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A given level of product performance is not sufficient to justify an “up to” claim. (pages 3-4)

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“Up to” Claims - High flying or flying high? (pgs. 3 & 4)
"Up To" Performance Claims

Our technical report for this issue concerns “up to” claims where a maximum performance outcome is identified and used to promote a product over a rival. The complexity of these types of claims, which are fundamentally based on an attempt to exploit variation in performance, is discussed and the report leads to a surprising conclusion compared to how it begins.

We will be discussing claims of all types in our upcoming Advertising Claims course in April and details about it are given at the end of this newsletter. We will also be holding a Master Class in Sensory and Consumer Science on March 7-9 for advanced attendees. This would be a very good continuation of the learning from attending one of our previous courses or would be useful to those with some years of experience in the field who want to further develop their expertise.

I look forward to seeing you at one of our programs in 2016.

Best regards,
Daniel M. Ennis
President, The Institute for Perception

WHAT WE DO:

Client Services: Provide full-service product and concept testing for product development, market research and legal objectives

Education: Conduct internal training, external courses, and online webinars on product testing, sensory science, and advertising claims support

IFPrograms*: License proprietary software to provide access to new modeling tools

Research: Conduct and publish basic research on human perception in the areas of methodology, measurement and modeling

REGISTRATION NOW OPEN for the following Courses and Webinars:

MARCH 7 - 9, 2016 ........................................... The Cloister - Sea Island, GA
MASTER CLASS in Sensory and Consumer Science

APRIL 12 - 14, 2016 ........................................... The Greenbrier in WV
Advertising Claims Support: Case Histories and Principles

AUGUST 23 - 26, 2016 ........................................... Campinas, São Paulo, Brazil
Internal Sensory Testing: Tetrad Test, Power, and Consumer Relevance
Drivers of Liking*: Principles and Applications

SAVE-THE-DATE NOVEMBER 8 - 10, 2016 .........The Greenbrier in WV
Tools and Applications of Sensory and Consumer Science

WEBINAR CALENDAR:

MARCH 17, 2016
The Science of Answering Questions

JUNE 16, 2016
Discrimination Testing with Batch-to-Batch Variability

Recordings of all previously presented webinars can be ordered at www.ifpress.com

Detailed information and registration for all courses and webinars is available at www.ifpress.com

To Contact Us...

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To download previously published technical reports and papers from our website, become a colleague at www.ifpress.com

The Institute for Perception
Mission Statement:
To develop, apply, and communicate advanced research tools for human perceptual measurement.
Our webinars have been qualified for Certified Food Scientist (CFS) recertification contact hours (CH). See details online to find what CFS Certificants may claim.

Drs. Daniel Ennis, Benoît Rousseau, and John Ennis are pleased to present a Master Class in sensory and consumer science for participants who have at least 5 years of experience in the field and possess a good understanding of existing methodologies.

In this 3-day advanced course, we will begin with a set of principles that we will use to interrelate a diversity of techniques used to understand how people perceive items such as products, concepts and brands.

In the second section, we will discuss unfolding – what it is and why the problem it solves has always been of high interest.

The final section will focus on Graph Theoretic Analysis (GTA). Whenever combinations of discrete items need to be discovered, GTA may be extremely useful. We will explain how to find solutions for combinatorial problems using cliques and bundles, and a technique called backtracking.

March 7 – 9, 2016 (3 days) .......... $1,950*

* A 20% discount will be applied to each additional registration from the same company made at the same time
* Academic discount available on request

Fee includes:
► All course materials and a copy of our latest book, Tools and Applications of Sensory and Consumer Science
► Daily continental breakfast, lunch, and break refreshments
► A group dinner on Monday and Tuesday evenings
► Three-month free trial of IFPrograms™ software
► Complimentary attendance at a quarterly IFP webinar

REGISTER ONLINE AT: www.ifpress.com/short-courses

LOCATION: A discounted room rate has been arranged for course attendees at The Cloister, Sea Island, Ga. (See details online)

WEBINAR: March 17 at 2:00 EDT

The Science of Answering Questions

Taught by: Dr. Daniel Ennis

This webinar offers an in-depth look at how people answer questions in surveys. We will take you through:
► The process of operationalizing survey concepts
► Improvement of survey item comprehension, validity, and reliability
► A process model for answering a question to distinguish optimizing behavior from satisficing behavior
► Survey design to identify and remove sources of bias
► Analysis of data and statistical issues

