

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	File No. EB-04-SE-069
)	NAL/Acct No. 200632100005
Behringer USA, Inc.)	FRN 0014638803

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: February 16, 2006

Released: February 16, 2006

By the Commission:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (“NAL”) and Order, we find that Behringer USA, Inc. (“Behringer”) marketed 50 models of unauthorized radio frequency devices specifically, digital audio music devices, in apparent willful and repeated violation of Section 302(b) of the Communications Act of 1934, as amended (“Act”),¹ and Section 2.803(a) of the Commission’s Rules (“Rules”).² Significantly, we find that Behringer continued to import and market substantial numbers of these unauthorized devices for more than a year after the Enforcement Bureau initiated an inquiry into Behringer’s compliance with the Commission’s equipment authorization requirements. Based on the facts and circumstances before us, including the egregious nature of Behringer’s continued non-compliance, we conclude that Behringer is apparently liable for a forfeiture in the amount of one million dollars (\$1,000,000).

II. BACKGROUND

2. Section 302 of the Act authorizes the Commission to make reasonable regulations, consistent with the public interest, governing the interference potential of equipment that emits radio frequency energy, and prohibits, *inter alia*, the offering for sale of radio frequency devices to the extent such activity does not comply with those regulations. The purpose of this section is to ensure that radio transmitters and other electronic devices meet certain standards to control interference before they reach the market. The Commission carries out its responsibilities under Section 302 in two ways. First, the Commission establishes technical regulations for transmitters and other equipment to minimize their potential for causing interference to radio services. Second, the Commission administers an equipment authorization program to ensure that equipment reaching the market complies with the technical requirements.³ The equipment authorization program requires that radio frequency equipment be tested for compliance with applicable technical requirements in accordance with one of three authorization

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(a).

³ 47 C.F.R. Part 2, Subpart J.

procedures -- certification, Declaration of Conformity, or verification⁴ -- prior to the initiation of marketing. “Marketing” includes the sale or lease, offer for sale or lease (including advertising for sale or lease), importing, shipping, and/or distribution for the purpose of selling or leasing or offering for sale or lease.⁵

3. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices or home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.” Section 2.803(a)(2) of the Commission’s implementing regulations provides that:

... [N]o person shall sell or lease, or offer for sale or lease (including advertising for sale or lease), or import, ship, or distribute for the purpose of selling or leasing or offering for sale or lease, any radio frequency device unless ... [i]n the case of a device that is not required to have a grant of equipment authorization issued by the Commission, but which must comply with the specified technical standards prior to use, such device also complies with all applicable administrative (including verification of the equipment or authorization under a Declaration of Conformity, where required), technical, labeling and identification requirements specified in this chapter.

Under Section 15.101 of the Rules,⁶ certain Class B digital devices,⁷ such as digital audio music devices marketed to the general public, must be authorized in accordance with the verification procedure prior to marketing. Specifically, Class B digital devices must be tested and verified as compliant with the conducted emission limits and radiated emission limits set forth in Sections 15.107 and 15.109 of the Rules,⁸ must be labeled as specified in Section 15.19(a)(3) of the Rules,⁹ and must comply with the user manual requirements set forth in Section 15.105(b) of the Rules.¹⁰ Additionally, if such devices are

⁴ Certification is an equipment authorization issued by the Commission or one of its designated Telecommunications Certification Bodies, based on representations and test data submitted by the applicant. 47 C.F.R. § 2.907(a). A Declaration of Conformity is a procedure where the responsible party – the manufacturer, or in the case of imported equipment, the importer – makes measurements or takes other necessary steps to ensure that the equipment complies with the appropriate technical standards. 47 C.F.R. § 2.906(a). Under the Declaration of Conformity procedure, the measurements must be made by an FCC-accredited laboratory. 47 C.F.R. § 2.948(a)(3). In addition, a copy of the Declaration of Conformity listing the party responsible for compliance must be included in the literature supplied with the product. 47 C.F.R. § 2.1077. Verification is also a procedure where the manufacturer, or in the case of imported equipment, the importer, makes measurements or takes the necessary steps to ensure that the equipment complies with the appropriate technical standards. However, unlike the Declaration of Conformity procedure, it does not require that an accredited laboratory make the measurements or that a Declaration of Conformity be supplied with the equipment. 47 C.F.R. § 2.902(a).

