

FORUM

Law of the Surf Forum Number 2 Law, Culture and Knowledge of Surfing

Convened by Associate Professor Brian Fitzgerald
Queensland University of Technology Law School

Formerly Head of the School of Law and Justice
Southern Cross University

Edited by
Brian Fitzgerald and Geoffrey Clarke*

Brian Fitzgerald (Chairperson)¹

Introduction

There are three core themes to be addressed at this Forum.

Firstly to set the context, our distinguished panelists will consider what surfing means in the year 2001. We shall then move on to look more closely at the definition of the unwritten norms of surfing. The first “Law of the Surf Forum” held in 2000 (see (2001) 5 *Southern Cross University Law Review* 228) invited us to continue an examination of these customary rules, as they were seen as the way to maintain the spirit of surfing for future generations. Lastly, we shall consider the notion of the ownership of the culture and knowledge of surfing. The aim here is to look at how (surfing) culture is commodified, and the extent to which people can claim to have legal rights in particular cultural activities and artifacts.

* Editorial note: A special thank you to Greg Melick SC for helping us with this event, and to all the panelists and participants for their support. We were fortunate to have George Greenough, Max Perrot, Keith Anderson, Phil Roxborough and Paul Witzig, amongst others, in attendance. I might note that George Greenough’s t-shirt displayed an interesting yet apt slogan: “Respect is the Lore”.

¹ Head of the School of Law, QUT

Before we begin I would like to introduce Justice Greg James, who attended last year's "Law of the Surf Forum" and who has given us tremendous encouragement, to say a few opening words.

Justice Greg James²

Welcome

It is not hard to give encouragement and support to two of the things in my life I have loved, surfing and the law. This is the first time I have seen anyone put them together and putting them together here at Byron Bay makes this whole forum immensely attractive. Not only to me but also to all those people who over the past year have talked to me about surfing because they had heard what was said and seen the publicity for last year's Law of the Surf Forum. They have seen a university looking at surfing and law and have been frankly very envious that I had the opportunity to come last year and again this year. I welcome you all to this forum. It would be a grave pity if the vigorous activity, the thought and the promulgation of sanity and its standards last year were to fade away because we cannot do it again effectively this year. But it looks very much as though we can. We have Stephen Kuhn who has tried to look at this phenomenon of surfing and the law as a thesis topic and who must be dissuaded from not completing his thesis soon. We have got the impact of modern concepts of intellectual property, on what was once an individualist sport in which people really did not give any thought to whether or not 40 years down the track the movies made of them would make a great deal of money but for other people.

This evening we have Rusty Miller, who is able to give us the ethos and culture of surfing from almost the beginning when only a few of us surfed (perhaps here I should include Geoffrey Clarke's reference to an occasion when he had five days at Crescent Head with just two of them out surfing, something we will never know again), right through to the packed beaches of today. We will discuss the concerns that we had last year and how will the extension of Tort Law to surfing allow us to survive in an independent sport. Welcome again and we will now commence with the first panel on the culture and

² Judge of the Supreme Court of NSW

sociology of surfing, the presenter is Rusty Miller, the commentators are Geoffrey Clarke and Melanie Mott.

Panel I: What is Surfing in the Year 2001?

Rusty Miller³

A funny thing happened on the way to this meeting. We were trying to get a parking place in crowded Byron Bay. A Queensland licensed vehicle quickly stopped in front of us and backed up into the parking place. As we drove by my daughter noted that they were laughing at us because they got it and we did not. So I came here in a funny mood.

Anxious pushy crowds are happening in surfing here also and somehow we have to learn to live with this current reality. I choose to relate to the experiences of the Hawaiians in these matters because that is where I lived for some years and where I got the experience of handling large surfing crowds.

First I want to thank Southern Cross University School of Law and Justice for your work in cultivating our Australian culture of civil order and civil discourse. I appreciate your forums, your publications and positive belief in the democratic process. Thank you for these important things that you are doing.

The other night I was working at the computer and in the background I was watching a Sylvester Stallone movie called "Judge Dredd". It was in the future after the world order had broken down and outside the massive city walls was old war rubble and desolate, like pictures coming out of Afghanistan. This community had an interesting way of dealing with lawlessness. They had a group of ordained police/judges combined into one person riding around on flying space age bikes which could chase down anyone, anywhere. These individuals were police, judge and jury all in one: practical, efficient, low cost law and order: The Hobbesian World. This is a bit more brutal and less just than surfing's tribal law but it has its similarities: quick, definite and on the spot.

³ Professional Surfing Instructor Byron Bay - A Surfing Legend

My surfing life experience has contained an element of this sort of law and justice. It is the on the spot natural law and it revolves around the 'Hawaiian Way' where surfing originated. Hawaiians are very used to being swarmed and swamped with visitors from everywhere. They have been dealing with stoked up surfing crowds for over three decades.

Basically the key word in Hawaii has always been and still is 'Respect'. If you show it you might get some back, in the form of some waves under your belt. In the ocean there, it is obvious who has earned their stripes in the waves.

In earlier days as a grommet (young surfer) on the beach in California, when going to Hawaii was just another dream, the older guys and women were my heroes with their stories and pictures about their last adventure to ride the big waves with the Hawaiians. It was always about the Hawaiians being such amazing watermen and hosts. Their friendly open arms 'Aloha' way. They took you in completely, without condition. This is the Polynesian way; my home is your home. When you are in the Hawaiian home surfing, and you are with the families, playing music and eating with them, you do not want to be anywhere else. It is the ultimate feeling when you are in good stead with the locals. Duke Kahanamoku, who took surfing to Australia and also to California, represented this natural sharing generosity. It worked well and still works well.

Along the way came some surfers who took advantage of this Aloha way and helped themselves to more than their fair share of waves, daughters and wives. As we all know in Indigenous societies, crossing the line can have some very serious consequences. The surfing heaven when not respected can quickly turn into a nightmare. So where are we today with surfing and all its free spirits out there among the waves of the world?

In Byron we have a five star surfing destination, marketed by ourselves in thousands of coloured brochures as the best place to be (lifestyle deluxe, in a package). I use our surfing place 'The Pass', which is the most inundated spot, as a barometer. Most days at The Pass it is amazingly harmonious, as I believe most surfers are by their nature inclined to be friendly, peaceful and sharing.

But in the middle of this are those times when the population, intensity and hype in surfing increases, and this rule of natural balance and law breaks down. Sadly some of our most respected surfers,

those who we say have many stripes now choose to ride lower quality waves on less crowded beaches. This is what we are gathered here today next to the waves to discuss. How to maintain the rich fabric of the good surfing spirit?⁴

Much of what is great in human achievement involves some kind of intoxication, some sweeping away of prudence by passion. Without the Bacchus element life would be uninteresting, with it, it is dangerous. Prudence versus passion is a conflict that runs throughout history. It is not a conflict in which we ought to side wholly with either party.

All in all what I wish to conclude with is this thought, that we best not go too far down the path of over-organised legal rules and regulations, especially with surfers. As surfing is a very special way of life indeed, like a sensitive animal on the verge of extinction that could sadly be evolving into a unrecognisable, mutated, marketed box with the label: ‘Surfing magic for sale,’ we would best be careful.

Self-regulation by those in the tube is still the key.

