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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Ralph T Reilly,

No. CV-18-03775-PHX-MTL

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Plaintiff,

ORDER

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v.

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Steve Wozniak, et al.,

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Defendants.

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Before the Court is Defendants’ Motion for Summary Judgment. (Doc. 124.) Defendants move for summary judgment on Plaintiff’s remaining claims for breach of implied-in-fact contract, copyright infringement, and declaratory relief. For the following reasons, the motion is granted in part and denied in part.¹

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I. BACKGROUND

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As the Court noted in a previous order, Plaintiff Ralph T. Reilly is an Assistant Professor of Management Information Systems at the Barney School of Business, University of Hartford. (Doc. 1 ¶ 3; Doc. 99 at 2.) On September 12, 2010, he emailed Defendant Steve Wozniak (“Wozniak”), the co-founder of Apple Computers Inc., stating, “I want to start a high tech university.” (Doc. 1 ¶ 4; at 16.) Wozniak replied, “Great idea.” (*Id.*) Wozniak also provided advice, including that Plaintiff should start by “evaluat[ing] the need for this university,” and then, after planning was complete, he “should be able to

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¹ The Court believes that oral argument would not significantly aid the decisional process. *See* Fed. R. Civ. P. 78(b) (court may decide motions without oral hearing); LRCiv 7.2(f) (same).

1 raise the money to build this dream.” (*Id.* at 16.) Aside from this advice, Wozniak stated
2 that he was “too busy to do anything more.” (*Id.*)

3 Plaintiff sent a follow-up email on September 22, 2010, stating, “I am going to be
4 bold here . . . Would you consider endorsing the idea of ME starting the WOZ Institute of
5 Technology?” (Doc. 125 at 15.) Wozniak replied, “[O]f course. . . go ahead. . . I wish you
6 total luck and success.” (*Id.*) He also stated, “I’ll get more involved eventually but right
7 now my life is crammed.” (*Id.*)

8 Plaintiff claims that he and Wozniak took steps to develop the idea over the next
9 two years. Plaintiff states that he introduced Wozniak and his wife, Janet Wozniak, to
10 potential business partner Charter Oak State College (“Charter Oak”) by email on or about
11 December 22, 2010. (Doc. 129 at 12 ¶ 4.) Wozniak and Charter Oak ultimately executed a
12 Personal Service Agreement for purposes of developing the “Woz School of Technology.”
13 (*Id.* ¶ 5.) Wozniak asserts that he has “no recollection of ever speaking with anyone from
14 Charter Oak or performing any work with anyone associated with that entity.” (Doc. 125
15 at 3 ¶ 19.)

16 Plaintiff and Wozniak met in person on March 25, 2011 at a SARTA Tech Index
17 Celebration Luncheon in Sacramento, California.² Plaintiff states that the purpose of the
18 meeting was to discuss his “proposed tech university.” (Doc. 129 at 12 ¶ 5.) He alleges that
19 the two “agreed to proceed with a ‘deal’ handshake depicted in a photograph” taken at the
20 luncheon and attached as Exhibit D to the Complaint. (Doc. 1 ¶ 6, at 32.) Wozniak,
21 however, states that he “didn’t make any deal” with Plaintiff, that he “never, ever” enters
22 into business deals, and that he has no recollection of taking a photograph with Plaintiff.
23 (Doc. 125 at 6.) Further, Wozniak states that he takes photographs like the one attached to
24 the Complaint “thousands of times a year” because “[p]eople actually pay money to get a
25 picture taken with me at meet and greets and at my speeches.” (*Id.*)

26 Plaintiff claims that Wozniak permitted him to proceed with potential investors in a
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28 ² On the Court’s information and belief, “SARTA” is a reference to the Sacramento Area
Regional Technology Alliance.

1 November 21, 2011 email, stating “I figure it’s your idea.” (*Id.* ¶ 6; at 34.) Plaintiff created
2 a website and logo for the project and obtained copyright protection for the “graphic
3 images, photographs, and tangible expressions” attached as Exhibit I to the Complaint.³
4 (*Id.* at 4, 59–76.)

5 On January 23, 2012, Plaintiff states that he and Wozniak met with the Apollo
6 Group in San Francisco, California, to discuss the idea of a high-tech university. Plaintiff
7 attached a copy of the PowerPoint presentation he purportedly presented to the Apollo
8 Group as Exhibit F to the Complaint. (Doc. 1 at 35–42.) Wozniak states that he does not
9 recall Plaintiff being present during that meeting, and that there is “no evidence that any
10 documents from the Apollo Group meeting were ever reviewed by Wozniak or provided
11 to the other Defendants.” (Doc. 124 at 5.)