⁵ 47 C.F.R. § 2.803(e)(4).

⁶ 47 C.F.R. § 15.101.

⁷ A Class B digital device is “a device marketed for use in a residential environment notwithstanding use in commercial, business and industrial environments.” 47 C.F.R. § 15.3(i).

⁸ 47 C.F.R. §§ 15.107, 15.109.

⁹ 47 C.F.R. § 15.19(a)(3).

¹⁰ 47 C.F.R. § 15.105(b).

imported into the United States, the importer must submit a declaration to Customs (on FCC Form 740, or electronically, where electronic filing is available) indicating that the devices meet one of the conditions for entry into the United States.¹¹

4. In March 2004, the Bureau received a complaint alleging that Behringer was marketing digital audio equipment that was not labeled and therefore may not have been authorized in accordance with the Commission's equipment authorization requirements. In response to the complaint, the Bureau issued Behringer a letter of inquiry ("First LOI") on March 29, 2004.¹² Behringer responded to the First LOI on April 19, 2004.¹³

5. In its response to the First LOI, Behringer stated that, in January 2000, it began importing, marketing, distributing for sale and selling in the United States digital audio products, such as mixers, amplifiers, and digital effects processors ("digital devices"). The information provided by Behringer indicated that, since January of 2000, it imported, marketed and distributed for sale at least 66 different models of digital devices. A listing of these 66 models is included in Attachment A. Behringer further stated that, from January 2000 through April 2004, it manufactured approximately 1.33 million of its digital devices for sale in the United States,¹⁴ and actually imported approximately 1.17 million of its digital devices, which it distributed to approximately 2,000 retailers for sale in the United States.¹⁵

6. Behringer acknowledged that its audio products are Class B digital devices subject to the Commission's equipment verification and related requirements,¹⁶ including the applicable technical standards.¹⁷ Behringer also acknowledged that it had not verified compliance of any of the 66 models of its digital devices with the applicable FCC technical standards, prior to importing and marketing such devices in the United States.¹⁸ Rather, Behringer represented that "a range" of its digital devices had been tested and passed "CE" directives,¹⁹ and expressed its belief that those devices will also comply with the Commission's technical standards given "the relationship between the applicable FCC and CE electromagnetic compatibility regulations and the results of Behringer's CE tested products to date."²⁰

¹¹ 47 C.F.R. §§ 2.1203-2.1205.

¹² See Letter from Joseph P. Casey, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Doug White, President, Behringer USA, Inc. (March 29, 2004) ("First LOI").

¹³ See Letter from Delbert D. Smith, Esq. and Michael J. Mendelson, Esq., Jones Day to Brian Butler, Assistant Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (dated April 19, 2004) ("LOI Response").

¹⁴ LOI Response at 2.

¹⁵ LOI Response at 1.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 3-4.

¹⁸ *Id.* at 3-5.

¹⁹ The "CE" mark is an abbreviation of Conformité Européenne (French for European Conformity) that indicates conformity with European safety requirements.

²⁰ LOI Response at 3, 5.

Test reports subsequently submitted by Behringer showed that only one model was tested for CE compliance before Behringer began importing and marketing its digital devices in the United States in January 2000 and that 7 additional models were tested for CE compliance prior to issuance of the First LOI on March 29, 2004.²¹

7. Additionally, Behringer represented that, after receiving the Bureau's First LOI, it initiated measures to ensure compliance with the Commission's equipment verification standards and related requirements. Behringer represented that it engaged a test laboratory to test all of its digital products, and that it would submit the test results as they become available.²² Behringer also represented that it would ensure that all of its digital devices marketed and sold in the United States are properly labeled and that the accompanying instruction manuals include the requisite information.²³ Further, Behringer represented that "[o]n a going-forward basis, [it] would ensure that the Commission's Form 740 is submitted for each radio frequency device, as defined in 47 U.S.C. § 302 and 47 C.F.R. § 2.801, which is imported into the Customs territory of the United States."²⁴

