

**Dirty Little Tricks
People Play
in Licensing –
The Advanced Course!**

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They Aren't Really “Dirty Tricks”

- Common strategies and tactics
- Illogical or underhanded
- Used when logic and persuasion fail
- May make sense to the user, or not!
- Calling them “dirty little tricks” makes us feel better!

Compound Tricks are the Norm

- Rarely are used one-by-one
- If you recognize one, be alert!
- Common patterns & combinations
- Often relate to a style, rank or attitude
- Can sometimes be blocked with an opposite style, rank or attitude

The “Hot Shot”

- A “wheeler-dealer”
- Uses tricks as a matter of course
- A confident “winner”
- Always wants to get the last nickel
- Prideful, even arrogant

Antidote: The “Friendly Stickler”

- Cordial, even jovial
- Very calm
- Goes “by the book”
- May have written guidelines
- Amused by the Hot Shot’s antics

Hot Shot vs. Friendly Stickler

HS: I've been licensing my whole life; this is a rather small deal for me.

(Puffery)

FS: Well, I'm not getting any younger either! This U has been licensing for 30 years, so we have established norms to follow that reasonable companies always accept. *(We Have a Policy)*

Hot Shot vs. Friendly Stickler

HS: You may have never heard anyone raise these issues, but I've been around long enough to see them become problems. (*Issue Inflation*)

FS: Ha ha, the lawyers can make anything into an issue, can't they! (*Humor Deflection*)
I don't think our guidelines will allow us to change those things. (*We Have a Policy*)

Hot Shot vs. Friendly Stickler

HS: That's ridiculous! Nobody in their right mind would ever agree to that! (*Righteous Indignation*)

FS: Really? Wow, this is really modest in view of similar deals we've done! (*Hidden Benchmarks*)

Hot Shot vs. Friendly Stickler

HS: I don't know why you call my re-draft 'lopsided,' I was very careful to make it fair. (*Cherry Picking*)

FS: But more fair to you than me, right? Seems you got the cake and we got the crumbs, but what the heck, we'll walk through it.

(*Soft rebuttal, Resignation*)

Hot Shot vs. Friendly Stickler

HS: I don't think I can agree to that, but let's move on and come back to it.

(Leapfrog)

FS: I'm sorry, but I'm not allowed to do that. I'll talk to my boss about this issue and we can talk again next week.

(We Have a Policy, Delay of Game)

HS: Oh, never mind. I guess we can live with it. Let's move on.

Hot Shot vs. Friendly Stickler

HS: I know we had agreed, but my board needs this one little thing and it's a deal.

(The Nibble)

FS: Uh-oh, train wreck! It's already approved by my boss and logged in."

(My Boss is a Bastard)

I guess we could re-negotiate, but everything would be back on the table. *(Pandora's Box)*

HS: Never mind, I'll get them to take it as-is.

Hot Shot vs. Friendly Stickler

FS: I looked over the signature copies you sent, and it's missing the two additional milestone fees we agreed to.

HS: Really? Strange, I know they were in your last draft. Maybe I accidentally worked off an older one.

(Gee, How Did That Get In There?)

I already got the president to sign these, can't you just accept it this way? *(Just Sign Here)*

The Analyst

- Entirely focused on money
- Leaves contracts to the lawyers
- Argues with spreadsheets
- Speaks reverently about benchmarks
- Recites valuation methods
- Feels arguments are bullet-proof

Antidote: The Microscope

- Patient and won't be rushed
- Digs down to bedrock on the numbers
- Asks a million questions
- Willing to find his or her own data
- Market-savvy
- Nobody's fool

Analyst vs. Microscope

A: As you can see in this spreadsheet, I'm afraid the net present value of the technology is rather low. So we won't be offering much. (*NPV Shell Game*)

M: Very interesting, can you tell me how you arrived at the discount rates? They drive the entire analysis of course.

(*Focus on Assumptions*)

And aren't your investors discouraged by this analysis? (*Double-books Call-out*)

Analyst vs. Microscope

A: Why, those discount rates are quite standard in the investing community.

