

Case/Gen. Docket No. 68360/2013

REPUBLIC OF ITALY

IN THE NAME OF THE ITALIAN PEOPLE COURT OF MILAN

IP CHAMBER / SPECIALISED BUSINESS LAW DIVISION - A –

The Court in collective session with the following judges:

Ms. Marina Tavassi	President
Ms. Silvia Giani	Reporting Judge
Ms. Alessandra Dal Moro	Judge

has handed down the following

JUDGEMENT

in the civil proceedings of Grade I, Case/Gen. Docket No. **68360/2013** brought by:

BUSINESS COMPETENCE S.R.L., represented by its legal representative, represented and assisted by the lawyers Messrs. Marco Saverio Spolidoro, Michele Imbornone and Mark Bosshard, under a power of attorney at the foot of the application for a pre-trial description order, with address for service at the law offices of the lawyer Mr. Spolidoro in Milan, via Daverio n. 6;

PLAINTIFF

against

**FACEBOOK S.R.L.,
FACEBOOK INC. and
FACEBOOK IRELAND LTD,**

represented by the respective legal representatives *pro tempore*, all represented and assisted by the lawyers Messrs Micael Montinari, Marco Bellezza, Oreste Pollicino and Antonia Verna, under special powers of attorney attached to the description proceedings' instruments, with address for service in Via dell'Orso 2, Milan, at the law offices of the lawyer Mr. Micael Montinari.

DEFENDANT

SUBJECT: Copyright and unfair competition.

CLOSING APPLICATIONS

For the Plaintiff:

- 1) to ascertain and declare that all of the Defendants - who in various ways and by inappropriate and illegal conduct benefited from the knowledge they acquired of the Plaintiff's "Faround" product, and who contributed to promoting and making available the Facebook application/utility "Nearby" to Italian users, as described in greater detail in the substantive grounds of claim section of the writ of summons and, in any case, having contributed to disseminating in Italy the social network "Facebook" which that application/utility incorporates - have infringed the copyright of the electronic database of the Plaintiff's "Faround" app described in greater detail in the substantive grounds of claim section of the writ of summons, as well as implementing acts of unfair competition to the Plaintiff's detriment;
- 2) to enjoin the Defendants from further using, exploiting, disseminating and promoting the Facebook app/utility "Nearby", described in greater detail in the substantive grounds of claim section of the writ of summons and any other app/utility, however named, that contains the same logical algorithm for the selection, processing and presentation of data;
- 3) to order the Defendants to withdraw from the Italian market the Facebook app/utility "Nearby", described in greater detail in the substantive grounds of claim section of the writ of summons and any other app/utility, however named, that contains the same logical algorithm for the selection, processing and presentation of data;
- 4) to order each Defendant to pay a monetary fine of Euro 15,000 for each day of violation of the orders issued under the two preceding subsections;
- 5) to order the publication of the conviction ruling or associated order or an extract thereof, twice in two main national newspapers (e.g. "Il Corriere della Sera" or "La Repubblica") and/or in leading magazines from the computer trade or mobile telephony sectors, selected by the Plaintiff and at the Defendants' expense, and also
- for at least six months, on the Italian version of the home page of the website www.facebook.com in a prominent position and in a manner that ensures that it will be immediately visible upon entering the website;
- 6) to order the Defendants jointly to compensate the Plaintiff for all damages caused to it by the unlawful conduct better described above, based on the findings of the preliminary investigation and also based on fair and equitable settlement;

7) to order the Defendants jointly to return to the Plaintiff all unlawful profit obtained from the commercial exploitation of the Facebook app/utility "Nearby", described in greater detail in the substantive grounds of claim section of the writ of summons and any other app/utility, however named, that contains the same logical algorithm for the selection, processing and presentation of data;

As a preliminary procedural matter:

8) to order the Defendants to produce accounting records (ledgers, VAT registers, invoices) and any other company documents pertaining to the marketing/distribution/dissemination/promotion within Italy of the "Nearby" Facebook app/utility, with particular reference to the number of "Nearby" apps/utilities that have been activated by users resident in Italy;

9) to order a Court Technical Expert Report (accounting area) to be produced in order to determine and/or estimate - based on the documents produced and on any other document and/or element provided or produced by the parties or obtained by the Court Technical Expert during his/her assignment, if necessary outside of Italy:

a) the number of "Nearby" apps/utilities/functionalities that have been downloaded and/or activated by users resident in Italy;

b) the number of Italy-based advertisers included in "Nearby"'s preferential display lists and the fees they paid to the Defendants for such advertising;

c) the total revenue obtained by the Defendants as a result of marketing and/or disseminating and/or distributing the "Nearby" Facebook app/utility within Italy;

- d) the percentage royalty or the average and/or reasonable figure payable by the end user and/or by a business operator in the sector to obtain a license to use an application consisting of an interactive electronic database such as that of "Faround" and "Nearby" or, in the case of a business operator, to be included on a preferential display list;
 - e) the Defendants' profit margin on marketing and/or distributing and/or disseminating the "Nearby" Facebook app/utility within Italy;
 - f) the extent of financial loss which the Plaintiff incurred as a consequence of the Defendants' illegal conduct;
 - g) the economic benefit obtained by the Defendants as a result of marketing and/or disseminating and/or distributing the "Nearby" Facebook app/utility within Italy;
- 10) if the counterparty should hinder in any way the implementation of the measures referred to in subsections 8 and 9 above or fail to fully cooperate in their implementation (also abroad), to order a new or supplementary Court Technical Expert Report (accounting area) to examine the following matters:
- a) the extent of Business Competence's actual investments in developing "Faround" and/or
 - b) the price that an independent software developer of the size of Business Competence could request from a customer to develop a functioning and optimised version of an advanced geolocation app similar to "Nearby"/"Faround".