Geoffrey Clarke⁵

Surfing began when the world was first formed. In the heavens above Tahiti it was decided by the gathering Gods that they would give the gift of flying on the waves to the people of their islands and they would call it “surfing”. The Gods decided that Hine Tepo Temerama would descend from the moon and take the shape of a mortal woman. The Gods would call her Hina, goddess of the waves.

Captain Cook may have been the first European to witness surfing. He wrote when observing Tahitian surfing in 1777, “I could not help concluding that this man felt the most supreme pleasure while he was driven on so fast and so smoothly by the sea”. However, the missionaries forbade the surfing culture of the Tahitians in the early 1800s when seeing naked men and women engaging in such a pleasurable pastime. The missionaries felt that surfing was an

⁴ Editorial note: Rusty Miller goes on to discuss the dichotomy between rational and non-rational motivational factors.

⁵ Surfer since the late 1950s; Southern Cross University Law Graduate, Solicitor

unfortunate heathen custom. Perhaps, the first time that surfing was considered anti-social behaviour and therefore a “sub-culture”.

The legendary Hawaiian Duke Paoa Kahanamoku introduced surfboard riding into Australia on the 23 December 1914. The first Australian to ride a wave in Australia was a woman, Isobel Latham. Until the 1950s surfboard riding was predominantly performed by surf lifesavers as part of their club’s activities. However, by the late 1950s the Surf Life Saving Association (SLSA) officials rejected the surfboard as a rescue craft, adding that surfing for fun did not fulfill the principles of the SLSA, somewhat like the 19th Century missionaries edict in the Pacific. A collective identity of surfboard riders emerged as a sub-culture and by the mid-1960’s surf life savers and board riders could be identified as two separate and hostile surfing cultures. Surfers in the 1970s described themselves as “hedonistic” “unconventional” and having a sub culture image while “clubbies”, the representatives of mainstream society, were described as “conformist” and “establishment types”. The maintenance of an alternative image among surfers today has become more difficult, due, to the paradoxical fact that the majority of surfers are themselves representative of the cultural mainstream. It could be argued that as surfing became popular with more people the sub-culture became part of a cultural mainstream of society.

The breakdown of a collective identity became more noticeable by the mid-1980s as the surfing culture went through a process of individualisation. Attention was focused on individual performances as enthusiasm for competitive surfing increased with the creation of surf stars through the media. The proliferation of surfing identities through contemporary surf movies (as opposed to the surf movies of the 60s and 70s), which only show them surfing, but nothing of the surfing lifestyle and the spirituality of surfing, illustrates the fragmentation of the surfing “sub-culture”. Some have argued that with the influence of the marketing requirements of sponsors, many surfers have lost their distinctive “sub-culture” image and the spirituality of surfing.

I believe that the “spirituality of surfing” is still alive within the majority of surfers. Surfing in itself is a unique cultural experience in comparison to all other activities pursued by humans. For example all the variables are moving: the wave, the person, the board, the wind, nothing is constant. Surfers, it could be argued, are the most optimistic people ever. We continually seek the ultimate surf and

while the surf may not be good on a particular day we continue to believe that “Huey” and/or “Hina” will produce that perfect surf. The ability to communicate with the true spirit of surfing is only limited by the philosophy and the imagination of each surfing individual.

Education is the key to surfing behaviour and education through surf rider clubs is the best way to educate surfers about their duty of care to other surfers and to abide by the unwritten rules of surfing. Therefore, a surfboard club education officer should educate not only the etiquette of surfing, but also the responsibility to other surfers in the surf. When parents take their children into surf they should explain the rules of surfing and that there is a duty of care to other surfers in the water and that the surf is there to be shared by all surfers. Through education, goodwill and common sense surfers will protect the “spirituality of surfing” through self-regulation therefore eliminating the need for governments to introduce legislation to regulate surfers and surfing. Surfing is a personal thing to each surfer. A natural element of respect in the surf by surfers for other surfers will preserve surfing as a way of life that has existed since the gathering Gods gave the gift of flying on the waves.

Melanie Mott⁶

First of all I would like to thank Southern Cross University School of Law and Justice for organising this Forum and inviting me to speak about the culture and sociology of women’s surfing. Please bear with me as it is been a long time since Sociology 101 and I am only presenting my own personal point of view. Other women surfers may have different ideas and opinions about how we identify ourselves as women surfers and the influences that shape this image.

I initially wondered whether there was a culture of women’s surfing but quickly realised that it has been around ever since lighter boards allowed for increased female participation. Over the last five years with the rapid increase in the number of females taking up surfing there are now many small formal and informal locally based networks of women surfers working hard to increase and support female participation in their regions and just enjoying the lifestyle. As an example a letter called “*Never too Old*” from the latest *Waves Surf*

⁶ President of the All Girls Surfriders Club, Lennox Head

Girl magazine begins, “Hello, I am 63 years old and my fourteen year old granddaughter recently got me involved in surfing. I love it! I have been surfing my beloved short board for three months and I am able to stand up and I am starting to do a couple of tricks. I want to thank my granddaughter for getting me into surfing and I encourage you all to surf. I regret not surfing years ago and I think all of you should get out there and try it”.

I am not sure if there are others here who have read a recent media release from Rip-Curl which reports on a survey claiming there are 720,000 men and 180,000 women actively surfing in Australia. The same survey reports that there are a further 480,000 women stating their interest to pursue surfing, but never having tried.

I think there is still a lot of fragmentation in the women’s surfing culture, especially at the grass roots level. The professional girls have their own unique challenges as a group negotiating with the existing male dominated official surfing associations and businesses. There has been some progress on uniting the voice of women’s surfing and the WCT girls initiated the formation of the International Women’s Surfing (IWS) association in the year 2000. The IWS aims to develop and guide the growth of women’s competitive surfing but also has a long term vision of sharing the influence, spirit and ultimate financial success of women’s professional surfing at all levels of participation.

Surf industries, probably a whole sub-culture in themselves, are certainly now a driving force in the development of our cultural symbols. Some might view this, somewhat cynically, as a branding process. There has been a huge surge into the market for specialty women’s surfing and lifestyle products. Unfortunately, this years women’s professional tour was plagued by cancellation and downgrading of events even before the tragedy in America. Only a very few of the elite girls have concrete monetary sponsorship from businesses to support their professional careers. It often seems to me that there is not much in the way of cash support being put back into women’s surfing by the big businesses. However, it must be acknowledged that this is just a reflection of the situation for women in most other sports as well and just part of the long ongoing process of achieving equity with men in all things.

I believe that most women surfers agree that although women could be considered a sub-culture of the larger male surfing community, we share the same reasons for being surfers as our male counterparts. We love surfing for the unique personal and physical challenges it gives

us. For the opportunity it offers to immerse us fully in our environment and just for the pure fun of riding waves. Specialist women's surfing magazines portray the girls as surfers first and appear to primarily emphasize that the girls can do anything, just get out there and give it a go. I am personally enjoying being part of the growing women's surfing culture and look forward to watching more and more women take up surfing in the future.

Already, in Byron Bay and Lennox Head there are times when there are almost as many girls out in the water as boys, and that is especially if the All Girls turn up for their club round. That is all I had to say today, thank you.

Peter Maguire⁷

I would appreciate it if Rusty could talk about the Hawaiians' regulation of their sport. How is it regulated in Hawaii or how was it regulated when you surfed Hawaii as opposed to today?