(Selective Benchmarks)

M: Interesting, can you tell me your source? Surely there are variations, I'd like to see what the range of values might be for various technologies. *(Trust but Verify)*

A: Why, it's just common knowledge! But let's move on, I have more to share.

Analyst vs. Microscope

A: As you can see in this spreadsheet, if you demand a 5% royalty, you will earn far less than if the royalty is 1% as we suggest. *(Lower rate = more \$)*

M: Ha ha! Quite counter-intuitive! How can this be? *(Humorous Indignation)*

A: At a high royalty we won't be eager, but at a lower royalty we will work like mad!

M: Hmm, keeping 99% rather than 95% of the revenues is such a factor? Perhaps you aren't the right licensee for us. *(Bluff)*

Analyst vs. Microscope

A: Why, our 1% proposal is quite fair, the other universities we deal with are fine with this. . *(We Always Got These Terms Before)*

M: Really? Which universities? I'll be glad to call them, perhaps there is some factor here I'm unaware of. *(Calling their Bluff)*

A: Oh, I couldn't say, those deals are quite confidential of course. *(Hidden Benchmarks)*

M: Well, then they are not much help to us.

Analyst vs. Microscope

A: Your proposed diligence provisions are a deal-killer for us; we will work hard, but never again will we get sued over this!

(The Hindenberg)

M: Well, that was a deal with a big company; universities as you well know are not litigious, and indeed are litigation-adverse.

(Distinguishing)

And these terms are to prevent disputes, not cause them.

Analyst vs. Microscope

M: The sublicensing clause we proposed is critical to us, it has returned a fair value to us on our most successful technology.

(Our Most Important Deal Has That Clause)

A: Well, that may be so; but I bet your licensee feels it is far too generous! Besides, this technology is far less developed, and has a much smaller market. *(Distinguishing)*

The Bully

- Considers himself a big shot
- His company is big and rich
- A booming voice and strong presence
- Always the smartest person in the room
- Expects and demands compliance
- Those who disagree are evil or fools

Antidote: The “Wounded Dove”

- Pleasant and very polite
- Self-deprecating
- Knows a bit more than he or she lets on
- Seems younger than their years
- Lets others bluster without being intimidated
- Asks for help

Bully vs. Wounded Dove

B: Your 6% royalty is preposterous!

You have to go much lower, or I'm done!

(Go Negotiate With Yourself)

W: Gosh, I'm kind of new to this. What do you think would be fair? *(Wounded Dove)*

B: It's not worth a dime more than 1%!

(Righteous Indignation, Low-ball)

W: Oh my, the boss would never take less than 4%! *(My Boss is a Bastard)*

Bully vs. Wounded Dove

B: I need to talk to your boss. (*High Hat*)

You have no clue what you are doing!

(*Stomp down*)

W: I am doing my best sir, I can assure you.

You can talk to my boss if you like, but he's a bit hard-headed. (*Boss is a Bastard*)

And our office is so under-funded, everyone else has less experience than me.

(*My Organization is Dysfunctional*)

Bully vs. Wounded Dove

B: I'm standing firm, there is no way we can pay more than 0.5%. (*Retreat*)

W: But you already offered 1%! And I'm not allowed to take less than 4%.

(*I'm Not Authorized*)

B: You are totally incompetent! (*Ad Hominem*)

Tell your boss the deal's off! (*Bluff*)

W: I shouldn't tell you, but another company already offered 3%. (*Waiting in the Wings*)

The Politician

- Knows public universities are political
- Active in local and state politics
- Sits on government advisory boards
- Papers tell stories of his or her contributions to economic development
- A name-dropper and opportunist

Antidote: The Public Servant

- Pleasant and very polite
- Modest and private
- Shows no ambition or money needs
- A cog in the big machine
- Stays within the rules
- Every deal is a typical deal

Politician vs. Public Servant

P: The Governor says your office will give me a very favorable deal. *(I know the Governor)*

PS: My, the Governor mentioned us? We are simple public stewards, and all of our deals with local companies are favorable. *(Call)*

P: I am well known, I want the papers to write a positive story. *(Hate to Tell the Papers)*

PS: Well, I'm just a humble public servant doing my job. No story there!