Plenty of time will be allowed to answer your questions about this topic. Our webinars have been qualified for Certified Food Scientist (CFS) recertification contact hours (CH). See details online to find what CFS Certificants may claim.
Background: In a Federal Trade Commission (FTC) decision concerning an energy-related claim for storm windows, the FTC ordered a manufacturer to cease and desist “Making any energy-related claim which uses the phrase “up to” or words of similar import, unless, (a) the maximum level of performance claimed can be achieved by an appreciable number of consumers under circumstances normally and expectantly encountered by consumers and (b) the class of persons who can achieve the maximum level of performance claimed is disclosed.” In a 2012 settlement with windows marketers, the FTC stated that “up to” and similar claims must be supported by “competent and reliable scientific evidence . . . that all or almost all consumers are likely to achieve the maximum savings claimed.” Inherent in the idea behind an “up to” claim is that the product will perform differently under different conditions or that the consumer will experience different variants of the product.

For example, a cleaning device may be more or less effective depending on the surface on which it is used or a drain product may depend on water hardness that may vary from one area to another. The latter example exemplifies why “up to” claims can be problematic. If a consumer happens to live in a region where there is high calcium in the water supply, that consumer may never experience the maximum benefit claimed in an “up to” statement as the claim may have been substantiated only in areas where soft water is prevalent. The FTC would require that all or almost all consumers “can” experience or “are likely” to experience the maximum benefit. In this technical report we will explore the complexity of “up to” statements when used in the context of consumer product advertising claims.

Scenario: Your company produces and markets cookies, including chocolate chip cookies, and you know from preliminary research that there is a quantifiable difference in the number of chips visible to the consumer in your cookies compared to a competitor. As a product development manager supporting the legal and brand teams responsible for advertising claims support, you would like to make a quantitative claim against your competitor. Both companies market bags of cookies where the serving size is 5 cookies and each cookie weighs about 6g. In a typical bag of cookies, the number of chips on each cookie visible to the consumer varies for your product and that of your competitor. A preliminary estimate shows that the maximum number of chips per cookie for your brand is 9 and that the average number for your competitor is about 4. You would like to claim that your product provides “up to twice as many chocolate chips as a typical cookie” from your competitor (because 9/4 is greater than 2). Based on category development and brand development indices (BDIs and CDIs) your field supplier designs a national study in the major markets of the USA so that average BDIs for both brands are comparable. A total of 500 bags of each type of cookie from high-volume outlets are procured and the number of visible chips per cookie are tabulated. Figures 1 and 2 show the distributions of numbers of chips per cookie in the bags sampled for your product and your competitor’s product. Do you have justification for a claim that your brand has up to twice as many chocolate chips on a cookie as your competitor?

"Up To" Claims: The mere fact that a given level of performance can occur for a product is not sufficient to justify an “up to” claim. In addition, the claim must not be based on a unique set of conditions that only apply in an atypical, narrow setting. As required by the FTC, most if not all consumers must have at least some chance or probability of experiencing the claimed level of performance. The FTC does not specify what this probably should be. This is a potential problem for an advertiser who must make a subjective judgment about this probability. In order to be sure that any consumer has some chance to experience the benefit claimed in an “up to” statement, there is a need for extensive data on product distribution and usage conditions, making these types of claims difficult to substantiate.

![Figure 1](image1.png) Number of chips per cookie in your brand.

![Figure 2](image2.png) Number of chips per cookie in your competitor's brand.
consumers. “Up to” claims exploit variation in product performance in a way that the average consumer simply is not prepared to understand. You also realize that you have not conducted a consumer takeaway survey to learn how a consumer would understand your proposed “up to” claim. When the FTC conducted a survey of consumers concerning a claimed “up to” energy saving of 47% using a certain type of window, 36% of consumers thought that the ad implied that they would actually realize a 47% saving. This number dropped to 27% of consumers when the additional information was provided that an average owner will save 25% on their heating and cooling bill. It is very clear from the data that you have collected that your product provides more chocolate chips per cookie than your competitor and a $t$-test comparing the two means in Table 1 is highly significant. In view of the ambiguity associated with your proposed “up to” claim, you decide to recommend a more conservative claim. You avoid the “up to” claim completely and demonstrate with high statistical confidence that your product has more chips per cookie than your competitor. You recommend a straightforward superiority claim based on the average number of chips per cookie thus reducing the likelihood of an FTC ruling and fine, an embarrassing NAD hearing, a class-action lawsuit or a false advertising challenge by your competitor if you had proceeded with the “up to” claim.

