

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

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

FORFEITURE ORDER

Adopted: May 23, 2007

Released: June 1, 2007

By the Commission:

I. INTRODUCTION

1. By this Forfeiture Order (“Order”), we find that Behringer USA, Inc. (“Behringer”) marketed 50 models of unauthorized radio frequency equipment, specifically digital audio music devices, in 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 We further find that Behringer’s violations warrant, and the record before us supports, the imposition of a forfeiture in the amount of one million dollars (\$1,000,000).

II. BACKGROUND

2. Section 302(b) of the Act provides that “[n]o person shall manufacture, import, sell, offer for sale, or ship devices of home electronic equipment and systems, or use devices, which fail to comply with regulations promulgated pursuant to this section.” Under Sections 2.803(a) and 15.101³ of the Commission’s implementing regulations, Class B digital devices⁴ may not be marketed prior to authorization in accordance with the Commission’s verification procedures⁵ and related requirements.⁶ “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 equipment.⁷

¹ 47 U.S.C. § 302a(b).

² 47 C.F.R. § 2.803(a).

³ 47 C.F.R. § 15.101.

⁴ A Class B digital device is “a device marketed for use in residential environment notwithstanding use in commercial, business and industrial environments.” 47 C.F.R. § 15.3(i).

⁵ Under the verification procedures, the manufacturer of radio frequency devices, or the importer in the case of imported devices, must make measurements or take the necessary steps to obtain measurements to ensure that the subject devices comply with the Commission’s technical standards. *See* 47 C.F.R. § 2.902(a).

⁶ *See* 47 C.F.R. §§ 15.19(a)(3), 15.105(b), 2.1203-05; *see also supra* n. 10, 11, 12 and accompanying text.

⁷ *See* 47 C.F.R. § 2.803(e).

3. Digital audio music devices are considered Class B digital devices, and, as such, must be authorized in accordance with the Commission's verification procedures prior to marketing.⁸ Specifically, under the Commission's equipment verification procedure, Class B digital devices must be tested and verified as compliant with the Commission's conducted emission and radiated emission limits set forth in Sections 15.107 and 15.109 of the Rules.⁹ Additionally, Class B digital devices must be labeled as specified in Section 15.19(a)(3) of the Rules,¹⁰ and its user instruction manuals must include the information detailed in Section 15.105(b) of the Rules.¹¹ Finally, imported Class B digital devices are subject to mandatory Custom declaration (FCC Form 740) filing requirements.¹²

4. On February 16, 2006, the Commission issued a Notice of Apparent Liability for Forfeiture ("NAL") proposing a \$1,000,000 forfeiture against Behringer for its apparent willful and repeated violation of the equipment marketing restrictions and related requirements.¹³

5. Specifically, the NAL found that since January 2000, Behringer has imported and marketed in the United States 66 models of unauthorized digital audio music devices.¹⁴ Between January 2000 and March 2004, Behringer imported and distributed approximately 1.17 million such devices for sale in the United States.¹⁵ The NAL further found that between April 2004 and February 2005 Behringer continued to import and market unauthorized devices, even though it had previously represented to the Enforcement Bureau in response to the first letter of inquiry ("LOI") that it had initiated compliance measures.¹⁶ In this regard, during the one-year period after the Enforcement Bureau initially launched its investigation, Behringer imported 93,620 unauthorized units and sold 100,304 unauthorized units with a retail value of approximately \$28.5 million.¹⁷ The NAL concluded that the circumstances warranted a substantial upward adjustment from the aggregate base forfeiture of \$350,000 (\$7,000 base forfeiture x 50 unauthorized models) and accordingly proposed a \$1,000,000 forfeiture.¹⁸

⁸ See *supra* n. 5.

⁹ 47 C.F.R. §§ 15.107 and 109.

¹⁰ 47 C.F.R. § 15.19(a)(3).

¹¹ 47 C.F.R. § 15.105(b).

¹² 47 C.F.R. §§ 2.1203-2.1205.