Rusty Miller

I was lucky and well prepared because of the many years dreaming about going to Hawaii. Before I actually got to go to Hawaii I spent a lot time on the beaches in California with older surfers who had been there: the late Mike Diffendiffer and Pat Curren (Tommy Curren's dad). The Windansea group and other elders would include me in safaris up and down the coast. When I participated in conduct unbecoming they would say, something like "Oh yeah you can act like that on the beaches and in the water here Rusty, but if you do that in Hawaii, they'll knock your ear off". And although I was a cocky young surfer thinking I was pretty cool, when I went to Hawaii, I was very careful and actually minded my manners. I also learned how to act from the Hawaiians who visited California and worked at Velzy's surfboard shop. They came and surfed at Swarmies, the point break where I lived, which was near San Diego. There was one surfer, who was a fantastic big wave rider and he came back with these amazing shots on these big waves and I could never understand why he had not gone back to Hawaii. I found out years later that he

⁷ Historian, Columbia University, New York

had done the wrong thing over there and he got a bad reputation and he could not go back because once you made a mistake over there you made bad karma for yourself. It was not just that you could not come back it was others like your sister and your brother, were excluded too, everything was very connected. Basically, there is in Hawaii, the concept of respect. If you have respect you will get to surf and if you do not have respect you do not get to play in the surf. The Hawaiians are organised like that. As it is here too I believe, but I think it is a little more indefinite. I think one of the points is that here at Byron Bay our local surf law has broken down and we are getting so inundated it's hard, even when the locals have it together, to keep it under control. This is what I am hoping we will be talking about today. What do we do as surfers? We share the surf but if the surfer has bad manners it is not right. This surfer should be told of his or her inappropriate behaviour. When I am in Byron or other surfing places I do not hesitate to remind people to act with respect for other surfers. I would encourage all caring surfers to be "friendly manners" police.

Stephen Schnierer⁸

I work at SCU where I was the director of the College of Indigenous Australian People for 12 years but I also have a background in Marine Biology. I was born and raised in Byron Bay, and have lived by the sea all my life. I am an avid fisherman, surfer and beach walker. I love the sea and have made it the focus of my studies at university. I got into surfing from watching my cousins, the Keevers, surf The Pass. They were the first surfers in this town and Keith Anderson is married to one of those cousins, Leona Keevers. I do love surfing and I do look up to the Rusty Millers of this world who show respect. I am heartened to hear two presenters today talk about Indigenous culture and surfing, as this is a big issue for me. At some point the surfing culture in Australia needs to think about and acknowledge the appropriation of this particular aspect of an Indigenous culture from the Pacific namely 'surfing' and perhaps bring about some redress. After all, surfing was central to Hawaiian cultural practices and only certain people were allowed to surf. Western culture has appropriated this cultural practice and turned it into a multi million-dollar industry. I firmly believe that the surfing industry should look at ways to share some of the huge financial benefits that come from the surfing

⁸ Southern Cross University

industry with the traditional owners. However that is not the issue I wanted to talk about here today.

I am interested in the idea of introducing laws into surfing and controlling some of the unacceptable behaviour that goes on out there. I have worked in a number of fora internationally and nationally in environmental areas trying to control the roguish behaviour of multinational companies dealing with Indigenous communities and their knowledge. I do not believe that creating new laws to control unacceptable behaviour is the only strategy we should adopt. We have to include a long-term approach in dealing with these types of issues. I am a strong believer in education and I think that we have to weave surfing and its culture into the educational curricula of our kids at school. The chronic behaviour that you see in the surf is not necessarily because of surfing *per se*, but arises as a result of the kind of society we live in today. Our kids are not being taught what behavior is acceptable. For example my son does a surfing school at Bangalow Primary School which is a five day course. I would like to think that the surfing school teaches something about the Indigenous roots of surfing and not just how to get out there on a board, and get in the road of someone because you do not understand what is going on.

Allan Atkins⁹

I think that there is a natural order of things out in the water according to the skill level of the competitors and the respect for ability maintains that natural order. I think personal selfish attitudes in the water, where persons of higher level skill take advantage of this and people of the lower level of skill are more ambitious than their skills allow, causes the whole system to come into conflict. When you look at it in terms of natural form you come back to a relationship between people and an education of the people that participate in the sport. I think we have a very good opportunity to have an ordered sort of society out in the water.

From an educational point of view I am not sure how much people know about our surf school networks. Our organisation coaches about 300,000 people per year. There are all sorts of groups from

⁹ National Executive Director , Surfing Australia

disabled groups, disadvantaged groups through to education departments, primary and secondary schools. We have programs that take student teachers and university physical education students through basic coaching. Our programs are designed as educational packages, they are not just skilled development programs. Everyone who travels through those packages get surf awareness and surf safety information at the same time. Our approach as an organisation is a holistic approach and we try and represent the lifestyle, respect and feeling for surfing in the way we present the programs. There is a big opportunity in Australia though this organisation to educate people in the water. I think that is happening. I think this is the key to where we will go in the long term to make better-educated people and help people better relate to one another.

Melanie Mott

I guess my only other comment is that there are always going to be people who won't show respect to anyone and will not show respect to any rules or even laws. I had a bit of a road rage incident on the way here too, Rusty, which I was quite upset about. I was passing through a small village west of Byron at 3.15pm in the school zone and was overtaken by a woman in a car, followed by a man on a motorbike both doing at least 80km and I just could not understand the mentality behind that kind of behaviour. Not only that, as I was coming out of the village I saw them both pull into a driveway of a house just up the road. So, there are going to be people who are going to flaunt those rules no matter how much education we give them. But certainly the more we increase awareness the more likely it is that we can stop people behaving badly out of ignorance.

Stephen Kuhn¹⁰

I have a comment on how as a community out there in the water you can actually deal with rogues. But, it is not just the rogues that cause the problems. I think we have to understand that with increasing numbers of overseas tourists in the water, some with broken English,

¹⁰ Legal Practitioner, New South Wales Aboriginal Land Council, Master of Laws candidate at the University of Wollongong researching the Law of Surfing

some who do not speak English, problems arise with people speaking at them. There are growing tourism ventures now with people coming in from Europe to do these surf treks down the coast and they get themselves into trouble. Maybe we need to look at this surf etiquette sheet being available in several languages and making surf schools provide them as a first base with that kind of information before they get out there in the water and get into that kind of trouble.

Brian Fitzgerald

Geoffrey Clarke and I were talking about whether surfers are good communicators. It seems to be that surfers are pretty quiet in the water, although they can be social. We were talking about how it might seem rude to communicate in the surf, because a lot of the time when you go surfing it is very quiet and loud mouths are not really appreciated. I am a teacher so we communicate a lot in our daily activities, but when you go out in the water unless you see someone you know, often it is a very silent experience and if someone yells at you, it is almost like an insult. Yet communication in the water could have a very positive consequence in that it could help us avoid collisions. What would you say to coaches if you were coaching younger people about communicating in the water, is there a protocol about how we should communicate in the water? Let us leave that question there for discussion.

I would now like to introduce Stephen Kuhn, Peter Coroneos and Margaret Bryant. Stephen is doing a Masters of Laws degree that is focused on the Norms of Surfing. It is an interesting project and he is probably one of the few people in the country or across the world in a Law School that is looking at this issue. Stephen just missed out on making it up here last year. Peter was here last year and is from the Internet Industry Association, he is a surfer and last year talked about how Internet rules and customary rules of surfing have similarities. Margaret is a local surfer who has been heavily involved in a number of surfing organisations.

