SENATE DOCKET, NO. 809 FILED ON: 1/17/2013

SENATE . . . . . No. 730

The Commonwealth of Massachusetts

PRESENTED BY:

Barry R. Finegold

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying:

An Act regarding asset forfeiture.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Barry R. Finegold	*Second Essex and Middlesex*
Marcos A. Devers	*16th Essex*

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By Mr. Finegold, a petition (accompanied by bill, Senate, No. 730) of Barry R. Finegold and Marcos A. Devers for legislation relative to the asset forfeiture of child pornography. The Judiciary.

The Commonwealth of Massachusetts

An Act regarding asset forfeiture.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 272 of the General Laws is hereby amended by inserting after section 29C the following section:-

Section 29D. (a) The following property shall be subject to forfeiture to the commonwealth and all property rights therein shall be in the commonwealth:

(1) All materials, products, and equipment of any kind which are used, or intended for use: in delivering, dispensing, distributing, transmitting, encrypting, or otherwise disseminating any visual material in violation of sections 29B or 29C of chapter 272; or in luring, inducing, persuading, tempting, inciting, soliciting, coaxing or inviting a child under the age of 16 in violation of section 26C of chapter 265.

(2) All conveyances, including aircraft, vehicles or vessels used, or intended for use to facilitate a violation of any provision of sections 29B or 29C of chapter 272 or section 26C of chapter 265.

(3) All negatives, slides, books, magazines, films, videotapes, photographs or other similar visual reproductions, computers, video cameras, or digital or analog cameras which are used, or intended for use, to facilitate a violation of sections 29B or 29C of chapter 272.

(4) All moneys, negotiable instruments, securities or other things of value furnished or intended to be furnished by any person in exchange for visual material in violation of chapter 272 section 29B or 29C, or in exchange for a violation of section 26C of chapter 265; all proceeds traceable to such an exchange, including real estate and any other thing of value; and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of any provision of sections 29B or 29C of chapter 272, or section 26C of chapter 265.

23 (5) All real property, including any right, title, and interest in the whole of any lot
24 or tract of land and any appurtenances or improvements thereto, which is used in any manner or
25 part, to commit or to facilitate the commission of a violation of any provision of sections 29B or
26 29C of chapter 272, or section 26C of chapter 265.

27 (6) No forfeiture under this section shall extinguish a perfected security interest
28 held by a creditor in a conveyance or in any real property at the time of the filing of the forfeiture
29 action.

30 (b) Property subject to forfeiture under paragraphs (1) through (5) of subsection (a),
31 inclusive, shall, upon motion of the attorney general or district attorney, be declared forfeit by
32 any court having jurisdiction over said property or having final jurisdiction over any related
33 criminal proceeding brought under any provision of section 26C of chapter 265 or sections 29B
34 or 29C of chapter 272.

35 (c) The court shall order forfeiture of all conveyances subject to the provisions of
36 paragraph (2) of subsection (a) and of all real property subject to the provisions of paragraph (5)
37 of subsection (a) of this section, except as follows:

38 (1) No conveyance used by any person as a common carrier in the transaction of
39 business as a common carrier shall be forfeited unless it shall appear that the owner or other
40 person in charge of such conveyance was a consenting party of privy to a violation of either
41 section 26C of chapter 265 or sections 29B or 29C of chapter 272.

42 (2) No conveyance or real property shall be subject to forfeiture unless the owner
43 thereof knew or should have known that such conveyance or real property was used in and for
44 the business of: unlawfully disseminating visual material in violation of sections 29B or 29C of
45 chapter 272; or enticing a child under the age of 16 in violation of section 26C of chapter 265.
46 Proof that the conveyance or real property was used to facilitate the unlawful dissemination of
47 visual material or the enticement of a child under the age of 16 on 3 or more different dates shall
48 be prima facie evidence that the conveyance or real property was used in and for the business of
49 unlawfully disseminating such visual material or enticing a child under the age of 16.

50 (d) A district attorney or the attorney general may petition the superior court in the name
51 of the commonwealth in the nature of a proceeding in rem to order forfeiture of a conveyance,
52 real property, moneys or other things of value subject to forfeiture pursuant to paragraphs (1)
53 through (5) of subsection (a), inclusive. Such petition shall be filed in the court having
54 jurisdiction over said conveyance, real property, monies or other things of value or having final
55 jurisdiction over any related criminal proceeding brought under any provision of section 26C of
56 chapter 265 or sections 29B or 29C of chapter 272. In all such suits where the property is
57 claimed by any person, other than the commonwealth, the commonwealth shall have the burden
58 of proving to the court the existence of probable cause to institute the action, and any such
59 claimant shall then have the burden of proving that the property is not forfeitable pursuant to

60 paragraphs (1) through (5) of subsection (a), inclusive. The owner of said conveyance or real
61 property, or other person claiming thereunder shall have the burden of proof as to all exceptions
62 set forth in subsections (c) and (g). The court shall order the commonwealth to give notice by
63 certified or registered mail to the owner of said conveyance, real property, moneys or other
64 things of value and to such other persons as appear to have an interest therein, and the court shall
65 promptly, but not less than 2 weeks after notice, hold a hearing on the petition. Upon the motion
66 of the owner of said conveyance, real property, moneys or other things of value, the court may
67 continue the hearing on the petition pending the outcome of any criminal trial related to the
68 violation of section 26C of chapter 265 or sections 29B or 29C of chapter 272. At such hearing
69 the court shall hear evidence and make conclusions of law, and shall thereupon issue a final
70 order, from which the parties shall have a right of appeal. In all such suits where a final order
71 results in a forfeiture, said final order shall provide for disposition of said conveyance, real
72 property, moneys or any other thing of value by the commonwealth or any subdivision thereof in
73 any manner not prohibited by law, including official use by an authorized law enforcement or
74 other public agency, or sale at public auction or by competitive bidding. The proceeds of any
75 such sale shall be used to pay the reasonable expenses of the forfeiture proceedings, seizure,
76 storage, maintenance of custody, advertising, and notice, and the balance thereof shall be
77 distributed as further provided in this section.

