

DISTRICT CT COURT, CITY AND COUNTY OF DENVER, STATE OF
COLORADO Case No.. 96-CV-4693

ORDER FOR PRELIMINARY INJUNCTION

ROBERT LEWIS, STOREFRONTS IN CYBERSPACE, a Colorado limited liability company, and THE GAME PROGRAM L L.C., a Colorado limited liability company,

Plaintiffs

vs.

ROCKY MOUNTAINS INTERNET, a Colorado corporation, and COLORADO ROCKIES BASE BALL CLUB, LTD., a Colorado corporation,

Defendants

and COLORADO ROCKIES BASEBALL CLUB, LTD., a Colorado corporation, Counterclaim -Plaintiff,

vs

ROBERT LEWIS, STOREFRONTS IN CYBERSPACE, a Colorado limited liability company and THE GAME PROGRAM, L L C, a Colorado limited liability company,

Counterclaim -Defendants

THE COURT, having reviewed the Application for Preliminary Injunction and the Memorandum in Support of the Application for Preliminary Injunction submitted by the Defendant /Counter claimant The Colorado Rockies Baseball Club, Ltd ("Rockies"), in this action, and having presided over a hearing by the Court on September 17,19, and 26, 1997 on that Application, being satisfied that the elements of C.R.C.P. 65 have been satisfied and being otherwise fully advised in the premises, hereby makes the following Findings of Fact Conclusions of Law and Orders the following relief:

FINDINGS OF FACT

1. The Rockies are the owners of the trademark "ROCKIES"(Reg. Nos. 1,831,055 and 1,842,521) and "COLORADO ROCKIES"(Reg. Nos. 1,831,056 and 1,839,084 and 1,913,394)(hereinafter "the Rockies' Marks") which have been registered on the Principal Register of the United States Patent and Trademark Office since 1994.

2. The Rockies have been using the Marks in commerce in connection with the marketing of a variety of consumer goods and services since July, 1991.

3. The Rockies and its licensing agent Major League Baseball Properties, Inc. have expended substantial energy and resources in promoting and publicizing the Rockies' Marks.

4. The Rockies' Marks are well known and widely recognized by sports fans throughout the United States as designating the Rockies as the source of goods and services in connection with professional baseball.

5. In or about April 1995, Plaintiffs/Counterclaim Defendants, Robert Lewis, Storefronts in Cyberspace, and the Game Program, LLC, (collectively "Lewis") began offering an electronic publication, entitled "The Daily Colorado Rockies Web," about the Rockies on the world wide web at the domain name "rockies.com."

6. In December, 1995 Lewis obtained a Colorado state trademark registration (No. 951 147177) for "THE DAILY ROCKIES WEB."

7. At various times since April 1995, Lewis has presented the following information on his "Daily Rockies Web" electronic publication at the web site associated with the domain name " rockies.com":

- a. A designation that the web site was "The Official Source for the Rockies Fan";
- b. Exact reproduction of the "Official Colorado Rockies Media Notes";
- c. Reproductions of the Rockies' trademarked and copyrighted logo;
- d. A "link" to a site offering "Official Rockies Merchandise";
- e. Representations that individual players on the Rockies team had established their own " webs" hosted by Lewis' web site;
- f. Representations that the public could send e-mail to these Rockies players via Lewis' web site and/or e-mail address;
- g. Lewis' own logo for the . "Daily Rockies Web" which was confusingly similar to the Rockies' trademarked and copyrighted logo;
- h. Verbatim reproduction, without any notice, of the Rockies' copyrighted publication "The A to Z Guide to Coors Field (1995)" ; and
- i. A purported copyright of the Rockies' copyrighted material.

8. Recently, after temporarily dropping the Rockies trademarks from the titles used on his web pages at the behest of the Rockies, Lewis introduced a new title, Colorado Rockies Daily News which has added new confusion and enhanced existing likelihood of

confusion. Lewis has advertised his domain name "www.rockies.com" on banners in the immediate vicinity of Coors Field, the home stadium of the Rockies.

9. In August, 1995, the Rockies notified Lewis that his use of their logo and other trademarks were in violation of the Rockies' rights and demanded that he cease all use of the Rockies' Marks.

10. In November, 1995, the Rockies' licensing agent, Major League Baseball Properties, Inc notified Lewis that his web site and its contents were infringing the Rockies' Marks;

11. In December, 1995, Major League Baseball Properties, Inc. sent Lewis a second letter demanding a reply to their first letter in order to avoid litigating the issue.

12. Thereafter, Lewis received further warnings and was aware that the Rockies objected to his registration of the domain name "rockies.com," and to his use of the Rockies trademarks in identifying his products and services and creating the impression of association with the Rockies.

CONCLUSIONS OF LAW

1. For the reasons stated below, the Rockies have demonstrated a probability of proving that Lewis' use of the Rockies' Marks creates a likelihood of confusion as to the source or origin of Lewis' goods and services, and thus the Rockies have established a reasonable probability of success on the merits of their trademark infringement claim, as well as their claims for statutory unfair competition, common law unfair competition and violation of the Colorado Consumer Protection Act:

- a. The Rockies' Marks are strong marks entitled to broad protection against infringement;
- b. Lewis has copied the Rockies' identical marks and has used them in connection with similar goods and services as those provided by the Rockies;
- c. Lewis appropriated the Rockies' Marks in connection with his Internet services with actual knowledge of the Rockies Marks. A preponderance of the evidence indicates that Lewis intended to confuse and deceive the public in order to derive economic benefit from the reputation and good will associated with the Rockies' Marks;
- d. Lewis has marketed his electronic publication, which is similar in nature to the services and goods of the Rockies, directly to the Rockies' prospective customers and fans;
- e. The consumers of Lewis' goods and services are not likely to exercise a high degree of care in selecting the services offered by Lewis; and
- f. The Rockies have established that there have already been several instances of actual confusion in the marketplace as a result of Lewis' unauthorized use of the Rockies' Marks.