Panel II: The Existence and Content of Surfing Norms

Stephen Kuhn

To start with, I am going to go to the issue that has just been discussed now about “what are people like out in the surf?” The first thing that I would like to say is surfing is a lot of fun and it is all of the things that people describe it as. It is “sick”, it is “wicked”, it is “choice”, it is whatever it is depending on what generation you are. Today we are looking at the rules that make all this fun possible, the rest of the time we are out there just trying to catch a wave and have a good time. I would like to bring that same sort of enthusiasm and fun into this conversation.

I will quote from a book by Kent Pearson, which for my research has become my gospel, the title is *Surfing Subcultures in Australia and New Zealand*¹¹. One quote that is relevant to today’s discussion is as follows:

The surfer who is able to paddle into critical take off situation, especially if it involves competing with surfers already in the take off area and successfully gains the inside position, is carving a situated role for himself. Repeat performers, surf to enhance or detract from the establishment of such a position. The playing of aggressive roles in relation to other surfers at take off is often not explicit, the technique of ignoring and affected nonchalance may assist the aggressive role player to maintain a facade which obscures his intention and gives some insulation from direct confrontation with other surfers.¹²

I believe that sums up what goes on out in the surf much of the time, and explains why there is not a lot of talking going on in the surf zone, because everyone is threatening each other but they do not want to say so.

I will now move on to specifically what I am going to talk about today. I have spent two years dwelling on these issues. One of the

¹¹ Pearson K, *Surfing Subcultures in Australia and New Zealand*, University of Queensland Press, Brisbane, 1979

¹² Pearson, note 10, p 155-6

interesting things about it, from a legal point of view, is that nobody has talked about the law of surfing and nobody has looked at that issue and really, from a research point of view, that is where you want to be. You want to be the person that is doing groundbreaking research. There are other areas of law and other instances where people have looked at the issues of social norms.

One of the things that Rusty talked about was the crowded surf in Hawaii, which has been happening for three decades. In *Surfing Subcultures in Australia and New Zealand*, Kent Pearson says that in 1911 the beaches of Hawaii were crowded; he says the emergence of modern surfing as we know it started in 1908. Kent Pearson cites George Freeth as the first modern surfer to take surfing to California. What happened was that there was an American tourism writer and an American journalist who happened to be in Hawaii at the same time, in about 1907 or 1908. One of them had already been there for a while and said to the other, “You have got to come see this guy do his trick” and they watched this guy surf and were amazed (read “stoked”). One of them supposedly went out and learnt to surf, there is a dispute about whether that actually occurred. They published an article about the people who walk on water and lo and behold three years later Hawaii was a surfing Mecca. Many Americans, who had the finances and the adventure spirit, began going to Hawaii to surf. Pearson goes on to talk about how crowded the beaches were in 1911 and by 1915 they were even more crowded with as many as 150 people in the water surfing at one time. I believe that the crowds would have fluctuated from time to time. I think surfing is a fashion industry and it comes and goes like other fashions resulting in variations in crowd numbers.

A comment was made that we have to be careful about using surfing as a “surfing magic for sale”. In fact that is exactly what they did in 1908 at Huntington Beach in California, which was named after Mr. Huntington who was a railway and real estate entrepreneur. Those two things combined well to establish Huntington Beach, which is south of Los Angeles. Huntington heard about George Freeth and he sent his representatives over to Hawaii and offered money to Freeth to come to California and surf near Huntington Beach. Huntington was subdividing land at that time and to increase sales he had Freeth surf for the potential purchasers. So everyone started buying property and the rest is history. This highlights that surfing magic for sale has been used for some time.

There have been some comments that imply surfing is a sport. That is one of the issues that I am addressing in my research because I am not decided on the issue of whether surfing is play or a sport. I am certainly not convinced that surfing is what you would call a sport. Kent Pearson again, does quite a good analysis on it and on the balance of probability approach, 51% suggests that surfing is sport and not play. I tend to disagree with that because I believe that surfing is play.

The idea that surfing is play is something to keep in mind, when we are talking about surfing. Surfing is a fun activity. Hilary Kuhn once described the beach to me as “Australia’s anarchic zone”. That is the term that I think appropriately describes our relationship with the beach. The reason I say this is that when you go to the beach you strip down more than you do in any other environment that you ever go into. You run around freely and you mess around freely in the water and I think the joy element that comes with that is something that we need to keep.

That is one thing that I believe has gone in the last forty years. If you look at film/video footage from the 1950s and 60s of people at the beach, people would take anything that floats and basically try and ride that on a wave and they would all be laughing and knocking into each other and it was not such a big deal. These days, people say, “I am on a long board”, “I am on a short board”, or “I am on a boogie board” or whatever and you can go where-ever you are allowed to surf on that craft according to the local rules. People claim a wave and want to have it to themselves.

The question that I have been asked to look at is “what are the norms of surfing?” When I first approached the topic, “the Law of the Surf” for my current research I thought I would look at how the laws of the surf were like other laws. Now I have changed my approach and I start with the position that the law of the surf is the law of the surf. If we were to impose another system what impact might that have? When I say impose another system, I mean change it from an oral tradition practised by a bunch of people out in the surf trying to deal with each other in that particular situation to some sort of formal written down form. In essence, change the nature of those laws.

I now take the approach that surfing is an activity and surfing does not need to be analysed from a legal perspective. Surfing is an activity and I am looking at the law and saying “what does the law actually have to offer?” When I am saying “the law” in that context I am referring to

common or judicial law, and parliamentary law. I am not referring to the law of the surf, which is just the social lore that currently exists.

I did some historical research to see whether there has been any successful regulation of surfing. In relation to surfing related injury, the NSW Government has completed two reports but has never really imposed or done anything as a result of those reports. This happened because their findings were that the types and the regularity of injuries as a result of surfing are insignificant in terms of the government imposing some sort of regulation to control it. There have also been some defective attempts to control surfing. I remember in the mid 1980s when the government said you could not make a surfboard sharper than a 20-cent coin at the nose. I think that regulation lasted for about six weeks. There were some boards with these 20-cent coin noses, and then all of a sudden the boards got pointy again. That highlights one other issue. Anyone trying to regulate the situation is going to have a hard time actually enforcing the new regulations.

What is really important about informal laws is that they give people an opportunity to regulate themselves. It lets them deal with their own environment and have some control over it. I would argue that they are as vital to the sustenance of our community as are the laws that are imposed by the judiciary or by the Parliament. This is an opportunity for people to actually think for themselves and work through the difficult processes. In the surf if you drop in on somebody or you have cut somebody out or you have done something else, you know you have done something wrong. You have a few options. You either paddle further away from where you last took off or you go back there and apologise. It is that experience and the capacity to deal with that situation that is important. The issue is that not everybody has a desire to co-operate with others but that is a psychological problem not a legal problem. It could be dealt with perhaps by education but that is another issue. I think that these informal laws that we have in our society are vital.

If we start to undermine these laws by suggesting that there are other ways of regulating, by writing down the laws, then I do not think that is the right way to go.

What is more important to me is the possible damage written laws can do to the environment of surfing. For a start, if you have written rules then people are going to look at them and say “Alright, well, that is what it says”. People are going to be out there in the surf quoting

them or contemplating them, rather than wave by wave determining what is going on and making a decision. They are split second decisions as well, about what is going to be the best way to act in this situation.

