

Examples Mr Houston uses to support standardisation

Analogy	FOXTEL Comment
VHS/Beta	This analogy is not relevant as much of the content on Betamax and VHS was common content so there was no reason for consumers to purchase both machines. If there had been clearly different content for each then consumers may have been prepared to buy both or, if the content was substitutable, to buy one or another. As ultimately all content appeared on VHS format, due to marketing rather than the quality of the format, Betamax ultimately failed. ¹
Microsoft Windows	The function of a computer program is to communicate and work together with other components of a computer system and with users. To achieve this it is necessary that all players in the field provide relevant information to each other or agree on a common set of standards and adhere to these standards. ² The same issues do not arise in relation to subscription television as the STUs do not need to "talk to" each other or work with each other in the same way. Where a subscriber wants two services it can do so through the FOXTEL STU (or two separate STUs). If the subscriber only wants one service it only needs one STU.
1998 speech by the Deputy Director General (DDG) for Competition for the European Commission (paras 109 and 118)	First, it should be noted that this was a personal speech given by the DDG, 8 years ago, and was expressly stated not to represent the views of the EC. FOXTEL submits that it does not support Seven's argument and reflects a theoretical understanding of industry mechanics that have not been born out in practice. The DDG accepts that new entrants <i>could</i> roll-out an entire population of STUs and it is only the cost of doing so and consumer reluctance to have multiple STUs which prevents this being feasible. ³ He suggests that the new entrant's best chance of entry is "using the set top boxes which already exist." FOXTEL is, in fact, giving access to the STUs which already exist, ie those in FOXTEL subscribers' homes. FOXTEL submits that the investment that access seekers have to make in STUs for non-

¹ See www.totalrewind.org/infodesk.htm

² Andrea Glorioso, "An interoperable world: the European Commission vs Microsoft Corporation and the value of open interfaces", 20th BILETA Conference, April 2005

³ In fact, immediately before the passage quoted by Houston, the DDG says that "enforced standardisation of digital set top boxes appears to be premature. Indeed, it may even be dangerous to do so before the market has had time to settle."

	<p>FOXTEL home is small by comparison and that consumers will only ever need to have one STU.⁴</p>
<p>KirchTV and BSKyB merger</p>	<p>The comments made by the European Commission in its 2000 decision are taken out of context and are not relevant. The issue being addressed by the EC in that case related to the fact that the operator of the cable, Telekom, exclusively used BetaResearch conditional access technology which is decipherable only by the d-box decoder. This BetaResearch technology and the d-box were owned and controlled by Kirch. As the EC stated:</p> <p style="padding-left: 40px;">This means that any potential competitor wishing to supply services using the cable can only do so after acquiring a license for the encryption technology from BetaResearch. It would then try to use Kirch's d-box to reach users. However, this would mean that the potential entrant <u>would depend on</u> its direct competitor, Kirch.⁵ (Emphasis added)</p> <p>This is not the situation in relation to FOXTEL. FOXTEL does not own or control the conditional access technology that can be used on the Telstra cable. Any access seeker can obtain access to the cable, license its own CA system and install a compatible STU without being reliant on FOXTEL at all. Indeed, FOXTEL's SAU ensures that access seekers <u>are not</u> reliant on it in order to access non-FOXTEL homes whereas Seven's proposal ensures they are.</p> <p>Additionally, comments made about the merger related to the commercial union of two companies, not 3rd party access of content.</p>
<p>Report by the US Federal Communications Commission (FCC) on bundling by subscription television providers</p>	<p>In paragraph 129 of his report, Mr Houston refers to a FOXTEL queries the relevance of this report to the Australian context, as it understands the US industry is very different to the Australian industry in terms of structure, pricing, packaging, number of channel and regulatory regime. FOXTEL also notes that the benefits, or otherwise, to consumers of bundling various channels together is a controversial issue in the US. The FCC published a report dated 18 November 2004, which is the predecessor of the report referred to by Mr Houston and addresses the same issues. This report concluded that it was unclear if an "a la carte" regime would reduce subscription television prices for many households (see page 6 of the report).</p>

⁴ Houston also refers to a 1996 decision by the UK OFT in relation to BSKyB (not the British pay TV market as suggested): see para 117. The OFT is only speculating as to what consumers may or may not want to do and there is no objective evidence provided in support of this.

⁵ Kirch decision para 61

FCC 1998 directive	<p>Houston's reference to the FCC 1998 directive ordering multichannel video programming distributors (MVPD) to make available separate security components or security modules which could be used by consumers to receive their broadcasts is also a case in point.⁶ This directive orders MVPDs to separate out their security and non-security functions from the STUs so that the security element can be provided separately (in a CableCard) and the STU can be used freely between different operators' services by inserting different CableCards. This can so far only be done for one-way distribution of programming and consumers still need an integrated STU for two-way (eg interactive) services.⁷ The ban will only apply to cable operators and not satellite operators (as their STUs are currently available from unaffiliated sources). The banning of integrated STUs has recently been extended again until 1 July 2007 due to remaining concerns about the impact on security of subscription television programming once it is separated. This simply demonstrates the difficulty with separating out STUs from proprietary CA systems even in a mature industry. The reality is that even in the mature US industry most subscription TV systems still bundle CA, STU and the basic tier. Even the STUs retailed by DirectTV and EchoStar are only able to be used for the particular subscription TV service. For the hundreds of cable companies the basic tier is always bundled with the STU and the CA system.</p> <p>Mr John Paul of Trident Media Partners (Sydney, Australia & Washington, DC) believes that there is a substantial possibility that the ban will be repealed due to commercial pressure from operators.</p>
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⁶ Houston Section 6.2.3.

⁷ Federal Communications Commission, *12th Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 10 Feb 2006, para 54-55, 211