Politician vs. Public Servant

P: I've heard such great things about you from others on the Governors Technology Council! *(Massage, Implied Threat)*

PS: Perhaps they know my boss, who is very well respected. But I'm not so well known.

P: Well, I could change all that. Perhaps you one day you could work for an exciting company like ours! *(Our Kind of Person)*

PS: Oh, never! I'm happy serving the public.

Politician vs. Public Servant

PS: I was at a reception, and Nancy Smith said she heard our deal wasn't going well. Is she representing you?

P: No, just a friend. I mentioned some concerns to her last week, she shouldn't have said anything to you! (*Tap on the Shoulder*)

PS: No problem. I laughed and told her that's what all companies say in negotiations, but our deals are always generous.

Politician vs. Public Servant

P: I don't know why you say I agreed to 4%, I never would have agreed to that! (*Amnesia*)

PS: Well, I sent you an email after our last meeting that documents your agreement.

P: Well I don't recall that at all, but in any event the company has changed directions, (*Mulligan*) and our new investors would never fund us with such a deal.

(*Silent Investors*)

Politician vs. Public Servant

P: Besides, our new consultant says 4% is way out of line. (*Have to Do What they Say*)

PS: We can do 2.5% if we bump the up-front to \$500K and minimums to \$75K. (*“Yes If”*)

P: No way! (*Indignation*) I’m sure the VPR would see things my way. (*End Run*)

PS: You are welcome to ask, but she trusts us implicitly. (*Calling the Bluff*)

AND SO IT GOES!

- Compressed and perhaps exaggerated, but this is what dirty tricks look like in real life
- Hate to admit it, but both sides do them!
- In practice, both sides shift styles many times in the course of negotiations
- The dynamic is a slow give-and-take peppered with emotion and cleverness
- You CAN'T do any of this by email!
Negotiation by email really doesn't work

Disclaimer

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In other words, (1) this presentation is intentionally tongue in cheek, so don't take it too seriously; and (2) if what you learn here gets you in big trouble, **DON'T BLAME ME!**

Thanks!

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The Original Dirty Tricks

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High Hat With a Stomp-Down

- Same as the High Hat, except they complain you are incompetent, stupid, hostile, arrogant or nuts
- Accompanied by a demand you be replaced in the negotiations, or the deal is off!
- An act of desperation
- To block it: (i) make sure the boss knows and trusts you, and knows such tricks are used; (ii) give the boss a heads-up if your gut says it might happen; (iii) ask someone else to pick up where you ended, and brief them fully

The Whipsaw

- Common for a company that is funding inventors' research, or is willing to do so
- You think the deal is going well
- They contact the faculty inventor, and tell them you are totally screwing up the deal, with a threat to cut off funding
- The inventor then blasts you (or your boss!) for ruining it, pressures you to back down
- To block it: Tell the inventors to expect the call! Ask them to express confidence and refer to you

Good Cop, Bad Cop

- Very common, many variations
- One is demanding, confrontational, stubborn; the other is supportive, kind and friendly
- The good cop is equal to or works for the bad cop
- The fallacy: the good cop is trying to help you satisfy the bad cop!
- To counter: two ways, based on authority:
 - Ignore the good cop, force the bad cop's hand
 - Ignore the bad cop, concede little to the good cop

The High Hat

- They tell your boss they aren't making headway, ask the boss to appoint someone else, have a sit-down, or handle the deal
- Reasons given are your inexperience, your lack of flexibility, or lack of authority
- They usually try to keep the door open for a follow-up with the boss, to keep you on edge
- To block it: make sure the boss knows and trusts you, and knows such tricks are used

“My Boss is a Bastard”

- They agree to accept a term you wanted (or “will try to get it”), but “the boss says no.”
- They apologize for the boss, and complain that he/she is a tough taskmaster
- Often they never talked to the boss at all!
- Sometimes they ask the boss to disagree!
- The first time the car salesman goes to the boss’s office...does he ever say yes? Of course not!
- To counter: (i) insist on talking to the boss, (ii) explain your boss is a bastard too, (iii) consider a “High Hat,” (iv) ask for something big in return