The other thing about it is that people do not interpret rules the same way. What someone actually reads or what someone sees in a picture, which are what most of these posters depend on, is not the same thing that everyone else sees. If “a picture says a thousand words” and the words beside it say “do not drop in” well, the picture and words are open to interpretation. It is going to be different for different people.

So what are the existing laws of the surf? I conducted some surveys from Wollongong, where I live, up to Noosa. I passed through Byron Bay and went to many other places. Part of my survey asked the question: “Name five laws of the surf”. Most people could only name two maybe three but interestingly enough, from the responses, there appears to be about 15 or 20 rules of the surf. The list of rules on the east coast of Australia, as I have compiled them, is as follows:

1. Do not drop in
2. Do not snake
3. Paddle out wide
4. Give way to the person on the wave
5. Give way to the person paddling out
6. Do not throw your board
7. First person standing has right of way
8. Person furthest inside has right of way
9. Respect locals
10. Respect elders
11. Have fun
12. Do not surf between the flags
13. Paddle out on the rip
14. Do not hog waves
15. Respect learners and beginners
16. Do not take anger into water

17. Respect travelers
18. Do not surf alone
19. Wear a leg rope
20. Keep out of swimming area
21. Person on left has right of way
22. Indicate if not taking a wave
23. Do not spear board at people
24. Do not apply to boogie-board riders (so none of the rules apply to boogie-board riders)
25. Go hard
26. Respect the environment

Surfing is a subtle sport and the ocean is a fickle master. The fluidity offered from the oral rules that have developed with surfing allow for people to use their own judgment. In using this judgment people and communities work out their own boundaries. Surfing has existed in its modern form for nearly 100 years. I would argue the reason it has no written rules, unlike nearly every other aspect of our lives, is that it has been self-regulating and it works.

Justice Greg James

Last year I tried to explain that there is a great deal of mystique about what law does apply in Australia below the low water mark. Believe it or not there is very little statute law that does apply below the low water mark. Some years ago a very young lawyer by the name of Lester Bryan, who has since gone into another job up here, tried to look at challenging the surf club's entitlements to order board riders to surf in particular areas of the beach. At about that time the High Court dealt with the *Seas and Submerged Lands Act* case¹³. This case made it perfectly clear, in combination with a number of other cases, that State Authorities had little power to regulate below the high water

¹³ *New South Wales v The Commonwealth* (1975) 135 CLR 337. Also see *The Commonwealth v Yarmirr; Yarmirr v Northern Territory* [2001] HCA 56

mark. Consequently you will find that there is very little applicable State legislation. New South Wales has some, but it mainly regulates power craft. The common law runs, that is the judge made law. There is not the slightest doubt that if you run over a boogie-board rider you can be held to be negligent and can be seriously hit with a big award for damages. You may find yourself charged with crimes ranging from maliciously wounding through to manslaughter or if you do it deliberately, murder. There have been charges of manslaughter in California in the past two years. The criminal law runs, judge made law of negligence runs and bluntly speaking, if you try to ride a board between the flags you will be in trouble.

Stephen Kuhn

Just to let you know the actual rule that you breach when you surf between the flags on a surfboard is that you are disobeying a sign.

Peter Coroneos¹⁴

I guess I have an interesting perspective on this because I have been a surfer since I was 13 and have been involved in running the national industry body for the Internet. If you came to the forum last year, you would have heard me say that the Internet has a lot of similarities with surfing; its sort of an unregulated space which arose from very anarchic origins.

I guess the difference is that the military was somewhere involved with the formation of the Internet. I do not see any evidence of that in the ancient Hawaiian culture.

The issue with Internet regulation is that at this point in time the government has moved in and has started passing laws affecting how people can conduct themselves on the Internet. The big problem with that is going to be how they will actually enforce the laws because the Internet is this thing with many unidentified uses. The reason the government has moved into this space is because they have seen that there are a number of continuing problems, like child pornography and spamming. These are unresolved issues that are becoming more problematic. They are affecting more people and at some point

¹⁴ Chief Executive of the Internet Industry Association, Australia

governments think that they have to intervene because the community is not adequately regulating itself. In that context I think there is a danger for surfing. I am not an advocate for passing written laws with government backing to regulate surfers' conduct. I think that would destroy one of the reasons we love surfing so much – because it has that freedom about it.

I am really interested in the fact that people, like those here today, have moved to explain the need to self regulate surfing. I think it is a more fruitful approach. I know there may be legal issues about the enforceability of those rules but at least that, combined with an education process, might provide the solution so that governments are not tempted to move in and intervene. As I said last year it might only take one politician's child to be killed in the surf to see laws passed quick smart in parliament to regulate surfing.

We have seen this in the Internet Industry. If the politicians see there are votes in this, or they are personally affected, then you will have laws governing surfing. The fact that they cannot be effectively enforced is sometimes not an issue it is more about a symbolic value and I believe that is the real risk. In summary, what we have learned from the Internet Industry is the extent that the surfing community itself can be pro-active in its self-regulation and that is a good thing.

Two issues flow from this. Firstly, it avoids governments taking control and messing it up for surfers and the surfing community. The second thing is that the people who have the greater understanding, people that are using the activity and are involved in it are the ones that have the control. I believe that it is better to have the control within your own space rather than having someone else come in and impose something on you. We should think about this issue of 'norms of surfing', what does it actually mean when people create rules?

A judge such as Justice Greg James has the power given to him by the government, through the people, to determine the rights and responsibilities of individuals in society. Justice Greg James can make a decision that can put someone behind bars so he carries a very heavy responsibility. A Judge has the power to exercise authority to actually affect your freedom. If we are going to give a Judge that power through these laws then we had better be pretty careful about making sure that the laws have got a legitimate foundation. In societies where people hold the law in contempt you get anarchy. That is when you get people rising up against governments and the judiciary because

people think these rules do not apply to them because they were not involved in their creation. To these people those laws have no legitimacy.

I started thinking along these lines and applying this reasoning to the issue of writing codes for surfers. The question immediately arose, "What is the power? What is the force of the set of rules in the community of surfers?" Perhaps the surfers at Margaret River might decide for themselves. What sort of standing do those rules have in other communities of surfers elsewhere and why should a surfer pay any attention to that anyway?

I think that this is a really interesting question. I believe the answer is somewhere along the lines that, it's almost the tribal nature of surfing. You have almost senior members or more experienced surfers who tend to have the respect of the group.

This is probably how laws began in the first place. There were communities of wandering tribes and there would be at some point, people within the communities that were recognised to have authority. They were the elders and the community was prepared to accept the wisdom that the elders provided. They are the ones that we assume know more about it than us or know best what is good for us.

Let us say I am a little grommet and my mum said, "You can go surfing but you better go and find out what the rules are first". Being a thirteen-year-old I am obviously an expert Internet user so I go on the Internet and type in "rules of surfing". This is an exercise that you should all try. It is interesting, you get up to 5 pages of about 30 links on each page, about 150 links, which I found in about a second. I am reading these rules and it is like some of the things that Stephen was talking about, no snaking and do not drop in. There is a lot of commonality there and then you go to other sites and they have competition rules. They are sometimes a little bit different, for example, right of way rules that you may not apply everyday in the surf when free surfing.

There is an interesting thing that is emerging. The Internet is a great repository of information and you can go there and get a snapshot of all these rules that have been created all over the world to do with surfing. The majority of the rules are similar but there are some quite strong differences. Which of these rules will apply to me here in Byron Bay when I go surfing tomorrow? Are they the ones that make more sense to me and that I agree with, or the ones that the Australian

Surfing Association says are the rules? Or what the locals say apply? Or none? I do not have an answer to the question I am just raising this as an issue.

