

CAN SURFERS HAVE TRADITIONAL KNOWLEDGE INTELLECTUAL PROPERTY?

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Various international agreements address traditional knowledge (TK), Indigenous Peoples and local communities. A distinction exists between the traditional knowledge of Indigenous Peoples and the traditional knowledge of local communities. The World Intellectual Property Organisation's (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is negotiating a text in anticipation of a Diplomatic Conference to agree on binding obligations about TK distinguishing between the TK of Indigenous Peoples and local communities. This article reports on a pilot study assessing the TK of the surfing community of the Gold Coast, Australia in the context of a local community's TK. Through semi-structured interviews of surfers and non-surfers, the following hypotheses were tested: (1) that surfers exist as a local community; and (2) as a local community, surfers have special forms of knowledge and practices particular to their local community that might be characterised as TK. The results of this pilot study show that surfers are a local community and that they do have special forms of knowledge and practices that might be characterised as TK. If this is the intended reach of WIPO's new form of intellectual property, then this will extend well into the economies of developed countries.

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CONTENTS

I	INTRODUCTION.....	155
II	METHODOLOGY.....	158
III	RESULTS.....	159
A	<i>Participation in Surfing</i>	159
B	<i>What Makes a Person a Member of a Surfing Local Community?</i>	160
C	<i>What is the Extent of the Community?</i>	161
D	<i>How Do You Know You are a Member of Your Local Surfing Community?</i> ...162	
E	<i>Surfing Conventions and Rules About Practices</i>	162
F	<i>What Happens if Someone does not Comply with the Local Rules and Conventions?</i>	165
G	<i>What are the Boundaries of Community?</i>	165
IV	DISCUSSION.....	166

I INTRODUCTION

The phrase ‘local communities’ in the context of traditional knowledge (TK) can be traced to the United Nations *Convention on Biological Diversity* (‘CBD’)¹ that provided for Contracting Parties ‘as far as possible and appropriate’ and subject to national legislation to ‘respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity’.² Contracting Parties were also obliged to promote, ‘with the approval and involvement of the holders of such knowledge, innovations and practices’, a ‘wider application’ and ‘encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices’.³ This language was reiterated in the subsequent *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity* (‘Nagoya Protocol’), although only for the subset of ‘[TK] associated

¹ *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) (‘CBD’).

² *Ibid* art 8(j).

³ *Ibid*.

with genetic resources'.⁴ There the obligations were again subject to national legislation to:

Take measures, as appropriate, with the aim of ensuring that [TK] associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.⁵

In the context of the CBD and *Nagoya Protocol*, TK refers to the 'knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity'.⁶

TK is also under discussion at the World Intellectual Property Organisation (WIPO) where the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is negotiating a text in anticipation of a Diplomatic Conference to agree on binding obligations.⁷ Unlike the narrow scope of the CBD and *Nagoya Protocol* forums addressing TK associated with genetic resources, the IGC is negotiating agreements for the effective protection of TK, traditional cultural expressions and genetic resources. At this stage, the IGC has been unable to finally agree on a definition of TK, although there is text under active consideration and close to consensus agreement:

[TK] refers to knowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that may be dynamic and evolving and is the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and

⁴ *Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/10/27 (20 January 2011) [103] and annex (Decision X/1, annex 1, 89-109) (*Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*) ('Nagoya Protocol').

⁵ CBD (n 1) art 7.

⁶ *Ibid* art 8(j).

⁷ The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has met on 40 occasions without finally concluding the text for consideration by a Diplomatic Conference, with the latest meeting continuing negotiations: see *Draft Report*, WIPO Doc WIPO/GRTKF/IC/40/20 PROV 2 (30 September 2019). For an overview of developments, see Daniel Robinson, Ahmed Abdel-Latif and Pedro Roffe, *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge, 2017).

environment, including know-how, skills, innovations, practices, teaching, or learning.⁸

The separation of ‘indigenous [peoples]’ and ‘local communities’ reflects an important distinction that has been made at the CBD and the *Nagoya Protocol* forums, recognising that Indigenous Peoples and local communities are different conceptions. The debate to separate these concepts traces back to the United Nations Permanent Forum on Indigenous Issues recommendation that the terminology be updated ‘as an accurate reflection of the distinct identities developed by those entities since the adoption of the [CBD] almost 20 years ago’.⁹ While agreeing to this change in terminology at the CBD and *Nagoya Protocol* forums, and that it would not have any legal effect,¹⁰ the consequence was to create clearly separate entities, so that some groupings that might not meet the definitions of ‘indigenous peoples’ could meet the broader definition of ‘local communities’.¹¹ The lack of legal effect suggests these were already separate conceptions. This distinction also recognises the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’) that specifically addresses the TK of Indigenous Peoples and the specific obligations that apply to Indigenous Peoples’ TK.¹² Significantly, the *Nagoya Protocol* expressly notes the UNDRIP and affirms in its Preamble that ‘nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of [Indigenous Peoples] and local communities’.¹³ This perhaps also clarifies that ‘local communities’ are not limited to notions that define Indigenous Peoples and might include other groupings with shared interests.¹⁴ Importantly for our purposes, ‘local

⁸ *The Protection of Traditional Knowledge: Draft Articles*, WIPO Doc WIPO/GRTKF/IC/40/4 (9 April 2019) annex, 5.