¹³ See *Behringer USA, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 1820 (2006).

¹⁴ *Id.* at 1824 ¶ 11 and 1825-26 ¶ 15. As of the date the NAL was issued, Behringer had tested and verified only 28 of the 66 models. Out of those 28 models, 16 models were tested and verified more than one year prior to the NAL, and thus were beyond the one year statute of limitations under Section 503(b)(6)(B) of the Act, 47 U.S.C. § 503(b)(6)(B). Thus, only 50 unauthorized models were subject to the NAL. See NAL, 21 FCC Rcd at 1827 ¶¶ 20-21; see also *infra* n.69.

¹⁵ *Id.* at 1822 ¶ 5 and 1825-26 ¶ 15.

¹⁶ *Id.* at 1825-26 ¶ 15 and 1827-28 ¶ 22.

¹⁷ *Id.* at 1827-28 ¶ 22.

¹⁸ *Id.* at 1828 ¶ 23.

6. In its response to the NAL,¹⁹ Behringer acknowledges that it “failed to comply with applicable rules governing testing, labeling, and the filing of Form 740 for certain of its products.”²⁰ Nevertheless, Behringer seeks a reduction in forfeiture liability, claiming that the NAL erroneously included 28 models of its devices as non-compliant²¹ and that the forfeiture proposed in the NAL is excessive.²² Behringer also claims that it has implemented affirmative measures to ensure compliance with the FCC equipment authorization and related requirements.²³

III. DISCUSSION

7. The proposed forfeiture set forth in the NAL was assessed in accordance with Section 503(b) of the Act²⁴ and Section 1.80 of the Rules,²⁵ and the guidelines enunciated in the Commission’s *Forfeiture Policy Statement*.²⁶ In assessing forfeiture liability, Section 503(b)(2)(E) of the Act directs the Commission to take into account the violator’s degree of culpability, history of prior offenses and ability to pay; the nature, circumstances, extent and gravity of the violation, and such other matters as justice may require.²⁷ We have considered Behringer’s claims in light of the above statutory factors, and have determined that there is no basis for reduction of the proposed forfeiture.

A. The NAL Properly Considered the 28 Challenged Models

8. Behringer challenges the NAL’s inclusion of 28 models in determining the proposed forfeiture amount.²⁸ As discussed below, we find that the NAL appropriately considered these 28 challenged models in determining the proposed forfeiture amount.

9. First, Behringer claims that the NAL erred by including the SRC2000 and the BLM- 420.²⁹ Behringer asserts, for the first time, that it discontinued the SRC2000 in October 2004, more than a year prior to the date the NAL was issued,³⁰ and it never shipped or sold the BLM420 in the United States. As an initial matter, we note that an internal email submitted by Behringer in support of its

¹⁹ See Response to Notice of Apparent Liability for Forfeiture and Order of the Federal Communications Commission (March 20, 2006) (“Response”).

²⁰ *Id.* at 8.

²¹ *Id.* at 2-8.

²² *Id.* at 13-14.

²³ *Id.* at 8.

²⁴ 47 U.S.C. § 503(b).

²⁵ 47 C.F.R. § 1.80.

²⁶ *Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) (“*Forfeiture Policy Statement*”).

²⁷ 47 U.S.C. § 503(b)(2)(E).

²⁸ In its Response, Behringer submits that the “forfeiture proposed by the FCC should not have included these 27 products,” but the company is actually challenging the NAL’s inclusion of 28 models. Response at 1.

²⁹ *Id.* at 2-3.

