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ADVISORY OPINION

U.S. CONSUMER PRODUCT SAFETY COMMISSION

WASHINGTON, D.C. 20207

September 12, 1978

Mr. A. Fred DeLong
Technical Editor
Bicycling Magazine
Huntingdon at Terwood Rd.
Hatboro, Pennsylvania 19040

Dear Mr. DeLong:

Your July 4, 1978 letter to Joseph Fandey of the Commission staff raised a question about bicycle preemption. (We understand that Mr. Fandey has already responded to the other portions of your letter.) You have asked whether the Commission's bicycle regulation would preempt a state requirement for lighting on bicycles ridden at night.

The Commission believes that such a lighting requirement protects cyclists against at least two risks of injury. One is inadequate nighttime visibility of bicycles to cars. The other is obstacles in the road that may not be visible to a cyclist at night.

Because the Commission's reflectivity requirements do not address the second risk, we believe that a state lighting requirement for bicycles ridden at night would not be preempted. Under the Federal Hazardous Substances Act, preemption applies only if (a) the Commission has established a requirement to protect against a risk of injury associated with a product and (b) a state's non-identical requirement is applicable to the same product and is designed to protect against the same risk. Although reflectors and lights address one risk of injury that is the same, the total risk addressed by lights is not the same as that addressed by reflectors.

Please note that the Commission has approved this advisory opinion.

Sincerely,

Stephen Lemberg, for

Margaret A. Freeston
Acting General Counsel

BICYCLING!

FRED DE LONG, Technical Editor
Residence: Huntingdon at Torwood Rd.
Hatboro, Pennsylvania 19040

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JUL 11 1978
Consumer Product Safety Commission
Office of the General Counsel

Mr. Joseph Fandey
Consumer Product Safety Commission,
5401 Westbard Avenue,
Bethesda Md., 20207

4 July, 1978

Dear Mr. Fandey:

Mr. Ken Edinger informs me that you will continue to work on Bicycle Safety Standards, and are considering Technical Guidelines to replace those portions of the CPSC regulations that were remanded by the court decisions.

Having worked with the Commission previously to try to present the viewpoint of the user as well as the serviceman, I would be glad to offer any assistance you might wish to review changes or gudielines in the future.

I have spoken previously about the dangers of braking standards for wet and dry braking, that do not also include the effect of braking from higher speeds, and long continued braking, on the block and rim combination. The 15 mph stop is by no means comparable to continuous braking on a hill., even a short hill of as little as 0.1 to 0.2 miles length. Also the dangerous effects of pitchover.

The protrusions guidelines should take into account items that are normally fitted and have shown to have no effect on accidents. The remanded regulation went far overboard in lack of consideration of these items, resulting in much unneeded consumer and manufacturer costs with no advantage accruing. These recommendations had been presented to the Commission, but were ignored.

I enclose a letter to Dr. Venable concerning wheel reflector color, and would like to see a change in the color specification, to agree with the ISO proposed standards, the result of multi-nation examination.

Likewise, as also ignored protestations, the front and rear reflector specification for mounting does not take into account the fitment by the cyclist of the very common front handlebar bag or basket, or rear saddlebags and panniers. This is a serious mistake that must be corrected.

Your comments are invited. You will find that any comments I make will be in a constructive, not an destructive agressive manner. As a 200,000 mile cyclist and member of ANSI-TAG and ISO TC/149 Technical Committees, you may find this helpful in your endeavors.

Fred De Long

Fred De Long
Technical Editor

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There appears to be a great question in many minds about the pre-emption position of the CPSC regulations in respect to bicycle lighting at night. The statement has been made that since lighting isn't included in the CPSC specs, that the pre-emption makes the State Laws that call for bicycle lighting at night are over-ruled.

Since this understanding, or mis-understanding, whichever is correct is of concern in the highest circles of those intensely interested and active in bicycle safety work in this country, I herby petition for a ruling in this regard.

In my initial discussions with CPSC personnel before the regulations were finally promulgated, it was flatly stated to me that this not mentioning of lighting in the original text of the proposed regulations was not meant in any manner to preclude lighting. Rather, the amount of study needed to make a reasonable and effective lighting specification made it prudent to leave this item, if felt needed, for a future time.

However, these discussions were prior to the preemption period. Again, I request an Official Ruling on this question of extreme importance in the field of bicycle nighttime safety. It is a matter of record that almost all states presently, and the Uniform Vehicle Code also, require front lighting when a bicycle is ridden at night. Can CPSC preemption overrule these important and necessary safety provisions of existing State Laws?