As a preliminary procedural matter, by oral evidence:

It is requested that the following formal witness interrogatory be made, and the person to be heard is Ms. Sara Colnago, the Plaintiff's legal representative with address for service at the Plaintiff's address, for the purposes of the proceedings:

- i) "is it true that the figures indicated in the document shown to you (see Doc 3 of the Plaintiff's file) correspond to the investments made by Business Competence S.r.l. in order to develop and promote the "Faround" application";

It is requested that the following formal witness interrogatory be made, and the person to be heard is Mr. Riccardo Paglia, a collaborator of Business Competence with address for service at the Plaintiff's address, for the purposes of the proceedings;

ii) "is it true that the document shown to you (see Doc 14 of the Plaintiff's file) was drawn up by you and briefly describes the logics, the functionality and the operation of the "Faround" application developed by Business Competence".

In any case

13) to obtain the official dossier of the pre-trial description procedure, Court of Milan Case/Gen. Docket No 29.942/13 complete with the associated minutes and the report of the court-appointed expert;

14) with reimbursement of the fees and expenses associated with the proceedings - including costs incurred for the *ex parte* technical consultant - including incidental legal expenses, VAT and Lawyers' National Insurance Fund (C.P.A.);

For the Defendants:

- as an interlocutory matter: to find that the Court lacks jurisdiction in relation to the Defendant company Facebook Inc. and, accordingly, to declare with reference to the latter company that the competent Court in the United States of America has jurisdiction;

- still as an interlocutory matter: to find that the Court lacks jurisdiction in relation to the Defendant company Facebook Ireland and, accordingly, to declare with reference to the latter company that the competent Court in the United States of America has jurisdiction or, in the alternative, that the competent Court in the Republic of Ireland has jurisdiction;

- preliminarily: to ascertain and declare that the Defendant company Facebook Italy lacks the capacity to be sued and, accordingly, to remove said company from these proceedings;

- in the alternative - and in the unlikely event that the aforementioned interlocutory and preliminary applications are not accepted - to reject the Plaintiff's application as it is unfounded in fact and in law;

- still in the alternative: in any case to reject the Plaintiff's applications for an injunction and for withdrawal from the market of the "Nearby" Places" functionality and of any other app/utility, however named, that has the same logical algorithm for the selection, processing and presentation of data, given the clearly disproportionate and excessive nature of those measures;

- as a preliminary procedural matter, subject to the case being referred to preliminary investigation:

in the unlikely event that the Honourable Judge does not consider that the declaration made under affidavit by Mr. Daniel Hui (head engineer of the team involved in developing the "Nearby Places" Facebook functionality) and also the documentation attached thereto - filed in the precautionary proceedings pursuant to Article 700 Code of Civil Procedure brought by the counterparty and confirmed in the parties' appearance hearing of 12 February 2014 in the context of the same proceedings (see Annex no. 5 to the Defendants' Entry of appearance and statement of defence) - constitute valid and conclusive evidence of the circumstances referred to therein, the request is repeated for witness evidence to be taken through Mr. Hui on the articles of proof as articulated in the Defendants' preliminary pleadings pursuant to Article 183 subsection VI, No. 2 of the Code of Civil Procedure, of 3 June 2014;

in the unlikely event that the Honourable Judge considers that the information provided by Mr. Alfio Bongiovanni the Court-appointed expert in the Expert Report filed on 30 May 2015 is not sufficiently clear and unambiguous, in relation to the lack of originality of the Plaintiff's application "Faround", the Court-appointed expert is asked to clarify his position on the related technical question posed by the Honourable Court, basing his answer to that question also on information and evidence provided by the Defendants (including the instruments, documents and records of the proceedings, *ex parte* appraisals, the testimony given by Mr. Hui as *per* the affidavit drawn up by him and the documentation attached thereto) relating to the existence on the market - before "Faround" was launched - of similar geo-location applications (e.g. the third-party applications "Yelp", "Foursquare", "Loopt", "Ness" "Raved" as well as Facebook services functionality such as "Facebook Places" and "Facebook Deals") and also based on information readily available from public sources in relation to the features of those already existing applications;

- in any case: to reject the Plaintiff's preliminary applications as being immaterial and irrelevant for the purposes of deciding the dispute in question;

- in any case: with award of costs, duties and fees for these proceedings and for the pre-trial description procedure indexed at Case/Gen. Docket No. 29942/2013 and for the proceedings pursuant to Article 700 Code of Civil Procedure indexed at Case/Gen. Docket No. 68360/2013 brought by the Plaintiff, as well as VAT and Lawyers' National Insurance Fund (C.P.A.) in accordance with law.

STATEMENT OF GROUNDS

1. *The Plaintiff's applications.* By instrument served on 19 September 2013 within the deadlines which the Court fixed in the order confirming the pre-trial measures, the Plaintiff Business Competence S.r.l. - a company operating in the online marketing services sector - brings these main trial proceedings for a finding of infringement of copyright of the electronic database "Faround" and of acts of unfair competition pursuant to Article 2598 No. 3 of the Civil Code, and also for an injunction restraining the Defendants from further using and promoting the "Nearby" Facebook utility, an order of withdrawal from the market in Italy and a finding against the Defendants of joint liability to pay compensation for all damages caused to Business Competence as a result of the unlawful conduct in question and/or to return the unlawful profit arising from the commercial exploitation of the "Nearby" application.

The Plaintiff Business Competence S.r.l. adduced as follows:

- In 2012 it developed a mobile phone application called Facearound, which was - at Facebook's request - subsequently renamed "Faround". The utility, by using a particular algorithm, selected and organised data on the Facebook profiles of users who accessed "Faround", and displayed - on an interactive map subdivided by category - the shops and stores nearest to the user, together with relevant information and offers, as well as positive reviews from the "Faround" community.
- The Plaintiff company, in order to develop the above software, had in the same year obtained access to the "Facebook Platform" as an independent developer creating applications designed to interface with the program and to be used by users of the social network.
- The application was of significant financial and advertising interest for the owners of businesses that had their own Facebook page who, by subscribing to "Faround", could appear in the results displayed on the virtual map. The geolocation service for businesses "near" to the user was designed to operate with Facebook and it classified different businesses based on the tastes of the user and of his/her community of friends.