If we are going to engage in a rulemaking process that does not involve the passage of formal laws, then I believe we have to involve the surfing community. Otherwise I believe that you will have a problem, as we have found in the Internet Industry, where a self proclaimed authoritative body attempts to make rules and others do not feel they have had an input into their development. Then there is no ownership and there will be problems with compliance.

Remember the Monty Python movie, “Quest for the Holy Grail”? King Arthur rides by on a horse and there are these two peasants in the field. One of them looks up and says, “Who is that guy?” and the other says “He is the King,” and he says, “Well I didn’t vote for him.” and then there is discussion about whether he is insulting the King because he did not recognise his legitimacy.

Our experience in the Internet space is that it is always better if the community itself can reach consensus on standards. E-mail is an example. There is a thing called ‘netiquette’ when you are on the Internet. It is always bad to type e-mails in or post to newsgroups all in upper case or in caps because netiquette says that that is equivalent to yelling. You should always use lower case or upper and lower case. So that is a rule of netiquette and it has just evolved, I do not know where it came from but that is something that the community had developed as part of just being nice to each other, respect for one another.

To some extent the Internet community has become self-organised. It is a bit like the Wild West when you begin. Anything goes and then eventually the community will appoint a sheriff or a marshal and then they will assume some control. Then you have some stability. Then society becomes a little more organised. They might appoint a judge and then they will have education. Then you end up with civilisation. I was really privileged to hear Rusty Miller’s comments about the Greeks and the whole concept of ostracisation and the concept of social order. I mean, the Greeks really were the creators of social order, as we know it, the forerunners of our civilisation. I think, historically, you can look at parallels and learn from the things in the past and see that we do not have to reinvent the wheel here.

Another issue is whether the norms of surfing can coexist with legal rules that are enforced by courts. Since the *Mabo*¹⁵ decision there has been a lot of discussion about how indigenous customary law can coexist side by side with imported law, which is what we received from the British. I spent a short time living in Darwin and there were many interesting questions about whether the courts and the police should intervene if there had been a tribal dispute and it had been resolved by the community.

This raises the interesting question of the interaction between codes of practice that either the Internet Industry or the surfing community can write for “ourselves” and the traditional law, which may seek to override or defer to the codes of practice. In summary, my hypothesis is: to the extent that we, as a surfing community, can self regulate effectively, then we are less likely to invite the complexity of an externally imposed and enforced set of rules. That should be our aim.

Margaret Bryant¹⁶

I thought that I would just speak from my heart rather than from notes. I feel that as an older woman surfer, I have a role to play with the girls who are involved in our surfing club and who look to Mel and I as their role models as to how to behave in the surf.

We have about 70 members in the club and we have very little problem with the girls behaviour in competition and in the surf generally. Everybody in this room, I am sure, has dropped in, whether it be on purpose or as a fun thing or just by mistake. I think that is just the way surfing is as there are so many variables. Mel has even said to me and for which I am really happy, “Marg have another look”, you know I have actually done something wrong and I appreciate that I have maybe not looked, especially on a more critical break. There are different sessions where surfing is sometimes more serious than at others sessions.

You might go to Wategoes and have a fun day and it does not really matter if you drop in, share a wave and that is fun. Obviously if you’re less experienced you do not go to the point at Lennox and sit in the take-off zone because undoubtedly someone will tell you to get out

¹⁵ *Mabo v Queensland [No. 2]* (1991) 175 CLR 1

¹⁶ Secretary of the All Girls Surfriders Club, Lennox Head, New South Wales

of the take off zone. So where do I come from in relation to the norms of surfing? I see myself setting an example for the young girls out in the surf, while still looking upon my peers to set good examples of behaviour including acceptance of others in the surf.

I must say that in the majority of cases, the behaviour of surfers, particularly women of course, with the odd exception, is very good. The focus of surfing is to have fun and enjoy the companionship of other surfers. I have noticed on the odd occasion that aggressive surfers do not seem to relax, enjoy and have fun surfing. They surf as if they own every wave that comes and do not share the waves. This behaviour suggests that the person does not have the true feeling of what surfing is all about. This behaviour I feel creates more problems in the surf, therefore it is imperative that we share the waves and enjoy the surfing companionship of man and woman in the surf and most of all respect our peers and preserve our ocean environment and the spirituality of surfing. I firmly believe that if surfing remains free of interference from those that believe that they own the surfing culture and from government legislation then the surfing ethos will be preserved as it was in the beginning. Thank you for allowing me to express my thoughts feelings and passion not only as a woman surfer but also as a surfer.

Brian Fitzgerald

Surfing is a very visual activity and I believe the more we see it commodified or marketed the more we will see the exploitation of its imagery. We are going to see more disputes from a legal perspective over who actually owns images and the cultural representation of surfing. We have already seen this happening with Indigenous culture in relation to the protection of Indigenous cultural images.¹⁷ Similar questions could be raised of the whole surfing culture as well; questions about ownership, exploitation and user rights across the board. We have as our next presenter Jaime Massang, who works in the area of intellectual property law. He will present a paper that will look at some of the more practical examples of where intellectual property rights can be found across the surfing industry.

¹⁷ *Bulun Bulun v R & T Textiles Pty Ltd* [1998] FCA 1082

Panel III: The Ownership of Surfing Knowledge or Culture

Jaime Massang¹⁸

I believe the reason I have been invited to speak to you is because surfing intellectual property makes big money for a select group of people and that there is no reason why any of you cannot turn your hobby and ideas into a livelihood.

In general I believe surfers have a very poor knowledge of the value of their own Intellectual Property. In fact some of the most brilliant developments in surfing technology have never been protected either by way of a patent or design registration. I am talking of various developments in the designs of surfboards. Large companies who actually own a well-known brand name market these as their own products because the idea had not been protected by the original designer. For example, it is no problem to get a computerised shaping machine to copy a brilliant board design. Think of Simon Anderson and the “thruster” design, which is a standard fin configuration, or David Nuuheiwa and the “fish” design. In fact, in recent times, certain luminaries were surprised that they did not even own trademark rights to their own name. I am sure we have all heard such stories. The real lesson here is that if you start a business but do not register your Intellectual Property, it is then available for all others to use and then your business is worth a fraction of what it really should be worth. Ask yourself what Rip Curl or Billabong would be worth if their trademarks were not registered? In reality, nothing, because all the goodwill in their businesses is in their trademarks.

I see Intellectual Property or IP in surfing divided into three main groups.

1. Copyright: Literature in forms of video, publications such as magazine articles and journals.
2. Inventions and designs: Patents and design registration for new surfboards, fin systems, wet suits, leg ropes, sunglasses, shoes, surfing apparel and accessories.
3. Brands and Trademarks: Basically where all the money is for example, Billabong, Rip Curl, Hang Ten, Reef etc. Mainly in

¹⁸ Pipers Patent and Trademark Attorneys, Brisbane

class 25 for clothing, footwear and headgear; also in class 28 for games, playthings and sporting equipment such as surfboards, boogie boards and surfing accessories.

Personally, I own a respected person/brand long board and the only reason I bought one is because of reading and hearing how good the boards are. In fact, it has not improved my surfing ability one bit but the board lets my colleagues know that at least I know a quality board or am prepared to pay the price for one.