³⁰ *Id.* at Exhibit 1.

claim that the SRC2000 was discontinued more than a year prior to the NAL, which is dated October 16, 2004, states “We have identified the products listed below as discontinued items. The sales force have been tasked with aggressively selling them at a discount to clear inventory.”³¹ A subsequent internal email submitted by Behringer, dated October 26, 2005, states with respect to the same list of “discontinued” products “please let me have the inventory position on the products listed below and where significant inventory exists let me have the expected depletion time based on current consumption.”³² Thus, the documentation submitted by Behringer does not support its claim that it discontinued sales of the SCR2000 in October 2004. Moreover, as noted previously, Section 2.803(a)’s prohibition is not limited to the shipment, sale or lease of unauthorized equipment. Rather, Section 2.803(a)’s prohibition explicitly covers the offering (including the advertising) for sale or lease of unauthorized equipment. The record established, and Behringer does not dispute, that both the SRC2000 and BLM420 were advertised on its website and included in its price lists. Consistent with precedent,³³ we find that the inclusion of the SRC2000 and BLM420 on Behringer’s website and its price lists constituted marketing and as such were prohibited under Section 2.803(a). We accordingly find that Behringer unlawfully marketed the SRC2000 and BLM420 models in the United States, and that the NAL’s inclusion of these two models was appropriate.

10. Second, Behringer claims that the NAL erred by including the following five models: the AES/EBU9024, AES/EBU 8024, ADT1616, TDF1616 and AES808/ACB808P.³⁴ Behringer claims, for the first time, that these five models contain simple conversion circuits, and, as such, are not subject to the authorization procedures.³⁵ Behringer also claims, and provides documentation to show,³⁶ that after the NAL was issued, it tested and verified that the devices were compliant with the Commission’s technical standards.³⁷ Section 15.103(g) of the Rules provides:

Joystick controllers or similar devices, such as a mouse, used with digital devices but which contain only non-digital circuitry or a simple circuitry to convert the signal to the format required (e.g., an integrated circuit for analog to digital conversion) are viewed as passive add-on devices, not themselves directly subject to the technical standards or the equipment authorization requirements.³⁸

It is well established that parties bear responsibility for providing sufficient evidence to support their own factual assertions.³⁹ Accordingly, it was incumbent upon Behringer to provide supporting documentation

³¹ *Id.*

³² *Id.*

³³ See *ACR Electronics, Inc.*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 22293, 22299 ¶ 15 (2004), *forfeiture ordered*, 21 FCC Rcd 3698 (2006) (finding that the manufacturer violated Section 2.803(a) by distributing promotional materials and price lists for unauthorized devices) (“*ACR Electronics*”); *Gibson Tech Ed, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 14438, 14438-39, 14440 ¶¶ 3-4, 7 (Enf. Bur., Spectrum Enf. Div. 2005), *forfeiture ordered*, 21 FCC Rcd 2915 (Enf. Bur., Spectrum Enf. Div. 2006) (finding that the retailer violated Section 2.803(a) by advertising unauthorized devices on its website).

³⁴ See Response 3-4.

³⁵ *Id.* at 3.

³⁶ See Fourth Partial NAL Response (March 9, 2006); Sixth Partial Response (March 13, 2006).

³⁷ See Response at 3-4.

³⁸ 47 C.F.R. § 15.103(g).

³⁹ See, e.g., *Webnet Communications, Inc.*, Order of Forfeiture, 18 FCC Rcd 6870, 6878 ¶ 16 (2003) (rejecting (continued ...))

to substantiate its claim that these five models are not subject to the equipment authorization procedures. Behringer, however, failed to do so. Specifically, Behringer's technical documentation, which purports to show that these five models contained simple conversion circuits, does not diagram in detail the devices' circuit layouts or identify the component parts. Behringer's technical documentation thus is insufficient to permit a determination as to whether these five devices qualify as passive add-on devices under Section 15.103(g). Because Behringer failed to present detailed technical documentation, we cannot assess its claim that these devices are not subject to the technical standards or equipment authorization requirements. Further, the fact that these models were tested and verified as compliant with the FCC's technical standards after issuance of the NAL is irrelevant.