**Conclusion:** “Up to” claims are problematic because they inherently suggest the existence of multiple levels of performance and attempt to capitalize on this variation. They require that the benefit promised will be experienced by most if not all consumers with some unknown probability. Developing support for an “up to” claim may, depending on the type of product tested, lead to data that will also support other claims that are paradoxical to the original claim and lead to consumer confusion. In general, these types of claims might be better avoided unless the advertiser has a very compelling approach to communicate the basis for these types of claims.

**Reference:**

<table>
<thead>
<tr>
<th>chips/cookie/bag</th>
<th>Your Brand</th>
<th>Competitor</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maximum 6 (%)</td>
<td>0.2</td>
<td>0.8</td>
</tr>
<tr>
<td>Maximum 7 (%)</td>
<td>2.6</td>
<td>33.2</td>
</tr>
<tr>
<td>Maximum 8 (%)</td>
<td>27.4</td>
<td>66.0</td>
</tr>
<tr>
<td>Maximum 9 (%)</td>
<td>69.8</td>
<td>0</td>
</tr>
<tr>
<td>Mean of chips/cookie</td>
<td>5.2</td>
<td>4.3</td>
</tr>
<tr>
<td>(Standard Error)</td>
<td>(0.015)</td>
<td>(0.014)</td>
</tr>
</tbody>
</table>

Table 1. Maximum Percent of 6, 7, 8, or 9 chips/cookie/bag and overall means and standard errors for chips/cookie.

“Up To Twice as Many Chips...” The data represented in Figures 1 and 2 does not provide enough information to support an “up to” claim. All of the higher counts for your product could have come from a limited number of bags and, therefore, a limited number of consumers may have been exposed to them. We need to know the distribution of the maximum number of chips/cookie in each bag because this will give us an estimate of the likelihood that a consumer will realize the benefit when they open a bag of cookies. These results are shown in Table 1 for both brands. From this table it can be seen that 69.8% of the time the maximum number of chips/cookie for your brand is 9. For your competitor, the maximum number is 8 and this maximum occurs 66% of the time. From an analysis of the markets in which the products were purchased, you show that none of the markets deviate statistically significantly from these values so that you conclude that there is no reason to think that these probabilities will not apply to consumers in all of the markets. The mean value for chips/cookie for your competitor is 4.3. The first requirement for an “up to” claim - that all consumers must have some likelihood (about 70% in this case) of realizing the benefit - appears to be met provided that variation in these estimates is sufficiently small.

Before you conduct any further analyses to finalize the report for your “up to” claim, you consider what you would do in response to this claim if you were your competitor and had access to these data through the discovery phase in a legal challenge. Paradoxically, these data would allow your competitor to claim that their product provides “up to 50% more chocolate chips than a typical cookie” from your brand (8/5.2 is greater than 1.5). The two claims, one claiming to provide twice as many chips and the other providing 50% more chips than their respective competitors, although possibly technically justified, would be very confusing to
Advertising Claims Support

Case Histories and Principles

How do you compete effectively in an increasingly challenging environment? Comparative advertising can improve sales, but how do you address false claims or challenges made by your competitors? Claims support is a critical business focus for many companies in categories with aggressive competitors.

The purpose of this course is to raise awareness of the issues involved in surveys and product tests to provide the type of evidentiary support needed in the event of a claims dispute.

The course speakers have decades of experience as instructors, scientific experts, jurors, and litigators in addressing claims with significant survey and product testing components. National Advertising Division® (NAD®) and litigated cases will be used to examine and reinforce the information discussed.