The Wounded Dove

- They say they have less experience than you, and ask for help (and mercy!)
- Similar to Columbo's "bumbling inspector" or Matlock's "simple country lawyer"
- Invites you to give up too much information
 - You may have an urge to show off
 - You may want to be helpful in educating others
- Works if it makes you relax your guard (so don't!)
- To counter:
 - (i) be assertive;
 - (ii) a "High Hat" (need someone with more experience)

Amnesia

- They strongly deny making concessions you clearly remember
 - “I never would have agreed to such a thing!”
- Sometimes they deny you even negotiated!
- May result from misunderstanding, or from their realization they went too far
- To block it: keep notes, review key points before each session ends, E-mail a summary

Go Negotiate With Yourself

- You make an offer. Without making a counter-offer, they say they cannot accept yours
- They ask you to reconsider and get back to them
- If you do, you have just negotiated with yourself!
 - You made two offers in a row
- If a “low ball” or a “high ball” – you see it coming
- To counter:
 - (i) don't do it! Say you will negotiate further, but they need to make a counter-offer first
 - (ii) if no choice, lower the problem terms 5-10%, and add value elsewhere – they will say it's not enough, but it's hard to ask for 3 offers in a row!

The So-called “Mix-Up”

- You get a fax or e-mail that was intended for company insiders or another party
- It says your deal is less favorable than another, is disliked by management, or is just plain nuts!
- Rule of thumb: the more worrisome the message is to you, the more likely it was no mistake you got it
- To counter:
 - (i) discard the message and discount it entirely
 - (ii) nonchalantly mention it, and say “too bad, I guess this deal isn’t going to happen.” If you are unconcerned, they may feel they have overplayed their hand and back-pedal

“I Always Got Those Terms Before”

- VERY common for companies to claim other universities gave them the good terms they seek
- To counter:
 - (i) ask if this was common, or a one-time deal
 - (ii) ask if other terms of the deal were identical to this one
 - (iii) ask for copies of the other agreements and phone numbers of the negotiators
 - (iv) If they tell you who, call them up and ask!
Sometimes there are factors you didn't consider, a big difference between deals – or it's true!

The Flank Attack

- Unbeknownst to you, they made big side promises to people in high places – e.g., major research support, a big gift for the endowment
- You usually learn about it through a Whipsaw or a High Hat with a Stomp Down
- Can be a career-killer!
- To block it:
 - (i) keep in close contact with everyone on your side
 - (ii) focus on overall institutional interests
 - (iii) watch your ego
 - (iv) apply an “institutional conflict of interest” policy

The Hindenburg

- “Oh, my gosh, no! We did that in a deal once, and it was a total disaster!”
- Accompanied by a gut-wrenching story
- Sometimes sincere, sometimes contrived. But who can tell which?
- To counter:
 - (i) dig deeper into their story, you may find that your issue wasn't the problem at all
 - (ii) distinguish your deal based on facts
 - (iii) use different terms to get the same result

“Our Most Important Deal Has That Clause”

- An attempt to convince you that a certain clause is an absolute must
- Implies that criticizing that term would be an indictment of their greatest transaction
- To counter:
 - (i) suggest their most prized transaction may not be so hot for the other side, they may concede the point!
 - (ii) point out different facts, timing, markets
 - (iii) add qualifiers to the clause to weaken its negative impact

The Massage

- “We have heard so many great things about you. Everybody says you are great to work with!”
- What a pleasure to work with someone of your experience, instead of the inexperienced people in other offices.”
- Makes it kind of hard to be tough with them!
- A true set-up for a High Hat, should you turn out to be less than advertised!
- To block it: recognize flattery for what it is, don't let it affect your expectations or your ego

“You Are Our Kind of Person”

- An exaggerated Message that includes an implied or explicit job offer!
- Often used when the stakes are quite high
- Creates a serious ethical issue
- To counter:
 - (i) decline, and point out the conflict of interest
 - (ii) defer discussing the job offer until the deal is done
 - (iii) disclose it to your boss - they might withdraw their offer, attack your deal position as “sour grapes”
- Almost certain they won’t raise it after the deal!

Selective Benchmarks

- To support a 1% royalty rate, they show data from several deals with 1% or lower rates
 - Did they find any deals with higher rates and ignore them? If the data is perfect, they did!
- To counter: (i) ask for their sources so you can check independently. If they stall or claim that they are private, tell them you can't rely on information you can't access, (ii) find other deals that favor your position, (iii) point out differences in technology, stage of development, market size, etc.