11. Third, Behringer claims that the NAL erred by including the following 17 models: the AC112, CT100, DJX400, DX052, FCB1010, LC2412, V Amp Pro, MX3242X, Bass V-Amp, ACX1000, DFX69, DSP9024, DX626, GX112, VMX200, DSP110 and LD6230. Behringer claims that all 17 models were found to be compliant with European technical standards, as evidenced by the "CE" markings⁴⁰ and the CE test reports submitted in response to the Enforcement Bureau's Letters of Inquiry.⁴¹ According to Behringer, demonstrated compliance with the technical requirements of the CE should satisfy those of the FCC, because the standards for these products "are equivalent."⁴² In support of this assertion, Behringer submits a comparative analysis report prepared by its engineering staff⁴³ to show that 17 models were tested and found to comply under the "technically equivalent" CE and FCC standards.⁴⁴

12. We disagree. Although the CE and the FCC standards share some common elements, as the NAL noted, "[CE] testing neither is the equivalent of nor demonstrates compliance with the Commission's technical standards."⁴⁵ FCC compliance testing must be done in accordance with the FCC's measurement procedures.⁴⁶ Moreover, while Behringer correctly notes that the European test lab that conducted the CE tests is an accredited test laboratory under the Agreement on Mutual Recognition ("MRA") between the U.S. and the EC signed in 1998,⁴⁷ test laboratories accredited under the MRA are

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inability to pay argument because licensee failed to provide detailed and relevant financial information); *All American Telephone, Inc.*, Order of Forfeiture, 16 FCC Rcd 16601, 16610 ¶ 21 (2001) (rejecting carrier's claim that it was unable to pay proposed forfeiture because carrier failed to provide supporting evidence of its revenues); *Amer-I-Net Services Corp.*, Order of Forfeiture, 15 FCC Rcd 3118, 3123 ¶ 16 (2000) (rejecting carrier's unsubstantiated factual claims about its compliance plan).

⁴⁰ "CE" is an abbreviation for *Conformité Européenne*, and it represents that equipment meets European technical standards. See NAL, 21 FCC Rcd 1820 at n. 19.

⁴¹ See Response at 4-5.

⁴² *Id.* at 6.

⁴³ See Exhibits 2-3.

⁴⁴ Response at 5. Behringer tested the 17 models for compliance with FCC requirements *after* issuance of the NAL.

⁴⁵ NAL, 21 FCC Rcd 1826 ¶ 16.

⁴⁶ See 47 C.F.R. § 15.109(g)(1) which indicates that FCC measurement procedures must be followed even where testing to the relevant international emissions limits; see also 47 C.F.R. § 15.31 Note to Paragraph (a)(3) (stating "[d]igital devices tested to show compliance with the provisions of §§ 15.107(e) and 15.109(g) must be tested following the ANSI C63.4 procedure described in paragraph (a)(3) of this section").

⁴⁷ See *FCC Accepts Accreditation of European Laboratories for Declaration of Conformity Testing*, Public Notice, 13 FCC Rcd 16626 (OET 1998).

still required to apply the FCC's test procedures and rules. Behringer has not presented any evidence, or even asserted, that the European test laboratory conducted the compliance testing in accordance with the FCC's measurement procedures. In light of Behringer's failure to provide such evidence, we must reject Behringer's contention that the 17 models comply with FCC technical standards.⁴⁸ Additionally, we are not persuaded by Behringer's claim that it "reasonably believed that the CE tests it conducted for a number of its products ... would be sufficient to comply with the applicable FCC regulations."⁴⁹ Behringer's professed reliance on CE tests to establish compliance with the FCC standards is belied by the fact that it only tested 17 of the 50 models for compliance with CE standards. The record establishes, and Behringer does not dispute, that these 17 models were marketed in the United States prior to verifying compliance with the applicable FCC technical standards. We thus find that Behringer unlawfully marketed these 17 models, and that their inclusion in the NAL was appropriate.