So the reputation which I am relying on is all locked up in the respected person/brand. For all I know it could have been shaped by shaping machine and the respected person/brand stickers simply applied later. Such is the power of trademarks.

Surfers, or at least those in the know, will realise that the personality definitely will not be responsible for shaping the boards when they retire and the respected person/brand could become like any other factory brand. We have another important lesson and that is that the use of your own name can present problems for your business. The lesson is that if you start a business use a brand or trademark that is not limited to the working life span of the producer of the article because when you actually sell your business all the goodwill will be attached to you personally and not the business. This is important because someone actually purchasing your business will only be buying plant and equipment and will only pay a much reduced price, as they will really be buying second hand plant and equipment at that.

Differences Between Trademarks and Company or Business Names

In legal language, company or business names do not confer proprietary rights. That is, they are based on consumer protection legislation to simply identify to the public who are the principals running a business. Trademarks on the other hand do not tell anyone who owns the business. Yet unlike company or business names they are the next most important Intellectual Property assets of most business. For example, Coca-Cola and McDonalds Corporation may own their trademarks but it is the trademarks themselves and not the companies, which is the real IP asset worth millions of dollars.

In 1998, BMW and VW were locked in a struggle to purchase the “RR” trademark. Volkswagen bought the Rolls Royce Motor Car Company with an eleventh hour bid of £479 million. BMW was left to buy Rolls Royce PLC for £40million, which was the aircraft engine division. Can you imagine the reaction of Volkswagen’s chairman, when he discovered that the “RR” trademark was actually owned by the aircraft engine division who had been licensing the “RR” trademark to the motorcar division all along? In effect BMW now owned the mark, which it bought for less than a tenth of the price. Volkswagen paid for what was really a second-hand motor car factory. BMW now licenses the “RR” trademark back to Volkswagen who will continue making Rolls Royce cars. In the future Volkswagen will only be making the Bentley motor vehicle. The reasons you will not hear this story is because of the mistake by Volkswagens’ lawyers, and the “best of British” cars is now made by the Germans. Neither BMW who makes Rolls or Volkswagen who makes the Bentley, would want to damage their markets by making this known to their Imperial, British or Royalist purchasers.

Patents and Designs Rights

There is a difference between patent and design rights. A new surfboard shape is generally covered by designs because no one can get a patent for a surfboard. However, if it is an entirely new type of board this can be patented. For example, the POPE BISSECT board which comes apart in two pieces or the removable fin system marketed by FCS and GORILLA GRIP are patented.

Another example of patentable products is the safety helmet made by PUMA and that made by GATH. This produced some interesting litigation. One of the patents I have been involved in personally is sunglasses specifically designed to be used in the surf. New inventions in the surfing scene include a powered surfboard, which should make tow in obsolete or at least take the pain out of paddling through the break.

Copyright

In Australia there is no official register of Copyright. The good news is Copyright exists instantly once it is created and lasts for a period of fifty years after the year of the death of the author of the original

work. The down-side is that an allegation of copyright infringement is quite easy to defend, namely, that there was no copying involved but that two or more authors came up independently with exactly the same artistic piece of work. Copyright as you would know is generally for things such as books, videos, magazines, drawings etc, which cannot be protected by either patent, trademark or design registration. There is however some overlap in two-dimensional designs, namely designs that go on T-shirts for rock bands and the like. Examples of how copyrights have been used by surfers include; videos made by Chris Bystrom, the surfing books by Nat Young and Jeff Hakman, *Mr Sunset*, as well as other publications such as *Australian Long Boarder* and *Surfing Life*. Most of the images and cartoons used in these publications attract copyright.

Summary

Finally what does all this mean? It simply means that there are a lot of intellectual property rights in surfing, which can be protected. You only have to look at the company earnings made in registering trademarks such as Billabong and Rip Curl. The story of Gordon and Rena Merchant cutting out board shorts on the kitchen table is well known. This example shows how some surfers are at least aware of their own Intellectual Property and have in fact by seeking formal protection gone on to make money from their trademarks and designs.

As I previously mentioned, the real money is in surfing apparel where the whole genre of surf culture, which is all too evident, is shown in T-shirts, sunglasses, jewellery, and footwear. Finally, remember that the big surfing businesses all started from a little idea and the only way you will make any money from the idea it is to protect the idea.

Anne Fitzgerald¹⁹

I first came to Byron with friends of mine in about 1972, we went around to Wategoes and there was nothing much there in terms of the built environment. If you actually look back to the early 70s basically no-one would have imagined that the culture of Australia and I guess to a certain extent, other really developed countries like the United

¹⁹ Intellectual Property Lawyer

States, would focus so much about life lived in the natural environment. Now we have actually adopted this different lifestyle highlighted by changing demographics. We can plot the movement of people to the coastal areas in Australia. My view of Australia is that the land and the sea will always dominate the people of Australia and this has been happening at least for the last 60,000 years with Australia's Indigenous people

What we are actually seeing, as the non-Indigenous generations learn to live with this land bordered by sea, is that we are focussing on our natural environment. From this we now see companies designing and manufacturing the unique style of Australian clothing, the surf kind of clothing from companies like Billabong. Associated with that, is the body of law, upon which I have written a book - *Intellectual Property Law*. If you create and make a living out of your creation you should be protected from others who exploit your creativity. To me that is the real issue, the whole relevance of why we talk about understanding intellectual property and why it is going to become more important in the future for people who really understand and enjoy surfing, the surfing lifestyle and what happens to this lifestyle.

Brian Fitzgerald

One of the things we will continue to see with the commercialisation of surfing is the exploitation of imagery of people who are famous in surfing or who have notoriety in surfing. This raises the question of personality rights and the extent to which those images can be used without permission or compensation.²⁰ What is fair use and what is misappropriation? These are issues that will no doubt arise in the future. And what about those that made surfing famous and marketable; are they entitled to claim compensation for their efforts in making surfing an intellectual product?

The further point to make is that while Jaime and Anne have highlighted the power of intellectual property law to bestow legal rights upon creators of surf culture, we should not forget that claims to access such culture might also collide with the granting of rights. Just as we have seen in the digital environment of the Internet we may also see in the surfing environment a movement that argues for freer and broader access to surf culture and artifacts in the face of

²⁰ *Talmax Pty Ltd v Telstra Corp Ltd* (1996) 36 IPR 46

intellectual property rights: free surfing. And this leads to a key issue as to when, where and to what extent culture can be commodified and protected through intellectual property rights.

Stephen Schnierer

I have worked with advisory groups with the World Intellectual Property Organization (WIPO) on what is a very parallel situation. Where you have multi-national companies from Japan and the US actually taking out patents on things like the formula for curry which belongs to a particular group in India or the healing properties of Indigenous traditional medicines that have been used for thousands of years, because of their commercial value. There is not a lot of protection for the originators of that knowledge and those processes. This brings me to the comment that I wanted to make in terms of surfing, I believe that at some point we who love this activity that we are engaged in should be acknowledging and respecting the culture from which it came.²¹

Justice Greg James – Summing Up

When I gave the welcoming address, I expressed the hope that the vigorous debate here and, afterwards more widely, about the issues raised in last year's Law of the Surf Forum would not fade away, it is quite apparent that it has not. Brian has asked me to make a few remarks to sum up this Forum. Not only have we heard from Rusty Miller, Mel Mott and Geoffrey Clarke about the history, culture and spirituality of surfing but that discussion pointed a way to the later analysis of surfing's core values and its property values. Margaret and Melanie in particular dealt with the application of the history and culture of surfing and the norms of surfing as it relates to women's concerns. Some of the contributions by such people as Stephen Schnierer relating surfing to Indigenous issues and that of Alan Atkins the National Executive Director of Surfing Australia, dealing with issues of education, expanded the debate. There was much discussion, particularly over Stephen Kuhn's suggestion that the

²¹ Editorial note: Stephen also made some very interesting points about the exploitation of indigenous names in the market place and the legal regulation of such activity.

