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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 ENTERPRISE MANAGEMENT
LIMITED, INC., MARY LIPPITT,

10 Plaintiffs,

11 v.

12 CONSTRUX SOFTWARE
BUILDERS, INC, STEVE C.
13 MCCONNELL,

14 Defendants.

CASE NO. 2:19-CV-1458-DWC

ORDER ON DEFENDANTS' MOTION
TO DISMISS

15 Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR
16 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge.
17 Dkt. 11, 12. Currently pending before the Court is Defendants Construx Software Builders, Inc.
18 and Steve McConnell's Motion to Dismiss. Dkt. 31. After considering the relevant record, the
19 Court concludes Plaintiffs Enterprise Management Limited, Inc. and Mary Lippitt have stated a
20 copyright infringement claim regarding Defendants' Change Model chart. Plaintiffs have not
21 sufficiently stated a copyright infringement claim regarding Defendants' Domino Change Model
22 chart or a personality rights claim. Further, Plaintiffs' Consumer Protection Act claim is
23
24

1 preempted by the Copyright Act and fails to state a claim. For these reasons, Defendants' Motion
2 to Dismiss is granted-in-part and denied-in-part.

3 **I. Background**

4 In the First Amended Complaint ("FAC"), Plaintiffs allege Defendants unlawfully copied
5 and distributed Plaintiff Lippitt's works or derivations based on her works, which are owned by
6 Plaintiff Enterprise, without permission. Dkt. 29. Plaintiffs also allege Defendants used Plaintiff
7 Lippitt's name to benefit their business without Plaintiff Lippitt's permission in violation of
8 Washington State's Consumer Protection Act ("CPA") and Personality Rights Act. *Id.*

9 Defendants filed the pending Motion to Dismiss on December 26, 2019. Dkt. 31.
10 Plaintiffs filed their Response on January 13, 2020. Dkt. 32. Defendants filed their Reply on
11 January 17, 2020. Dkt. 33. On March 17, 2020, the Court directed the parties to provide
12 supplemental briefing in light of new Ninth Circuit case law. Dkt. 33. The parties submitted
13 supplemental briefing on April 10, 2020. Dkt. 35, 36.

14 **II. Standard of Review**

15 A defendant may move for dismissal when a plaintiff "fails to state a claim upon which
16 relief can be granted." Fed. R. Civ. P. 12(b)(6). To grant a motion to dismiss, the Court must be
17 able to conclude that the moving party is entitled to judgment as a matter of law, even after
18 accepting all factual allegations in the complaint as true and construing them in the light most
19 favorable to the non-moving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). To
20 survive a motion to dismiss, a plaintiff must merely cite facts supporting a "plausible" cause of
21 action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). A claim has "facial
22 plausibility" when the party seeking relief "pleads factual content that allows the court to draw
23 the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*

24

1 *Iqbal*, 556 U.S. 662, 672 (2009). Although the Court must accept as true a complaint's well-
2 pleaded facts, conclusory allegations of law and unwarranted inferences will not defeat an
3 otherwise proper Rule 12(b)(6) motion. *Vasquez v. L.A. County*, 487 F.3d 1246, 1249 (9th Cir.
4 2007).

5 **III. Discussion**

6 Defendants assert (A) Plaintiffs have failed to state a copyright infringement claim; (B)
7 the CPA claim is preempted by the Copyright Act; and (C) Plaintiffs have failed to state a
8 personality rights claim. Dkt. 31.

9 **A. Copyright Infringement**

10 In the FAC, Plaintiffs allege Defendants violated the Copyright Act by copying and
11 distributing, without authorization or approval from Plaintiffs, copies of Plaintiffs' charts or
12 derivations based on Plaintiffs' charts. Dkt. 29.

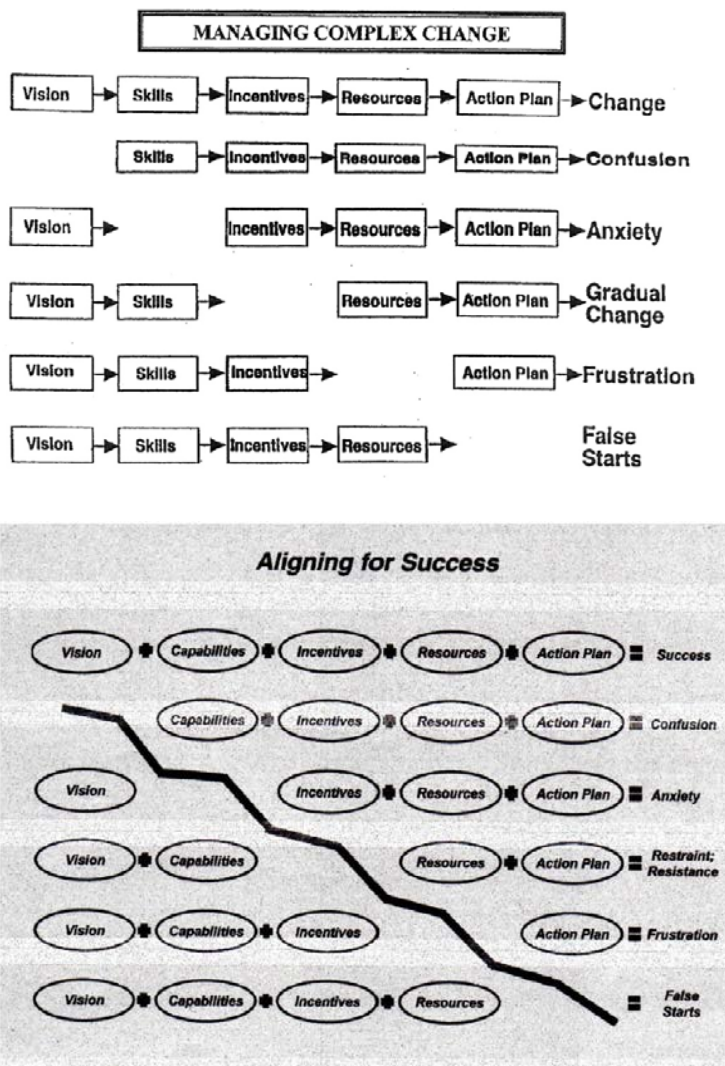
13 A plaintiff who claims copyright infringement must show: (1) ownership of a valid
14 copyright; and (2) that the defendant copied protected aspects of the copyrighted work.
15 *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1116-17 (9th Cir. 2018), *overruled on other grounds*
16 *by Skidmore as Tr. for Randy Craig Wolfe Tr. v. Zeppelin*, 952 F.3d 1051 (9th Cir. 2020); *Ellison*
17 *v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004). The second element contains distinct
18 components: "copying" and "unlawful appropriation." *Rentmeester*, 883 F.3d at 1117.