78 The final order of the court shall provide that said moneys and the proceeds of any such
79 sale shall be distributed equally between the prosecuting district attorney or attorney general and
80 the city, town or state police department, or sheriff's department involved in the seizure. If more
81 than one department was substantially involved in the seizure, the court having jurisdiction over
82 the forfeiture proceeding shall distribute the 50 per cent equitably among these departments.

83 All such monies and proceeds received by any prosecuting district attorney or attorney
84 general shall be deposited in a trust fund established pursuant to subsection (d) of section 47 of
85 chapter 94C, and shall then be expended without further appropriation to defray the costs of
86 protracted investigations, to provide additional technical equipment or expertise, to provide
87 matching funds to obtain federal grants, or such other law enforcement purposes as the district
88 attorney or attorney general deems appropriate. The district attorney or attorney general may
89 expend up to 10 per cent of the monies and proceeds for victim rehabilitation and therapy,
90 internet safety education and other cyber-crime watch programs which further law enforcement
91 purposes.

92 Any program seeking to be an eligible recipient of said funds shall file an annual audit
93 report with the local district attorney and attorney general. Such report shall include, but not be
94 limited to, a listing of the assets, liabilities, itemized expenditures, and board of directors of such
95 program. Within 90 days of the close of the fiscal year, each district attorney and the attorney
96 general shall file an annual report with the house and senate committees on ways and means on
97 the use of the monies in the trust fund for the purposes of victim rehabilitation and therapy,

98 internet safety education and other cyber-crime watch programs which further law enforcement
99 purposes.

100 All such moneys and proceeds received by any police department or sheriff's department
101 shall be deposited in a special law enforcement trust fund and shall be expended without further
102 appropriation to defray the costs of protracted investigations, to provide additional technical
103 equipment or expertise, to provide matching funds to obtain federal grants, or to accomplish such
104 other law enforcement purposes as the chief of police of such city or town, the colonel of state
105 police, or the sheriff deems appropriate, but such funds shall not be considered a source of
106 revenue to meet the operating needs of such department.

107 (e) Any officer, department, or agency having custody of any property subject to
108 forfeiture under section 26C of chapter 265 or sections 29B or 29C of chapter 272 or having
109 disposed of said property shall keep and maintain full and complete records showing from whom
110 it received said property, under what authority it held or received or disposed of said property, to
111 whom it delivered said property, the date and manner of destruction or disposition of said
112 property, and the exact kinds, quantities and forms of said property. Said records shall be open to
113 inspection by all federal and state officers charged with enforcement of federal and state child
114 pornography and internet crimes laws. Persons making final disposition or destruction of said
115 property under court order shall report, under oath, to the court the exact circumstances of said
116 disposition or destruction.

117 (f) (1) During the pendency of the proceedings the court may issue at the request of
118 the commonwealth ex parte any preliminary order or process as is necessary to seize or secure
119 the property for which forfeiture is sought and to provide for its custody, including but not
120 limited to an order that the commonwealth remove the property if possible, and safeguard it in a
121 secure location in a reasonable fashion; that monies be deposited in an interest-bearing escrow
122 account; and, that a substitute custodian be appointed to manage such property or a business
123 enterprise. Property taken or detained under this section shall not be repleviable, but once seized
124 shall be deemed to be lawfully in the custody of the commonwealth pending forfeiture, subject
125 only to the orders and decrees of the court having jurisdiction thereof. Process for seizure of said
126 property shall issue only upon a showing of probable cause, and the application therefor and the
127 issuance, execution, and return thereof shall be subject to the provisions of chapter 276, so far as
128 applicable.

129 (2) A district attorney or the attorney general may refer any real property, and any
130 furnishings, equipment and related personal property located therein, for which seizure is sought
131 to the office of seized property management, as established by section 47 of chapter 94C.

132 (g) The owner of any real property which is the principal domicile of the immediate
133 family of the owner and which is subject to forfeiture under this section may file a petition for
134 homestead exemption with the court having jurisdiction over such forfeiture. The court may, in

135 its discretion, allow the petition exempting from forfeiture an amount allowed under section 1 of
136 chapter 188. The value of the balance of said principal domicile, if any, shall be forfeited as
137 provided in this section. Such homestead exemption may be acquired on only 1 principal
138 domicile for the benefit of the immediate family of the owner.

139 (j) A forfeiture proceeding affecting the title to real property or the use and occupation
140 thereof or the buildings thereon shall not have any effect except against the parties thereto and
141 persons having actual notice thereof, until a memorandum containing the names of the parties to
142 such proceeding, the name of the town where the affected real property lies, and a description of
143 such real property sufficiently accurate for identification is recorded in the registry of deeds for
144 the county or district where the real property lies. At any time after a judgment on the merits, or
145 after the discontinuance, dismissal or other final disposition is recorded by the court having
146 jurisdiction over such matter, the clerk of such court shall issue a certificate of the fact of such
147 judgment, discontinuance, dismissal or other final disposition, and such certificate shall be
148 recorded in the registry in which the original memorandum recorded pursuant to this section was
149 filed.