The Retreat

- They negotiate backwards – their new offer is worse than the last one!
- Obviously worse, or more subtle - some terms look better, but overall deal is worse
- To counter:
 - (i) take it head-on and complain, they may back down
 - (ii) counter with your own Retreat! It will illustrate the futility of that approach.

The NPV Shell Game

- They use complicated “net present value” calculations to support their poor offer
- To counter:
 - (i) ask for a “table of assumptions,” and if they provide it, challenge the assumptions
 - (ii) check their business plan for projections they made for investors, see if they are consistent with the NPV calculations and assumptions

Lower Rate = Higher Royalties

- Spreadsheets show high sales if royalties are low
- They say if rate is high, they won't invest and sell aggressively; so total royalty income will be low.
- But a low rate will make them invest and sell with gusto, yielding a higher total royalty income
- May make sense if you ask way too much, but doesn't justify a below-market rate!
- To counter:
 - (i) laugh! It's a ridiculously self-serving argument
 - (ii) Tell them keeping 97% of the money isn't so much better than 95% that behavior would change
 - (iii) say you are concerned about their commitment

“I’d Hate to Tell The Papers”

- Anybody can threaten, few can actually do it
- Media is aimed at ordinary people, and contracts put most people to sleep! Few will run it UNLESS:
 - The complainer is well known (e.g., large company, perhaps with impact on the local economy)
 - The technology is hot (e.g., renewable energy)
 - The institution is already under attack
- To counter:
 - (i) make your correspondence friendly!
 - (ii) tell the boss right away
 - (iii) decline to comment about ongoing negotiations

“I Know the Governor”

- When negotiating with public universities, companies sometimes play politics
- Especially common for small in-state companies to curry political favor and use it
- A High-Hat with the Governor is a uniquely unpleasant experience!
- Few can deliver on their implied threats
- To counter:
 - (i) get advice from upstairs on when to push back and when to give in
 - (ii) don't be the Lone Ranger! It could cost you your job

The Slow No

- “Sounds interesting, we will get back to you.”
- When you get the same kind of enthusiastic delay over and over, it’s a “Slow No”
- Can result from being overly polite
- Can be deadly if you don’t recognize it, because other options may fade away
- To counter:
 - (i) tell them you are moving on to other interested parties, and see if they jump
 - (ii) move ahead as if it were “no”; circle back before you close the alternate deal, but don’t risk losing that deal

“My Boss is a Loon”

- A variation on “My Boss is a Bastard”
- The negotiator figuratively throws up his/her hands and says, “sorry, he’s nuts!”
- Can be effective; makes a High Hat sound hopeless!
- To counter:
 - (i) ask to talk to the boss to find out!
 - (ii) ask if they really want a bad manager to ruin the business
 - (iii) ask for contact information for their boss’ boss

“My Organization is Dysfunctional”

- A broader variant of “My Boss is a Loon”
- Rarely used by companies, more commonly used by TTOs, especially understaffed or newly created ones
- Sometimes used “tongue in cheek” to avoid raising concerns about downstream performance or relationships
- To counter:
 - (i) ask them to agree they want to improve, and this deal might be a good place to start!
 - (ii) reconsider the deal

The End Run

- Similar to a High Hat, but they go to somebody parallel to you, and try to do the deal there
- E.g., they try to make the deal with the sponsored programs office or the VPR's office instead
- Can be soft (“gee, I don't think they really understand what we need”) or hard (“those people were so unreasonable, rude and rigid I just can't work with them anymore.”)
- To block it: tell those in related offices it might happen, ask them to please express confidence in you and refer the person back to you

Ad Hominem

- The frontal personal attack - trying to discredit your decisions or opinions by discrediting YOU
- Can be against your expertise, experience or attitude (e.g., you are nasty, hostile, arrogant)
- Puts you on defense, it's easy to react badly
- Telegraphs that a “High Hat” is coming
- To block it: (i) keep your emotions in check, (ii) make sure the boss knows and trusts you
- To counter: (i) smile and brush it off, (ii) say you are shocked because you are respectful of them (iii) consider being a “Wounded Dove”

Tap on the Shoulder

- Somebody (e.g., local lawyer or business leader) at a cocktail party says he/she has heard that this negotiation isn't going very well
- They usually say your counterpart is a very good person, and that you should “try to work it out”
- Creates an implied threat that the other side could affect you in ways you can't even imagine!
- To counter: say “thanks, I am sure we will work it out,” and don't mention it to the other side – otherwise, they will think it worked!