13. Finally, Behringer claims that the NAL erred by including four models that are "marketed and sold separately" but are "identical" in "electronic design and topology" to other products.⁵⁰ Specifically, Behringer claims that: the V-AMP 2 is identical to the Bass V-AMP; the GMX212 is identical to the GMX1200H; the V-Amp Pro is identical to the BASS V-AMP PRO; and the LX112 is identical to the LX1200H.⁵¹ In support, Behringer provides a comparative analysis of the models.⁵² Under Section 2.902(b) of the Rules, a device's equipment verification attaches to all devices the manufacturer or importer subsequently markets that are "identical" to the sample tested and verified as compliant with the Commission's applicable technical standards.⁵³ Under Section 2.908 of the Rules, "identical" is defined as "identical within the variation that can be expected to arise as a result of quantity production techniques."⁵⁴ Behringer, however, failed to provide sufficient documentation to support its argument that the devices are identical. The comparative analysis submitted by Behringer, which purports to establish that these devices were identical, neither diagrams in detail the eight models' circuit layouts, nor identifies their component parts. Accordingly, given Behringer's failure to present such detailed documentation, we must reject its claim that the four devices were identical to other products marketed separately.⁵⁵

B. The Proposed Forfeiture Is Not Excessive

14. Behringer claims that the NAL's proposed forfeiture amount is "excessive" when compared with the conduct of other companies whose actions resulted in fines in excess of \$1,000,000.⁵⁶

⁴⁸ See *supra* note 39.

⁴⁹ Response at 9.

⁵⁰ *Id.* at 6.

⁵¹ *Id.*

⁵² *Id.* at Exhibit 4. Pursuant to Sections 0.457 and 0.459 of the Rules, 47 C.F.R. §§ 0.457 and 0.459, Behringer requested confidential treatment of the "Comparative Analysis of Identical Behringer Products," asserting that the material contains "commercially sensitive information ... the disclosure of which could result in substantial competitive harm." Response at Exhibit 5. Having reviewed the material, we agree with Behringer and will accord the material confidential treatment.

⁵³ 47 C.F.R. § 2.902(b).

⁵⁴ 47 C.F.R. § 2.908.

⁵⁵ See *supra* note 39.

⁵⁶ Response at 13.

Behringer claims that fines in excess of \$1,000,000 have generally been reserved for violations that directly and deliberately harmed consumers,⁵⁷ jeopardized public safety,⁵⁸ and resulted in the exposure of children to programming that violate standards of decency.⁵⁹ Compared to such cases, Behringer characterizes its “failure to comply with the applicable Part 15 unintentional radiator standards and labeling requirements” as “relatively minor.”⁶⁰

15. As the cases cited by Behringer reflect,⁶¹ the Commission has assessed fines of \$1 million and more for violations involving harm to consumers and public safety in accordance with the directives of Section 503(b)(2)(D) of the Act⁶² and the upward adjustment factors of Section 1.80 of the Commission’s implementing regulations. The Commission has also applied these statutory directives and upward adjustment factors and assessed forfeitures of \$1 million or more in cases involving violations that did not directly affect consumer well being or public safety where, as here, the violator’s misconduct was egregious, its economic gains were substantial, its revenues have demonstrated an ability to pay, and its violations were continuous and repeated over a period of time.⁶³

16. Given the nature and extent of Behringer’s violations and its resources, we find, as the NAL found, that the proposed upwardly adjusted \$1 million forfeiture was consistent with precedent, as

⁵⁷ Behringer cites the following as illustrative examples of cases in which fines in excess of \$1,000,000 have been proposed or assessed for violations involving direct and deliberate harm to consumers: *ACS Telecom, Inc. d.b/a Alternatel*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 18654, 18656-57 ¶¶ 8-9 (2002) (proposing a \$1,440,000 forfeiture against an operator service provider for engaging in a widespread and deliberate scheme to mislead and overcharge consumers), *consent decree ordered*, 19 FCC Rcd 5160 (2004); *NOS Communications, Inc. and Affinity Network Inc.*, Notice of Apparent Liability for Forfeiture, 16 FCC Rcd 8133, 8141-42 ¶¶ 18-19 (2001) (proposing a \$1,000,000 forfeiture against a telecommunications carrier for deceptive marketing practices), *consent decree ordered*, 17 FCC Rcd 25853 (2002); and *Webnet Communications, Inc.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 11603, 11608-09 ¶¶ 14-15 (2002), *forfeiture ordered*, 18 FCC Rcd 6870 (2003) (imposing a \$1,200,000 forfeiture against a long distance provider for repeated slamming violations).