12 On April 29, 2013, Wozniak’s business manager, Ken Hardesty, emailed Plaintiff,
13 advising that he was aware that Plaintiff had created an online “platform demo of ‘Woz
14 Institute of Technology.’” Mr. Hardesty stated that he was “not sure what [Plaintiff] was
15 up to,” but that he was to “shut down this site immediately and confirm back to me
16 directly.” (Doc. 125 at 90.) Plaintiff apologized and took down the website shortly
17 thereafter. (*Id.* at 6.)

18 More than four years later, on November 11, 2017, Plaintiff learned that Wozniak
19 had entered into a business arrangement with Defendant Southern Careers Institute, Inc.
20 (“SCI”) to develop “Woz U.” (*Id.* ¶ 10.) Wozniak and SCI ultimately formed the entities
21 Woz U Education, LLC (“Woz Arizona”) and Woz U Education Holdings, LLC (“Woz
22 Delaware”) to formalize Woz U business arrangements. Plaintiff argues that, “[a]s
23 introduced to the public, Woz U included graphic design, course design and course outline
24 which were substantially similar” to those created by Plaintiff and disclosed to Wozniak.
25 (Doc. 136 at 6.) Defendants assert that Woz U, which was at the time operating under the
26 name “Coder Camps,” approached Wozniak, through Mr. Hardesty, to use Wozniak’s

27 ³ The Complaint states that this included an A+ Certification, Ethical Hacker Certification,
28 Web Design and Development Certification, Network Security Certification, Network
Administration Certification, and Cloud Essentials Certification. (*Id.* at 4.)

1 name in connection with its existing online school. (Doc. 124 at 7.) Defendants also state
2 that Plaintiff has “produced no evidence that any of the Defendants utilized any idea,
3 business plan, curricula, images, sales strategy or educational training concept that he
4 created.” (*Id.* at 6–7.)

5 Plaintiff emailed Wozniak to congratulate him on November 21, 2017. Wozniak
6 responded on December 24, 2017, stating, “You are right on the mark. You had the right
7 idea . . . I doubt it would have happened without your initial idea.” (*Id.* ¶ 14; at 91.) Upon
8 Defendants’ refusal to compensate Plaintiff for his “right idea,” this action ensued. (*Id.* at
9 7.)

10 Plaintiff filed the Complaint against Wozniak, Woz Arizona, Woz Delaware, and
11 SCI on November 3, 2018. (Doc. 1.) It alleges that Defendants “used, applied, and
12 exploited” Plaintiff’s copyrighted work in marketing and publicizing Woz U. (*Id.* ¶¶ 12,
13 13.) The Complaint asserts claims of breach of an implied-in-fact contract against Wozniak
14 and claims of money had and received, copyright infringement, declaratory relief, and
15 accounting against all Defendants. (*Id.* at 7–11.) It seeks damages of at least \$1,000,000,
16 disgorgement of Defendants’ profits, an accounting, declaratory judgment, and attorneys’
17 fees. (*Id.* at 13.) Upon Defendants’ motion, the Court previously dismissed Plaintiff’s
18 claims for money had and received and accounting as preempted by the Copyright Act, 17
19 U.S.C. §§ 101–810. (Doc. 99.)

20 Defendants now move for summary judgment on Plaintiff’s remaining claims for
21 breach of an implied-in-fact contract, copyright infringement, and declaratory relief
22 (Counts 1, 3, and 4, respectively). (Doc. 124.) The motion is now fully briefed. (Docs. 136,
23 144.)

24 **II. LEGAL STANDARD**

25 Summary judgment is appropriate if the evidence, viewed in the light most favorable
26 to the nonmoving party, demonstrates “that there is no genuine dispute as to any material
27 fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A
28 genuine issue of material fact exists if “the evidence is such that a reasonable jury could

1 return a verdict for the nonmoving party,” and material facts are those “that might affect
2 the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477
3 U.S. 242, 248 (1986). At the summary judgment stage, “[t]he evidence of the non-movant
4 is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255
5 (internal citations omitted); *see also Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127,
6 1131 (9th Cir. 1994). Substantive law determines which facts are material and “[o]nly
7 disputes over facts that might affect the outcome of the suit under the governing law will
8 properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. “A fact
9 issue is genuine ‘if the evidence is such that a reasonable jury could return a verdict for the
10 nonmoving party.’” *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir.
11 2002) (quoting *Anderson*, 477 U.S. at 248).

