Artist has asked this firm to help her with legal problems arising from several contracts. This memo will break the analysis down by contract.

ARTIST v. ROCK STAR

Artist agreed to decorate a bedroom. In exchange, Rock Star agreed to pay $100,000 and feature photographs of the finished art on her personal website.

1. Though Artist uses sequins to do the work, the predominant purpose of the transaction is the decoration of a space, and furniture within the space, that Rock Star already owns. This is a service and the common law applies to this contract.

2. There are no formation or enforceability issues.

3. Performance

Artist did the work and Rock Star kept her promise to pay $100,000 in exchange. However, publicity was also part of the deal. Rock Star promised to keep photos of the sequined bedroom on her personal website for at least six months (through June 2012). She breached by removing the photos after only two months.

The publicity was very important. It helped Artist earn as much in February revenues ($100,000) as Rock Star paid in cash. Thus, it seems likely that Rock Star has committed a material breach by taking the photos down. Cure is unlikely, as Rock Star acted on the advice of an attorney. But Artist completed her side of the bargain and has no performance to suspend, so whether the breach is material is less important here than in many cases. Whenever a promise is broken, the law provides Artist with a remedy.

4. Damages

Artist’s damages are equal to the loss in value to her, minus cost avoided (zero since she completed her own performance), plus incidental and consequential damages.

Artist lost four months of advertising, which in and of itself is a type of value (though difficult to quantify here).

However, consequential damages are the focal point, since Artist believes this breach caused her profits to drop. Suppose we use the February 2012 profits as a benchmark, since the photos were still posted at that time. Then, Artist lost $50,000 in March 2012 and $58,000 for April 2012. She may suffer further losses in May and June.
5. Limitations on damages

a) Did the breach (removing photos) cause the drop in profits? There are other possible causes. For example, Rock Star’s third DUI may have made her—and anyone associated with her—less popular than before. Or prospective buyers may have come to realize that Artist doesn’t do her all of her own work, making her products less attractive as a purchase or investment (see discussion of Artist v. Actor below).

b) Damages must be foreseeable at the time of contracting in order to be recoverable. See Hadley v. Baxendale. This requirement is probably met here. Rock Star should have realized when she promised to post the photos that taking this publicity away prematurely could cause Artist’s profits to drop.

c) Artist cannot recover her lost profits unless she can establish them with certainty. Artist comes to us for advice on May 8, 2012. At that time, it is unclear whether profits will be lower in May and June 2012, and if so, by how much. However, these figures should be better defined by the time this case gets to court.

d) Could Artist mitigate damages?

First, she could pay for other advertising or publicity (though this could require her to spend money she does not have right now). Second, Artist probably has her own website. If she took photos of Rock Star’s bedroom, she might post them there. There are two problems with this solution: publishing photos of a bedroom without consent might violate Rock Star’s privacy; and traffic to Artist’s website is probably much lower than traffic to Rock Star’s website.

6. Specific performance

Specific performance is an equitable remedy and a court has discretion to grant or withhold it. A court is more likely to order specific performance if: (a) the promised performance is unique; and (b) damages are not an adequate remedy.

Can Artist persuade a court to order Rock Star to reload the photos to her personal website? Two factors favor her case. First, Rock Star’s personal website receives a lot of traffic from fans and others who are curious about her lifestyle. It may afford a unique advertising opportunity that Artist cannot easily replace, even if she creates a website of her own. Second, damages may not be adequate in this case. Artist will have a hard time proving that Rock Star’s breach caused the lost profits, for the reasons stated above.

On the other hand, this is a discretionary remedy. A court may be reluctant to force a person to post photos of her bedroom, particularly at a time when Rock Star is seeking to rehabilitate her image. And indeed, Artist should think twice about asking for this remedy. Association with a person in trouble for DUI may hurt as much as help.
ARTIST v. ACTOR

1. This is a sale of goods. Artist sold a rhinestone-studded mirror to Actor. The mirror is a movable thing or good. Therefore, Article 2 applies to this transaction.

2. Express warranties

There are two possible express warranties in this fact pattern.

a) First, Rock Star’s website portrayal of the sequined bedroom is like an advertisement that Artist commissioned. It could be reasonable to attribute statements made on the website to Artist, due to her agreement with Rock Star.

We need to find out what Rock Star said on her website. She must have captioned the photos and mentioned Artist’s name. Perhaps she also stated that Artist sewed all the sequins herself (which was quite a feat). The bedroom could be viewed as a sample of Artist’s work creating an express warranty that finished goods purchased from Artist will conform to that sample and be the product of her own hands. See 2-313(1)(c).

Similarly, if Rock Star stated that Artist always does all the work on her projects, that affirmation of fact could create an express warranty under 2-313(1)(a).

Of course, any sample or affirmation of fact would operate as an express warranty only if it was a basis of the bargain. Thus, we should also find out if Actor came across that website before he bought the mirror.

b) Second, Artist signed the mirror. Query: Can the signature be interpreted as an affirmation of fact that Artist (and only Artist) decorated the mirror? If so, it creates an express warranty under 2-313(1)(a).

Trade usage is part of this contract and may help interpret the meaning of Artist’s signature. One thing we need to research is what signatures represent in today’s art world. (What Peter Paul Rubens did four hundred years ago is not determinative.)

Here too, a signature would be an express warranty only if it was a basis of the bargain. We need to find out if Actor saw the signature before he bought the mirror.

