registration systems. (Nendrawan & Rastika, 2021)

To ensure its effectiveness, strengthening this community-based database must meet several important benchmarks. First, the collected data must reflect the authentic connection between renewable energy and the indigenous communities that own them. Involving indigenous communities in every stage of recording and validation is essential to maintaining the cultural legitimacy of the compiled data. Second, the database must not only document the physical form of the work but also encompass its comprehensive cultural context, including its historical origins, symbolic meaning, spiritual values, and social functions.

Another benchmark is a participatory validation mechanism, where each recording process must go through collective deliberation, ensuring that the data entered into the database is truly recognized by the community that owns it. Furthermore, managing information access rights is crucial for maintaining the confidentiality of sacred or sensitive traditional knowledge. This ensures that only those with permission or legal authority can access the information.

As an implementable solution, the government needs to develop a national digital platform dedicated to the documentation and recording of renewable energy, with indigenous communities as the primary managers. This platform is designed not only as a data repository but also as a legal instrument that can be used in intellectual property rights protection processes, both nationally and internationally. Existing regulations must also be revised to officially recognize community-based prior art databases as valid evidence in copyright testing and IP dispute resolution processes. This step will ensure that unilateral claims on renewable energy by unauthorized parties can be prevented early on.

On the other hand, empowering customary institutions as cultural authorities authorized to validate renewable energy is a crucial aspect that requires full state support. Customary institutions must be facilitated in terms of institutional capacity, human resources, and funding to enable them to sustainably manage and maintain the integrity of their databases. At the global level, integrating these community databases with international networks, such as those managed by WIPO and UNESCO, is a strategic step in strengthening legal recognition of renewable energy across jurisdictions. This way, renewable energy documented by indigenous communities in Indonesia can be recognized as official international references, thereby minimizing the risk of unilateral claims by foreign parties.

By designing strict benchmarks and implementing appropriate strategies, strengthening this community-based prior art database is expected to be able to close the legal loopholes that have weakened the position of EBT in the IPR system, while also being a corrective step against the dominance of the individualistic paradigm that is irrelevant to the protection of collective cultural heritage.

#### b. Prior Art as a Benchmark of Novelty

Within the legal framework of Intellectual Property Rights (IPR), the term prior art refers to any form of knowledge, work, or innovation known or available before an application for copyright protection is filed. The existence of prior art is a crucial element in the substantive examination process because it serves as an indicator for assessing the extent to which a work meets the elements of novelty and originality that are prerequisites for legal protection.

However, the concept of prior art becomes problematic when applied to Traditional Cultural Expressions (TRE). (Salsabilla, 2024) Unlike individual works, which are generally documented in written form, renewable and non-renewable arts (NRI) emerge from collective creative processes within indigenous communities and are passed down through oral traditions, rituals, and cultural practices within these communities. They are rarely formally recorded in official archives or databases of IPR institutions. This lack of formal documentation creates unique difficulties in proving prior art before IPR institutions. When external parties file copyright claims over undocumented NRE, IPR institutions often fail to find supporting evidence to refute these claims. This is because the evidentiary mechanisms within the IPR system are still oriented toward written evidence and formal administration, making NRE's position, stored in collective memory, vulnerable to unilateral claims.

This situation creates a gap for parties without authentic ties to indigenous communities to obtain legal recognition for renewable energy through formal registration processes, even though such actions lack cultural legitimacy. This gap indicates the need for a reinterpretation of the meaning of prior art, particularly in the context of renewable energy, where traditional knowledge passed down orally must be recognized as valid evidence even if it is not recorded in official documents. Therefore, the IPR legal system requires a new, more inclusive approach that accommodates the existence of community-based prior art as a form of living cultural heritage, so that legal protection for renewable energy can be implemented fairly and proportionally.

The incompatibility of the existing Intellectual Property Rights (IPR) system with the distinctive character of Traditional Cultural Expressions (TREs) has created an urgent need for a more inclusive and relevant model for proving prior art. This is because TREs are generally not recorded in official documentation but are instead passed down orally and live within the social practices of indigenous communities. This collective inheritance mechanism makes TREs difficult to accommodate within conventional IPR registration systems based on formal documentation.

As an alternative, a prior art verification mechanism based on community recognition (Community-Based Prior Art Verification) is needed, in which indigenous communities are given a primary role in the authentication and verification process for renewable energy. This model of verification relies not only on administrative documents but also includes oral narratives, cultural documentation, testimony from indigenous leaders, and audiovisual evidence that demonstrates the historical and cultural connection to the claimed cultural expression.

From a normative perspective, this community-based evidence model needs a strong legal basis

through legislation. The state must provide legal recognition for the validity of community evidence as a valid means of proof in intellectual property registration and disputes. Furthermore, a formal mechanism is needed for indigenous communities to file objections to EBT claims by external parties without cultural ties, through the objection procedures established by intellectual property institutions.