19 In the Motion to Dismiss, Defendants contend Plaintiffs have not sufficiently pled facts to
20 show (1) copying and (2) unlawful appropriation and therefore the FAC fails to allege a
21 copyright infringement claim. Dkt. 31.¹

22
23 ¹ Defendants do not argue Plaintiff has failed to allege a valid copyright. Dkt. 31. Further, Plaintiffs filed
24 certificates of copyright registrations for the charts Defendants allegedly copied. Dkt. 29, 29-1. Therefore, the Court
finds Plaintiffs pled facts sufficient to show ownership of a valid copyright.

i. Plaintiffs' Copyrighted Charts

The following two charts are Plaintiffs' alleged copyrighted works:



Plaintiffs' first chart, Managing Complex Change, is protected under U.S. Copyright Registration No. TX 2-124-202 and will be identified in this Order as "TX 2-124-202." See Dkt. 29, ¶ 22.² Plaintiffs' second chart, Aligning for Success, is protected under U.S. Copyright

² The FAC alleges the Managing Complex Change chart is protected by Registration No. TX 2-124-202. Dkt. 29. However, the Managing Complex Change chart in the FAC appears to be a chart created by Donald Warrick. See *Enterprise Management Ltd., Inc. v. Warrick*, 717 F.3d 1112 (10th Cir. 2013).

1 Registration Nos. TXu 956-226 and TX 50827-350 and will be identified in this Order as “TXu
 2 956-226/TX 50827-350.” *See id.* at ¶ 23.

3 ii. *Defendants’ Charts*

4 Plaintiffs allege Defendants violated the Copyright Act through use of a chart in
 5 Defendants’ YouTube video and a chart printed in a book authored by Defendants titled More
 6 Effective Agile. Dkt. 29.

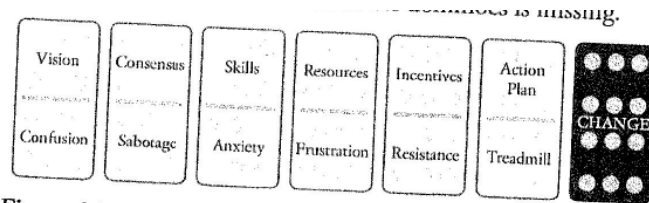
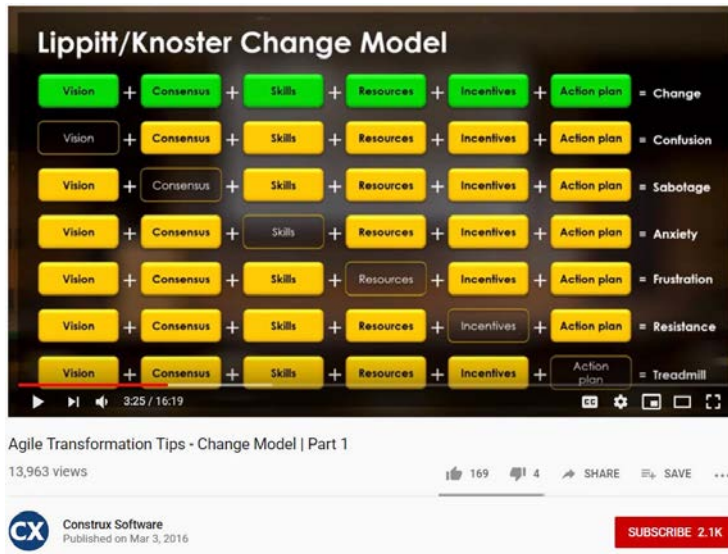


Figure 23-1
 The Domino Change Model describes required elements for change and the effects of each missing element.

20 Defendants’ first chart, used in the YouTube video, will be identified as “Change
 21 Model.” Defendant’s second chart, used in the book More Effective Agile, will be identified as
 22 “Domino Change Model.”

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