Scientific Team:
Dr. Daniel M. Ennis, Dr. Benoît Rousseau, Dr. John M. Ennis

Legal Team: (in alpha order)
Anita Banicevic, Kat Dunnigan, Christopher A. Cole, Hal Hodes, Alex Kaplan, Cynthia E. Kinsler, Michael Schaper, Annie M. Ugurlayan, Lawrence I. Weinstein

Approximately 18 credits will be sought for registrants in jurisdictions with CLE requirements. This program also qualifies for Certified Food Scientist contact hours (CH). CFS Certificants may claim 18 CH for their attendance.

TUESDAY (APRIL 12, 8am - 4pm)

8:00 – 9:00 | Introduction
♦ Introduction and scope of the course
♦ History of surveys in Lanham Act cases
♦ Hearsay objections
♦ Federal Rules of Evidence – Rule 703
♦ Daubert effects
♦ Admissibility of expert testimony (reliability and relevance)

9:10 – 10:00 | Claims
♦ A typical false advertising lawsuit
♦ “To sue or not to sue”

10:10 – Noon | A Motivating Case; NAD - Inside and Out
♦ Motivating Case: 3D TV
1) NAD Case #5416 (2012) LG Electronics USA, Inc. (Cinema 3D TV & 3D Glasses)
♦ Advertising self-regulation and the NAD process
♦ The NAD: View from the outside
2) NAD Mock Hearing ▲

1:00 – 2:00 | ASTM Claims Guide; Methods and Data
♦ Review of the ASTM Claims Guide: Choosing a target population, product selection, sampling and handling, selection of markets
♦ Claims: Superiority, unsurpassed, equivalence, non-comparative
♦ Methods: Threshold, discrimination, descriptive, hedonic
♦ Data: Counts, ranking, rating scales

2:10 – 3:00 | Sensory Intensity and Preference; Attribute Interdependence
♦ Sensory intensity and how it arises
♦ Liking and preference and how they differ from intensity
♦ Attribute interdependencies
2) NAD Case #4364 (2009) Playtex Products, Inc. (Playtex Beyond Tampons)
3) NAD Case #4385 (2009) Bausch & Lomb, Inc. (ReNu with MoistureLoc)

3:10 – 4:00 | Requirements for a Sound Methodology
♦ Types of data
♦ Psychometric properties of the survey items
♦ Validity: Ecological, external, internal, face, construct
♦ Bias: Code, position
♦ Reliability
♦ Method instructions – importance and impact

WEDNESDAY (APRIL 13, 8am - 4pm)

8:00 – 9:00 | Consumer Relevance
♦ Drivers of liking
♦ Setting action standards for consumer-perceived differences
♦ Linking expert and consumer data
♦ Clinical vs. statistical significance
♦ Consumer relevance in litigation

3) NAD Case #4305 (2015) T-Mobile USA (More Data Capacity)
4) NAD Case #5819 (2013) Unlever US (Degree MotionSense and Degree Clinical Protection Antiperspirants)

9:10 – 10:00 | Consumer Takeaway Surveys
♦ What is a survey?
♦ Purpose of conducting surveys
♦ Events and behaviors, attitudes and beliefs, subjective experiences
♦ How respondents answer questions: Optimizing and satisfying
♦ Filters to avoid acquiescence and no opinion responses
♦ Survey questions: Biased, open-ended vs. closed-ended
♦ Predicting primacy and recency effects
♦ Motivations to optimize
♦ Steps to improve survey questions

6) NAD Case #5849 (2015) T-Mobile USA (More Data Capacity)

10:10 – 11:00 | Identifying and Removing Sources of Bias
♦ Sampling
♦ Participation and non-response
♦ Uncontrolled individual differences
♦ Code and order
♦ Leading questions and interviewer effects

11:10 – Noon | The Right Method, Design, Location, and Participants
♦ Defining a proper universe
♦ Types of sampling: Probability and non-probability, convenience, random, stratified, quota, cluster
♦ Test options: Monadic, sequential, direct comparisons
♦ Test design issues: Within-subject, matched samples, position and sequential effects, replication
♦ Choosing a testing location and defining test subjects

7) NARB Panel #101 (NAD Case #3506) (1999) American Express vs. Visa
8) NAD Case #5049 (2015) The Procter & Gamble Co. (Clairol Balsam Lasting Color)
9) NAD Case #5425 (2012) Church & Dwight Co., Inc. (Arm & Hammer® Sensitive Skin Plus Scent)
Course Registration

ADVERTISING CLAIMS SUPPORT COURSE

April 12 – 14, 2016 (3 days) ........ $1,975*

*A 20% discount will be applied to each additional registration when registered at the same time, from the same company.