⁵⁸ Behringer cites *Centel Cellular Company of North Carolina Ltd. Partnership*, Notice of Apparent Liability for Forfeiture, 10 FCC Rcd 915 (1994), *forfeiture ordered*, 11 FCC Rcd 10800 (1996) (imposing a \$2,000,000 forfeiture against a wireless carrier for constructing and operating an antenna structure that constituted a hazard to air navigation), as an example of a case in which a fine in excess of \$1,000,000 was assessed for violations involving public safety.

⁵⁹ Behringer cites *Clear Channel Broadcasting Licensees et al*, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 1768, 1779 ¶¶ 20-21 (2004) (proposing a \$755,000 forfeiture against a broadcast licensee for repeatedly broadcasting indecent material), as an example of a case in which a substantial forfeiture was proposed for violations involving exposure of children to indecent programming.

⁶⁰ Response at 14.

⁶¹ See *supra* nn. 57-59. We note that the indecency case cited by Behringer did not propose a forfeiture in excess of \$1 million. See *supra* n. 59.

⁶² See *supra* n. 27 and accompanying text.

⁶³ See, e.g., *SBC Communications, Inc.*, 373 F.3d 140, 152 (D.C. Cir. 2004) (upholding the \$6 million forfeiture assessed against a carrier, based in part on the fact that the carrier’s violations were egregious, the carrier “stood to gain” by forcing its competitors to litigate to enforce merger conditions, and the carrier’s ability to pay); *Liberty Cable Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16105, 16113 ¶ 24 (affirming the \$1,425,000 forfeiture issued against a cable system operator for initiating service at multiple locations before obtaining Commission authorization, based in part on the fact that the company’s violations were egregious, repeated and continuous, and the company “stood to gain economically by providing service to subscribers even though it was not yet authorized to do so”).

well as the directives of Section 503(b)(2)(D) and the upward adjustment factors of Section 1.80. Indeed, we find that four of the seven upward adjustment factors specified in Section 1.80 were present in this case.⁶⁴ As set forth in the NAL, Behringer's violations were egregious, given that it continued to import and sell a significant number of unauthorized devices for approximately one year *after* the Enforcement Bureau launched its investigation and *after* Behringer represented that it would implement measures to come into compliance with the equipment authorization and related requirements.⁶⁵ We further note that Behringer ceased importing and selling the unauthorized units only *after* receiving a second LOI from the Enforcement Bureau.⁶⁶ Behringer's failure to take steps to bring its unauthorized devices into compliance, contrary to its representations to the Bureau, demonstrates a deliberate disregard for the Commission's rules, justifying a substantial upward adjustment of the base forfeiture amount. As noted in the NAL, Behringer also realized substantial economic gains from the sale of its unauthorized units.⁶⁷ Additionally, based on the record before us, Behringer, an international company with a reported \$130 million in revenues,⁶⁸ has the ability to pay a forfeiture (relative disincentive to comply with the Commission's regulations). Finally, Behringer's violations involved an unprecedented volume of unauthorized units, spanning a period of over five years, and thus were continuous and repeated.⁶⁹ These factors, taken together, warranted the substantial upward adjustment of the base forfeiture amount proposed in the NAL.

17. In sum, given the record, we find that the NAL's proposed forfeiture amount was reasonable and consistent with the case precedent, the statutory directives and the upward adjustment factors.