A. Fred DeLong

A. Fred DeLong

Technical Editor, Bicycling Magazine "
also " American Bicyclist and Motorcyclist

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U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

January 16, 1979

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Mr. A. Fred DeLong
Technical Editor
Bicycling Magazine
Huntingdon at Terwood Rd.
Hatboro, Pennsylvania 19040

Dear Mr. DeLong:

In a July 4, 1978 letter you raised a question about bicycle preemption. You asked whether the Commission's bicycle regulation would preempt a state requirement for lighting on bicycles ridden at night.

The Commission responded to your question in a September 12, 1978 advisory opinion. The opinion expressed the Commission's belief that the lighting requirement you described would protect bicyclists against at least two risks of injury ((1) inadequate nighttime visibility of bicycles to motorists and (2) obstacles in the road that may not be visible to bicyclists at night). The advisory opinion concluded that such a requirement would not be preempted since the Commission's regulation did not address the second risk of injury.

In an October 19, 1978 letter, the Bicycle Manufacturers Association of America and Schwinn Bicycle Company requested withdrawal of our September 12 advisory opinion to you. While we are not withdrawing that opinion, we believe that further discussion of the question you raised is needed.

In our September 12 opinion we should have emphasized that the Commission's conclusion was based on the assumption that the state or local bicycle lighting requirement at issue would address a different risk(s) of injury than the one the Commission has addressed. If a state or local requirement addresses only the same risk that the Commission's bicycle regulation addresses (that of inadequate nighttime visibility of bicycles to motorists), the preemption advice in our September 12 advisory opinion would not apply. In addition, our advice does not necessarily apply to any existing state or local requirements or to the Uniform Vehicle Code requirement because we have not analyzed any of those provisions.

Our September 12 opinion should have included some additional discussion about the preemption question that your letter raised. The requirement you described, for lighting on bicycles ridden at night, is clearly one which defines how a consumer must use a bicycle. In contrast, the Commission's regulation sets requirements which a bicycle must meet when introduced into interstate commerce. Because the Commission's regulation does not define how a consumer may or may not <u>use</u> a bicycle, the Commission believes that the Federal Hazardous Substances Act does not prohibit states or localities from issuing or enforcing a requirement that lighting be used on bicycles ridden at night.

Please note that this advice concerning a "use" requirement is based on an assumption. For the purpose of answering your question, we have assumed that the state or local requirement would not have the effect of setting any requirement which a bicycle must meet at the time it enters interstate commerce. In addition, since specific state bicycle lighting "use" requirements can vary, the preemption questions raised by each one should be evaluated on an individual basis.

This advisory opinion clarifies and supplements the one which we issued on September 12, 1978. It has been approved by the Commission.

Sincerely,

Andrew S. Krulwich
General Counsel

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October 19, 1978

The Honorable Susan B. King
Chairperson
Consumer Product Safety Commission
1111 Eighteenth Street, N.W.
Washington, D.C. 20207

Re: Advisory Opinion No. 270

Dear Chairperson King:

This petition is submitted on behalf of our respective clients, the Bicycle Manufacturers Association of America, Inc. ("BMA") and Schwinn Bicycle Company ("Schwinn"), and requests rescission of the captioned advisory opinion issued to Mr. A. Fred DeLong on September 22, 1978. That advisory opinion, dealing with the scope of federal preemption as to one aspect of bicycles, was specifically, albeit unusually, approved by the Commission itself thus giving it apparent status not ordinarily attending advisory opinions. The opinion should be withdrawn for a variety of reasons including the fact that it gratuitously considers and then turns upon issues not presented to the Commission and, in addressing those issues, reaches incorrect conclusions.

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Consumer Product Safety Commission
Office of the General Counsel

Mr. DeLong inquired simply whether a state may mandate front lighting when a bicycle is ridden at night. The appropriate substantive response should have been that preemption would not pertain to a purely "use" requirement, but would pertain to an original equipment requirement. Instead, the Commission inexplicably responded by discussing a hypothetical proposition, namely whether the state provision dealt with a risk of injury associated with an obstacle in the road.

The ramifications of the Commission's action are far more than academic, for the advisory opinion at issue could serve to encourage states to promulgate laws or regulations mandating headlight equipment at the point of sale to the consumer. While such promulgations would be preempted, the advisory opinion notwithstanding, the bicycle manufacturing industry could not absorb their substantive impact and would be hard-pressed to afford the litigation which would become necessary to negate that impact.

in its analysis of a hypothetical issue gratuitously supplied by the Commission. Compounding the situation, the advisory opinion erroneously "resolves" the hypothetical issue.

II.