*The Institute for Perception offers reduced or waived course fees to non-profit entities, students, judges, government employees, and others. Please contact us for more information.

Fee includes all course materials, continental breakfasts, break refreshments, lunches, and group dinners.

HOW TO REGISTER

Register online at www.ifpress.com/short-courses where payment can be made by credit card. If you prefer to be invoiced, please call 804-675-2980 for more information.

LOCATION: This course will be held at The Greenbrier® in White Sulphur Springs, WV. Renowned for its standard of hospitality and service, this hotel is an ideal location for executive meetings and consistently receives a AAA 5-Diamond rating.

LODGING: Lodging is not included in the course fee and participants must make their own hotel reservations. A block of rooms is being held at The Greenbrier at a special rate of $195 (plus resort fees & taxes). To make a reservation, please call 1-877-661-0839 and mention you are attending the Institute for Perception course (note: the special rate is not available through online reservations.) To learn more about The Greenbrier, visit their website at www.greenbrier.com.

TRANSPORTATION: Nearby airports include the Greenbrier Valley Airport (LWB, 15 min.), Roanoke, VA (ROA, 1 hr. 15 min.), Beckley, WV (BKW, 1 hr.), and Charleston, WV (CRW, 2 hrs.).

CANCELLATION POLICY: Registrants who have not cancelled two working days prior to the course will be charged the entire fee. Substitutions are allowed for any reason.

TUESDAY (APRIL 12, 8am - 3pm)

8:00 – 9:00 | Ratio, Multiplicative, and Count-Based Claims

The difference between ratio and multiplicative claims
Why ratio claims are often exaggerated
Count-based claims (e.g., “9 out of 10 women found our product reduces wrinkles”)
14) NAD Case #5107 (2009) Ciba Vision Corp. (Dailies Aqua Comfort Plus)
15) NAD Case #5416 (2012) LG Electronics USA, Inc. (Cinema 3D TV & 3D Glasses)
16) NAD Case #5484 (2012) Reynolds Consumer Products (Hefty® Slider Bags)
17) NAD Case #5779 (2014) SC Johnson (Scrubbing Bubbles® Heavy Duty Cleaner with fantastik® & Scrubbing Bubbles® Bleach 5-in-1 All Purpose Cleaner with fantastik®)

9:10 – 10:00 | “Up To” Claims

Definition and support for an “up to” claim
FTC opinion with litigated case example
Statistical models and psychological models
18) NAD Case #5263 (2010) Reebok International, LTD (EasyTone Women’s Footwear)
19) NAD Case #5876 (2015) The Procter & Gamble Co. (Duracell CopperTop & Duracell Quantum Alkaline Batteries)

10:10 – 11:00 | What to Do with No Difference/No Preference Responses

No preference option analysis
Power comparisons: Dropping, equal and proportional distribution
Statistical models and psychological models
20) NAD Case #4270 (2004) Frito-Lay, Inc. (Lay’s Stax® Original Potato Crisps)

11:10 – Noon | Venues Within and Outside the USA

False advertising litigation in Canada – differences from USA
Canadian advertising substantiation requirements
Advertising dispute resolution outside the USA and Canada
When a case spans multiple venues
Class action lawsuits
Litigated Case: Rogers Communications/Chatr vs. Commissioner of Competition (2013)
22) NAD Case #5249 and NARB Panel #172 (2010) Merial LTD (Frontline® Plus)

1:00 – 3:00 | Applying Course Principles and Concepts

Group exercise: Develop support strategy for an advertising claim to include: engagement of all stakeholders, wording of the claim, takeaway, design and execution of a national product test, product procurement, analysis, and report
Course summary and conclusion
Dr. Daniel M. Ennis - President, The Institute for Perception. Danny has more than 35 years of experience working on product testing theory and applications for consumer products. He has doctorates in food science and mathematical & statistical psychology. He has published extensively on mathematical models for human decision-making and was the first to show that humans possess a transducer in the chemical senses. Danny is a recipient of the Sensory and Consumer Sciences Achievement Award from IFT and also the ASTM David R. Peryam Award in recognition of “outstanding contributions to the field of basic and applied sensory science.” Danny consults globally and has served as an expert witness in a wide variety of advertising cases.

