

CALM Act – What You Need to Know

By: Jake Baldwin and Bruce Beard

Tired of loud commercials jolting you out of bed as you try to doze off to Seinfeld reruns? Hate how the local car salesman screams louder than the Real Housewives? You aren't alone. Loud commercials have been a source of consumer complaints at the FCC for over 50 years.

In 2010 and 2011, Congress and the FCC took action to calm the noise burst between commercials and regular programming. As a cable operator, you should know a few things about the new regulations.

The key thing to remember is that the CALM Act applies only to digital channels and your obligations increase if you are inserting commercials on digital channels.

Background

In December 2010, President Obama signed the Commercial Advertisement Loudness Mitigation Act, or CALM Act, into law. The CALM Act directed the FCC to adopt rules regulating the volume of commercials on digital television. A year later, the FCC released an order adopting rules to implement the CALM Act.

The rules take effect December 13, 2012 and require cable operators to comply with the standards in "Advanced

Television Systems Committee A/85: ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television." (We'll just call it ATSC A/85.)

Compliance

The FCC will check an operator's compliance if it receives a series of complaints concerning the operator. In response to the FCC inquiry, the operator will have to show compliance with ATSC A/85. Operators can show compliance by either relying on a safe harbor to be "deemed in compliance" or by demonstrating "actual compliance."

Safe Harbors. Operators can rely on safe harbors to be "deemed in compliance" with ATSC A/85. A few safe harbors are available, depending on where commercials are inserted.

Embedded Commercials. Many small operators do not insert advertising on digital channels. Instead, they merely pass through the commercials embedded in the content stream. The embedded commercials safe harbor allows an operator to show compliance with ATSC A/85 by relying on programmer certifications and by performing "spot checks."

Programmer Certifications. Operators

may rely on a network's or other programmer's certification if a few conditions are met. First, the certification has to be widely available to any operator who carries the programming. Next, the operator can only rely on a programmer's certification if the operator does not have any reason to believe the certification is false. Last, the operator has to perform a "spot check" in response to any enforcement inquiry.

Programmer certifications should be available for the majority of the programming from the networks and programmers. Look for the certifications on programmers' websites or through the NCTC as the December 13 compliance deadline nears.

Spot Checks. Spot checks may be required for programming that is not certified by the network or programmer. This requirement depends on how many subscribers an operator had on December 31, 2011. Smaller operators have to perform spot checks only if there is a trend of complaints. Larger operators have to perform annual spot checks.

● Small operators (those with fewer than 400,000 subscribers) do not have to perform annual spot checks, but they do have to perform spot checks in response to any enforcement inquiry from the FCC about a trend of complaints. Small operators may rely on a third party to do the spot checks – they are not required to invest in equipment for the spot checks.

● Large operators (those with more than 400,000, but fewer than 10 million, subscribers) must perform annual spot checks on half of the non-certified programming carried.

● Very large operators (those with 10 million subscribers or more) must perform annual spot checks on all non-certified programming carried.

● Large and very large operators must also perform spot checks in response to any enforcement inquiry.

About the Authors

Jake Baldwin is an associate and Bruce Beard is a partner with the Cinnamon Mueller law firm. With offices in Chicago, St. Louis, and Washington, DC, CM focuses on representing small and medium-sized cable, broadband, and telecommunications providers. CM is also outside counsel to the American Cable Association. For more information about CM, visit online at www.cm-chi.com



Locally Inserted Commercials. For locally inserted commercials, how operators demonstrate compliance with ATSC A/85 depends on whether the operator or a third party inserts the commercials.

Operator Inserted. If a cable operator inserts commercials on digital channels, the operator has to install, maintain, and use the equipment and software necessary to comply with ATSC A/85. The operator also has to provide records showing that the equipment has been used consistently in the regular course of business and that the equipment has undergone periodic maintenance and testing.

In addition, the operator has to certify that it is not aware of any violation of ATSC A/85, or that any violations have been promptly corrected. The operator must also certify that its equipment is not responsible for any trend of complaints.

Third Party Inserted. Many small operators rely on third parties for local ad insertions. The third party inserts commercials after the programming is

received by the operator from the programmer, but before it is transmitted to viewers.

For third party local insertions, the operator can show compliance with ATSC A/85 by relying on the third party's certification so long as the operator: (i) has no reason to believe the certification is false, (ii) certifies its equipment is not responsible for any trend of complaints, and (iii) performs a spot check in response to any enforcement inquiry.

Real-Time Processor. A cable operator can also show its compliance with ATSC A/85 by using a real-time processor. Real-time processors ensure consistent volumes by limiting the content's "dynamic range." To rely on this safe harbor, the operator has to follow four steps.

First, the operator has to show that it has used the processor consistently in the regular course of business. Second, the operator has to provide records showing that the processor has undergone periodic maintenance and testing. Third, the operator is required to certify

that it is not aware of any violation of ATSC A/85, or that any violations have been promptly corrected. Last, the operator has to certify that its equipment is not responsible for any trend of complaints.

Actual Compliance. Instead of showing compliance with ATSC A/85 through one of the safe harbors above, an operator can respond to an enforcement inquiry by showing actual compliance with ATSC A/85 for the commercials inquired about. The operator also has to certify that its equipment is not responsible for any trend of complaints.

Conclusion

The CALM Act is sure to generate publicity as it takes effect on December 13, 2012. Customers have clamored for quieter commercials for years. With the FCC's complaint procedure, customers now have a weapon to defend against loud commercials – and their complaints can lead the FCC to knock on your system's door. Make sure your company has taken the necessary steps to comply with the new rules. □