



# Myerson Dispute Resolution

Commercial Agents:  
Possible extension of commercial  
agent's rights to sellers of software

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# Welcome

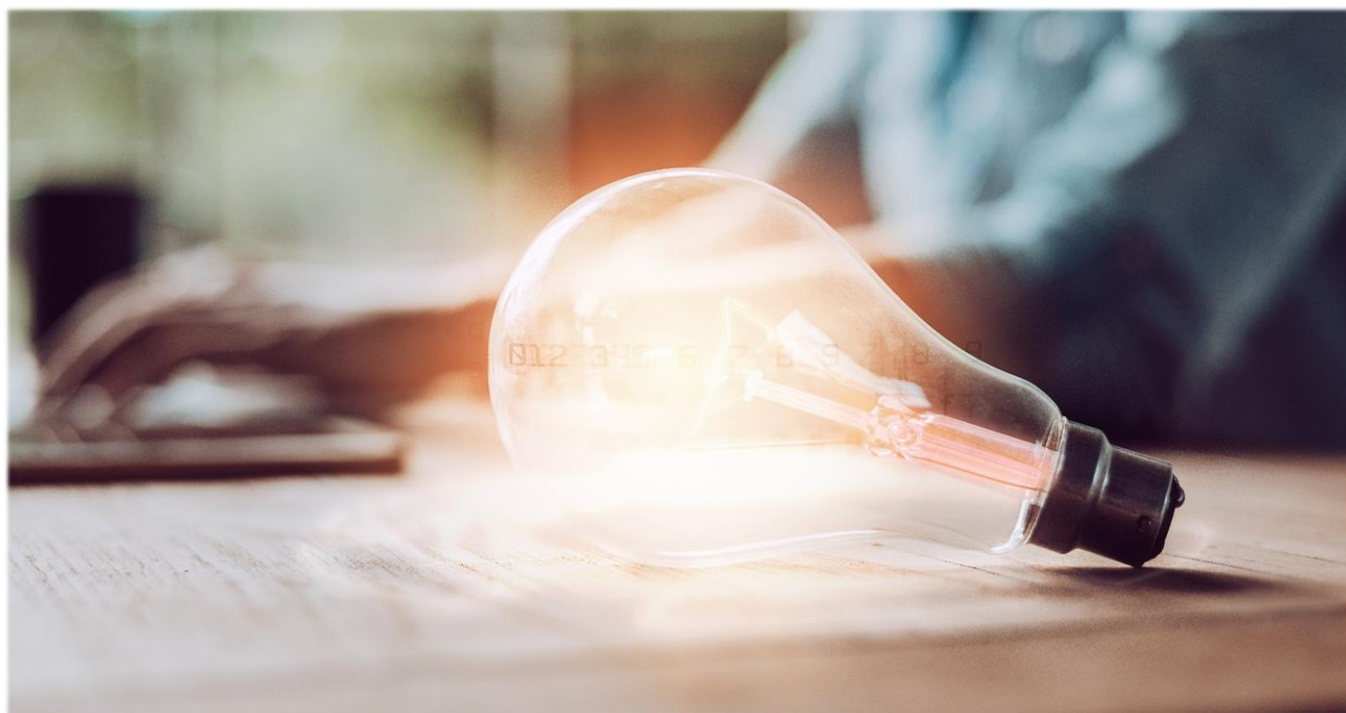
We understand the complexities of modern life and the importance of taking care of your business interests. So it's a deep source of satisfaction that so many Commercial Agents choose Myerson as their trusted adviser.

## Why Myerson?

At Myerson, we are the leading legal Commercial Agency firm outside of London, and we have years of experience in advising agents and principals.

The firm are proud to be ranked as 'Top Tier' in the prestigious international directory [The Legal 500](#), and commended by The Times 'Best Law Firms 2019'. This means you can be certain that you will be receiving the highest quality legal advice and that we can advise you on complex disputes.

Myerson is retained as an expert adviser to the members of [Agentbase](#) and the Association of Professional Sales Agents. Our litigation team has acted in agency disputes against companies based in Ireland, Germany, the Netherlands, Spain, France, Belgium, Italy and the USA, and are experienced in complex disputes.



# How We Work.

Every client and every case is different, and we are here to support you every step of the way.

**Personal, Partner-led Service.** Our experienced solicitors get to know you and your business inside out, so we can best advise you. We know that dealing with litigation can be stressful and we aim to take that stress away from you. We strive to become your trusted advisers, providing value and most of all, a genuine, personal service.