C. Behringer's Corrective Measures Do Not Warrant Reduction of the Proposed Forfeiture

18. Behringer seeks a reduction in the total forfeiture amount based on the "affirmative measures" it implemented after issuance of the Enforcement Bureau's March 29, 2004 LOI in order "to bring all of its products sold in the United States into compliance with the FCC's rules."⁷⁰ Behringer

⁶⁴ Section 1.80 of the Rules lists the following seven upward adjustment factors: (1) egregious misconduct; (2) ability to pay/relative disincentive; (3) intentional violation; (4) substantial harm; (5) prior violations of any FCC requirements; (6) substantial economic gain; and (7) repeated or continuous violation. See 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4); Section II. Adjustment Criteria for Section 503 Forfeitures.

⁶⁵ See *supra* n. 16, 17 and accompanying text.

⁶⁶ See *id.*

⁶⁷ The retail value of the unauthorized units imported and sold by Behringer during the one-year period after the Enforcement Bureau initially launched its investigation was approximately \$28.5 million. See *supra* n. 17 and accompanying text.

⁶⁸ NAL, 21 FCC Rcd at 1828 n. 49 and accompanying text.

⁶⁹ As the NAL pointed out, under Section 503(b)(6) of the Act, 47 U.S.C. § 503(b)(6), the Commission is barred from proposing a forfeiture for misconduct that occurred more than one year prior to the issuance of the NAL, but is not barred from considering such misconduct in determining the appropriate forfeiture amount for violations within the one-year statutory period. See NAL, 21 FCC Rcd at 1827 ¶ 20; see also *Enserch Corp.*, Forfeiture Order, 15 FCC Rcd 13551, 13554 ¶ 11 (2000); *Cate Communications Corp.*, Memorandum Opinion and Order, 60 RR 2d 1386, 1388 ¶ 7 (1986); *Eastern Broadcasting Corp.*, Memorandum Opinion and Order, 10 FCC 2d 37, 37-38 ¶ 3 (1967). Thus, the NAL's proposed forfeiture amount took into account the fact that Behringer's violations occurred for more than a five-year period, but related only to its apparent violations within the statutory period. See *supra* n. 14.

⁷⁰ *Id.* at 8, 10 (noting that it will only ship and make available for the U.S. market verified and fully compliant equipment).

further states that after the issuance of the NAL, it tested and verified 34 models as compliant with the Commission's applicable technical standards.⁷¹ Finally, Behringer states that since issuance of the NAL, it has begun implementing new procedures to ensure its compliance with the FCC's rules on a going-forward basis. Among other things, Behringer states that it has consolidated its research, development and manufacturing operations to ensure that all of its products are tested and verified in compliance with applicable standards; appointed a compliance officer to ensure that the requirements are met for each of the jurisdictions in which it markets its products; and is developing an in-house approval tracking and regulatory review process.⁷²

19. First, as noted in the NAL and set forth above, Behringer continued to market unauthorized devices for almost a year after receiving the Enforcement Bureau's first LOI in March 2004 and representing to the Commission that it would initiate measures to ensure that all of its devices comply with the verification and related requirements. Even after receiving the Enforcement Bureau's second LOI in December 2004, Behringer failed to implement measures to ensure all of its devices were in compliance with the Commission's requirements. We note, in this connection, that Behringer tested and verified 34 models for compliance only after the Commission issued the NAL.⁷³ Moreover, the Commission has repeatedly found that corrective measures implemented after Commission has initiated an investigation or taken enforcement action do not nullify or mitigate past violations.⁷⁴ Accordingly, we find that Behringer's remedial measures do not warrant any reduction in the forfeiture.⁷⁵