⁹ *Report on the Tenth Session of the Permanent Forum on Indigenous Issues*, UN ESCOR, Supp No 23, UN Doc E/2011/43-E/C.19/2011/14 (16-22 May 2011) [26].

¹⁰ See *Report of the Twelfth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/12/29 (17 October 2014) Decision XII/12(F), 91-91, [238]. See also *Report of the Eighth Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/12/5 (11 November 2011) [95], annex 1 (recommendation 8/6, [5(b)]).

¹¹ Nicole Schabus, ‘Article 8(j): Indigenous and Local Community Participation’ (2013) 43(6) *Journal of Environmental Planning and Management* 288, 291.

¹² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 66th sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007) art 31.

¹³ *Report of the Twelfth Meeting of the Conference of the Parties to the Convention on Biological Diversity* (n 10) Preamble para 28.

¹⁴ See *Guidance for the Discussions Concerning Local Communities Within the Context of the Convention on Biological Diversity*, UN Doc UNEP/CBD/AHEG/LCR/1/2 (7 July 2011) [6]. Notably, Indigenous Peoples and ‘local communities’ are holders of different bundles of human rights: see Darrell Posey and Graham

communities' are a separate conception and their TK is a separate, while overlapping, concept.

To examine the role and place of TK and 'local communities', this pilot study was conceived and developed to test a particular kind of knowledge among a grouping denoted as 'surfing communities' in the context of the IGC's deliberations about TK. This study set out to test the hypotheses: (1) that surfers exist as a local community; and (2) as a local community, surfers have special forms of knowledge and practices particular to their local community that might be characterised as TK. This article reports on that project. The following parts outline the methodology and results respectively, and then a discussion follows placing the results within the context of the CBD, *Nagoya Protocol* and IGC. The article concludes that surfers can be characterised as a local community and they have special forms of knowledge and practices particular to their local community that might be described as TK. This is significant because it demonstrates that TK has, potentially, a very broad scope and one which could possibly empower local communities by giving recognition to their special forms of knowledge and practices.

II METHODOLOGY

Semi-structured interviews were conducted in March and April 2017 with self-identifying members of the surfing local community and other non-community members on the Gold Coast, Australia (see Figure 1). These participants were identified by their participation in surfing activities on beach waves (breaks) (n=10). Non-members were identified by their non-participation in surfing activities (n=2). All participants were given unique identifiers as names (see Table 1).

All participants were asked a range of questions about their knowledge and practices of surfing on the Gold Coast. The purpose of these questions was to elucidate whether surfers were custodians and practitioners of the traditions of surfing that might be characterised as a special form of knowledge and practice particular to an identifiable local community. Each interview addressed three main themes together with questions and sub-questions, including asking for responses to pictures that illustrated surfing

Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities* (International Development Research Centre, 1996) 96.

rules and conventions (see Table 2 and Figure 2). The hypotheses being tested were: (1) that surfers exist as a local community on the Gold Coast; and (2) as a local community, surfers have special forms of knowledge and practices particular to their local community. The non-surfers were interviewed to test the uniqueness of the specific knowledge and practices held by those within the self-identifying surfing community.

The interviews were conducted according to the *National Statement on Ethical Conduct in Human Research*,¹⁵ with approval from the Griffith University Ethics Committee.¹⁶ As the conduct of this research involved the collection, access and/or use of identifiable personal information, the interviews were completed according to the Griffith University *Privacy Plan*.¹⁷ All audio recordings were erased after transcription. Other research data (interview transcript notes and analysis) will be retained in a locked cabinet and/or a password protected electronic file at Griffith University for a period of five years and then destroyed/erased. Those interviewed were provided with an information sheet about the research, signed a consent form and were provided with an opportunity to ask and continue asking questions about the research and its outcomes.

Interviews were recorded and then analysed by making notes about the responses. These notes were then considered according to themes and their relevance to addressing the research questions. Qualitative methods were preferred, as this pilot study was only intended to determine whether surfers exist as a local community on the Gold Coast and whether the community surfers have special forms of knowledge and practices particular to their local community.

III RESULTS

A *Participation in Surfing*

To test the hypothesis that surfers have special forms of knowledge and practices particular to their local community, two groups were identified: self-identifying members

¹⁵ National Health and Medical Research Council, Australian Research Council and Australian Vice-Chancellors' Committee, 'National Statement on Ethical Conduct in Human Research' (NHMRC, 2007 and updated to 15 May 2015) (Web Page) <<https://www.nhmrc.gov.au/about-us/publications/national-statement-ethical-conduct-human-research-2007-updated-2018>>.

¹⁶ Griffith University ethics reference number: 2017/170.

¹⁷ Griffith University, 'Privacy Plan' (Griffith University, 2012) (Web Page) <<http://www.griffith.edu.au/about-griffith/plans-publications/griffith-university-privacy-plan>>.

of the surfing local community participating in surfing activities on beach breaks (n=10) and non-members identified by their non-participation in surfing activities (n=2).