2. For the reasons stated below, the Rockies have demonstrated a probability of proving that Lewis' use of the Rockies' Marks has been diluting the value and distinctiveness of

the Rockies' Marks and thus the Rockies are likely to succeed on the merits of their federal trademark dilution claim:

- a. The Rockies' Marks are famous marks as defined by Federal Trademark Dilution Act of 1995, 15 U.S. C. §1125(c)(1);
- b. Lewis' use of the Rockies' Marks constitutes "commercial use" under the Federal Trademark Dilution Act of 1995;
- c. Lewis' use of the Rockies' Marks in connection with his web site services constitutes use of those marks in interstate commerce; and
- d. Lewis' use of the Rockies' Marks dilutes the distinctive quality of those marks by "blurring" the distinctiveness of those marks.

3. None of the affirmative defenses asserted by Lewis have any merit, particularly in light of his intent to deceive and confuse the public by his appropriation of the Rockies' Marks.

- a. The Rockies' delay in initiating their suit against Lewis is not unreasonable in light of the circumstances of this case;
- b. The Rockies have not failed adequately to police and enforce their trademark rights; and
- c. Lewis' use of the Rockies' Marks does not constitute "fair use."

4. The Rockies have demonstrated that Lewis' use of the Rockies' Marks in the title of his electronic publication offered on the Internet and in the domain name used as a source indicator for that electronic publication is causing irreparable injury to the Rockies, and that the Rockies have no plain, speedy, and adequate remedy at law.

5. The probable harm to the Rockies from Lewis' conduct outweighs any inconvenience that Lewis will experience if he is required to stop using the Rockies' Marks.

6. The public interest favors entry of a preliminary injunction on the facts of this case.

7. A preliminary injunction will preserve the status quo pending a trial on the merits. Pursuant to the preceding findings of fact and conclusions of law, the Court **HEREBY ORDERS:**

- (1) That the Rockies' application for a preliminary injunction is GRANTED;
- (2) That Lewis, his attorneys, officers, agents, servants, employees, and any and all other persons in active concert or participation with him,
 - (a) shall not use in any fashion that is accessible or available for viewing by the public, the names, titles or designations "Daily Rockies Web" or "Colorado Rockies Daily News," or other title, name or designation that includes the defendant's registered trademarks, "ROCKIES;" or "COLORADO ROCKIES," or any name, designation or mark confusingly similar thereto, as a trademark or source identifier to identify himself, any web site, web page, or other publication owned or controlled by Lewis that is in any way related to baseball, unless a different source is clearly identified in conjunction with the use of the Rockies' marks;
 - (b) shall not use any logo consisting of a silhouette of mountains and/or a soaring

baseball with or without the colors magenta, blue, or purple, or any shade of such colors, or that is otherwise deceptively similar to the defendant's logo, unless a different source is clearly identified in conjunction with the use of the Rockies' marks;

(c) shall not use the words "Daily Rockies Web," or "Colorado Rockies Daily News" or other words that include the words "ROCKIES" or "COLORADO ROCKIES" in any position in Lewis' web site that Lewis has reason to believe would be read by an internet search engine and displayed as a title or source identifier, unless a different source is clearly identified in conjunction with the use of the Rockies' marks;

(d) shall not publish anywhere, including on his web site, any statements which suggest that visitors to his web site may contact the Rockies or any of its players or representatives through the web site;

(e) shall not use in the text of his web site, first person pronouns or other misleading language that suggest that Lewis or the web site is speaking for or sponsored by or affiliated with the Rockies;

(f) shall not accompany the home page for his web site with audio consisting of baseball-related music or matter that suggests that the plaintiffs' web site is connected to Rockies Baseball;

(g) shall not fail to include in the home page of his web site, and all other pages on his web site having to do with baseball or the Colorado Rockies Baseball Club, including the pages for individual players, a prominent disclaimer of any connection between that web page and the Colorado Rockies Baseball Club, Ltd.;

(h) shall not use the trademark "ROCKIES" or "COLORADO ROCKIES" to identify himself, any web site, any web page, or other publication that appears to be dedicated in whole or in part to baseball, unless a different source is clearly identified in conjunction with the use of the Rockies' Marks, and

(i) shall not use the domain name "rockies.com" in connection with any web site that is or appears to be dedicated in whole or in part to professional baseball.

(3) that this Order shall be in effect from and after this date, September 26, 1997, at 1:45 p.m., upon defendant Rockies' posting of the bond ordered herein, and shall remain in effect pending a hearing on a permanent injunction, or until further Order of the Court.

(4) that pursuant to C.R.C.P. 65(c), the Rockies deposit security, or file a bond with corporate surety to be approved the Court, with the Clerk of the Court in the sum of \$ 100, 000 for the payment of such costs and damages as may be incurred or suffered by any party found to have been wrongfully enjoined by this Preliminary Injunction.

DATED; September 26, 1997

BY THE COURT

Federico C. Alvarez