

Issues in “Up To” Advertising Claims

Daniel M. Ennis

Background: In a Federal Trade Commission (FTC) decision concerning an energy-related claim for storm windows, the FTC ordered¹ 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 expectably 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 develop-

ment 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. Number of chips per cookie in your brand.

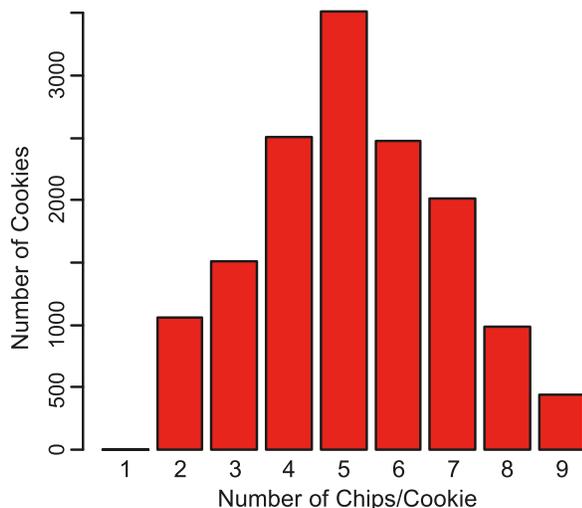
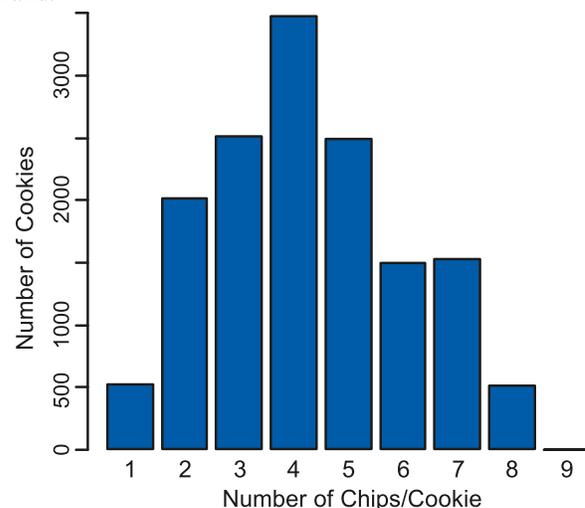


Figure 2. Number of chips per cookie in your competitor’s brand.



chips/cookie/bag	Your Brand	Competitor
Maximum 6 (%)	0.2	0.8
Maximum 7 (%)	2.6	33.2
Maximum 8 (%)	27.4	66.0
Maximum 9 (%)	69.8	0
Mean of chips/cookie (Standard Error)	5.2 (0.015)	4.3 (0.014)

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

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^{2,3} 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:

1. In re Plaskolite, Inc., 101 F.T.C. 344, Part 1, *5 (1983).
2. Ennis, D. M., Rousseau, B., and Ennis, J. M. (2014). *Tools and Applications of Sensory and Consumer Science*. (pp. 44-57). Richmond, VA: The Institute for Perception.
3. ASTM International. (2012). ASTM E1958-12 Standard guide for sensory claim substantiation. West Conshohocken, PA: ASTM