The non-members found almost all of the questions from the interview difficult. For example, when asked to look at the picture scenarios (see Figure 2), the non-members did not understand what was happening. Instead, they tried their best to describe what they could see in front of them. This contrasted with the surfers who, rather than explaining what they saw in the pictures, used their own experiences and knowledge to describe each picture. The comparison of these responses confirmed the hypothesis that those identifying as surfers have special forms of knowledge and practices that are confined to that grouping. While the sample size in this pilot study was small (n=2 for non-surfers and n=10 for surfers), the differences in dealing with this special form of surfing knowledge and practice were very clear.

B *What Makes a Person a Member of a Surfing Local Community?*

Question 1 asked surfers to consider themselves as self-identified members of their surfing local community (Table 2). To do this, surfers were asked to describe what makes them a member of their surfing local community. To gauge the extent of their surfing local community, surfers were then asked to explain what they considered to be the territorial boundaries. Next, surfers were asked how they knew they were a member of their surfing local community. Lastly, surfers were asked how one becomes a member of their surfing local community.

According to Surfing Australia, the peak body representing surfing in Australia, 'Boardriders Clubs' are designed to 'teach the skills required to pursue a competitive career, and introduce surfers to the benefits of the support and friendship offered by club membership'.¹⁸ Moreover, they ensure that 'the sport of surfing continues to go from strength to strength and maintains its status as a truly iconic Australian pastime'.¹⁹ The Gold Coast hosts a number of these clubs.²⁰ Members of these clubs are considered to be a part of the surfing local community. Generally, participating in surfing itself is enough

¹⁸ Surfing Australia, 'Boardrider Clubs' (Web Page, 2021) <<https://surfingaustralia.com/clubs/>>.

¹⁹ Ibid.

²⁰ See, eg, Surfing Australia, 'Mermaid Nobbys Miami Boardriders Club' (Web Page, 2021) (Web Page) <<https://surfingqueensland.com.au/clubs/>>; Surfing Australia, 'Burleigh Heads Boardriders Club Inc' (Web Page, 2021) (Web Page) <<https://surfingqueensland.com.au/clubs/>>.

to make a person a member of the surfing local community. There are, however, nuances based on time, participation in surfing at a particular place, participation in a lifestyle, social interaction and ritual. For example, Surfer D claimed that even though he was a member of his local Boardriders Club, he attributed his membership to his surfing local community based upon time as a surf rider. For him, he had grown up on the Gold Coast and had surfed his local break since he was a child. Therefore, time in the water is what made him feel like a member. Surfer D was not alone in attributing time as one of the factors — almost every other interviewee agreed.

Surfer I believed that being able to identify the regulars, and vice versa, was an aspect of being a member. Moreover, he believed that participating in the lifestyle and the location was all relevant. Surfer F considered that just owning a surfboard and heading to the beach made him a member. Meanwhile, Surfer B thought that it was the social aspect of surfing, for example, the ability to talk to another surfer, stranger or not, about the wind, the swell direction and the tide. Surfer C stated that being a member required a passion for the ocean. Moreover, he described his surfing as a ritual, a routine that he goes through.

C What is the Extent of the Community?

Many of the surfers expressed a certain level of comfort connected to surfing within the territorial boundaries of their surfing local communities. Surfer G explained that at some spots the locals would state that only those who live there can surf there. He highlighted Burleigh as being the most notorious for this kind of behaviour on the Gold Coast. Furthermore, he explained that the waves at Burleigh are neither too long, nor is it a big area. Therefore, when a four-wave set comes rolling through, it is a limited resource and there are just not enough waves for everyone. Surfer I explained that the boundaries of his community's territory are within 200 metres of his local break. He uses the carpark from where he begins his surf as the starting point for his radius. The banks — a term that surfers use to describe the build-up of sand on which the waves break — dictate where he surfs within that 200 metres radius. Meanwhile, Surfer A described his local break as the beach at the end of his street in Main Beach. Surfer E felt as though he had spent enough time at Burleigh, Snapper and Currumbin to warrant having some sort of

territorial claim over all three spots. This highlights that the distinctions between being a local or not differed between surfers.

D *How Do You Know You Are a Member of Your Local Surfing Community?*

Generally speaking, a person knew they were a member of their surfing local community once they had knowledge of the local breaks, felt comfortable out in the water and when existing locals who had been surfing there longer started to acknowledge them. Surfer I felt he was a member of his surfing local community when he had knowledge of the breaks and knew how to behave within that community. This, he noted, could differ from break to break, and made him an outsider when he surfed somewhere that was not his surfing local community. Surfers A and G believed that a marker of membership was when they knew the other surfers in the waters of their surfing local community.

E *Surfing Conventions and Rules about Practices*

To assess whether there were any existing conventions and rules about surfing that could be identified as forms of community knowledge and practices, surfers were shown pictures of apparent surfing norms (see Table 2 and Figure 2). Picture 1 asked the interviewees to discuss two different scenarios: (1) to talk about if, when surfing, the person furthest out or waiting the longest had any form of priority over waves; and (2) to discuss whether a surfer who was furthest inside and closest to the peak, gained priority in riding the wave.