Strengthening this model requires the development of a Community-Based Prior Art Database, compiled in a participatory manner, involving indigenous communities in the recording, validation, and management processes. This database serves not only as an archive of cultural knowledge but also as an official verification tool used in substantive examinations by intellectual property rights authorities. Data management must ensure the upholding of the principle of Free, Prior, and Informed Consent (FPIC), thus maintaining community sovereignty over traditional knowledge. For this model to be effective, collaboration between the government, indigenous institutions, and educational institutions is needed to support the documentation process and provide training for indigenous communities on cultural documentation and legal advocacy. This will ensure indigenous communities have sufficient capacity to actively protect their rights.

At the international level, this community-based prior art model can be proposed in global forums such as the WIPO IGC, for recognition as a protection model applicable across borders. This step is crucial to prevent the exploitation of renewable energy by foreign parties through morally illegitimate legal claims. From a normative legal perspective, this model is not only a technical solution for protecting renewable energy, but also a form of respect for the collective values, spirituality, and cultural identity contained within it, ensuring the continuity of authentic cultural heritage amidst the challenges of globalization.

### **Sui Generis Legal Protection as a Legal Alternative for Traditional Cultural Expressions (TREs)**

The limitations of the conventional Intellectual Property Rights (IPR) system in protecting Traditional Cultural Expressions (TREs), which are communal in nature and passed down across generations, require the design of a specific protection mechanism tailored to these unique characteristics. The sui generis protection regime exists as a solution to the legal vacuum that the IPR system, based on individualism and administrative formalities, has so far been unable to fill. (Jejen Hendar, 2025)

The sui generis regime refers to a specifically designed legal framework separate from the general IPR regime, which takes into account the cultural, spiritual, and social aspects inherent in renewables. Protection under this regime is not solely based on individual novelty and originality, but rather emphasizes recognizing the collective rights of indigenous communities as the legitimate holders of said cultural heritage. Thus, the sui generis regime provides flexibility for regulating legal protection based on local wisdom and traditional values.

The implementation of this regime must include fundamental principles that guarantee indigenous communities' rights to control, manage, and protect their renewable energy resources. The registration mechanism in a sui generis regime is no longer based on the principle of first to declare, but rather on a system of cultural recognition supported by community verification. In this regard, indigenous communities have full authority to determine who has the right to use and access renewable energy resources, including setting restrictions on commercial use by outside parties.

A sui generis regime must also be complemented by legal instruments that protect against exploitative or culturally damaging forms of utilization. This includes regulations regarding benefit-sharing, a licensing mechanism based on community consent (prior informed consent), and recognition of the collective moral rights inherent in renewable energy. At the implementation level, the success of a sui generis regime depends heavily on strengthening customary institutions as cultural authorities authorized to validate and oversee renewable energy utilization. State support through strengthened national regulations and institutional facilitation is a crucial prerequisite for this regime to operate effectively and sustainably.

At the global level, the integration of the sui generis regime into the international legal protection framework is a strategic agenda that must be championed. Cooperation between countries in

developing collective rights-based standards for renewable energy protection, as well as the recognition of community-based registration systems within the international IPR regime, would be significant steps to prevent unilateral claims by foreign entities. Thus, the sui generis regime is not only a solution to the legal vacuum in renewable energy protection, but also an instrument to strengthen the position of indigenous communities as legal subjects with full rights to their cultural expression, amidst the currents of globalization that tend to diminish collective values within the positive legal system. (Nurdin et al., 2025)

It can be concluded that sui generis legal protection is an alternative legal framework specifically designed to protect Traditional Cultural Expressions (TREs), taking into account the collective, communal nature, and cultural values inherent in such cultural heritage. Unlike conventional IPR systems based on individualism and administrative formalities, this regime positions indigenous communities as the primary rights holders authorized to determine the management and utilization of their TREs. Implementation of the sui generis regime requires strengthening customary institutions, recognizing collective moral rights, and supporting national regulations that align with international policies. Substantially, this regime addresses the legal vacuum that has so far ignored the social and cultural dimensions of TRE protection, while also serving as a strategic instrument to prevent unilateral claims and cultural exploitation by unauthorized parties.

#### 4. CONCLUSION

The concepts of originality and prior art within the first-to-declare system present serious challenges to the legal protection of Traditional Cultural Expressions (TREs), which are communal and passed down through generations. The registration system, which prioritizes the first claimant without considering cultural legitimacy, has opened the door to unilateral claims by unauthorized parties. The lack of formal documentation of TREs further weakens the position of indigenous communities in the prior art verification process, as the conventional IPR system prioritizes written evidence and the individualistic aspects of creators. Therefore, an alternative legal approach is needed that can recognize the collective dimension of TREs, through strengthening community-based prior art databases, implementing a sui generis protection regime, and harmonizing national and international regulations to ensure the fair and sustainable protection of the cultural rights of indigenous communities.

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