- Following an investment of approximately half a million Euros to develop the program's technical platform and to launch the app, Business Competence determined that its most advantageous business model would be to sell (by subscription) "greater visibility" services on the "Faround" map to Facebook Fanpage owners.

- The app was then registered on 25 September 2012 on the Facebook App Center, which only accepts apps that have been officially reviewed and approved by Facebook, and it was accepted by the Facebook App Store on 11 October 2012, along with all applications compatible with the social network, gaining significant success.

- On 18 December 2012, however, Facebook announced the launch of "Nearby", an application which competed with "Faround" and which, in the Plaintiff's view, cloned the latter's concept and format and altered only the graphic display layout.

- In order to obtain evidence of infringements ahead of the main trial on the merits for unfair competition and breach of copyright, the Plaintiff had - by application filed on 22 April 2013 - applied for a description of the program associated with the operation of the "Nearby" app, owned by the Defendant Facebook, and also of its functionality and of the related logical algorithms. However, the description procedure and order did not authorise obtaining a copy of the source code and the court-appointed expert - who was unable to access the company's computer system - was limited to a description only of the functionality of the "Nearby" app.

- "Faround" was original in that it created a series of criteria for the selection, organisation and presentation of data devised to operate with the categories of data hosted on Facebook. The previous programs developed by Facebook (Facebook Places) and by third parties (Foursquare and Yelp) lacked the same functionality as "Faround": the first was a kind of "person-finder" which enabled friends to be located in the vicinity rather than a geolocation of businesses in the vicinity of the user, while the other programs were devised based on logical algorithms - or selection criteria - that processed data entered by persons registered with the respective social networks, rather than data of Facebook, a much more widespread application.

- Facebook, noting the independent developer's success in attracting professional advertisers with the "Faround" app, had cloned the "heart" of the app, producing its own version and changing only the graphic display layout;

- the reason for the fast pace of development of the "Nearby" app - which contained the same functionality as "Faround" - was that Facebook had analysed the latter application so that it could imitate the sequence of criteria and instructions that enabled the program to process and present data in a specific manner.

- Facebook had engaged in acts of unfair competition within the meaning of Article 2598 No. 3 of the Civil Code, slavishly and conveniently and cost-effectively exploiting the results of its competitors' research and development, and also their investments, and abusing the Plaintiff's good faith as an independent developer.

2. *The Defendants' defence positions.* By pleadings filed on 12 March 2014, the Defendants entered an appearance in the main proceedings requesting the rejection of the Plaintiff's application. The following defences and pleas were submitted:

- Preliminarily, the Defendants pleaded the Italian court's lack of jurisdiction vis-a-vis Facebook Inc. on the basis that Business Competence accepted an exemption from Italian jurisdiction when it entered into the contractual relationship with the Defendant. The provisions of Article 16 of the "Declaration of Rights and Responsibilities", which applied when the relationship was entered into, represented an exemption from Italian jurisdiction in favour of the jurisdiction of foreign courts. Still preliminarily, the Defendants pleaded that the Italian courts had no jurisdiction vis-a-vis Facebook Ireland, again based on the provisions of Article 16 of the "Declaration of Rights and Responsibilities" and also on Article 5, first subsection, sub 3) of EC Regulation no. 44/2001. The Defendants also pleaded that Facebook Italy lacked the capacity to be sued, and sought for it to be excluded from the proceedings, as a company that was essentially separate from the other two Defendant companies and not involved in the management of the Facebook service, including the product which is subject to this dispute.

- On the merits, the Defendants pleaded that the description would not yield anything useful because the court-appointed expert was limited to describing certain functionalities of the Plaintiff's application and the functionalities of Facebook, accessing these using a smart phone with Internet connection.

- Facebook had not reproduced the "Faround" algorithm and had not copied the functionalities thereof; rather it had independently and separately developed the "Nearby" application before the counterparty launched its own application. "Nearby" evolved from the geolocation services which Facebook had developed since 2010, particularly "Facebook Places", which enabled users to share their location, and "Facebook Deals" which enabled businesses to be identified in the vicinity. Still in August 2010, Facebook had made user location data first available to developers through the programming infrastructure "Graph API", enabling them to develop geolocation-based products that employed data categories made available by Facebook and by users.

- In January 2012 - before the "Faround" app was registered in the Facebook App Center - Facebook developers tested the "beta" version of "Nearby", which was presented in August 2012 in a version not unlike the version subsequently launched on the market.

- "Faround" was not an original app, since it had been preceded by various geolocation-based applications such as Yelp (2004) and Foursquare (2009).

3. The precautionary pre-trial procedures and those during the main trial.

3.1. *The description procedure.* In its pre-trial application, filed on 22 April 2013 against Facebook Italy only, the Plaintiff requested an order authorising the description of the computer program underlying the operation of the “Nearby” app, owned by the Defendant Facebook, and also of its functionality and of the related logical algorithms. The description order, granted without the other side being heard, was carried out between 10 and 14 May 2013 at the Facebook offices in Italy, but it was not possible to access the company's computers in order to obtain a copy of the source code of the application subject to the description procedure; therefore, the court-appointed expert could only implement a description of the functionalities of the “Nearby” app, since he had no access to other data.

