

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

OVERTONE LABS, INC.,

Plaintiff,

v.

THE WEB FREAKS, INC.,

Defendant.

Civil Action No.: 13-cv-12709

COMPLAINT

Jury Trial Demanded

Plaintiff Overtone Labs, Inc. (“Overtone”) for its Complaint against defendant The Web Freaks, Inc. (“Web Freaks”) hereby alleges as follows:

NATURE OF ACTION

1. This is an action for infringement of United States Patent No. 8,502,060 (“the ‘060 patent”), arising under the patent laws of the United States, 35 U.S.C. §§ 1 *et seq.* Plaintiff Overtone, the owner of the ‘060 patent, is a small, family-owned business based in Lawrence, Massachusetts. Overtone conceived, designed, patented, developed, and now markets, a novel device and method for tuning a drum.

2. Defendant Web Freaks is knowingly and willfully infringing the ‘060 patent, including by making, using, offering for sale and selling a smart phone application called iDrumTech, which it created only after evaluating and studying the successful Overtone product.

3. In this action, Overtone seeks damages, including enhanced damages, and injunctive relief resulting from Web Freaks’ actions as set forth herein.

THE PARTIES

4. Overtone Labs, Inc. is a Delaware corporation with its principal place of business at 60 Island St., Lawrence, Massachusetts.

5. Upon information and belief, The Web Freaks, Inc. is a Florida corporation with its principal place of business at 3700 Commerce Boulevard, Suite 154, Kissimmee, Florida. Eric T. Rosebrock is Web Freaks' registered agent, director, and president.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1338(a).

7. This Court has personal jurisdiction over Web Freaks pursuant to Mass. Gen Laws. Ch. 223A, §§ 3(a)-(d) as this claim for patent infringement arises out of, *inter alia*, Web Freaks' business activities within the Commonwealth of Massachusetts, including sales of its iDrumTech app, as well as Web Freaks' purposeful contacts with Overtone concerning Overtone's commercial embodiment of the patent, called the Tune-Bot.

8. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400(b).

COUNT I

(Infringement of U.S. Patent No. 8,502,060)

9. Overtone incorporates all prior paragraphs of this complaint.

10. The '060 patent, entitled "Drum-Set Tuner," issued on August 6, 2013, naming David Byrd Ribner as inventor. Overtone is the assignee and owner of the entire right, title, and interest in and to the '060 patent. A true and correct copy of the '060 patent is attached hereto as Exhibit A and is incorporated herein by reference.

11. The '060 patent describes a system and method for resonance tuning. The '060 patent issued from U.S Application, Ser. No. 13/768,799 filed on Feb. 15, 2013, a continuation of U.S Application, Ser. No. 13/688,822 filed on Nov. 29, 2012. The '060 patent claims priority

to and incorporates by reference Provisional Patent Application Nos. 61/564,954 filed on Nov. 30, 2011 and 61/586,183 filed on Jan. 13, 2012.

12. Overtone developed, and now markets and sells, a device called Tune-Bot for resonance tuning a drum. The Tune-Bot embodies one or more of the inventions claimed in the '060 patent. Overtone began advertising and marketing the Tune-Bot in or about December 2011.

13. Since at least 2008, Eric Rosebrock, Web Freaks' director and president, has maintained a YouTube channel at <http://www.youtube.com/user/drummerconnection>. On this channel, entitled "Drummer Connection," Mr. Rosebrock posts reviews of drumming-related products, instructional videos, and other drumming-related videos.

14. Mr. Rosebrock also maintains a "Drummer Connection" Facebook page, available at <https://www.facebook.com/pages/Drummer-Connection/79051101460>.

15. Mr. Rosebrock previously maintained a website at <http://drummerconnection.com>. That website currently redirects visitors to a website that he maintains at <http://iDrumTech.com>.

16. In an email to Overtone dated December 12, 2011, Mr. Rosebrock expressed his interest in the Tune-Bot and his desire to obtain a product sample for review on his website and possible future promotion.

17. During a telephone conversation in or around December of 2011, Elliott Ribner, an Overtone employee, informed Mr. Rosebrock that Overtone had filed patent applications on the inventions embodied in the Tune-Bot.

18. On or around December 27, 2011, in response to Mr. Rosebrock's request, Overtone sent a prototype of the Tune-Bot to Mr. Rosebrock for testing and review.

19. Three days later, in an email to Overtone dated December 30, 2011, Mr. Rosebrock confirmed that he received the Tune-Bot prototype. He further stated:

I LOVE YOU GUYS!!!! Finally, a Tuner that is made for DRUMS. The built in filters are superb. The instruction manual is outstanding, the product is AMAZING!! Way to go, seriously. This is exactly what I've been dreaming about and you delivered it.

20. In an email dated January 4, 2012, Mr. Rosebrock provided Overtone with the URL of a video he created concerning his review of the Tune-Bot prototype.

21. Thereafter, Mr. Rosebrock purchased Tune-Bots from Overtone at a discounted price and resold them at retail price. For example, in an email to Overtone dated March 16, 2012, Mr. Rosebrock offered to demonstrate the Tune-Bot at an upcoming drum tuning clinic he was to conduct and requested that Overtone provide him with ten Tune-Bots to sell at the clinic. In response, Overtone provided Mr. Rosebrock with six Tune-Bots at a discounted price, which, on information and belief, he demonstrated and/or sold.

22. On June 12, 2012, Overtone contacted Mr. Rosebrock by email to request a testimonial for the Tune-Bot. Mr. Rosebrock responded later that day, stating that he “loved” the product and providing the following testimonial: “Tune-Bot has taken the woes out of drum tuning and allowed me to focus on a consistent sound without guessing. It's [sic] edgy design and thoughtful features bring drum tuning to a whole new level. I highly recommend Tune-Bot!”