12 **III. DISCUSSION**

13 **A. Breach of Implied-in-Fact Contract**

14 Wozniak moves for summary judgment on Plaintiff’s claim for breach of implied-
15 in-fact contract (Count 1). The Complaint states that Plaintiff and Wozniak entered into an
16 implied-in-fact contract under California law. Under this purported agreement, Wozniak
17 “voluntarily accepted the benefit of Reilly’s Work with full knowledge of the
18 circumstances and of the fact that Reilly did not submit and communicate Reilly’s Work
19 to [Wozniak] gratuitously.” (Doc. 1 ¶ 25.) Wozniak argues that summary judgment is
20 appropriate because the evidence demonstrates that Plaintiff never sought to sell any idea
21 to Wozniak. For the following reasons, the Court agrees with Wozniak.

22 **1. Relevant Law and Prior Ruling**

23 Under California law, where “an idea is furnished by one party to another, a contract
24 sometimes may be implied even in the absence of an express promise to pay.” *Grosso v.*
25 *Miramax Film Corp.*, 383 F.3d 965, 967 (9th Cir. 2004), opinion amended on denial of
26 reh’g, 400 F.3d 658 (9th Cir. 2005). As the Court previously noted in its order on
27 Defendants’ motion to dismiss, this principle arose from the California Supreme Court case
28 *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956). In that case, the plaintiff alleged that Paramount

1 Pictures turned his pitched idea into a feature film without compensating him. *Id.* at 726–
2 27. The court held that a contract exists where “the circumstances preceding and attending
3 disclosure, together with the conduct of the offeree acting with knowledge of the
4 circumstances, show a promise [to pay] of the type usually referred to as ‘implied’ or
5 ‘implied in fact.’” *Id.* at 738. The Ninth Circuit has endorsed *Desny* claims, stating, “[t]o
6 establish a *Desny* claim for breach of implied-in-fact contract, the plaintiff must show that
7 the plaintiff prepared the work, disclosed the work to the offeree for sale, and did so under
8 circumstances from which it could be concluded that the offeree voluntarily accepted the
9 disclosure knowing the conditions on which it was tendered and the reasonable value of
10 the work.” *Grosso*, 383 at 967.

11 This Court previously concluded that the Complaint contained the “minimal
12 requirements” to state a claim for breach of an implied-in-fact contract. (Doc. 99 at 20)
13 (*citing Goldberg v. Cameron*, 482 F. Supp. 2d 1136, 1150 (N.D. Cal. 2007) (“While this is
14 by no means a compelling allegation that the work was disclosed to the defendants in a
15 manner that would create an implied contract . . . it is sufficient to state a claim for an
16 implied contract.”)). The Court noted, first, that Plaintiff alleged that he prepared the work
17 at issue. *Grosso*, 383 at 967. (Doc. 1 ¶ 4 (Plaintiff emailed Wozniak stating “I want to start
18 a high tech university”); ¶ 6 (Wozniak emailed Plaintiff, stating “I figure it’s your idea”);
19 ¶ 8 (Plaintiff “created a website and logo”)). Second, the Court found that, at the pleading
20 stage, Plaintiff “disclosed the work to the offeree for sale.” *Grosso*, 383 at 967. The Court
21 noted that this issue was “more difficult” because “at no point does the Complaint explicitly
22 state that Plaintiff tried to *sell* Reilly’s work to Wozniak.” (Doc. 99 at 18–19.) Plaintiff also
23 alleged that “the offeree voluntarily accepted the disclosure knowing the conditions on
24 which it was tendered and the reasonable value of the work.” *Grosso*, 383 at 967. The Court
25 concluded that Plaintiff had stated a claim “without commenting on the likelihood that
26 Plaintiff will prevail on the merits” and that, at the motion to dismiss stage, “Plaintiff does
27 not have to allege in detail all the facts upon which he bases his claim.” (*Id.* at 19–20.) The
28 Court now addresses whether Plaintiff’s claim for breach of an implied-in-fact contract

1 survives summary judgment.

2 **2. Evidence of Implied-in-Fact Contract**

3 Wozniak argues that the evidence in this case makes clear that “Plaintiff never
4 sought to sell any idea or concept to Wozniak.” (Doc. 124 at 10.) Wozniak notes, for
5 example, that Plaintiff’s initial email stated, “I want to start a high tech university.” He
6 then asked whether Wozniak would “consider endorsing the idea of ME starting the WOZ
7 Institute of Technology...?” (Doc. 125 at 15.) In his deposition, Plaintiff explained this
8 email as meaning, ““Would you consider the idea of endorsing the idea of me’—me
9 meaning me personally—‘starting the Woz Institute of Technology?’ Me. Me. Me. Me,
10 Ralph.” (*Id.* at 42.) Further, when asked, “So in your email to Mr. Wozniak, you’re asking
11 him if he would be okay with starting a school with the name Woz Institute of Technology,
12 correct?,” Plaintiff stated, “Yes.” (*Id.* at 18.)