8. Subsequently, Behringer supplemented its LOI response with copies of test reports demonstrating compliance of 14 of its 66 models of digital devices with the Commission's conducted and radiated emission limits.²⁵ However, further investigation by Bureau staff revealed that Behringer was continuing to market the remaining models of digital devices for which it had not yet provided test reports demonstrating compliance with the Commission's technical standards.²⁶ Furthermore, a review of importation data maintained by Customs revealed that Behringer apparently was not submitting FCC Form 740s for the digital devices which it imported into the United States, as represented in its LOI response. Accordingly, on December 29, 2004, the Bureau issued Behringer a Further LOI.²⁷ Behringer responded to the Further LOI on February 15, 2005.²⁸

9. In its response to the Further LOI, Behringer admitted that it "has exported additional products to the United States that have not yet been tested for compliance with the Commission's

²¹ Further LOI Response at 1, Exhibits 2.

²² LOI Response at 4. In this connection, Behringer stated that it instructed Mitsubishi Electric Europe, B.V., of Dusseldorf, Germany, to "carry out testing on all of its digital products for compliance with FCC Rules 15.107 and 15.109." *Id.* at 3.

²³ *Id.* at 5-6. In the latter connection, Behringer also stated that it was updating the "instruction manuals which include the required statement available to its U.S. distributors and to U.S. purchasers of Behringer equipment over its website at www.behringer.com." *Id.* at 6.

²⁴ *Id.* at 5.

²⁵ *See* Attachment A.

²⁶ Specifically, Bureau staff observed that Behringer was continuing to market the devices on its website.

²⁷ Letter from Joseph P. Casey, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Doug White, President, Behringer USA, Inc. (December 29, 2004) ("Further LOI").

²⁸ Letter from Delbert D. Smith, Esq. and Michael J. Mendelson, Esq., Jones Day to Brian Butler, Assistant Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (dated February 15, 2005) ("Further LOI Response").

Rules.”²⁹ Behringer specifically admitted that since the Bureau issued the First LOI in March of 2004, it imported 93,620 units and sold 100,304 units of digital devices that had not yet been tested for compliance with the FCC’s rules.³⁰ Behringer also admitted that, notwithstanding its prior commitment, it “did not submit the Commission’s Form 740 when importing its Class B digital radio frequency devices into the United States,”³¹ and only began to file the forms in February 2005, after it received the Further LOI.³²

10. Following receipt of the Further LOI, Behringer submitted test reports demonstrating compliance of an additional 14 models of its digital devices with the Commission’s technical standards. To date, Behringer has submitted test reports demonstrating compliance of only 28 of the 66 models of digital devices with the Commission’s technical requirements.³³

11. Of the 28 models that Behringer has tested and verified as compliant with the Commission’s technical standards, 16 models were tested and verified more than one year prior to the date of this NAL. The marketing of these 16 models prior to verification are therefore beyond the applicable one-year statute of limitations and are not subject to this NAL.³⁴ Accordingly, this NAL takes into account only 50 of the 66 models of unauthorized Class B digital devices marketed by Behringer in the United States.³⁵ The Enforcement Bureau confirmed through advertisements and price lists on Behringer’s website that it marketed these 50 models within the past year.

III. DISCUSSION

12. Under Section 503(b)(1)(b) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.³⁶ To impose

²⁹ Further LOI Response at 3.

³⁰ *Id.* at Exhibit 4. *See also* Attachment A.

³¹ *Id.* at 4.

³² Behringer attributed its initial failure to file the FCC Form 740s to reliance upon its custom broker’s erroneous advice. We note, however, that Behringer’s reliance upon its broker’s advice does not relieve it of its responsibility, and its prior commitment, to comply with the filing requirements. *See* 47 C.F.R. § 2.1203(a); *see also* *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002); *Wagenvoord Broadcasting Co.*, 35 FCC 2d 361, 361-63 (1972).