Addressing Picture 1, Scenario 1 (furthest out or waiting longest), Surfer D thought that if a surfer was furthest out, they could be out of position, and therefore the surfer would not be in a position to catch the wave. Once the surfer who was furthest out got into position, Surfer D would then allow that person to catch the wave. Surfer B believed that 'furthest out' did apply at his local, while 'waiting the longest' did not. Surfer F thought that 'furthest out' really depended upon the waves as to whether it applied. Surfer J believed that both 'furthest out' and 'waiting the longest' existed at his local, and that he respected that the considerable effort made to get a wave should be rewarded with the wave. However, Surfer J made it clear that he would be waiting under the lip, just in case the priority surfer did not catch the wave. Surfer I thought that it always came down to who was on the waves first, regardless of who was furthest out, or who had been waiting

the longest. All the surfers, however, accepted that Scenario 1 was a best practice, even if they acted in conflict with this best practice.

Addressing Picture 1, Scenario 2 (furthest inside closest to the peak), the general feeling was that this is one of the fundamental rules of surfing — certainly across the Gold Coast and possibly further afield too. In terms of some variation, Surfer D went into great detail about ‘closest to the peak’. He explained that ‘closest to the peak’ is how things work out in the surf. Furthermore, he said that if a surfer had been waiting for a while, then they should paddle to the inside to ensure that they were closest to the peak.

Picture 2 asked the interviewees questions about paddling while they are surfing. Once again, two different scenarios were shown: (1) asked surfers to discuss the rule of paddling wide to avoid the surfer on the wave, and (2) asked about when a surfer is caught on the inside of the white wash and again avoiding the surfer on the wave. All surfers agreed that both scenarios applied at their local breaks. Some interviewees, however, maintained that there is a variation to this rule depending on whether the location is a beach break or a point break.²¹

Picture 3, once again, asked interviewees to discuss two different scenarios: (1) the rule as to whether or not the surfer, first to their feet on the board, had priority on a wave; and (2) communication between surfers when they are paddling to catch a wave to ride. The perspectives about Scenario 1, first-to-feet, varied. Surfer D described this as an old school rule, more suited to those who ride long boards. Surfer H thought that first-to-feet was overridden by the ‘closest to the peak’ rule. Surfer E also considered that the surfer on the inside, closest to the peak, had right of way over the wave.

For Scenario 2, terms of communication, Surfer D talked about how there should always be communication out on the water, especially when surfing a wave that breaks both left and right. The reason for this, he said, was so that the other side of the wave was not wasted. Moreover, Surfer D discussed how sometimes it came down to talent. For example, Surfer D discussed how most natural footers²² on the Gold Coast struggle to surf on their backhand. Therefore, most natural footers would not even attempt to go after

²¹ A beach break forms when a wave passes over a shallow sea floor (like a sand bar) or by the approaching shallows at a shoreline. A point break forms when a wave passes round (or wraps around) a point or headland.

²² A natural footer surfer is a surfer that stands on a surfboard with their left foot forward.

left-hand side breaking waves. This usually meant that the left breaking waves were vacant. Surfer D, a goofy footer (opposite of natural footer), would always try to communicate and ensure that the left breaking waves did not go unriden because some natural footers could not surf on their backhand.

Picture 4 asked surfers to discuss the rule of not letting go of their board. The purpose of this rule is to ensure safety to others. There have been incidents where surfers have let go of their board and others have been injured as a result.²³ All interviewees agreed that this was a rule that is followed at their local breaks. There were only two variations to this rule that were expressed. The first was that it was only acceptable to let go of your board if there was a really big wave coming and you did not think you could dive under water to avoid the wave crest. Surfer E, for example, described letting go of one's surfboard as an extremely dangerous thing to do and the only time to do this is if the waves are extremely big. The second variation was that it was only acceptable to let go of your board if there is nobody behind you. The reason for this was to ensure other people's safety on the water. Surfer J, for example, said that he only releases his board if there is no one behind him.

Lastly, Picture 5 asked surfers to discuss the 'drop in' and 'snaking' rules. The 'drop in' rule gives priority to the person closest to the peak, already up and riding a wave. 'Snaking' occurs in the line-up where an individual, 'the snaker', decides to paddle around a person, the victim, who has the inside position. The consequence of this is that the snaker now has the inside spot on the wave, which then, if the victim continues to paddle for the wave, makes the victim look like they are dropping in and therefore violating the 'drop in' rule. All surfers agreed that the 'drop in' rule applied everywhere, although it was not always observed, and that 'snaking' was a troubling part of surfing. Surfer F described the 'drop in' rule as one of the social norms of surfing and one that surfers are very passionate about. Surfer C explained that if someone from outside his community dropped in on him and did not apologise, he would employ an eye-for-an-eye tactic and therefore drop in on their wave. Surfer C was not alone regarding this because Surfer D also talked about how if someone were to drop in or snake him, he would drop in on that person too. Surfer E said that 'snaking' happens everywhere on the Gold Coast. Surfer A

²³ Paul Caprara, 'Surf's Up: The Implications of Tort Liability in the Unregulated Sport of Surfing' (2008) 44(2) *California Western Law Review* 557, 587.

said that snaking happened, and that surfers often let it happen once or twice, but not a third time without some form of comment or retaliation.