13 Plaintiff also testified, “I tried to find a platform because I didn’t have any money,
14 and I wasn’t asking Mr. Wozniak for any money. I just wanted to have the partnership
15 where he would lend the name and I would do everything else because that was the only
16 way it would work.” (Doc. 125 at 41.) When asked, Plaintiff agreed that by “partnership,”
17 he meant somebody “to actually finance [the] deal with Mr. Wozniak.” (*Id.* at 43.) Further,
18 Wozniak points to the following exchange in Plaintiff’s deposition:

19 Q: At the end of the day, the only thing that you really wanted
20 from Mr. Wozniak in regards to the Woz Institute of
21 Technology was the use of his name, true?

22 A: Yes. Correct. I wanted to use his name to open doors and
23 create a stir because he is such a tech icon and it would create
24 a—it would be a successful school if we had him on board.

25 (*Id.* at 46–47.)

26 Plaintiff also stated in his deposition that he entered into an agreement with Wozniak
27 at the March 25, 2011 SARTA luncheon—memorialized in a photograph of the two
28 shaking hands. (Doc. 125 at 26.) Plaintiff asserts that at this same luncheon, Wozniak
entered into a Personal Services Agreement with Charter Oak. (Doc. 125 at 27.) Plaintiff

1 confirmed that his own name does not appear on the Personal Services Agreement. Instead,
2 he argues, “Mr. Wozniak would not have entered into the agreement with Charter Oak
3 without me.” (*Id.* at 26.) When asked about the terms that he and Wozniak entered into,
4 Plaintiff stated at his deposition, “I told Mr. Wozniak thank you for signing the agreement.
5 I said this is a good idea, the online platform. They’re already in the online space. I said
6 that this is a good idea. We can go forward with our joint venture[.]” (Doc. 129 at 131.)

7 Wozniak stated, in his own deposition, that he has “never heard” the name “Charter
8 Oak,” does not “recall doing anything with Charter Oak,” and does not “even know what
9 [Charter Oak] is as an entity.” (Doc. 125 at 64.) Wozniak also stated that he “didn’t make
10 any deal” at the 2011 SARTA Tech Luncheon. (*Id.* at 66.) “I didn’t make any deal. I don’t
11 do business . . . I never, ever have. You won’t find any incidences where I did a deal on
12 my own, no.” (*Id.*) With respect to his interactions with Plaintiff, Wozniak stated at his
13 deposition, “Reilly called me and was real nice, and he was like a fan, and he wanted to
14 start the Woz Institute of Technology or something. I said go ahead. I wasn’t going to have
15 time to do anything with it, and I don’t care. I didn’t ask for any money. I don’t know. A
16 deal, I guess I would be getting something.” (*Id.* at 67.) When asked if he recalled speaking
17 with Plaintiff about a joint venture agreement, Wozniak stated, “Oh, no, absolutely not.”
18 (*Id.*) Wozniak stated, with respect to the photograph, “a hundred people will go through at
19 a luncheon sometimes or dozens, or even up to, even up to closer to a thousand. I’m just
20 there to take a picture in front of somebody’s logo. For everybody that comes through, they
21 paid to get a picture.” (*Id.* at 77.) Plaintiff admitted at his deposition that other people took
22 photographs with Wozniak at the same luncheon. (*Id.* at 26.)

23 Wozniak argues that this evidence confirms that “Plaintiff never asked Wozniak for
24 anything other than the use of his name to market an online school to others.” (Doc. 124 at
25 3.) As a result, Wozniak could not possibly have breached an implied-in-fact contract
26 because Plaintiff did not “disclose the work to the offeree for sale.” *Grosso*, 383 at 967.
27 Plaintiff responds that he “need not prove that [Wozniak] intended to ‘buy’ or ‘bought’ his
28 idea.” (Doc. 136 at 10.) Instead, Plaintiff argues that the relevant cases do not limit implied-

1 in-fact contract claims to “submissions of ideas to the person who will actually produce or
2 publish the idea.” (*Id.*) He argues that the fact that Wozniak *himself* never intended to start
3 Woz U is legally irrelevant to his implied-in-fact contract claim. (*Id.* at 13.)