³³ *See* Attachment A.

³⁴ 47 U.S.C. § 503(b)(6)(B).

³⁵ *See* Attachment A; *but see supra* discussion at ¶ 20.

³⁶ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1). Section 312(f)(1) of the Act defines “willful” as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991) (“*Southern California*”). The Commission may also assess a forfeiture for violations that are merely repeated, and not willful. *See, e.g., Callais Cablevision, Inc.*, 16 FCC Rcd 1359 (2001) (“*Callais Cablevision*”) (issuing a notice of apparent liability for forfeiture for, *inter alia*, a cable (continued....))

such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.³⁷ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.³⁸ As set forth in detail below, we conclude under this standard that Behringer is apparently liable for forfeiture for its apparent willful and repeated violations of Sections 302(b) of the Act and Section 2.803(a) of the Rules.

13. The fundamental issue in this case is whether Behringer apparently violated the Act and the Commission's rules by willfully or repeatedly marketing unauthorized radio frequency devices. Based on a preponderance of the evidence, we conclude that Behringer is apparently liable for a forfeiture of \$1,000,000 for apparently willfully and repeatedly violating Section 302(b) of the Act and Section 2.803(a) of the Rules.

14. Specifically, we propose base forfeitures of \$7,000 for each of the 50 models of unauthorized digital devices it marketed in the United States within the last year. Additionally, we propose upward adjustments to this aggregate base forfeiture of \$350,000 based on the egregious nature of Behringer's misconduct, its relative disincentive to comply (ability to pay a forfeiture), and the substantial economic gain it derived from its continued marketing of unauthorized devices after the Enforcement Bureau began its investigation. Although we propose forfeitures only for apparent violations within the applicable one year statute of limitations, we discuss below the history of Behringer's noncompliance in prior years to demonstrate the scope of its misconduct and to provide sufficient context for the misconduct that is within the statute of limitations period and thus covered by this NAL.

A. Marketing of unauthorized digital devices

15. We conclude that Behringer apparently violated Section 302(b) of the Act and Section 2.803(a) of the Rules by willfully and repeatedly marketing unauthorized digital audio devices in the United States. Since January 2000, Behringer has imported and marketed in the United States, 66 models of unauthorized digital devices. Between January 2000 and March 2004, Behringer imported approximately 1.17 million unauthorized digital devices for sale in the United States. Additionally, between April 2004 -- when Behringer represented in its response to the First LOI that it had initiated measures to ensure compliance with the Commission's equipment verification requirements -- and February 2005 -- when Behringer responded to the Further LOI -- Behringer *continued* to import and market in the United States unauthorized digital devices. Specifically, Behringer acknowledged that it imported 93,620 unauthorized devices and sold 100,304 unauthorized devices in the United States *after* the Enforcement Bureau began its investigation into Behringer's compliance with the equipment authorization requirements. Moreover, the record establishes that Behringer continued to market a total of 50 models of unauthorized devices in the United States during the past year. Furthermore, notwithstanding its representations in April 2004 that it would submit test reports demonstrating

(Continued from previous page) _____
television operator's repeated signal leakage). The term "repeated" means that the act was committed or omitted more than once, or lasts more than one day. *Callais Cablevision*, 16 FCC Rcd at 1362, ¶ 9; *Southern California*, 6 FCC Rcd at 4388, ¶ 5.

³⁷ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

³⁸ See, e.g., *SBC Communications, Inc.*, 17 FCC Rcd 7589, 7591, ¶ 4 (2002).

compliance of all 66 of its digital products, to date Behringer still has not submitted test reports verifying compliance of 38 models.³⁹

16. Under Sections 2.909(b) and 2.953(b) of the Rules,⁴⁰ Behringer, as the manufacturer and importer of Class B digital devices, is the party responsible for ensuring that all its models of audio products are tested and verified as compliant with the applicable technical equipment standards before such products are imported into and marketed in the United States. Although Behringer stated that, prior to the issuance of the First LOI, it tested a range of devices for “CE” compliance, the record established that Behringer, in fact, only tested a small number models for CE compliance.⁴¹ Irrespective of the number of models tested for CE compliance, we note that such testing neither is the equivalent of nor demonstrates compliance with the Commission’s technical standards.