F *What Happens if Someone does not Comply with the Local Rules and Conventions?*

The surfers were asked to discuss what happens when someone does not comply with the local rules and conventions. Most agreed that this varies from anywhere between a polite word to verbal abuse and, in extreme cases, violence. Surfer E talked about how it could vary from being beat up to being told never to come back to particular spots. Surfer E said he tried to tell people what they were doing wrong. He said that their response would dictate what would happen next. Surfer E said that things get more extreme when people do not show respect.

G *What are the Boundaries of the Community?*

Surfers were asked to think about when they go surfing outside their surfing local community as a way of establishing a local community and specialist knowledge and practices by contrasting experiences. The first question asked them to think about whether they felt like an outsider when they surfed somewhere that was outside their surfing local community. The response to this question was unanimous in that surfers do feel like outsiders to some extent when they are outside their local because you do not have the same recognition as you do when you surf within your surfing local community.

Next, surfers were asked how they found out about a local community's rules and conventions. Most surfers agreed that the general rules do not change from place to place. Most said, however, that because they felt like an outsider when surfing outside their community, they would spend a lot of time observing the locals of an outside surfing local community in order to see how they do things. Surfer E suggested that if you are surfing at a spot outside your surfing local community but you have a friend who already lives and surfs there, this can really help. Having such a friend can bring you up to speed with the intricacies of the local community and help you engage with the locals.

Then surfers were asked if these rules and conventions were applied differently in surfing local communities other than their own. Most of the surfers agreed that there is little difference in how the rules and conventions are applied at different places. The biggest

variation to such rules and conventions appears to come down to localism and the attitudes of those who are surfing at particular breaks.

Lastly, surfers were asked what happens if someone does not comply with the local rules and conventions of an outside surfing local community. Similar to the responses to the question of what happens if someone does not comply with the local rules and conventions at their surfing local community, it can range anywhere from a polite talk through to violence. This includes shouting, being told to go back to where you came from, death stares, being out-casted, racism, punches being thrown, to having the tyres of your car let down or your car scratched.

IV DISCUSSION

This pilot study set out to test the hypotheses: (1) that surfers exist as a local community on the Gold Coast, Australia; and (2) as a local community, surfers have special forms of knowledge and practices particular to their local community that might be characterised as TK. These hypotheses and analyses are important to inform the ongoing debates about TK in the WIPO IGC (and CBD and *Nagoya Protocol*) where 'local communities' are a key component of the definition of TK.²⁴ This involves an understanding of both a 'local community' and the kinds of knowledges, innovations and practices they have that might be characterised as TK.

The results confirmed the hypothesis that those self-identifying as surfers (n=10) did have special forms of knowledge and practices about surfing that were unique compared to those self-identifying as non-surfers (n=2). The results also demonstrated there was a consensus about the substance of special knowledge about surfing rules and conventions (Figure 2) with some variations in the territorial practices and applications based on localism (place of surfing) and attitudes (applying the rules and conventions).

The surfers considered their local community was bounded by: (1) territory — the places where surfing was carried out; and (2) groupings — membership of surfing organisations or participation in the lifestyle, social interactions or rituals of surfing. Interestingly, the territorial claims appeared to be based variously on the locality to home, distances around a car park, a surfing feature (sand bank) and so on. Meanwhile, the grouping

²⁴ *The Protection of Traditional Knowledge: Draft Articles* (n 8) annex, 5.

claims appear to be based on how long someone has surfed at a particular place, special knowledge about the surfing place, friendships and other such factors. As a generalisation, these are claims based on localism to a territory and the attitudes of those who are surfing at particular breaks (local surfers).

The special knowledge claims showed that there was a consensus about the form and content of the rules and conventions among self-identifying surfers, suggesting that they are the norms of surfing. There were, however, variations in their application based on individual surfer's compliance that included specific location (place) applications such as not wasting a limited resource and variations in the ways that the rules and conventions were enforced, ranging from talk to physical and property violence.

The following discussion considers the meaning of a 'local community' within the context of TK in the WIPO IGC negotiations and the application of the CBD and *Nagoya Protocol*, and then whether the surfing communities of the Gold Coast are such local communities with specific knowledge and practices that they might be characterised as possessing(?) TK. The article then concludes with consideration of the likely consequences for surfing local communities holding TK.

The phrase 'indigenous and local communities' was agreed at the final negotiations of the CBD in 1992²⁵. This was utilised as a compromise, addressing the concern of some developing countries with using the term 'Indigenous Peoples' and its international law implications, because some national constitutions already addressed 'local communities'.²⁶ The consequence of this, however, is that there is no clear meaning as to what a 'local community' is, or means, in the context of the CBD. The same phrase 'indigenous and local communities' was then adopted in the *Nagoya Protocol*,²⁷ with no further clarification about its likely meaning or reach.²⁸ The Food and Agriculture Organisation of the United Nations *International Treaty on Plant Genetic Resources for*

²⁵ CBD (n 1) art 8(j).