4 The Court is not convinced by Plaintiff’s argument. As *Desny* and its progeny make
5 clear, to state a claim for breach of implied-in-fact contract, “the plaintiff must show that
6 the plaintiff prepared the work, disclosed the work to the offeree for sale, and did so under
7 circumstances from which it could be concluded that the offeree voluntarily accepted the
8 disclosure knowing the conditions on which it was tendered and the reasonable value of
9 the work.” *Grosso*, 383 F.3d at 967. *See also Alexander v. Metro-Goldwyn-Mayer Studios*
10 *Inc.*, No. CV 17-3123-RSWL-KSX, 2017 WL 5633407, at *9 (C.D. Cal. Aug. 14, 2017)
11 (“But Plaintiff has no allegations that the Creed Idea was offered for sale.”). The
12 fundamental problem for Plaintiff is that he has not demonstrated that he disclosed his idea
13 to Wozniak for payment.

14 An implied-in-fact contract requires a “reasonable expectation of payment which
15 can be inferred from the facts and circumstances.” *Minniear v. Tors*, 266 Cal. App. 2d 495,
16 502 (Ct. App. 1968). Here, the evidence establishes that Plaintiff solicited Wozniak’s
17 “endorsement” to start the Woz Institute of Technology, but not an agreement for payment.
18 (Doc. 125 at 15.) Put another way, “there needs to be more than a unilateral offer and
19 [Plaintiff] only offers arguments as to his intent, not [Wozniak’s] understanding or
20 conduct.” *Jordan-Benel v. Univ. City Studios, Inc.*, CV 14-5577-MWF(MRWx), 2015 WL
21 9694896, at *3 (C.D. Cal. Feb. 13, 2015). The court in *Desny* aptly illustrated the situation
22 at hand here: “[t]he idea man who blurts out his idea without having first made his bargain
23 has no one but himself to blame for the loss of his bargaining power. The law will not in
24 any event, from demands stated subsequent to the unconditioned disclosure of an abstract
25 idea, imply a promise to pay for the idea, for its use, or for its previous disclosure.” *Desny*,
26 46 Cal. 2d at 739.

27 The Court finds that a reasonable juror could not conclude that Plaintiff and
28 Wozniak formed an implied-in-fact contract. In so ruling, the Court notes that Plaintiff

1 states that “[i]t is the law of the case that the Complaint states a *Desny* claim and as a result
2 [Wozniak] is not entitled to judgment as a matter of law merely because Reilly does not
3 allege and prove actual offer and acceptance.” (Doc. 136 at 9.) This is not entirely accurate.
4 In ruling on Defendants’ motion to dismiss, the Court found that Plaintiff had “sufficiently
5 stated the minimal requirements” to proceed with his claim for breach of an implied-in-
6 fact contract against Wozniak. (Doc. 99 at 20.) It specifically noted that it was “sympathetic
7 to Wozniak’s argument” that Plaintiff did not seek to sell anything to him. (*Id.* at 19.)
8 Accepting all of Plaintiff’s allegations as true, though, as required for a motion to dismiss,
9 the Court concluded that dismissal was not appropriate at that early stage. Now, the Court
10 concludes that the discovery described above makes clear that neither Plaintiff nor
11 Wozniak intended to enter into an agreement for payment. Because no reasonable juror
12 could find that Plaintiff “disclosed the work to the offeree for sale,” the Court grants
13 summary judgment to Wozniak on Plaintiff’s breach of implied-in-fact contract claim.⁴

14 **B. Copyright Infringement**

15 Defendants also move for summary judgment on Plaintiff’s claim of copyright
16 infringement against all Defendants (Count 3).⁵ Plaintiff created and obtained copyright
17 protection for a website and logo for the “Woz Institute of Technology” and obtained
18 copyright protection for the related “graphic images, photographs, and tangible
19 expressions.”⁶ (Doc. 1 at 4, 59–76.) The Complaint states that Defendants infringed
20 Plaintiff’s copyrighted works “by and in connection with the operation, marketing and
21 promotion of Woz U.” (*Id.* ¶¶ 31–36.) Defendants argue that “there is no direct evidence
22 that the Defendants copied the Plaintiff’s copyrighted materials.” (Doc. 124 at 13.) Plaintiff
23 asserts that the law does not require such evidence. The Court agrees with Plaintiff and
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25 ⁴ Wozniak also argues that the two-year statute of limitations for this claim has expired.
26 (Doc. 124 at 11.) Based on the Court’s determination above, it need not reach this
27 argument.

28 ⁵ Defendants did not previously move to dismiss this claim. (Doc. 99.)

⁶ The Complaint states that this includes an A+ Certification, Ethical Hacker Certification,
Web Design and Development Certification, Network Security Certification, Network
Administration Certification, and Cloud Essentials Certification. (*Id.* at 4.)