17. Accordingly, based on the preponderance of the evidence, we find that Behringer apparently violated, and continues to violate more than a year after receiving the First LOI from the Enforcement Bureau, Section 302(b) of the Act and Section 2.803(a) of the Rules by marketing unauthorized Class B digital devices in the United States. Within the last year specifically, which is the time period covered by this NAL, Behringer apparently marketed 50 models of unauthorized Class B digital devices in the United States.

B. Proposed Forfeiture.

18. Section 503(b) of the Act and Section 1.80(a) of the Rules provide that any person who willfully or repeatedly fails to comply with the provisions of the Act or the Rules shall be liable for a forfeiture penalty. Based upon the record before us, it appears that Behringer’s violations of Section 302(b) of the Act and Section 2.803(a) of the Rules were willful and repeated.

19. Section 1.80(b)(4) of the Rules establishes a base forfeiture amount of \$7,000 for each violation involving the importation or marketing of unauthorized equipment.⁴² Section 503(b)(2)(C) of the Act, however, authorizes the Commission to assess a maximum forfeiture of \$11,000 for each violation, or each day of a continuing violation, up to a statutory maximum forfeiture of \$97,500 for any single continuing violation.⁴³ In determining the appropriate forfeiture amount, Section 503(b)(2)(D) of

³⁹ See *supra* note 33 and accompanying text.

⁴⁰ 47 C.F.R. §§ 2.909(b), 2.953(b) (identifying the manufacturer of radio frequency devices subject to authorization under the verification procedure, or the importer in the case of imported devices, as the responsible party).

⁴¹ See *supra* note 20.

⁴² 47 C.F.R. § 1.80(b)(4).

⁴³ 47 U.S.C. § 503(b)(2)(C). The Commission twice amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), to increase the maxima forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. See *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 15 FCC Rcd 18221 (2000) (adjusting the maximum statutory amounts from \$10,000/\$75,000 to \$11,000/\$87,500); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 19 FCC Rcd 10945 (2004) (adjusting the maximum statutory amounts from \$11,000/\$87,500 to \$11,000/\$97,500); see also 47 C.F.R. § 1.80(c).

the Act directs the Commission to consider factors, such as “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁴⁴ In the present case, we find that each instance of marketing of an unauthorized model constitutes a separate and continuing violation, and, as discussed below, we find that the circumstances presented warrant a substantial proposed forfeiture amount.

20. Section 503(b)(6) of the Act bars the Commission from proposing a forfeiture for violations that occurred more than a year prior to the issuance of an NAL.⁴⁵ However, Section 503(b)(6) does not bar the Commission from assessing whether Behringer’s conduct prior to that time period apparently violated the provisions of the Act and Rules and from considering such conduct in determining the appropriate forfeiture amount for violations that occurred within the one-year statutory period.⁴⁶ Thus, while we may consider the fact that Behringer’s conduct has continued over a five-year span, the forfeiture amount we propose herein relates only to Behringer’s apparent violations that have occurred within the past year.

21. The record establishes that within the past year, Behringer has marketed 50 models of unauthorized Class B digital devices within the United States. Consequently, we initially find that Behringer is apparently liable for a base forfeiture of \$7,000 for each of these 50 models of unauthorized devices for a total base forfeiture of \$350,000. That base forfeiture amount is, however, subject to an upward adjustment.

22. Having considered the statutory factors enumerated above, we conclude that a substantial upward adjustment is warranted. We find the violations here particularly egregious because Behringer continued to import and market a substantial volume of unauthorized Class B digital devices for more than a year after the Bureau initiated its investigation. In this regard, we note that Behringer imported 93,620 unauthorized units and sold 100,304 unauthorized units after representing in its response to the First LOI that it would file the requisite import declarations on FCC Form 740 for any digital devices imported into the United States.⁴⁷ We also believe that an upward adjustment of the base forfeiture is warranted based on the substantial economic gain Behringer derived from its marketing of the unauthorized devices. We observe, in this connection, that the total retail sales of the 100,304 unauthorized devices that Behringer sold in the United States *after* the Bureau initiated its investigation amounted to approximately \$28.5 million.⁴⁸ Moreover, we take into account the fact that Behringer’s

⁴⁴ 47 U.S.C. § 503(b)(2)(D). *See also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

⁴⁵ 47 U.S.C. § 503(b)(6).