If either warranty exists, Artist breached if she was not the only person who decorated the mirror. Her apprentices probably did help glue the rhinestones to the mirror, since they were employed during the relevant time frame.

3. Implied warranties

Artist is a merchant because she deals in goods of the kind involved in this transaction: decorated items. See 2-104(1). As such, she made the implied warranty of merchantability when she sold the mirror to Actor. See 2-314(1).
To be merchantable, a good must meet the standards set forth in 2-314(2).

Here, a good argument can be made that the warranty has been broken. Artist signed the mirror even though she was not the only person who made it. For this reason, the mirror might not pass without objection in the art trade under the contract description. See 2-314(2)(a). Similarly, if one thinks of the signature as a label, the mirror did not conform to the affirmation of fact that the Artist made the mirror herself. See 2-314(2)(f).

4. Acceptance

There are two ways in which Actor accepted the decorated mirror. First, he kept it for over a month without rejecting it, which is longer than he needed to inspect the mirror. See 2-606(1)(b). Second, if he has been using the mirror for all this time (and maybe cracking the glass), he has acted inconsistently with Artist’s ownership of the mirror. That also constitutes acceptance. See 2-606(1)(c).

5. Revocation of acceptance

Since Actor accepted the mirror, the next question is whether he meets the requirements stated in 2-608 for revocation of acceptance.

a) Artist signed the mirror, even though she was not the only decorator. Authenticity is an important feature of art, one that impacts its value. Therefore, there is a good chance this non-conformity substantially impairs the value of the mirror to Actor.

Actor can argue that he accepted the mirror without discovering the problem because Artist, through her signature, assured him the product was her work and lulled him into a state of complacency. Alternatively, he might claim that his acceptance was induced by the difficulty of discovery. He could not learn that apprentices worked on the mirror simply by looking at the product, and he didn’t hear about their role in production until after he had accepted. See 2-608(1)(b).

b) Even if Actor had the right to revoke, he must also take steps to ensure that his revocation is effective.

Actor did notify Artist of the revocation by returning the mirror. See 2-608(2). His note in the box did not give reasons for revocation. But he explained his reason in his phone call with Artist the day before: she signed the mirror even though her apprentices helped decorate it. According to comment 5, the content of a revocation notice must be “determined by considerations of good faith, prevention of surprise, and reasonable adjustment.” Actor has given Artist the information she needs to understand why he returned the mirror.
Actor may well have provided notice shortly after he learned about the apprentices, in accordance with 2-608(2). However, Actor must also revoke before any substantial change in the condition of the mirror.

The glass of the mirror was cracked. This item was carefully packed, so it seems likely that Actor cracked the mirror before he decided to return it. The substantial change in the condition of mirror means that it is too late for Actor to revoke. See 2-608(2).

V. Remedies

If Actor’s attempt at revocation is ineffective, he will recover the difference at the time and place of acceptance between the value of the mirror as it was (unknown but probably low because the mirror was not authentic), and the value the mirror would have had if it had been as warranted ($10,000 or possibly more). See 2-714(2).

However, if the revocation is effective, Actor recovers the purchase price ($10,000) under 2-711(1), plus damages under 2-713.

The 2-713 damages would be the market price at the time Actor learned of the breach minus the contract price ($10,000). We don’t know when Actor learned of the breach. However, since the market for Artist’s products has been declining over time, odds are the market price when Actor learned of the breach was below contract price so that Actor’s 2-713 damages turn out to be less than zero.

ARTIST v. SUPPLIER

1. Supplier provides Artist with rhinestones, beads and sequins which are movable things or goods. Therefore, Article 2 applies to this transaction.

2. This transaction also appears to be an installment contract because Supplier makes separate deliveries every month for separate acceptances by Artist. Therefore, the rights and obligations of the parties must be determined under 2-612.

3. Artist breached the installment contract by failing to pay for the April 1 delivery of goods within five days after the goods arrived. However, failure to pay for only one out of twenty-four planned deliveries probably does not substantially impair value of the whole contract. Thus, we can reassure Artist that Supplier does not yet have the right to terminate this contract. See 2-612(3).

4. However, since this is a contract for the sale of goods, we must consider the impact of section 2-609.

Supplier had reasonable grounds for insecurity because Artist did not pay for the April delivery of rhinestones, sequins and beads. On May 1, Supplier reacted by sending an email which counts as a writing under UETA and E-Sign.
In this email, Supplier said it wouldn’t send more products until it got paid. Supplier is entitled to do this—it is suspending performance while it awaits assurances from Artist.

Supplier also asked Artist to explain why she was behind on payments and what she was doing to be sure she didn’t fall behind again. Essentially, Supplier made a written demand for adequate assurance of due performance. The demand is appropriately tailored to its insecurity: Supplier is trying to find out why payment is delayed and whether future payments will be made at all.

Artist will find it difficult to provide these assurances. The truth is that she didn’t have the money to pay for the April delivery. Nor is Supplier likely to be reassured by empty promises that Artist will make lots of profits in the future (especially since she can’t earn a dime without the decorations Supplier is withholding).

Still, Artist must do something, and soon. If she does not provide assurances within a reasonable time—30 days at the most—she will have repudiated the contract. See 2-609(4). And at that point, Supplier will have the right to terminate the contract and sue Artist for whatever damages it may have. See 2-610.

Artist has a mortgage, and thus, a house. Perhaps she could obtain a short-term line of credit that would allow her to pay Supplier now and in the immediate future. Perhaps a friend would make her a loan. These are avenues we should explore.