The Mulligan

- They say there has been an acquisition, change in management, change in corporate strategy, etc., and they can't accept prior agreed-upon terms
- Sometimes they send a new negotiator, sometimes they just send the same ones with a new boss (who is likely to be a bastard or a loon!)
- This can happen more than once in a single deal!
- To counter: you will probably have to play along; but don't let your previous bottom-line be a starting position! Start from your beginning offer.

“We Have a Policy”

- “Sorry, we have a written policy against it.”
- May be writing the policy as they speak!
- Presumes that the policy is rational and well thought-out, whether it is or not
- Very common strategy for universities
- To counter:
 - (i) ask how recent or inviolate it is,
 - (ii) see if policies of others are the same
 - (iii) point out every rule has its exceptions!

Just Sign Here

- The other side takes their most recent draft of the agreement (or modifies your draft), has it signed for their side and sends it to you for signature
- This is an attempt to pressure you to accept the deal “as is” in order to close; it also implies they are standing firm
- To counter:
 - (i) ignore the signature, edit it how you wish and send it back
 - (ii) edit it and send them a signed copy!

The Standoff

- The other party (perhaps both parties) does whatever it can to avoid making a first offer, thereby avoiding setting an upper/lower boundary for negotiations
- To counter: make a first offer, explaining that you usually like to start at 100% and negotiate down from there. If they responds that they “usually like to start at a 0% royalty,” offer to meet them half way - at 50% ! Now it’s their turn...

“I Tell Everybody How Great You Guys Are”

- It's great to have a licensee say nice things about you in public – until they stop
- An implied or direct threat to replace public praise with public criticism
- can be strong leverage in future interactions
 - Extremely common strategy for local start-ups
- To block it: praise them publicly like they praise you, so they have as much to lose!

“I Have to Do What My Lawyers/Consultants Say”

- Can be invoked anytime, about anything
- Mostly by companies, who can afford lawyers and consultants!
- Seems reasonable to take the advice you paid for
- To counter:
 - (i) point out that it is a business deal, lawyers and consultants shouldn't be allowed to run the business
 - (ii) point out no deal is risk-free
 - (iii) point out your lawyers/consultants say the opposite!

Negotiating from the Podium

- “In today’s talk, I will explain why university royalty expectations are out of step with marketplace realities.”
- “Our panel of industry experts will discuss valuation of early-stage technologies.”

Sound familiar?

- To counter: “In this talk, I will describe some world-changing university inventions and the huge markets they have created.”

The Silent Investors

- They say they can't accept a specific provision or deal structure because present or future investors will never agree to fund a company with such an unfavorable license
- Concerns may be sweeping, but can usually be narrowed down to one or two terms
- To counter:
 - (i) benchmark against similar deals, e.g., with other start-ups, to show fears are unfounded
 - (ii) if they say particular investors are saying no, ask to talk to them; that usually ends it

The Broken Record

- The other side takes a hard stance and politely (or not) repeats the same position over and over again
- You get tired of hearing it and want to walk away, but can't - politics, research \$, etc.
- To counter:
 - (i) try using comparable deals to challenge their position
 - (ii) improve other terms enough to accept their terms
 - (iii) tell them you will have to consider other licensees, then go look for them
 - (iv) use a “slow no” while you consider other options

“I’m Not Authorized”

- If they lack authority to make key concessions, they can probably avoid them
- If you accept their limitations, they can get concessions without reciprocating
- “Mother May I?” with a Board is very risky!
- Also used by tech transfer directors:
 - Must consult Board, VPR, General Counsel
- To counter:
 - (i) end discussion while they seek authority, point-by-point;
 - (ii) insist on working with someone who has it