²⁶ See Schabus (n 11) 288.

²⁷ Nagoya Protocol (n 4) art 7.

²⁸ See Thomas Greiber, Sonia Peña Moreno, Mattias Åhrén, Jimena Nieto Carrasco, Evanson Chege Kamau, Jorge Cabrera Medaglia, Maria Julia Oliva and Frederic Perron-Welch in cooperation with Natasha Ali and China Williams, *An Explanatory Guide to the Nagoya Protocol on Access and Benefit-sharing*, IUCN Environmental Policy and Law Paper No 83 (International Union for Conservation of Nature, 2012) 91. See also Kabir Bavikatte and Daniel Robinson, 'Towards a People's History of the Law: Biocultural Jurisprudence and the Nagoya Protocol on Access and Benefit Sharing' (2011) 7(1) *Law, Environment and Development Journal* 35.

Food and Agriculture ('ITPGRFA') also uses this terminology in the context of promoting 'in situ conservation of wild crop relatives and wild plants for food production, including in protected areas, by supporting, *inter alia*, the efforts of indigenous and local communities'²⁹. The ITPGRFA extends this ideal to Farmers' Rights recognising 'the enormous contribution that the local and indigenous communities and farmers of all regions of the world'.³⁰ Interestingly, the term 'local communities' is used by itself in the ITPGRFA in the context of promoting or supporting 'as appropriate, farmers and local communities' efforts to manage and conserve on-farm their plant genetic resources for food and agriculture'.³¹ Again, the meaning of 'local communities' was not specifically addressed.

The identification of 'indigenous peoples' and 'local communities' as clearly separate entities at the CBD and *Nagoya Protocol* forums,³² the ITPGRFA — including distinctive and separate uses — and as separate conceptions in the IGC drafting text,³³ shows there is a need to clarify the meaning of 'local community'. This is important because the bounds of the phrase 'local community' determines who the potential rights holders are in any given case, as they are clearly a distinctive grouping from Indigenous Peoples with rights to TK. As a distinctive group, 'local communities' are also likely to have distinctive TK that is different from Indigenous Peoples' TK, while also perhaps incorporating some of the Indigenous Peoples' TK. Some steps have been taken to understand the meaning of 'local communities' under the aegis of the CBD and *Nagoya Protocol*, although the meaning remains uncertain.

In an effort to address the lack of local community involvement in the CBD discussions, the Conference of the Parties to the CBD established an Expert Meeting of Local Community Representatives (AHEG/LCR) to try and identify common characteristics of local communities.³⁴ The meeting identified a number of common characteristics, and in

²⁹ *International Treaty on Plant Genetic Resources for Food and Agriculture*, opened for signature 3 November 2001, 2400 UNTS 303 (entered into force 29 June 2004) art 5.1(d).

³⁰ *Ibid* art 9.

³¹ *Ibid* art 5.1(c).

³² See *Report of the Twelfth Meeting of the Conference of the Parties to the Convention on Biological Diversity* (n 10), Decision XII/12(F), 91-91, [238].

³³ *The Protection of Traditional Knowledge: Draft Articles* (n 8) annex, 5.

³⁴ *Report of the Seventh Meeting of the Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity*, UN Doc UNEP/CBD/COP/11/7 (24 November 2011) [33]-[44], annex 1 (recommendation 7/2, [17]-[20]). See also *Report of the Expert Group*

particular, considered that self-identification was the ‘foremost and essential in any list of characteristics’.³⁵ It also included: territory for the maintenance of social, cultural, and economic aspects of the community; traditions such as history, culture, language, rituals, symbols and customs; a set of social rules and organisational-specific community/traditional/customary laws and institutions; self-regulation of customs and traditional forms of organisation and institutions; and so on.³⁶ In offering a perspective, the Secretariat of the AHEG/LCR provided, in part:

‘Local community’ remains, to some extent, an ambiguous term. It can refer to a group of people which have a legal personality and collective legal rights and this is considered a community in the strict sense. Alternatively, a ‘local community’ can refer to a group of individuals with shared interests (but not collective rights) represented by a non-governmental community-based organisation (NGO). For example, many traditional communities act through NGOs, which are social rather than community organisations.³⁷

In the context of the CBD, TK appears to mean the ‘knowledge, innovations and practices of [Indigenous Peoples] and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity’.³⁸ A key element of this definition is the phrase ‘embodying traditional lifestyles’ and whether this limits local communities according to some conception of traditional organisation, such as communities that have been established over generations (like traditional farming communities).³⁹ The CBD (and *Nagoya Protocol*) appear to have been conceived more broadly than this, with express recognition that local communities can exist in rural and urban areas. Self-identification as a community is also a key feature, and self-regulation

Meeting of Local Community Representatives Within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity, UN Doc UNEP/CBD/WG8J/7/8/Add 1 (4 September 2011).