1 denies Defendants' motion for summary judgment on this claim.

2 **1. Ownership of Valid Copyright**

3 To prevail on his claim for copyright infringement, Plaintiff must prove two
4 elements: "(1) ownership of a valid copyright, and (2) copying of constituent elements of
5 the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340,
6 361 (1991). As to the first element, Defendants do not dispute that Plaintiff registered the
7 website and logo for the Woz Institute of Technology with the United States Copyright
8 Office.⁷ (Doc. 124 at 12.) Plaintiff's certificates of registration entitle him to a "rebuttable
9 presumption of originality." *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1075 (9th Cir.
10 2000) (internal citation omitted). That said, Defendants state, in passing, that a plaintiff
11 cannot "succeed on a copyright claim if the materials allegedly copied are not protected by
12 the Copyright Act." (Doc. 124 at 12.) Defendants also state that "ideas, concepts, and
13 processes are not protected from copying." (*Id.* at 12) (citing *Attia v. Society of the New*
14 *York Hospital*, 201 F.3d 50, 54 (2nd Cir. 1999)).

15 To the extent that these statements may be interpreted as an argument that Plaintiff's
16 creations are, in fact, not copyrightable, the Court rejects it. The Court is mindful that the
17 Copyright Act specifically excludes from copyright protection "any idea, procedure,
18 process, system, method of operation, concept, principle, or discovery, regardless of the
19 form in which it is described, explained, illustrated, or embodied in such work." 17
20 U.S.C. § 102(b). Nonetheless, to constitute an "original" work subject to copyright means
21 "that the work was independently created by the author (as opposed to copied from other
22 works), and that it possesses at least some minimal degree of creativity." *Feist*
23 *Publications, Inc.*, 499 U.S. at 345 (citing *M. Nimmer & D. Nimmer*,
24 *Copyright* §§ 2.01[A], [B] (1990)). The "requisite level of creativity is extremely low; even

25 ⁷ Although neither the Complaint nor the pending briefing specify the precise date on which
26 Plaintiff's copyrights were registered, "[u]pon registration of the copyright . . . a copyright
27 owner can recover for infringement that occurred both before and after registration."
28 *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 886–87 (2019).
Defendants do not dispute that Plaintiff obtained copyright protection before filing the
present lawsuit. (Doc. 124 at 12.)

1 a slight amount will suffice. The vast majority of works make the grade quite easily, as
2 they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”
3 *Id.* (citation omitted). Accordingly, although facts themselves are not copyrightable, factual
4 compilations may possess the requisite originality because the “compilation author
5 typically chooses which facts to include, in what order to place them, and how to arrange
6 the collected data so that they may be used effectively by readers.” *Id.* at 348.

7 The Court finds that Plaintiff’s website and logo, as attached to the Complaint, are
8 entitled to copyright protection. Defendants, other than raising general assertions about the
9 requirements for copyright protection, have not demonstrated (or argued) that the
10 copyrights are invalid. *See Entm’t Research Grp., Inc. v. Genesis Creative Grp., Inc.*, 122
11 F.3d 1211, 1217 (9th Cir. 1997) (A valid copyright registration “shifts to the defendant the
12 burden to prove the invalidity of the plaintiff’s copyrights.”) (citation omitted). Plaintiff’s
13 website and logo also indisputably required “some creative spark.” *Feist Publications, Inc.*,
14 499 U.S. at 345. The Court notes that this copyright protection does not extend to individual
15 facts and ideas contained within the copyrighted materials. It also does not extend to
16 Wozniak’s name or likeness. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004
17 (9th Cir. 2001) (“A person’s name or likeness is not a work of authorship within the
18 meaning of 17 U.S.C. § 102.”). Nonetheless, the “organization and expression of the facts
19 or ideas contained in” Plaintiff’s website and logo for the Woz Institute of Technology are
20 subject to copyright protection. *B2B CFO Partners, LLC v. Kaufman*, 787 F. Supp. 2d
21 1002, 1007 (D. Ariz. 2011). *See also Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led*
22 *Zeppelin*, 952 F.3d 1051, 1069 (9th Cir. 2020) (noting that “it is not difficult to meet the
23 famously low bar for originality”).