Prior to the hearing confirming the description of 15 May 2013, the Defendant Facebook Italy S.r.l. entered an appearance in the proceedings within the deadline assigned, challenging the lawfulness of the description procedure and declaring that Facebook lacked the capacity to be sued. It alleged that it was involved exclusively in promotional and commercial support activities, whereas Facebook Inc. and Facebook Ireland Ltd. (which belonged to the Facebook group and had their head offices in California and in Ireland) were in charge of managing and distributing the functionality of the “Nearby” app.

The court - having authorised both foreign companies to be summoned to the proceedings by order of 18 May 2013, and having heard all the parties who appeared at the hearing of 10 July, and having called the court-appointed expert to make clarifications at the later hearing of 17 July 2013 - confirmed the description by order of 26 August 2013, extended its validity to the two summoned companies but did not, however, authorise the description to be carried out at the Defendants' foreign head office as it considered this to be disproportionate and unnecessary, observing - in its order of 31 July 2013 Case/Gen. Docket No. 29942/2013 and Court Technical Expert Report of 17 July 2013, for the purposes of the proceedings, that:

- 1) the description measure is not admissible to protect against unfair competition, therefore the facts alleged in reference to unfair competition are of no relevance;
- 2) The court-appointed expert confirmed, in his brief and accessible observations, that Facebook was unable to access the source code of the “Faround” app developed by the Plaintiff and concluded that, although Facebook “had the opportunity to analyse in detail the app's functioning from the “user side” and from the “side of interaction with the Facebook world” before the application was published”, “it did not have the opportunity to access that application's source code” (see note sent on 17 July 2013, and report).

3) It is not necessarily to check Facebook's source code in order to protect copyright to databases".

3.2. *The precautionary procedure during the main trial.*

By application made pursuant to Article 700 Code of Civil Procedure and filed on 3 December 2013, before a Court Technical Expert Report was ordered in the main trial proceedings, the Plaintiff applied for an injunction against Facebook using "Nearby" Places. The court, by order of 15 February 2014, confirmed on appeal by the Court (sitting *en banc*) - although noting multiple items of evidence pointing to unlawful conduct - rejected the application due to the absence of a *prima facie* case, and the need for "preliminary investigations mainly of a technical nature" (order of 15 February 2014 Case/Gen. Docket No. 68360/2013).

4. *The main trial on the merits.*

In the proceedings on the merits - after the granting of the deadlines referred to in Article 183, subsection 6 of the Code of Civil Procedure - a technical Court Technical Expert Report (IT area) was ordered to ascertain and verify the originality and inventiveness of the computer program developed by the Plaintiff and to verify the functionality of both programs, the derivation of one from the other and to verify whether Facebook developed the "Nearby" software independently, formulating the following question for the court-appointed expert at the hearing of 21 October 2014:

"the court-appointed expert - having read the case records and documents, carried out any investigation considered necessary, heard the parties and their consultants, examined all the documents and instruments filed by the parties in the main proceedings, in the precautionary procedure during the main trial and in the description procedure, duly authorised to seek mediation, having read the minutes and the deposition of Mr. Hui, after a careful description of the Plaintiff's "Faround" app and of the Defendant's "Nearby" app and of the factual elements that assist in answering the questions and, in particular, of the dates when they were created and processed - as shown by the documents on file in the proceedings - is asked to:

say if the Plaintiff's program shows originality and inventiveness;

say if there are similarities, and, if so, what similarities, between the two functionalities "Faround" and "Nearby";

specify the development times of the two programs;

verify if the documents show that the Defendant developed previous versions of "Nearby" (defined in the documents "Nearby" places, p 43) having the same functionality and prior to the launch of the "Faround" program;

compare "Nearby"'s functionality with the program "Facebook Places" and "Facebook Deals";

assess if the Defendant's "Nearby" app derives from "Faround" or if it developed independently out of the previous version Facebook Places or any versions which self-evidently (or based on documentary evidence) preceded "Faround", taking into account the time frame and the development content of the Defendant's and the Plaintiff's application".

At the end of the hearing scheduled to examine the Court Technical Expert Report, the case was deemed ready for decision, and the final hearing was scheduled by the Court (sitting *en banc*), granting the deadlines referred to in Article 190 Code of Civil Procedure.

5. *The plea of lack of jurisdiction in relation to Facebook Inc. and to Facebook Ireland Ltd.*

The foreign Defendants pleaded, as an interlocutory matter, that the court assigned to hear the case lacked jurisdiction, referring to the provisions of Article 16 of the "Declaration of rights and responsibilities", valid at the time when the relationship was entered into, and also Article 3 of Law 218/1995 which determines the general criterion for founding Italian jurisdiction, namely that the Defendant summoned should be either domiciled or resident in Italy or a representative of the Defendant should be present in Italy, duly authorised pursuant to Article 77 Code of Civil Procedure - preconditions which are not satisfied in this case. Similarly, the foreign Defendants consider that EC Regulation 44/2001 does not apply because the United States of America were not party to the Convention and, in the alternative, because the special jurisdictional criterion could not apply, which is referred to in Article 5, first subsection, sub 3) of that Regulation, and which established the jurisdiction of the court of the place where the detrimental event occurred or could occur.

This plea, however, must be rejected for the reasons already stated in the precautionary proceedings - and confirmed by the Court (sitting *en banc*) that heard the appeal against the precautionary order - and which we refer to in their entirety, considering that no new submissions have been made to invalidate them:

- Firstly, the exemption of Italian jurisdiction invoked on the basis of the Declaration of Rights does not operate in the non-contractual area; the contractual clause in question relates only to disputes pertaining to rights arising from the contract as opposed to non-contractual actions such as those founded on Article 2598 Civil Code or on copyright.

- The Italian court's jurisdiction is based on the principle of *commissi delicti* - the law of the place where the offence was committed, by virtue of the criteria detailed in Regulation 44/2001, which is still applicable to the present case (Regulation 1215/2012, indeed, which amended Regulation 2001, is applicable only to cases brought after 1 January 2015, pursuant to Article 66).