Dr. Benoît Rousseau - Senior Vice President, The Institute for Perception. Benoît received his food engineering degree from AgroParisTech in Paris, France and holds a PhD in sensory science and psychophysics from the University of California, Davis. He has more than 20 years of experience in managing projects in the field of sensory and consumer science, actively working with clients in the US, Asia, Latin America, and Europe. His theoretical and experimental research has led to numerous journal articles as well as several book chapters. Benoît is also well known for his advanced presentation skills, where his use of sophisticated visual tools greatly contribute to the success of The Institute for Perception communications, short courses, and webinars.

Dr. John M. Ennis - Vice President of Research Operations, The Institute for Perception. John received his PhD in mathematics and also conducted post-doctoral research in cognitive neuroscience at the University of California, Santa Barbara. He is the winner of the 2013 Food Quality and Preference Award for “Contributions by a Young Researcher.” John has published in statistics, mathematics, psychology, and sensory science. He has a strong interest in the widespread adoption of best practices throughout sensory science, serves on the editorial boards of the Journal of Sensory Studies and Food Quality and Preference, and is chair of the ASTM Subcommittee E18.04 - “Fundamentals of Sensory.”

**National Advertising Division (NAD)**

**Kathleen (Kat) Dunnigan - Senior Staff Attorney, the NAD.** Kat has worked for the Legal Aid Society’s Juvenile Rights Division, the Center for Appellate Litigation, and Center for HIV Law and Policy. She has also litigated employment discrimination, civil rights claims, and many employment cases before the New Jersey Supreme Court.

**Hal Hodes - Staff Attorney, the NAD.** Prior to joining the NAD, Hal worked in private practice where he represented hospitals and other health care practitioners in malpractice litigation. Hal has also served as an attorney at the New York City Human Resources Administration representing social services programs.

**Annie M. Ugurlayan - Senior Attorney, the NAD.** Annie has handled over 150 cases, with a particular focus on cosmetics and food cases. She is a published author, Chair of the Consumer Affairs Committee of the New York City Bar Association, and a member of the Board of Directors of the New York Women’s Bar Association Foundation.

**Canadian Litigator**

**Anita Banicevic - Partner, Davies Ward Phillips & Vineberg in Toronto, Canada.** Anita has represented clients in contested misleading advertising proceedings and investigations initiated by Canada’s Competition Bureau, and advises domestic and international clients on Canadian competition and advertising and marketing law.

**USA Litigators (in alpha order)**

**Christopher A. Cole - Partner, Crowell & Moring in Washington, DC.** Chris practices complex commercial litigation and advises the development, substantiation, and approval of advertising and labeling claims. He has represented several leading consumer products and services companies and has appeared many times before the NAD.

**Alexander Kaplan - Partner, Proskauer Rose in New York City.** Alex represents and advises a range of consumer product, food and beverage, pharmaceutical and medical device companies before the federal courts and the NAD. He also frequently counsels clients concerning advertising and marketing claim substantiation and review.

**Cynthia E. Kinser (Mills) - Deputy and Attorney, Consumer Advocate and Protection Division of the Tennessee Attorney General’s Office.** Cynthia works to protect consumers and businesses from unfair and deceptive trade practices, enforces state and federal antitrust laws, and enforces the Unauthorized Practice of Law statutes.

**Michael Schaper - Partner, Debevoise & Plimpton in New York City.** Mike is a litigation partner who focuses on various types of complex civil litigation, including in numerous areas of intellectual property law, as well as antitrust litigation and other antitrust counseling.

**Lawrence I. Weinstein - Partner, Proskauer Rose in New York City.** Larry is co-head of the firm’s renowned False Advertising and Trademark Group. His practice covers a broad spectrum of intellectual property law, false advertising, trademark, trade secret, and copyright matters, as well as sports, art and other complex commercial cases.