**The Highest Level of Expertise.** Combining commerciality and practicality, our team's breadth of experience means Myerson can provide expert legal advice and assistance on all agency matters. We also have developed excellent links with specialist barristers and forensic accountants so that you are provided with a complete team of experts for your case.

**A Team You Can Trust.** We help clients nationwide and internationally, with complex agency matters. You can therefore rest assured that our expert team knows its stuff!



# Your Solicitors



## Adam Maher

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## Suzanne Carr

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The solicitors that will be working with you are specialists.


The Legal 500 highlight the department for its work in commercial agent disputes. The litigation team contains 15 solicitors and is headed by Adam Maher whom the Legal 500 rate as a “Leading individual” and ‘first-class litigator’ with ‘razor-sharp commercial judgement, tenacity and excellent communication skills’; who ‘quickly identifies the core issues’ and is ‘extremely robust under pressure. Suzanne Carr, a commercial agency specialist is also recommended by the Legal 500.

We are happy to discuss your situation in a no-obligation telephone call to assess your claim, give a preliminary advice and suggest a way forward. We can also suggest innovative funding solutions where available to assist with the costs of the litigation, such as “no win, no fee” funding.

You can find out more about our Commercial Litigation Team by clicking [here](#).

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# Possible extension of commercial agent's rights to sellers of software.

This article provides an update on the possible extension of commercial agents' rights to sellers of software.

The Commercial Agents Regulations apply to agents who sell or purchase goods in Great Britain on behalf of their principals.

## What are “goods”?


The Regulations do not define what is meant by “goods”. Generally speaking, goods are tangible items than an agent buys or sells for a principal under an agency arrangement.

There is not always a bright line between what are classed as goods and what are not. Services are not goods for the purposes of the Regulations nor are items sold on commodity exchanges - for example rough diamonds. However, gas and electricity supplies are goods.

Things become more complicated where an agent sells software that is delivered digitally or in electronic form to a principal's customers.

## Software as “goods”?

Under UK agency law, software sold on its own (for example downloaded or delivered electronically) is not currently considered to be goods, but software bundled and sold within physical hardware or discs can be.



This position was brought into question in 2016, when the High Court in the case of *Software Incubator Ltd v Computer Associates Ltd* [2016] EWHC 1587 ruled that an agent negotiating the supply of software (delivered electronically) was involved in the sale of goods and therefore was afforded protection of the Regulations.

However, that decision was overturned by the Court of Appeal in 2018. The case is now being reconsidered by the Supreme Court.

## Guidance from Europe.

As the UK Commercial Agents Regulations originate from the EU Commercial Agents Directive, the Supreme Court has asked for guidance from the European Court of Justice (ECJ) on whether software supplied to a principal's customers electronically (as opposed to being contained in physical hardware) is "goods"; and also, whether a licence of software is a "sale" under the Directive.

The ECJ has not published its decision yet, but Advocate General Tanchev proposed on 17 December 2020 that the ECJ should answer the questions referred by the Supreme Court as follows:

- A copy of computer software which is supplied to a principal's customers electronically, and not on any tangible medium, constitutes "goods" within the meaning of Article 1(2) of the Directive.
- Computer software which is supplied to a principal's customers by way of a grant to the customer of a perpetual licence to use a copy of the computer software for an unlimited period in return for payment of a fee corresponding to the economic value of that copy, constitutes a "sale" within the meaning of Article 1(2) of the Directive.

## Conclusion.

The *Software Incubator* case arose while the UK was still a member of the EU. As the UK has now officially left the EU, the UK Courts are no longer bound by decisions of the ECJ. Nevertheless, the Regulations will remain in force in the UK (for now) as "retained EU law". Therefore, if the ECJ adopts the Advocate General's proposal, then it seems likely that the Supreme Court will adopt the same approach when deciding the *Software Incubator* case. If that happens, the practical implication for UK agents will be that software delivered other than on hard media will be considered as "goods" and agents that sell such software will benefit from the protection of the Regulations, including the right to claim 'pipeline' commissions and compensation payments after termination of their agencies.

# You're in safe hands!

If you would like further information about how we can help you, or if you have any questions, please don't hesitate to contact a member of our Dispute Resolution Team today.

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 SCAN ME

Because  
life is rarely  
**black** and  
**white.**



myerson



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