The DeLong Inquiry Relates Only to "Use" Requirements

Reduced to its essence, Mr. DeLong's inquiry is simply whether federal preemption overrules existing state and/or local provisions requiring "front lighting when a bicycle is ridden at night". This is the only question presented to the Commission by Mr. DeLong. Had the Commission responded directly to the question presented, it could have, and we submit should have, pointed out that federal preemption ordinarily would not defeat state use regulations because the Federal Bicycle Safety Regulation is limited to original equipment provisions. Therefore, so long as a bicycle use requirement does not translate itself, as a practical matter, into requiring original equipment not specified in the Federal Bicycle Safety Regulation at the point of sale, federal

I.

Background

Because uniform regulation of this nationally marketed product is vital to the continued viability of the small bicycle manufacturing industry, the legislation incorporating federal preemption into the Federal Hazardous Substances Act was designed in large measure specifically to protect this industry. The joint BMA/Schwinn submission on the question of federal preemption dated July 15, 1978, which dealt with the related issue of sidewalk bicycle provisions, discussed in some detail the legislative history underlying the statute and the Congressional commitment to protect the bicycle manufacturing industry in particular from the ravages of non-identical, and possibly conflicting, dual regulation. Please refer to that prior submission for a detailed explanation of the legislative history underlying the statutory preemption provision.

The opinion to Mr. DeLong, unfortunately, is insensitive to the history of federal preemption insofar as it relates to the Federal Bicycle Regulation and is incorrect

preemption would not pertain.*

Instead, however, in ostensibly responding to the DeLong inquiry, the Commission gratuitously and unnecessarily analyzed the risks of injury protected by lighting requirements. In turn, the opinion assumes that there are state or other provisions which have lighting requirements which not only respond to the need to illuminate the cyclist to other users of the road, but also respond to a supposed second risk of injury, i.e., obstacles in the road that may not be visible to the cyclist. This assumption is clearly erroneous. A review of existing state laws and pertinent Uniform Vehicle Code provisions reveals that all of them are "use" requirements - i.e., that they relate to use of the bicycle at

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* BMA and Schwinn ordinarily do not contend that states cannot promulgate "user" requirements for bicycles. It must be clearly understood, however, that certain user requirements can be of such a nature as to directly impact the bicycle as made and sold to consumers and thus, in our view and as supported by legal precedent, would be preempted.

night.* See Department of Transportation, "Pedestrian and Bicycle Safety Study", pages 75-77, 88, 97 (March 1975); and Department of Transportation, "Bicycling Laws in the United States", pages 108-111 (September 1974).

The simple response to the DeLong inquiry should have been that as a general proposition federal preemption does not interfere with state use requirements because the Federal Bicycle Safety Regulation deals only with original equipment of bicycles at the time of sale. As will be discussed below, the response could also have taken cognizance of existing laws and responded that the bicycle regulation preempts all existing state laws on front headlamps to the extent they are construed to be new equipment requirements.

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* While Kentucky has a nearly 30-year old statute suggesting a relationship between a bicycle headlight and obstacles in the road, a recently added provision appears to negate such a concept by clearly recognizing that headlights and other bicycle illumination systems are intended expressly for the purpose of making the bicyclist's "presence known to other users of the road." Ky. Rev. Stats., §§ 189.040(9), 189.287 (amended 1974).

III.

There Would Be Federal Preemption
Of State New Equipment Requirements

The briefing materials submitted by the Office of General Counsel do not recognize the critical distinction between equipment and use requirements. At best, the response to Mr. DeLong was ambiguous as to whether the Commission was rendering an opinion on a use or an equipment requirement. For this reason alone, the response was not only inaccurate, but misleading and created more ambiguity and difficulty than even Mr. DeLong perceived exists at the present time. More importantly, the CPSC is completely wrong in concluding that there would be no preemption because the risk addressed by the federal provision is not the same as state lighting provisions.

There was a fundamental misconception within the parameters of the briefing package regarding the issue raised and the Commission's obligations in responding to the DeLong inquiry. The briefing package states:

> "In order to provide a substantive response, the Commission must decide whether reflectors and headlights protect against the same risk of injury." (Emphasis added)

This is incorrect. While it is true that federal preemption under the FHSA pertains only where the state and the federal bicycle regulations are regulating against the same risk of injury, the question presented by Mr. DeLong does not even suggest that the state regulations relate to a "different" risk of injury.

The briefing package engaged in a long discussion about the different risks of injury which state and UVC lighting provisions address. The memorandum contends that headlight requirements relate not only to the risk of insufficient nighttime visibility to a motorist, but:

> "What is important, however, is that a front lighting requirement <u>also</u> addresses the risk of injury presented by unseen obstacles in the road at night." (Emphasis added)

This statement is speculative, unsupported by any evidence underlying promulgation of the Federal Bicycle Safety Regulation by the CPSC, and is thus nothing more than an unwarranted assumption.