³⁵ *Ibid*, 12.

³⁶ *Ibid*, annex (Common Characteristics).

³⁷ *Guidance for the Discussions Concerning Local Communities Within the Context of the Convention on Biological Diversity* (n 14) [6]. See also Expert Group Meeting of Local Community Representatives Within the Context of Article 8(j) and Related Provisions of the Convention on Biological Diversity, *Identification of Common Characteristics of Local Communities* (2011) UNEP/CBD/AHEG/LCR/INF/1, 4.

³⁸ CBD (n 1) art 8(j); see also *Nagoya Protocol* (n 4) art 7 — this is limited to TK ‘associated with genetic resources’.

³⁹ See *Report of the Expert Group Meeting of Local Community Representatives* (n 34) [15]-[37].

of customs and traditional forms of organisation and institutions are relevant considerations.⁴⁰

The IGC has developed glossaries of relevant terms including ‘indigenous and local communities’, drawn broadly from existing United Nations and other international instruments, national, regional and draft laws, multilateral instruments, other organisations and processes, and dictionaries.⁴¹ The phrase ‘indigenous and local communities’ is traced to the CBD (and *Nagoya Protocol*) and its use there as the ‘recognition of communities that have a long association with the lands and waters that they have traditionally lived on or used’, citing the preferred definition of the Permanent Forum on Indigenous Issues.⁴² This appears to be a very narrow conception of the CBD and *Nagoya Protocol*’s use of the phrase, and directed to only Indigenous Peoples. Although, at the IGC, clearly Indigenous Peoples and ‘local communities’ are distinct and separate conceptions, and ‘local communities’ are not Indigenous Peoples. This leaves some uncertainty about the meaning of ‘local communities’.

The results from this pilot study suggest that surfers are a local community and do have special forms of knowledge and practices that might be characterised as TK within the conception of TK for the purposes of the IGC, the CBD, and the *Nagoya Protocol*. The significance of this conclusion is that surfers as a local community with TK are the potential rights holders in any given case where TK is being utilised. Two immediate problems arise from this conclusion: (1) the relationship between surfer local communities’ TK and Indigenous Peoples’ TK about surfing; and (2) what kind of rights follow a finding that surfer local communities (that are not Indigenous Peoples) have TK?

There is no doubt that surfing involves Indigenous Peoples’ TK:

He’e nalu [surfing] has been practiced by Polynesians for centuries and has reached high cultural refinement in Hawai’i ... It was discovered by the West in 1778, when Captain Cook and his crew anchored in Waimea, Kaua’i. As a native practice, *he’e nalu* was integrated into the political and religious taboo (*kapu*) system which stratified Hawaiian society. Permissions and bans from the *kapu*

⁴⁰ Ibid annex (Common Characteristics).

⁴¹ *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, WIPO Doc WIPO/GRTKF/IC/40/INF/7 (10 April 2019) [4].

⁴² Ibid annex, 22.

system applied to surfing, where commoners (*maka'āinana*) were prohibited from surfing with chiefs (*ali'i*) and from riding some surf breaks, like Kapuni in Waikīkī ... Nevertheless, *he'e nalu* was popular and indulged in by children, women and men, commoners and chiefs.⁴³

The question is whether surfing local communities' TK is different so that the two forms of TK can be distinguished and dealt with separately, or, whether surfing local communities' TK must give way to Indigenous Peoples' TK about surfing. Our pilot study only contributes to this question by suggesting that the rules and conventions addressed appear to be modern practices and norms. We did not investigate the origins of these practices and norms and they may be directly traceable to Indigenous Peoples' TK about surfing. If they are not, then the remaining question is how to address this specific surfing local community TK in the context of derived TK from Indigenous Peoples. This will require further investigation and consideration in future research.

The other question is if surfing local communities do have special forms of knowledge and practices that might be characterised as TK, what does this mean for TK as intellectual property at the IGC? The scope and conditions of protection, and the form of protection, remain contested at the IGC.⁴⁴ If surfers have TK, will this require respect for that TK and the opportunity to practice and express it? An existing limitation on any recognition inherent in the WIPO forums (and similarly for TK in the CBD and *Nagoya Protocol* forums) is that the form of TK will finally be determined in domestic WIPO member laws consistent with their commitments at the WIPO Diplomatic Conference. Further research about the likely scope and conditions of protection of such TK is required and how that might be enforced in domestic courts.

Whether surfers will eventually have rights to protect and enforce their TK as a consequence of these potential binding obligations is presently uncertain. What this pilot study demonstrates is that the IGC's definition of TK incorporates a conception of 'local community' and that a surfing local community on the Gold Coast, Australia, can fall within that conception because of its identifiable special knowledge and practices. The

⁴³ Jérémy Lemarié, 'Debating on Cultural Performances of Hawaiian Surfing in the 19th Century' (2016) 142-143 *Journal de la Société des Océanistes* 159. See also *Identifying Examples of Traditional Knowledge to Stimulate a Discussion of what should be Protectable Subject Matter and what is Not Intended to be Protected*, WIPO Doc WIPO/GRTKF/IC/40/12 (24 May 2019) annex. 2.