- Although the USA is not a signatory to the Brussels Convention on jurisdiction, Law No. 218/1995, it has adopted the criteria of that Convention for identifying the applicable law, which are therefore intended to operate outside the sphere of validity of the Convention and of the later EU Regulations Brussels I and I-bis (see Supreme Court of Cassation - United Chambers, order 21.10.2009 No. 22239; United Chambers order 27.2.2008 No. 5090; United Chambers order 11.2.2003 No. 2060, United Chambers 12-04-2012, No. 5765, according to which: *"in determining the scope of Italian jurisdiction in relation to a Defendant who is neither resident nor domiciled in Italy, it is necessary to apply the criteria set forth in sections 2, 3 and 4 of Title 2 of the Convention, even if the Defendant is domiciled in a State not a signatory to the Convention"*).

- Article 5, first subsection No. 3 of Regulation (EC) No. 44/2001, referred to by Law No. 218/1995 and applicable on a temporal basis, identifies - in the area of civil offences - the criterion of the court of the place in which the *"detrimental event occurred or could occur"*. In accordance with the consistently stated position of the European Court of Justice, Article 5 No. 3 - already cited - must be interpreted as meaning that the place in question means the place where the victim's rights were infringed, irrespective of the future consequences of such infringement (see Supreme Court of Cassation - United Chambers, 05/07/2011, No. 14654; Supreme Court of Cassation - United Chambers, 27/12/2011, No. 28811; Supreme Court of Cassation - United Chambers, 5/5/2006, No. 10312).

Therefore, the Italian court has jurisdiction as the court of the place in which the protected interest is assumed to have been infringed, in that Facebook's "Nearby" app, allegedly subject to copyright infringement, is disseminated, distributed and utilised using mobile devices within Italy.

- The Italian court also has jurisdiction in relation to the allegation of unfair competition, since the adverse market effects - caused by the unfair conduct in question and represented by the diversion of potential Italian customers - occurred in Italy, which is the place where the detrimental event occurred and this is therefore the basis for Italian jurisdiction, according to the criteria of private international law and of international conventions.

6. *The Defendant Facebook Italy S.r.l.'s plea that it lacks capacity to be sued*

The Defendant Facebook Italy S.r.l.'s plea that it lacks capacity to be sued is unfounded because the capacity to act, as a precondition of the action, must be assessed based on the submissions first made by the Plaintiff and it is lacking only in rare cases (which certainly do not include the present case) such as, for example, when a Plaintiff presents, as its own, a right that in fact belongs to another party, or seeks judgement against a Defendant although the latter is not party to the substantive relationship in dispute (*see, inter alia, Supreme Court of Cassation 2951/2016; Supreme Court of Cassation 14177/2011; Supreme Court of Cassation 6132/2008; Supreme Court of Cassation 11284/2010, according to which "the capacity to act and engage in cross examination must be determined not in relation to its actual existence but, rather, in relation to its affirmation in the original writ of summons"*).

The Plaintiff's arguments are well-founded in this case, to the effect that the Italian Defendant cooperated in the alleged offences by marketing Facebook services within Italy.

7. *The findings of the Court Technical Expert Report.*

Before making any legal and factual assessment of the alleged offences, we should begin with the findings of the Court Technical Expert Report, first noting that the court-appointed expert examined only the user interface of the programs in question, namely that part of the program which users are immediately familiar with, whereas the source code of the program "Nearby" was not found at the place where the description procedure occurred, nor did the Defendant produce said source code voluntarily despite the court's formal request to this effect in the proceedings (see the description minutes).

It should also be recalled that, although the Plaintiff requested this, the Court hearing the precautionary application did not authorise the description procedure at the Defendant's foreign offices, for the reasons indicated in the order of 31 July 2013, as detailed above (§ 3.1).

Having said that, it should be noted that the failure to acquire the aforementioned source code and the consequent failure to obtain any evidence that the Defendant copied the source code of "Faround" is not of decisive importance in proving the alleged offence.

In the present case, the derivation/processing activities did not require access to the source code - and indeed this was probably better omitted, in the court-appointed expert's assessment and also that of the Plaintiff's independent expert - because a simple analysis of the "Faround" application was sufficient to gain an insight not only into the program's functioning but also into the way it interacted with data made available by Facebook, in that the latter had organised an infrastructure that was available to developers. "In view of this, it was possible to immediately trace the calls to functions made available by the Facebook API and used.... And thus to know in what sequence, and using which data, any application accesses the Facebook database".

The court-appointed expert had already highlighted the following relevant circumstances at the description procedure stage:

- Applications of developers are validated by Facebook to ensure that they conform to its policies;
- The validation of an application enables Facebook to familiarise itself with the application's operations and functionality, and to analyse in detail the way the application interfaces or communicates with Facebook by utilising the API i.e. the low-level interactions that Facebook makes available to third party developers;
- Facebook has available the compiled version of the application.

Moving on to the results of the aforementioned expert operations ordered during the case, it emerged in the main trial proceedings that:

- the "Nearby" application was not in fact independently developed from the preceding version Facebook Places or from any versions previous to "Faround" (Court Technical Expert Report page 50). There is no evidence that the "Nearby" app represents a development of the previous applications Places and Deals, previous to the publication of Faraound (Court Technical Expert Report page 44). The Defendants failed to provide adequate technical or project documentation, functional analyses and/or works stages reports in the proceedings, or even in the incidental Court Technical Expert Report procedure (Court Technical Expert Report pages 49 and 50);

- the two applications "Faround" and "Nearby" are "extremely similar in their purpose and general layout" (Court Technical Expert Report page 45); "the functionality of "Nearby" overlaps that of "Faround" (Court Technical Expert Report page 51);

- the differences between the two programs from the technical and implementation point of view are of medium to low complexity and are not significant and, in particular, they do not exclude the hypothesis that "Nearby" was derived from "Faround", revealing, in this case, not differences but the behaviour of overlapping functionality (Court Technical Expert Report page 62);

- the "Faround" app, although it is not original in absolute terms, "represents an intelligent reinterpretation of existing information (combining data in the database of Facebook users with the geographical location of the person using the application at that time), by organising such information so as to provide users with services that... are enjoyed in a completely new and much more effective way" (Court Technical Expert Report page 43).