⁴⁶ *See* 47 U.S.C. § 503(b)(2)(D), 47 C.F.R. § 1.80(b)(4); *see also* *Globcom, Inc. d/b/a Globcom Global Communications*, 18 FCC Rcd 19893, 19903 ¶ 23 (2003), *rev. pending*; *Roadrunner Transportation, Inc.*, 15 FCC Rcd 9669, 9671-71 ¶ 8 (2000); *Cate Communications Corp.*, 60 RR 2d 1386, 1388 ¶ 7 (1986); *Eastern Broadcasting Corp.*, 10 FCC 2d 37, 37-38 ¶ 3 (1967); *Bureau D’Electronique Appliquee, Inc.*, 20 FCC Rcd 3445, 3447-48 ¶¶ 8-9 (Enf. Bur., Spectrum Enf. Div. 2005).

⁴⁷ It was implicit in Behringer’s representation that it would file the requisite import declarations that any imported devices would be in compliance with the Commission’s equipment authorization requirements. *See* 47 C.F.R. § 2.1204 (specifying the conditions for importation of radio frequency devices).

⁴⁸ We estimated the total retail sales of these unauthorized devices using price lists found on Behringer’s website. While we recognize that Behringer’s gross revenues from its sale of these unauthorized devices is less than the (continued....)

violations have continued for more than five years overall and more than one year after the Bureau initiated its investigation. Finally, we take into account Behringer's high revenues and ability to pay a forfeiture in determining the appropriate forfeiture amount. As the Commission made clear in the *Forfeiture Policy Statement*, companies with higher revenues, such as Behringer,⁴⁹ could expect forfeitures higher than those reflected in the base amounts.⁵⁰

23. Accordingly, we propose an aggregate forfeiture of \$1,000,000 for Behringer's apparent willful and repeated violation of Section 302(b) of the Act and Section 2.803(a) of the Rules. In proposing the \$1,000,000 forfeiture, we recognize that it is substantially higher than the base forfeiture amount of \$350,000. We also recognize that the proposed forfeiture amount substantially exceeds the forfeiture amounts proposed in recent equipment cases. Specifically, we recently proposed a \$75,000 forfeiture against a manufacturer for advertising one model of an unauthorized device in various venues,⁵¹ and proposed a \$125,000 forfeiture against a retailer for selling several models of unauthorized devices on thirteen occasions.⁵² We believe, however, that because Behringer marketed a significantly larger number of models and units of unauthorized devices, and given the other factors discussed above, particularly Behringer's failure to live up to the representations made in its response to the Bureau's First LOI, the substantial upward adjustment of the base forfeiture amount is fully warranted. Furthermore, we note that \$1,000,000 proposed forfeiture amount is substantially lower than the straightforward application of the applicable maximum statutory forfeiture amount of \$4,875,000.⁵³ We believe, however, that the forfeiture proposed will sufficiently deter Behringer's future violations of the Act and the Rules.

(Continued from previous page) _____

retail sales, we think it is obvious that Behringer realized substantial revenues from its sale of these unauthorized devices.

⁴⁹ Since Behringer was founded in 1989, Behringer "has reported a continuous 40 percent annual growth and a 130 million US dollar turnover in 2003." Press Release, *Happy Birthday, Behringer! Behringer Announces its 15th Anniversary at the Frankfurt Prolight+Sound 2004* (March 31, 2004), www.behringer.com.