23. On January 26, 2013, at the National Association of Music Merchants (“NAMM”) trade show in Anaheim, California, Mr. Rosebrock informed David Ribner, Overtone’s President and CEO, that he planned to release a smartphone software application (“app”) for resonance tuning a drum employing features similar to those of the Overtone Tune-

Bot device. The following day, Elliott Ribner informed Mr. Rosebrock that the methods and features of the Tune-Bot were the subject of a pending Overtone patent application.

24. On January 30, 2013, Mr. Rosebrock emailed Elliott Ribner stating that he “seriously felt bullied into not releasing this app” and that it had been his “mission” to create the app, “regardless of threats or persuasion.” Later that day, Mr. Rosebrock emailed Elliott Ribner again to request a copy of the pending patent application.

25. Overtone responded on February 1, 2013, informing Mr. Rosebrock that the patent application was to be published in May 2013. The application was published as U.S. Patent App. Pub. No. 2013/0139672 on June 6, 2013.

26. On information and belief, Web Freaks has known of the claims of the ’060 patent at least since June 6, 2013, when U.S. Patent App. Pub. No. 2013/0139672 was published. On information and belief, Web Freaks has known of the ’060 patent since the patent’s issuance on August 6, 2013.

27. After February 1, 2013, and in or around February of 2013, Web Freaks released its iDrumTech Drum Tuner application (“the iDrumTech app”) for Apple iPhone, iPad, and iPod Touch. Web Freaks now makes, uses, and sells and offers to sell the iDrumTech app through Apple’s App Store. Web Freaks also maintains a website at <http://iDrumTech.com> advertising the iDrumTech app, offering it for sale, and providing hyperlinks to the App Store page where the iDrumTech app may be purchased. Web Freaks and Eric Rosebrock have also posted videos to YouTube demonstrating the use of the iDrumTech app and advertising the app for sale.

28. On October 22, 2013, Web Freaks released the iDrumTech app for Android phones and tablets. Web Freaks now makes, uses, and sells and offers to sell the iDrumTech app through the Google Play store.

29. Through its website and other sources of advertising, Web Freaks encourages users to use the iDrumTech app in a manner that infringes the claims of the '060 patent. Web Freaks' actions encouraging infringement of the '060 patent are knowing and intentional.

30. Web Freaks' customers have purchased the infringing iDrumTech app and used the app in a manner that infringes the '060 patent.

31. The iDrumTech app has no substantial non-infringing uses other than to perform the methods of resonance tuning and pitch detection claimed in the '060 patent on a smartphone, thereby creating the tuning devices also claimed in the '060 patent.

32. Web Freaks has advertised, offered for sale, and sold its infringing iDrumTech app in Massachusetts, and users in Massachusetts have used the app in a manner that infringes the '060 patent.

33. The iDrumTech app permits users to purchase products and additional app features from Web Freaks within the app, also known as "in-app purchases." For example, the iDrumTech app contains a "Drum Shop" feature through which Web Freaks markets and sells additional products such as tuning presets for specific drum kits or specific artists.

34. The iDrumTech app has a "Tuning Calculator" feature, which allows users to calculate the target frequency for a particular drum based on various user inputs such as drum size and desired fundamental note. Upon information and belief, the target values output by the iDrumTech app were copied directly from values calculated by Overtone based on proprietary methods developed by Overtone for Tune-Bot users. Upon information and belief, Web Freaks appropriated these output values by using the Overtone tuning calculator, which Overtone makes available on its website at <http://www.tune-bot.com/tuningcalculator.aspx>.

35. In a letter dated September 11, 2013, Overtone informed Web Freaks that the iDrumTech app infringed claims of the '060 patent owned by Overtone and requested that Web Freaks permanently cease offering the infringing app.

36. The actions of Web Freaks, as set forth above, constitute infringement, pursuant to 35 U.S.C. §§ 271(a)-(c), including both direct and indirect infringement, of one or more claims of the '060 patent, including without limitation, by manufacturing, using, selling, and/or offering for sale, without authorization, the iDrumTech app for use with iPhone and Android phones.

37. Overtone has been damaged as a result of Web Freaks infringement.

38. Web Freaks' aforementioned actions have been, and continue to be, committed in a knowing and willful manner and constitute willful infringement of the '060 patent, entitling Overtone to increased damages pursuant to 35 U.S.C. § 284, and rendering this case "exceptional" within the meaning of 35 U.S.C. § 285, entitling Overtone to an award of attorneys' fees and costs.

WHEREFORE, plaintiff Overtone requests that this Court:

- a.) Enter judgment that Web Freaks has infringed and is infringing the '060 patent;
- b.) Award Overtone damages adequate to compensate it for Web Freaks' infringement of the '060 patent, but no less than a reasonable royalty for the use made of the inventions claimed in the '060 patent by Web Freaks, together with pre- and post-judgment interest and costs;
- c.) Award increased damages pursuant to 35 U.S.C. § 284, together with pre- and post-judgment interest and costs;

d.) Preliminarily and permanently enjoin Web Freaks, its officers, agents, servants, employees, and representatives, and all others in active concert or participation with them, from further infringing, directly or indirectly, the '060 patent;

e.) Declare this to be an exceptional case and award Overtone attorneys' fees and costs pursuant to 35 U.S.C. § 285;

f.) Award Overtone attorneys' fees, costs, and expenses incurred by Overtone in bringing this action together with pre- and post-judgment interest; and

g.) Award such additional relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

Overtone demands a trial by jury on all issues so triable.

Respectfully submitted,

Dated: October 25, 2013

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