8. *The programs under examination.*

"Faround" and "Nearby" are both geolocation apps which enable the geographic location of a mobile device to be identified. They use information from the Facebook network, combining this information with geolocation data and processing it with search results. They have the same functionality i.e. to flag the existence of businesses within a certain distance from the user's location, and to highlight Facebook friends' comments.

More particularly, both have the following functionality:

- they give the user's physical location, combining with the data of the social network Facebook (using geo-location);

- they enable all places in the vicinity that have a Facebook page to be identified, e.g. restaurants, bars, hotels, etc.
- they enable users to organise the results based on various parameters and search criteria;
- they provide information on distance from the user's location, on Facebook users' comments or "posts" (on "Faround" it's also possible to select offers made by the businesses identified, etc.).
- all the data originate entirely and exclusively from Facebook, with which the Plaintiff's program is integrated.

Although the court-appointed expert revealed a number of differences between both social networks such as, for instance, the graphic layout and the possibility of viewing available deals, he noted that these differences are not significant and that they do not, in any case, exclude the hypothesis that "Nearby" is derived from "Faround", as they represent "overlapping" applications.

9. *The facts ascertained in the proceedings.*

Having clarified the method by which the technical assessments were carried out and verified the court-appointed expert's conclusions, we now move on to the merits of the case and begin by reconstructing the facts ascertained in these proceedings which are relevant for purposes of reaching a decision, keeping in mind from now on that the proceedings must be based on probabilistic presumptive inferences.

- Facebook's "Nearby" app was launched on 18 December 2012, three months after the launch of "Faround" (September 2012) and shortly before the Plaintiff began its campaign for the sale of subscriptions and services, which the Plaintiff up to that point had provided for free;
- Facebook's fast-paced development of the "Nearby" app occurred after Facebook assessed and approved the Plaintiff's program. The Plaintiff, as the developer, was obliged to submit to Facebook a final working copy of the app and at the end of August 2012, the Plaintiff sent Facebook a final working prototype of "Faround" to enable the planned assessment to go ahead (Doc 17 of the Plaintiff.);

- Facebook launched "Nearby" - very soon after "Faround" was launched - after "Nearby" had engaged in significant activities to promote and publicise the program;
- The program developed by Facebook, after the Plaintiff created "Faround", has the same functionality as the Plaintiff's program. "Both applications appear extremely similar in their purpose and general arrangement. The graphic and functional differences between both applications from a technical point of view and in terms of engineering and design input are not significant" (see Court Technical Expert Report page 51);
- Facebook's access to the application's prototype enabled it not merely to analyse the app's functioning from the user side, but also "from the side of interaction with the Facebook world before the application was published" and, therefore, to know the data flows which "Faround" exchanged with the Facebook platform and the manner in which the app interfaced with Facebook, using the "API" made available to developers (court-appointed expert note in the description procedure of 16 July 2013);
- Facebook had expressly reserved the right to "analyse the applications and their content and data for any purpose, including commercial (for example, identifying the recipients of advertisements and indexing content for searches)" (see, *sub* Doc 10 of the Plaintiff and Doc. 7 of the Defendant, declaration of rights and responsibilities, Article 9.17);
- Facebook had also reserved the right to "create applications offering functionality similar to the applications of developers or in competition with them (Article 19.9 Doc cited);
- Facebook's "Nearby" program was not independently developed from previous versions of Facebook or from any other versions preceding the Plaintiff's program (see Court Technical Expert Report page 50).

10. *The Defendant's defence submissions, particularly in relation to the non-acquisition of the source code and the independent development of the program by Facebook.*

The Defendants - defending themselves against these unequivocal elements which all point to Facebook's "Nearby" program being derived from the Plaintiff's program - submitted, on the merits, that the Plaintiff failed to provide a copy of the source code as evidence and, in addition, that the program was independently developed from previous Facebook versions before the Plaintiff launched "Faround".

10.1. *The non-acquisition of the source code of "Nearby"*. In relation to the first line of argument, as was noted above, the fact that the Defendants did not obtain the program's source code is not of decisive importance for the purposes of these proceedings dealing with the illegality of copyright infringement and unfair competition; apart altogether from the fact that the non-acquisition of the source code resulted from a lack of cooperation by Facebook which, despite the court's invitation to do so, failed to make available the source code and insisted, instead, on pleading a lack of jurisdiction (see Art. 5 above).

And it is worth remembering that, in order to ascertain whether or not "Nearby" was developed/derived from "Faround", it is not necessary to obtain a copy of the source code since it is sufficient to conduct an analysis of the competitor's program and that, in this case, such analysis was facilitated by the fact that Facebook had in its possession - before "Faround" was launched - a copy of the prototype and, again and above all, that this analysis facilitated an understanding of its operation from the "side of the user" and also "from the side of interaction with the Facebook world", since the program was developed on Facebook's very own platform, thanks to its standard offer to independent developers.

10.2. *The lack of evidence in support of the Defendants' submission that it independently developed the "Nearby" app*. The Defendants provided no evidence in the case to support their assertion that they had independently developed the "Nearby" app before the Plaintiff developed its "Faround" app, and they furnished completely inadequate documentary evidence, not supplemented during the proceedings, even though the incomplete nature of those documents had already been highlighted at the precautionary stage.