⁴⁴ *The Protection of Traditional Knowledge: Draft Articles* (n 8) annex, 10-11.

merits of this conclusion are open to speculation. The consequences of these results, however, are that the IGC (and possibly the CBD, *Nagoya Protocol* and ITPGRFA) need to more carefully consider the outer bounds of their possible application of TK, and whether this broad conception of a 'local community' is intended.

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Table 1: Names of Surfers and their Surfing Local Communities

The self-identified local community for each surfer and non-surfer interviewed. The locations are also identified on the map in Figure 1.

Surfer name	Surfing local community
Surfer A	Main Beach
Surfer B	Mermaid
Surfer C	Northcliffe
Surfer D	The Spit
Surfer E	Burleigh, Snapper, Currumbin
Surfer F	Surfers Paradise
Surfer G	Nobby's Beach
Surfer H	Broadbeach
Surfer I	Broadbeach
Surfer J	Miami
Non-surfer A	-
Non-surfer B	-

Table 2: Interview Questions

Each interview addressed three main themes together with questions and sub-questions.

Question	Theme	Question
1.	About you as a self-identified member of a surfing local community.	A. What makes you a member of a surfing local community?
		B. What are the territorial boundaries of your surfing local community?
		C. How do you know you're a member of your surfing local community?
		D. How do you become a member of your surfing local community?
		E. Do you feel like an outsider when you surf somewhere that isn't your home break?
2.	Thinking about going surfing, look at each of these pictures and tell us how the rules and conventions apply at your local surfing place ... and tell us about any local variations?	Picture 1 – Catching the wave Picture 2 – Paddling out to the waves Picture 3 – Priority on the waves Picture 4 – Controlling the board Picture 5 – Dropping in and snaking (see Figure 2 for the illustrations of these rules and conventions)
3.	Thinking about when you go surfing outside your surfing local community.	A. Why do (or don't) you feel like an outsider?
		B. How do you find out their rules and conventions?
		C. How are some of these rules and conventions applied differently to your surfing local community?
		D. What happens if someone doesn't comply with the local rules and conventions?

Figure 1: Map of Surfing Local Communities on the Gold Coast, Australia

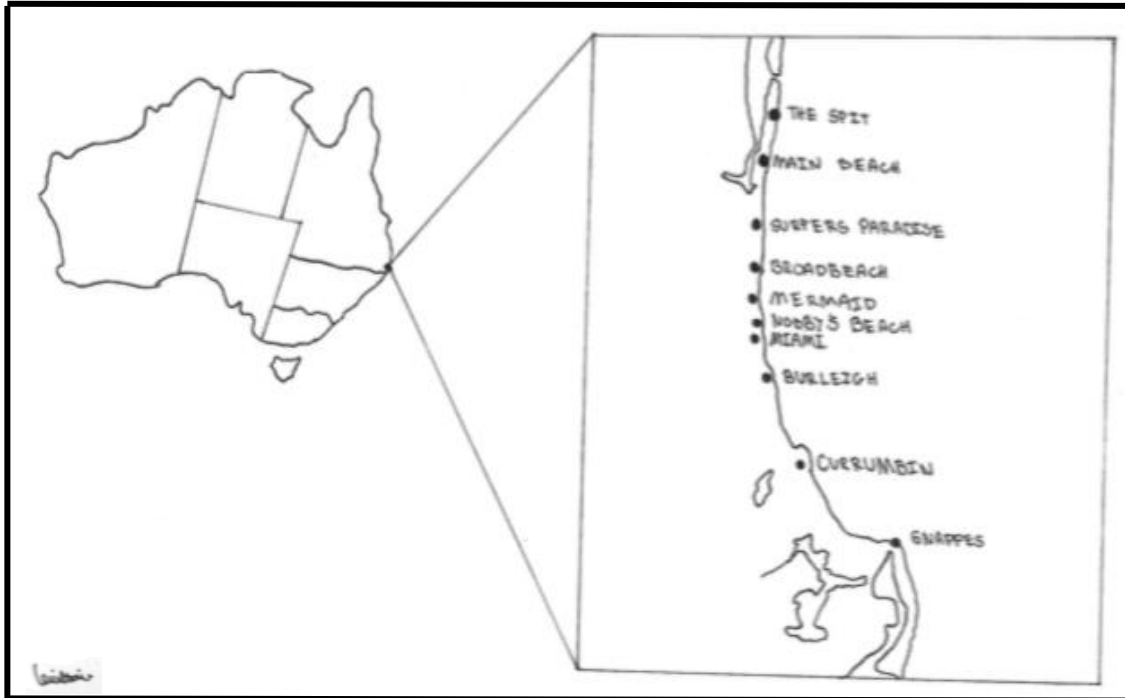


Figure 2: Surfing Rules and Conventions

To assess whether there were any existing conventions and rules about surfing that could be identified as a form of community knowledge and practices, surfers were shown pictures of apparent surfing norms. The apparent norms were identified from web searches of surfing rules and surfing etiquette.