24 **2. Copying of Original Elements**

25 The Court now assesses whether Defendants have demonstrated that they did not
26 copy the original elements of Plaintiff’s copyrighted works. *Feist Publications, Inc.*, 499
27 U.S. at 361. Defendants argue that “there is no direct evidence” that they copied Plaintiff’s
28 copyrighted materials. (Doc. 124 at 13.) They point to the fact that Wozniak’s business

1 manager, Ken Hardesty, learned in April 2013 that Plaintiff had created a “dummy
2 website” for the Woz Institute of Technology, was upset, and demanded that Plaintiff take
3 down the unauthorized website, which Plaintiff did. (Doc. 125 at 6.) Defendants also point
4 to Plaintiff’s deposition testimony that, when asked whether Wozniak or Mr. Hardesty
5 provided a copy of the website for the Woz Institute of Technology to any other Defendant,
6 Plaintiff responded, “I don’t know. I don’t know. I have no firsthand knowledge that they
7 did anything.” (*Id.* at 45.)

8 Such direct evidence is not required for a copyright infringement claim. Indeed,
9 “direct evidence of copying is not available in most cases.” *B2B CFO Partners, LLC*, 787
10 F. Supp. 2d at 1007. In the absence of such evidence, a plaintiff “can attempt to prove it
11 circumstantially by showing that the defendant had access to the plaintiff’s work and that
12 the two works share similarities probative of copying.” *Skidmore as Tr. for Randy Craig
13 Wolfe Tr.*, 952 F.3d at 1064. This type of evidence “shows that the similarities between the
14 two works are due to copying rather than . . . coincidence, independent creation, or prior
15 common source.” *Id.* (citation omitted). Such a finding may be based on the overlap of
16 unprotectable as well as protectable elements. *Id.*

17 The Ninth Circuit uses a two-part test to determine whether a defendant’s work is
18 “substantially similar to the plaintiff’s copyrighted work.” *Id.* (citing *Cavalier v. Random
19 House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002)). First, the “extrinsic test” compares the
20 “objective similarities of specific expressive elements in the two works.” *Id.* The second
21 prong, the “intrinsic test,” “test[s] for similarity of expression from the standpoint of the
22 ordinary reasonable observer, with no expert assistance.” *Id.* (quoting *Jada Toys, Inc. v.
23 Mattel, Inc.*, 518 F.3d 628, 637 (9th Cir. 2008)). A district court “applies only the extrinsic
24 test on a motion for summary judgment, as the intrinsic test is reserved exclusively for the
25 trier of fact.” *Williams v. Gaye*, 895 F.3d 1106, 1119 (9th Cir. 2018).

26 The Court finds that Defendants are not entitled to summary judgment based on the
27 extrinsic test for substantial similarity. First, Defendants have not even raised this
28 argument, instead relying on their assertion that Defendants possessed no direct knowledge

1 of Plaintiff’s copyrighted materials. (Doc. 124 at 12.) There is “no burden upon the district
2 court to distill every potential argument that could be made based upon the materials before
3 it on summary judgment.” *Anthony v. Equifax Info. Servs., LLC*, No.
4 213CV01424TLNCKD, 2018 WL 2287954, at *7 (E.D. Cal. May 18, 2018) (citing
5 *Resolution Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995)). Similarly, there
6 is no “duty on the part of the judge” to research and refine “perfunctory and undeveloped
7 arguments any time a party’s attorney has in the slightest way adverted to such arguments
8 in its submissions.” *Id.* (internal quotations omitted).

9 Further, upon review of the relevant materials (Doc. 129 at Exs. H–J; 59–101), the
10 Court finds that Plaintiff has presented at least a genuine dispute of material fact. Plaintiff’s
11 copyrighted materials for the Woz Institute of Technology contain “obvious similarities”
12 to those developed by Defendants for Woz U. *Cavalier*, 297 F.3d at 826. Plaintiff’s and
13 Defendants’ websites both promote online educational programs named after Wozniak,
14 shortened to “Woz.” (Doc. 129 at 74, 91.) The websites both promote video-based curricula
15 to be completed at the students’ own pace. (*Id.* at 74, 93.) Both websites offer various
16 course options, some of which appear to be substantially similar. For example, the Woz
17 Institute of Technology and Woz U websites both offer courses focused on security (titled
18 “Cyber Security” and “Network Security Certification,” respectively) and comprehensive
19 programs (the “Full-Stack Software Developer” and the “A+ Certification”). (*Id.* at 75, 93.)
20 Both also contain “About” sections with biographical information about Wozniak and the
21 respective programs’ accessible technology courses. The websites also contain
22 substantially similar photographs of Wozniak in front of a black background. (*Id.* at 60,
23 91.) As to the parties’ logos, both contain “WOZ” in capital letters. And at least one of
24 Plaintiff’s copyrighted logos uses a font that the Court deems to be substantially similar to
25 that used in Defendants’ materials. (*Id.* at 87, 91).