⁷¹ See Behringer's Partial Response to the NAL (March 1, 2006) (submitting reports indicating that the following six models were tested and verified between February 26 and 28, 2006: ACX1000, CT100, DX626, VMX200, DX052 and DJX400) (March 1, 2006); Behringer's Second Partial Response to the NAL (March 3, 2006) (submitting reports indicating that the following three models were tested and verified between February 28 and March 3, 2006: GX112, AC112 and LC412); Behringer's Third Partial Response to the NAL (March 7, 2006) (submitting reports indicating that the following two models were tested and verified on February 3, 2006: GMX1200H and LX1200H); Behringer's Fourth Partial Response to the NAL (March 9, 2006) (submitting reports indicating that the following seven models were tested and verified between February 28 and March 8, 2006: DFX69, MX3242X, V-AmpPro(LXI Pro), DSP110, Bass-Amp(LX1-B), DSP9024, and FCB1010); Behringer's Fifth Partial Response to the NAL (March 10, 2006) (submitting the report indicating that the model PMH880 was tested and verified on March 1, 2006); Behringer's Sixth Partial Response to the NAL (March 13, 2006) (submitting reports indicating that the following sixteen models were tested and verified between March 2 and 7, 2006: ADT1616, AES/EBU8024, AES808/ACB808P, TDF1616, DDX3216, ADA8000, BCF2000, BCR2000, DEQ1024, LD6230, SL2442FX, SL3242FX, SRC2406, VX2496 and V-AMP/LX1-X). Behringer notes that the BCA2000 failed FCC compliance testing and therefore the import, marketing and sale of this model "remains on indefinite hold." Response at 9 and Exhibit 6.

⁷² *Id.* at 11-13.

⁷³ As noted above, an additional model, the BCA2000, failed FCC compliance testing. See *supra* n. 66.

⁷⁴ See *ACR Electronics*, 19 FCC Rcd at 22303 ¶ 25; *AT&T Wireless Services, Inc.*, Notice of Apparent Liability for Forfeiture, 17 FCC Rcd 7891 (2002), *forfeiture ordered*, 17 FCC Rcd 21866, 21875 ¶¶ 26-28 (2002); *Seawest Yacht Brokers*, Notice of Forfeiture, 9 FCC Rcd 6099, 6099 ¶ 7 (1994); *TCI Cablevision of Maryland, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6013, 6014 ¶ 8 (1992); *Miami Radio, Inc.*, Memorandum Opinion and Order, 45 FCC 2d 612 ¶ 4 (1974); *Executive Broadcasting Corp.*, Memorandum Opinion and Order, 3 FCC 2d 699 ¶ 6 (1966); see also *Johannus Orgebouw B.V. The Netherlands*, Forfeiture Order, 19 FCC Rcd 7196, 7198-99 ¶ 9 (Enf. Bur. 2004).

⁷⁵ Cf. *Oleumtech Corporation*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 2421, 2423 ¶ 10 (downwardly adjusting the proposed forfeiture based on a finding that the manufacturer "made a good faith effort to bring the transmitter into compliance with the Rules by submitting its device for certification testing prior to receiving the Spectrum Enforcement Division's LOI") (emphasis added); *Bureau D'Electronique Appliquee, Inc.*, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 3445, 3448 ¶ 9 (Enf. Bur., Spectrum Enf. Div. 2005), (continued)

IV. CONCLUSION

20. We find that Behringer willfully and repeatedly violated Section 302(b) of the Act and Section 2.803(a) of the Rules by marketing 50 models of unauthorized Class B digital devices. We further find that the proposed \$1 million forfeiture was reasonable and consistent with precedent and that the record does not support any reduction of the proposed forfeiture amount.

V. ORDERING CLAUSES

21. Accordingly, IT IS ORDERED that, pursuant to Section 503(b) of the Act, and Sections and 1.80 of the Rules,⁷⁶ Behringer USA, Inc. IS LIABLE FOR A MONETARY 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.

22. 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.

23. A request for full payment under an installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.⁷⁷

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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forfeiture ordered, 20 FCC Rcd 17893 (Enf. Bur., Spectrum Enf. Div. 2005) (downwardly adjusting the proposed forfeiture based on a finding that the manufacturer “made a good faith effort to bring [its equipment] ... into compliance with the Rules by identifying the need to obtain separate certification for the devices and submitting a purchase order for final testing and certification *prior* to the Enforcement Bureau’s issuance of the letter of inquiry”) (emphasis added).

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

⁷⁷ See 47 C.F.R. § 1.1914.