The written declarations - affidavits - made by Mr. Hui, a collaborator of the Defendant, and those made at the precautionary hearing of 12th February 2014, are not supported by documents of certain date or by suitable planning or analysis documents, or even by technical documents, but they are accompanied by ordinary newspaper articles of a general character or by images - inadequately detailed - which are incapable of supporting the Defendants' defence submissions in relation to the independent and prior development of the program. And indeed, apart from the aforementioned non-technical articles related to the application of Facebook Places or other articles whose generalised content can have no bearing on the case, the Defendants produced simple images related (according to them) to the previous version of "Nearby" which, however - given their generality and lack of certain date - are incapable of proving the existence of a version prior to "Nearby" and, *a fortiori*, that such a version was independently developed by Facebook (see attachments all produced *sub* Doc 5 of the Defendants, and the careful analysis of same by the court-appointed expert, at pages 12-16, who concludes his expert report with the observation that: the statements made by Mr. Hui "*are not, from a technical and objectively assessable point of view - confirmed by the documents attached to the affidavit*": pages 15:41 of the Court Technical Expert Report). In summary, the Defendant furnished no suitable documentary evidence in the proceedings; it did not furnish technical documents, market analyses and/or functional documentation pertaining to the objectives to be achieved; documents which would hardly be lacking if the program had been independently developed, when one considers that companies of this size normally act and should act in a highly organised and business-like manner.

11. Unequivocal and consistent items of evidence - which indicate (with very high probability close to certainty based on canons of legal causality and scientific probability) that Facebook developed/derived its app from the Plaintiff's "Faround" app, are therefore not invalidated by contrary items of evidence, since the Defendants' submissions were disproved and they failed to demonstrate that they developed the "Nearby" app independently or that it was derived from versions previous to the Plaintiff's app.

What has been ascertained is that, just a few months after "Faround" was launched - i.e. within too short a timeframe for the program to be independently developed (based on the principle *id quod plerumque accidit* i.e. based on most probable outcomes), the Defendant launched a program that had the same functionality as "Faround", after having reviewed this application and been in a position to verify its operation and interaction dynamics with Facebook.

In truth, Facebook had "privileged and early" access to a prototype of the app and also to the data flows that "Faround" exchanged with the platform, analysing its functionality and occupying an excellent position to understand its operating mechanisms both from the "side of the user" and "from the side of interaction with the Facebook word", before the application went public. Facebook, which possessed the prototype to be examined at the review phase, was well placed to easily identify the operational logics of "Faround" and the criteria for the selection and organisation of data even though it did not have the source code (as this evidence was not obtained), as it was able to trace the calls to functions made available by the Facebook API. In fact, Facebook was in the privileged position of being able to review in advance the app's operation, not just from the side of the user but also from the side of interaction with the Facebook platform with which it was fully integrated. By analysing the "Faround" application, the Defendant was in a position to know how and in what sequence the application - developed for the social network Facebook - accessed the Facebook database and collected data of interest to it. This broadly facilitated - also in terms of time - the process of analysing and understanding the program.

The purpose of legitimately analysing the "Nearby" program was exclusively to review the program, not to enable Facebook to exploit it by developing another program in competition with it.

No contractual clause could, without clear abuse of good faith, allow Facebook to exploit a developer's investments in order to replicate or derive another competing program by analysing the program which the third party developed on Facebook's own platform. We will return to this theme, given that the Defendants also submitted that their conduct was protected by the clauses of the declaration.

12. *Infringements of copyright and unfair competition.*

In light of the facts ascertained and the logical inferences that must necessarily be drawn, the Defendants are held liable for the commission of unlawful acts of copyright infringement of the databases and unfair competition pursuant to Article 2598 No. 3 Civil Code.

In relation to both profiles, attention must be paid to the provisions "applicable to developers/operators of applications and websites", contained in the registration forms and relied upon by the Defendants in support of the lawfulness of the conduct in question (Doc 7 of the Defendants).

We refer to Article 9.16, which states: "*We may analyse the applications, content and data for any purpose, including for commercial purposes*", and to Article 9.19 which states: "*We may create applications that offer functions and services which are similar to the developers' applications or which are in competition with those applications*".

13. *The infringement of copyright of the "Faround" database.*

"Faround" is a database implemented in the form of a computer program.

The databases, together with the computer programs, are protected as creative works. Databases are the intellectual creations of their developers or authors, "based on the selection or arrangement of the material in question" (Article 1, subsection 2 LA).

They are "collections of works, data or other independent elements systematically or methodically arranged and made individually accessible by electronic or other means (Article 1 No. 1 Directive 96/9/EC on the legal protection of databases; ECJ 9/11/2004, C-444/02, Fixtures marketing Ltd/OPAP).

The Court must examine three important issues:

- 1) if "Faround" is an original work of a creative nature;
- 2) if and to what extent the "analysis" of a third party program is lawful;
- 3) if the principle of individual autonomy can justify a departure from applicable legal limits.

13.1. *The requirement for the "Faround" program to be an original work.*

In order to ascertain if the work is protected, it must first be ascertained if it is of a creative nature and, in relation to "Faround", if it utilises a database that constitutes an intellectual creation of its author in terms of the selection or arrangement of the material in question.

According to consolidated case law, the legal concept of "creativity does not coincide with the concepts of creation, originality and novelty in absolute terms, but refers to the personal and individual expression of an objective reality that belongs to the categories listed, for example, in Article 1 of Law No. 633 of 1941, so that in order for an original work to receive protection under that law, it is sufficient for there to be a "creative act", however minimal, that is capable of being manifested in the material world. This implies that creativity cannot be excluded simply because the work in question consists of simple ideas and concepts that are part of the intellectual wealth of individuals with experience in the area" (among others, Supreme Court of Cassation 12314/2015; Supreme Court of Cassation 17795/2015; Supreme Court of Cassation 9854/2012). More particularly, for works of compilation it is sufficient that the data in question have been elaborated and organised by the author in a personal and independent manner, "based on the selection or arrangement of the material in question".