⁵⁰ Specifically, the Commission stated:

[O]n the other end of the spectrum of potential violations, we recognize that for large or highly profitable communication entities, the base forfeiture amounts ... are generally low. In this regard, we are mindful that, as Congress has stated, for a forfeiture to be an effective deterrent against these entities, the forfeiture must be issued at a high level For this reason, we caution all entities and individuals that, independent from the uniform base forfeiture amounts ..., we intend to take into account the subsequent violator's ability to pay in determining the amount of a forfeiture to guarantee that forfeitures issued against large or highly profitable entities are not considered merely an affordable cost of doing business. Such large or highly profitable entities should expect in this regard that the forfeiture amount set out in a Notice of Apparent Liability against them may in many cases be above, or even well above, the relevant base amount.

Forfeiture Policy Statement, 12 FCC Rcd at 17099-100.

⁵¹ *ACR Electronics, Inc.*, 19 FCC Rcd at 22303 ¶ 24.

⁵² *Pilot Travel Centers, L.L.C.*, 19 FCC Rcd 23113, 23117 ¶¶ 15-17 (2004).

⁵³ See *supra* note 43 and accompanying text, permitting a maximum of \$97,500 for each of the 50 instances of apparent violations.

24. Finally, we note that, following the Enforcement Bureau's issuance of the LOIs, Behringer did take some initial steps to comply with the Commission's equipment authorization and related requirements. These efforts, however, do not warrant reduction of the proposed forfeiture amount. First, implementation of corrective measures in response to an LOI is expected, and thus does not nullify or mitigate past violations.⁵⁴ Second, Behringer committed to even greater remedial actions in its response to the First LOI than it has achieved to date. Indeed, it appears that Behringer's measures still have not brought all of its devices into compliance with the relevant FCC rules. Given the continuing nature of Behringer's violations, we will require Behringer to submit an affidavit, signed by an officer or director of the licensee, to the Enforcement Bureau within 30 days of the release of this NAL, stating whether it has complied with Sections 302(b) of the Act and Sections 2.803(a) of the Rules with respect to each model which it is currently importing and marketing in the United States, and if not, providing its plans for full compliance. Behringer's failure to submit the affidavit, or failure to comply with the applicable equipment requirements, may subject the company to further appropriate enforcement action.

IV. ORDERING CLAUSES

25. Accordingly, **IT IS ORDERED** that, pursuant to pursuant to Section 503(b) of the Act⁵⁵ and Sections 0.111, 0.311 and 1.80 of the Rules,⁵⁶ Behringer USA, Inc., **IS NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of one million dollars (\$1,000,000) for willfully and repeatedly violating Section 302(b) of the Act and Section 2.803(a) of the Rules.

26. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Behringer USA, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

27. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

28. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

29. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status.

⁵⁴ See *AT&T Wireless Services, Inc.*, 17 FCC Rcd 7891 (2002), *forfeiture ordered*, 17 FCC Rcd 21866, 21875-76 ¶¶ 26-28 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 ¶ 7 (1994); *TCI Cablevision of Maryland, Inc.*, 7 FCC Rcd 6013, 6014 ¶ 8 (1992).

⁵⁵ 47 U.S.C. § 503(b).

⁵⁶ 47 C.F.R. §§ 0.111, 0.311 and 1.80.

Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

30. Requests for payment of the full amount of this NAL under an installment plan should be sent to: Chief, Revenue and Receivable Operations Group, 445 12th Street, S.W., Washington, D.C. 554.⁵⁷

31. **IT IS FURTHER ORDERED** that, pursuant to Section 403 of the Act,⁵⁸ Behringer USA, Inc., must submit the affidavit described in paragraph 23 above, within 30 days from the release of this NAL, to: Federal Communications Commission, Enforcement Bureau, Spectrum Enforcement Division, 445 12th Street, S.W., Washington, D.C. 20554, Attention: Ava Holly Berland.

32. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Delbert D. Smith, Esq. and Michael J. Mendelson, Esq., Jones Day, 51 Louisiana Avenue, N.W., Washington, D.C. 20001-2113, counsel to Behringer USA, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁷ See 47 C.F.R. § 1.1914.

⁵⁸ 47 U.S.C. § 403.