Code of Conduct for surfers whilst well meaning, in the light of modern Torts Law may create a liability in those who disseminate it.

The intellectual property issues outlined by Jaime Massang and discussed by Anne Fitzgerald were translated into the practical day to day concerns which we were told about by George Greenough who linked board design and intellectual property concerns to safety issues. Anne Fitzgerald related Jaime's detailed practical exposition, from the view of a patent attorney to the wider theoretical and academic concerns of the law.

Once again it was good to hear from Peter Coroneos of the Internet Industry Association who traced the similarities between Stephen Kuhn's anarchic zone (the beach) and the conventionally, self regulated Internet.

In summary, this has been a forum with practical, academic, and historical content carrying on the tradition so wonderfully established last year. The Southern Cross University School of Law and Justice is to be congratulated in including this forum in its 2001 Summer School provoking vigorous and wide-ranging discussion.

Appendix

The following paper was distributed at the Forum.

Preserving the Spirit of Surfing

Brian Fitzgerald & Geoffrey Clarke

Every social system has a set of “norms” (code/rules) that it uses to bring order and safety to the activities of daily life. Surfing is no different. There are “norms” and most surfers adhere to them, or at least they think they adhere to what they think are the “norms”.

Surfing has a deep history in Polynesian culture and in the last 100 years (at least) has been of significant interest to people in Australia and the USA. At times over this last 100 years surfing has been of immense popularity, where at other times it has been regarded more as a sub-culture. The surfing scene of the late sixties and early seventies – “the soul generation” - certainly exhibited aspects of the social revolution taking place in Australian and American culture. The image portrayed across the popular and surfing press was of an anarchic sub-culture wherein surfers were a culture unto themselves. Tribal laws predominated.

In more recent years, especially since the mid 1980’s surfing - which includes short and long surfboard riding, body surfing, boogie board riding and a number of other activities - has exploded in popularity. It is now a mainstream sport or past time or recreational activity depending on your perspective. It is estimated that in Australia more than 2 million people surf. On any given day you will find thousands of surfers along the coastlines of Australia. The increasing popularity of surfing has increased the potential for accidents and possibly intentional aggression. The limited nature of the resource (waves) to be allocated amongst the growing numbers of surfers continues to raise issues. Have you ever been surfing and sworn at a person for dropping in or dropped in yourself – even if accidentally? Or have you been involved in a board to board collision or even physical aggression of body to body?

Surfing does have some basic “norms” that instill respect for the safety and soul of fellow surfers. In an environment of limited resources and dangerously crowded surf beaches the spotlight has fallen on them to provide some answers. These “norms” have been

passed down through generations of surfers, mentors and/or gurus or more fundamentally through board-riding clubs and surf schools. Some say the “norms” should be part of the labels attached to surf clothing, equipment and surf-craft. The Surfriders Foundation has a charter of “norms” which it has put on a poster, and is also found on the Internet at www.surfrider.org.au.

The most basic rule is that one surfer should not “drop in” on another surfer. Other rules have emerged. Nowadays for instance it is common to hear the term “snake” which means something like to unjustifiably steal wave priority. As well, it is generally accepted that the person paddling out should give way to the person riding on a wave toward the shore. Yet there are some countervailing considerations because rules must be interpreted and applied in a common sense or reasonable way. If a surfer riding in could take action to avoid or mitigate a collision then it would be reasonable to expect them to do so. You cannot always take the right of way regardless of risk.

The law is looming, particularly the law of negligence. Simply stated, to prove negligence you need to show a duty to take care, a failure to observe the standard of care expected of a reasonable person, and resulting damage. In many cases, negligence is the law or legal principle that is invoked if you are involved in an accident.

To some extent proving whether there is a duty to take care and whether it has been breached will depend upon the practices employed in the surfing culture. The “norms” will play an important role in determining if someone has been careful – obeyed the “norms” which are designed to bring safety to surfing. However, these “norms” need to be interpreted reasonably when deciding whether there has been a breach of a duty of care.

In Australia, we have yet to see one surfer sue another for a collision. But surfers can and have sued local government authorities and lifesaving clubs where board-riders have collided with surfers swimming between the red and yellow flags. Suing other surfers is against the sub-culture. But as the sub-culture becomes main stream the ethics of surfing are watered down. Wisdom will no longer be bestowed by surfing elders in the line up or by the local community but by the vagaries of everyday society.

There is another interesting legal point. Do we consent to harm by going into the surf? We must know that surfing is a risky activity in

which physical injury is highly likely no matter how small the waves. By entering the surf do we agree to the inherent risk of injury? For instance, a rugby player cannot complain about breaking an arm in the ordinary course of the game because they accept a certain level of risk. Lawyers call this “voluntary assumption of risk”. But a rugby player could seek legal redress for receiving a broken jaw through over zealous violence outside the scope (rules) of the game. This would be a risk to which they have not consented. So the issue of consent to risk or injury is important and not yet fully determined.²²

Also, what if you contributed to the injury, by not following the customary “norms”, using common sense or taking the appropriate evasive action, is that relevant? Lawyers call this “contributory negligence”. Contributory negligence is simply a failure to take reasonable care for one’s own safety and is assessed and apportioned under law meaning that you must accept blame for your contribution to the damage.

Localism is also a difficult issue. It is part of the culture of surfing for locals to aggressively regulate their resource, namely the local break. The nature of localism has changed in the last two decades as the popularity of surfing has grown. True localism has not disappeared but the emphasis has changed; visiting surfers are expected to respect the local (surfing) community and the environment of the local breaks. However, locals who use violence to justify their priority or privilege can face criminal charges. If you intentionally punch someone unjustifiably while surfing this is assault/battery and it can lead to a criminal prosecution and/or civil action.

To ensure that any set of rules that emerges understands the nature of surfing it is important to give some definition to the “norms” and the Surfrider Foundation and others have progressed along this path. Most people have some idea that some general rules apply but when pressed to give some closer definition to those norms certainty seems to disappear. However we need to be careful that we do not create norms and set them in concrete so that they lose touch with the culture – some say norms have to evolve and be responsive to the changing demands of surfing. We are embarking on a research project to look

²² See *Prast v Town of Cottesloe* [2000] WASCA 274; *Fleuhr v City of Cape May* 159 N.J. 532 (Sup. Ct N.J. 1999); *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9.

more closely at the nature of norms in surfing and how they work, as we consider this is important to preserving the spirit of surfing.

Editorial Postscript: Since this Forum there has been considerable public interest in the issue of liability for personal injuries, which has led to proposals for reform. It remains to be seen what impact the *Review of the Law of Negligence Report* (2002) <http://revofneg.treasury.gov.au/content/review.asp> and proposed legislation like the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) (awaiting assent on 20/11/02) <<http://www.nsw.gov.au>> will have in this area.