Even assuming arguendo that determining the risk of injury involved was necessary to answer the DeLong inquiry, it is clear that the risk of injury addressed by state front bicycle lighting provisions is the same risk of injury addressed by the Commission in the Federal Bicycle Safety Regulation, namely, the risk posed by accidents between bicycles and motor vehicles. The state laws and the Uniform Vehicle Code provisions dealing with the use of headlights make obvious that their very purpose is to provide precisely the same protection against automobile and bicycle collisions as that offered by reflectors by assuring bicycle conspicuity.

In support of this, one need go no farther than a review of the appropriate section of the Uniform Vehicle Code on which most if not all state lighting laws and regulations are predicated. Section 12-702 of the UVC provides:

> "Every bicycle in use at the times described in §12-201 shall be equipped with a lamp on the front

> emitting a white light visible from a distance of at least 500 feet to the front.* (Emphasis added)

That the purpose of the UVC headlamp requirement is to provide a method for a motorist to observe a bicycle being used at certain times is confirmed by §12-201, which provides:

> "Every vehicle upon a highway within this State at any time from a half hour after sunset to a half hour before sunrise and at any other time when, due to insufficient light or unfavorable atmospheric conditions, persons and vehicles on the highway are not clearly discernible at a distance of 1,000 feet ahead shall display lighted head and other lamps and illuminating devices as respectively required for different classes of vehicles. . . ." (Emphasis added)

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* Prior to 1975, this provision was contained in §11-1207(a), which read in pertinent part as follows:

> "(a) Every bicycle when in use at nighttime shall be equipped with a lamp on the front which shall emit a white light visible from a distance of at least 500 feet to the front. . . ."

The state laws requiring the use of headlights at night are directed to the same end. The two Department of Transportation studies referenced previously summarize the existing state laws relating to bicycle equipment requirements. The study entitled "Bicycling Laws in the United States" reports (pp. 109-110) that the laws of 37 states duplicate the Uniform Vehicle Code in requiring bicycles used at night to be equipped with a front headlamp emitting a white light visible from a distance of 500 feet and that eleven other states have comparable laws which differ only slightly from the Code provisions. Two states have no laws on the subject. Thus, not only the UVC, but effectively all existing state bicycle laws are designed solely to deal with the conspicuousness of the bicycle to a motorist.

The court cases construing these state laws confirm that they are intended to deal only with the risk of injury relating to inadequate visibility of bicycles to cars, and that they are not intended to deal with the risk of injury relating to obstacles in the road that may not be visible to

a cyclist at night. In Spence v. Rasmussen, 226 P.2d 819 (Ore. 1951), the court construed a similar Oregon provision as follows:

> "This provision respecting a front lamp on a bicycle is designed for the benefit of those approaching a bicycle from the front and for the protection of the bicyclist from such. It in no way requires a light of such intensity as to render objects visible along the highway in front of the bicycle.
>
> * * * *
>
> The requirements of the statute respecting front lamps on motor vehicles have entirely different purposes than the statute respecting bicycle lamps. The front lights on motor vehicles are designed to render visible not only the road ahead and each side thereof, but also persons and objects thereon in the path of the vehicle. They are required to be of such specific intensity as to render persons and objects visible on the highway for certain established distances ahead of the vehicle." (Emphasis added)
>
> Id. at 826-827.

See also Oxendine v. Lowry, 260 N.C. 709, 113 S.E.2d 687, 690-692 (1963); Albrecht v. Broughton, 6 Cal. App.3d 173, 85 Cal. Rptr. 659, 663-64 (1970). Thus, the existing state laws relating to front headlamps on bicycles deal with the risk of injury relating to the visibility of the bicycle to a motorist* - the same risk of injury addressed by the UVC.

Significantly, the risk addressed by the UVC and the state statutes is the very same risk addressed by the bicycle reflectivity provisions of the Federal Bicycle Safety Regulation. Section 1512.16 of the Federal Regulation provides as follows:

> "Bicycles shall be equipped with reflective devices to permit recognition and identification under illumination from motor vehicle headlamps." (Emphasis added)

This provision of the Federal Bicycle Safety Regulation was challenged by Mr. John Forester in his suit against

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* See footnote on page 6.

the CPSC. Although Mr. Forester and the Commission agreed "nighttime visibility to motorists is extremely important to cyclist safety", Mr. Forester wanted a mixed headlight-reflector system. The United States Court of Appeals in its decision concluded that the federal reflector system and the alternative front lighting system proposed by Mr. Forester were both designed to protect against the same risk of injury and pointed out that in fact the Commission had so considered the issue.