26 Granting summary judgment on “substantial similarity may be appropriate in the
27 rare case where no reasonable juror could find that the defendant had not captured the total
28 concept and feel of the copyrighted work.” *2B CFO Partners, LLC*, 787 F. Supp. 2d at

1 1009. *See also Cavalier*, 297 F.3d at 822 (“[S]ummary judgment is not highly favored on
 2 questions of substantial similarity in copyright cases.”) (citation omitted). Given that the
 3 Court finds that the works at issue contain “objective similarities,” this is not one of those
 4 “rare cases.” *Skidmore as Tr. for Randy Craig Wolfe Tr.*, 952 F.3d at 1064. The Court “will
 5 not substitute its overall impression” of the respective websites and logos “for that of the
 6 individual fact finders.” *B2B CFO Partners, LLC*, 787 F. Supp. 2d at 1009. The Court will
 7 deny summary judgment as to Plaintiff’s copyright infringement claim.⁸

8 C. Declaratory Relief

9 Plaintiff seeks a declaratory judgment from the Court stating:

- 10 A. Woz U embodies the Reilly Work in its operation,
 11 marketing and promotion.
 12 B. Defendants and each of them are obligated to account and
 13 pay to Reilly the reasonable and fair value of Reilly’s
 Work.

14 (Doc. 1 ¶ 40) (Count 4). Defendants move for summary judgment on this claim because,
 15 they state, Plaintiff’s other remaining claims fail as a matter of law. (Doc. 124.) The Court
 16 agrees that the portion of section (B) requiring Defendants “to account” is no longer
 17 relevant in light of the Court’s prior dismissal of Plaintiff’s accounting claim. (Doc. 99 at
 18 14.) Otherwise, given the denial of Defendants’ motion for summary judgment on
 19 Plaintiff’s copyright infringement claim, summary judgment is not appropriate as to
 20 Plaintiff’s request for a declaratory judgment. The Court will therefore deny Defendants’
 21 motion as to Plaintiff’s requested declaratory judgment, other than as to the language “to
 22 account.” That said, a declaratory judgment “is a remedy for an underlying cause of action;
 23 it is not a separate cause of action.” *Snyder v. HSBC Bank, USA, N.A.*, 913 F. Supp. 2d 755,
 24

25 ⁸ The Court notes that there is no inconsistency in entering summary judgment on the
 26 breach of implied-in-fact contract claim but retaining the copyright infringement claim.
 27 The “rights created under California law emanating from *Desny* [are] qualitatively different
 28 from the rights protected by federal copyright law because a *Desny* claim includes an added
 element: an agreement to pay for use of the disclosed ideas.” *Montz v. Pilgrim Films &
 Television, Inc.*, 649 F.3d 975, 980 (9th Cir. 2011).

1 770 (D. Ariz. 2012). Accordingly, the Court construes Plaintiff's request for declaratory
2 judgment as a request for a remedy, rather than as a separate cause of action.

3 **D. Attorney's Fees**

4 Defendants seek attorney's fees under the Copyright Act, which permits a court, "in
5 its discretion," to award a "reasonable attorney's fee" to the prevailing party. 17
6 U.S.C. § 505. In light of the denial of Defendants' motion for summary judgment on the
7 copyright infringement claim, the Court declines to award attorney's fees at this time.

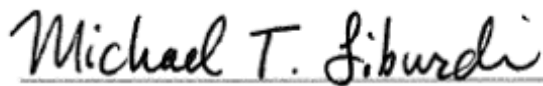
8 **IV. CONCLUSION**

9 Accordingly,

10 **IT IS ORDERED** that Defendants' Motion for Summary Judgment (Doc. 124) is
11 **granted in part and denied in part**. Defendants' Motion for Summary Judgment is
12 granted in favor of Defendants as to Plaintiff's claim for breach of implied-in-fact contract.
13 It is denied as to Plaintiff's claims for copyright infringement and declaratory judgment as
14 described herein.

15 **IT IS FURTHER ORDERED** setting a trial-setting conference for **March 18,**
16 **2021, at 11:00 AM**, in Courtroom 503, Sandra Day O'Connor U.S. Federal Courthouse,
17 401 W. Washington St., Phoenix, Arizona 85003-2151. Participants shall have their
18 calendars available and be prepared to schedule dates for a Final Pretrial Conference and
19 for trial. In-person appearance is preferred; however, the Court will permit telephonic
20 appearance upon request.

21 Dated this 2nd day of March, 2021.

22
23 

24

Michael T. Liburdi
25 United States District Judge
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27
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