Attachment A
Behringer Unauthorized Class B Digital Devices Marketed in the United States

Type of Device	Models #s	Date of Test Report Demonstrating Compliance with FCC Standards	Total # of Unauthorized Devices Imported After First LOI	Total # of Unauthorized Devices Sold After First LOI
Dynamic Processors	DSP9024		4	450
	AES/EBU 9024			206
	DSP1424P	2/24/2005		2/
Equalizers	DEQ2496	5/11/2004 ¹		2/
	DEQ1024		2606	696
	AES/EBU 8024			49
Microphone Preamps	VX2496			852
Digital Effects Processors	REV2496	3/13/2005	4753	565
	DSP2024P	6/24/2004 ^{1L}		2/
	DSP1224P	2/24/2005		5
Audio Solutions	DSP1124P	2/24/2005	2803	11212
	DSP110		1405	4319
	ADA8000		5665	8161
	SRC2496			456
	SRC2000			179
	CT100			2/
UB Series Mixing Consoles	UB2442FX-PRO	5/11/2004 ^{1L}		2/
	UB2222FX-PRO	5/5/2004 ^{1L}		2/
	UB1832FX-PRO	5/11/2004 ^{1L}		2/
	UB1622FX-PRO	5/11/2004 ^{1L}		2/
	UB1222FX-PRO	4/14/2004 ^{1L}		2/
	UB1204FX-PRO	6/24/2004 ^{1L}		2/
	UB1204-PRO	6/23/2004 ^{1L}		2/
Analog Mixing Consoles	SL3242FX-PRO		7543	5567
	SL2442FX-PRO		6480	3007
	MX3242X		410	1442
Digital Mixing Consoles	DDX3216		300	1204
	ADT1616		335	846
	TDF1616			69
	AES808/ACB808P			2/
Powered Mixers	PMH5000	3/1/2005	7400	1702
	PMH3000	3/1/2005	15092	4804
	PMH1000	4/6/2005	11378	1044
	PMH880S		5979	1061
	PMH660M	5/2//2005		2/
	PMH2000	8/3/2004 ^{1L}		2/

Attachment A (cont'd)

Type of Device	Model #s	Date of Test Report Demonstrating Compliance with FCC Standards	Total # of Unauthorized Devices Imported After First LOI	Total # of Unauthorized Devices Sold After First LOI
DJ Mixers	VMX1000	2/17/2005	14068	7437
	VMX300	2/16/2005		1245
	VMX200			^{2/}
	VMX100	4/13/2004 ^{1/}		^{2/}
	DJX700	3/14/2005	12401	10909
	DJX400			1217
	DX626		352	1643
	DX052		75	1265
DJ Gear	DFX69			^{2/}
Modeling Amp	V-AMP PRO			^{2/}
	V-AMP2	4/13/2004 ^{1/}		^{2/}
	X V-AMP			^{2/}
	BASS V-AMP PRO	3/3/2005		^{2/}
	BASS V-AMP			^{2/}
	LX1200H		3455	685
	LX1-112	4/13/2004 ^{1/}		^{2/}
Guitar Amp	GMX1200H		1645	565
	GMX212	6/11/2004 ^{1/}		^{2/}
	GMX210	9/20/2004 ^{1/}		^{2/}
	GMX110	4/13/2004 ^{1/}	7250	6009
	AC112		169	2085
	GX112			^{2/}
	ACX1000		1906	8134
Instrument Amp Accessories	FCB1010			^{2/}
Pro Lighting Systems	LC2412			^{2/}
	BLM420			^{2/}
	LD6230			^{2/}
Audio Interfaces	BCA2000		2960	744
Controllers	BCF2000		5191	3052
	BCR2000		4961	1213

^{1/}These models are beyond the applicable one-year statute of limitations because Behringer tested and verified these models as compliant with FCC technical standards more than one year prior to the date of this NAL.

^{2/}Although Behringer did not report any sales of these models during the period between April 2004 (when Behringer submitted its response to the First LOI) and February 2005 (when Behringer submitted its response to the Further LOI), Enforcement Bureau staff confirmed from advertisements and price lists on Behringer's website that it was continuing to market these models in the United States.