The court clearly related the two systems to the single risk of injury and then upheld the Commission's mandate of a system of reflectivity to deal with that risk of injury as opposed to mandating lighting. In the process, the court acknowledged that existing state laws were dealing with the same risk of injury. Thus the court stated:

> "The Commission developed an all-reflector system through a balancing of cost, durability, and effectiveness of alternative systems. See 40 Fed. Reg. 25485 (1975). It concluded that all-reflector system would be less expensive to install, would be less susceptible to malfunction and would require less maintenance than would a system involving lights. In addition, reflectors

> require no volitional act to render them effective, in contrast to lights. The Commission also determined that the reflector system would do little harm to the functioning of bicycles. Although it recognized that a light system would be somewhat more effective, it noted that the standard would in no way prevent bicyclists from installing lights. Id.
>
> Forester's argument assumes that cyclists who ride at night would, but for the standard, purchase, maintain and use headlamps. The Commission could rationally have concluded that this was unlikely, and, that many unsophisticated or infrequent nighttime riders would otherwise do so without any protection at all. Although most states require use of headlights and rear reflectors when actually riding at night, there is in most jurisdictions no routine effort to enforce these requirements. Moreover, the regulation is not inconsistent with these state statutes. The Commission could also have rationally concluded that it should not, by federal regulation, require all bicycle purchasers, including those who seldom or never ride after dark, to pay the penalty in cost and weight of a headlamp system. Reflectors appear to provide a significant margin of added safety at a relatively small monetary cost and loss in bicycle efficiency. In view of the Commission's careful balancing of the relevant factors, we do not

> find this standard to be irrational."
> (Emphasis added)
>
> Forester v. CPSC, 559 F.2d 774, 797-798 (D.C. Cir. 1977)

Not only do existing laws and regulations deal with visibility, but any bicycle light that would enable a bicyclist to see obstacles in the road ahead of him would likely utilize an extremely large light and heavy battery which would add substantial weight to a bicycle. As a practical matter, therefore, most riders would likely find such a system unduly expensive, aesthetically unpleasing and mechanically unsatisfactory. The Commission has done a disservice to the bicycle industry, state authorities and consumers alike by gratuitously suggesting that it is feasible to adopt laws dealing with such a risk of injury.

IV.

Conclusion

Perhaps the most unfortunate aspect of the advisory opinion to Mr. DeLong is that it is simply erroneous in concluding:

> "Because the Commission's reflectivity requirements do not address the second risk, we believe that a state lighting requirement for bicycles ridden at night would not be preempted."

It is clear error to conclude that state requirements relate to the "second" risk of injury. As to the "first" risk of injury, any state provision construed as a new equipment requirement would be federally preempted.

In large measure, the inquiry on federal preemption presented by the National Committee on Uniform Traffic Laws and Ordinances relating to sidewalk bicycles (Advisory Opinion No. 269) and the DeLong inquiry relating to lighting are similar in concept in the sense that while the Commission may not have adopted certain requirements in its regulations, its conscious decision not to impose those regulations is sufficient to activate federal preemption. In dealing with the risk of injury of accidents between motor vehicles and bicycles and the question of how to assure bicycle conspicuity under nighttime conditions to mitigate against such accidents, the Commission consciously decided to utilize the reflector system as opposed

to lights. See Forester, supra. Therefore, just as in the sidewalk bicycle situation, any state requirement mandating lighting as an equipment requirement, either directly or as a practical matter, would be federally preempted.

V.

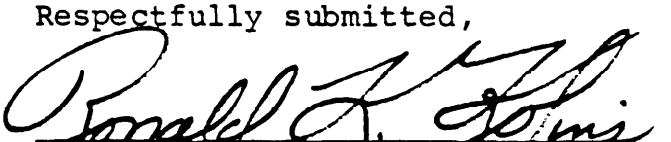
Relief Requested

BMA and Schwinn respectfully request the Commission to withdraw the advisory opinion issued to Mr. DeLong. If the opinion is subsequently reissued, it should be limited to the question raised by Mr. DeLong and conclude simply that preemption would not pertain to purely use requirements.

Leaving the present advisory opinion intact without withdrawal or correction will encourage activity at the state level which BMA and Schwinn will have to address on an individual, case-by-case, basis. This will open a "Pandora's Box" and defeat the very purpose for which federal preemptive

legislation was originally enacted: uniformity, rather than diversity, of regulation.

Respectfully submitted,



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