Article 3 of Directive 96/9/EC on the legal protection of databases, provides that "under this Directive, databases which - based on the selection or arrangement of the material in question - represent an original intellectual creation of their author, receive protection as such under copyright law. No other criteria apply in establishing if such protection may be afforded to databases. The protection afforded to databases by virtue of the copyright law under this Directive does not extend to the evaluation of their content, and leaves the rights to such content open and undecided".

According to Recital 15, "the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation; whereas such protection should cover the structure of the database" and that "no criterion other than originality in the sense of the author's intellectual creation should be applied to determine the eligibility of the database for copyright protection, and in particular no aesthetic or qualitative criteria should be applied".

That criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices and thus stamps his 'personal touch', (see ECJ, C-604/10, Football Dataco).

In this respect, it emerged that even though other geolocation apps existed at the date when the Plaintiff's program was launched (August-September 2012) - such as "Yelp" and "Foursquare", developed by third parties, and "Facebook Places" and Facebook Deals" - none of these collected data exclusively from Facebook and organised such data independently with all of the functionality of "Faround".

And, indeed, the programs Yelp and Foursquare were not integrated with Facebook and did not enable communication with data present on Facebook profiles.

The Facebook programs Deals and Places were fairly rudimentary geolocation apps with fewer functions than those developed by the Plaintiff, and this was indeed confirmed by the fact (clearly highlighted by the Court-appointed expert) that "Nearby" was not "a program independently developed from the previous version Facebook Places or from other versions prior to "Faround" (see Court Technical Expert Report page 50).

In conclusion, no prior art grouped all of the "Faround" functionalities in a single app destined for use on the Facebook platform, because the prior art did not have databases that interfaced exclusively with Facebook and, in any case, did not apply the same data selection and organisation criteria which have facilitated the development of all of "Faround"'s functionality.

Although the court-appointed expert stated that the program was not novel in absolute terms, he confirmed that the minimum conditions necessary were satisfied in order to afford protection to the original creative work (Court Technical Expert Report page 43). The creative character of the work has therefore been ascertained, as undisputed case law has determined that it is sufficient for there to be "an even minimal creative act that can be manifested in the material world", and that a work's creative character is not excluded even if it is an expression of "simple ideas and concepts that are part of the intellectual wealth of individuals with experience in the area" and, in relation to works of compilation, it is sufficient that "the data in question have been elaborated and organised by the author in a personal and independent manner, based on the selection or arrangement of the material in question".

13.2. *The legality of the "analysis" and "decompilation" activities.*

The protection of copyright concerns not only the reproduction but also "the adaptation, transformation and any other modification" of the work, which must be authorised in general terms by the author.

As already mentioned several times, the transformation or modification in question may occur without access to the source code of the first application, by analysing the operation of the program in order to understand and determine the ideas and principles that underlie the program. Reverse engineering enables one to begin with the compiled code or the end result and can go into more complex levels of detail including "Black-box analysis", i.e. the analysis of the program's operation in order to determine its purpose and basic principles.

In the present case, this operation was facilitated by the availability of the executable copy for reviewing the program and, above all, by the interaction of the program with the Defendant's platform, which facilitated - by tracing the calls to functions made available by the application infrastructure (API) - the analysis of data flows between "Faround" and Facebook, including which data and in what sequence and order the app "communicated" with Facebook.

We will now ascertain the legal limits of the "analysis" and "reverse engineering" activities, leaving aside for the moment considerations which in themselves render the Defendants' conduct unlawful due to the infringement of principles of professional integrity and an abuse of the trust generated by the "social contract" between the parties to the proceedings, to which we will return further below.

So, reproduction, adaptation and transformation activities are allowed if they are "necessary in accordance with the program's intended use" (Article 64-ter LA). A person entitled to use a copy of the computer program may, without authorisation from the copyright owner, "observe, study or test the operation of the program in order to determine the ideas and principles on which it is based" only "if it carries out those activities while loading, displaying, running, transmitting or storing the program which it is entitled to run". Contractual clauses agreed in violation of this provision are null and void (Article 64-ter).

The important point is that the lawfulness of activities of analysis carried out by a person other than the author depends on the purpose of those activities, which must be the typical intended use of the protected work: in the present case, implementing the mandatory review in order to make the program available to users.

Analysis is also permitted - but this doesn't apply in the present case - when it is absolutely necessary in order to obtain information for purposes of interoperability with other programs. Even in this case, however, the legality of activities of analysis is conditional on compliance with specific conditions and, more particularly, that the information is not used for "*purposes other than ensuring the interoperability of the independently created program*" and that it is not exploited "*for the development, production or marketing of a computer program substantially similar in its outward form*" (Article 64-quater) - in other words, for commercial purposes; this provision too - as expressly indicated - cannot be waived by contractual clauses, otherwise they will be null and void.

13.3. In conclusion, the activities of analysis - whose purpose is to understand the programs' operating mechanisms - are permitted only insofar as they remain limited to the programs' typical intended use, but they are never permitted for commercial purposes.

The limits imposed by legislation on operations of analysis - and we now come to the third question - cannot be waived by contractual clauses, otherwise they will be held to be null and void.

13.4. Applying the principles examined in the present case, it may be observed that:

- Both programs have equivalent functionality and "Nearby" is an elaboration of "Faround" (see Court Technical Expert Report page 45, according to which "Both applications are extremely similar in their purposes and general arrangement");

- The Defendant did not develop its own program independently but by analysing the "Faround" program in order to identify the ideas and principles on which it was based: the technical interpretation of Facebook failed to disclose that it developed the "Nearby" application as an evolution from the previous applications Places and Deals before the "Faround" app was published" (Court Technical Expert Report page 50) and "the documents filed with the proceedings failed to demonstrate that the "Nearby" app was independently developed from the previous version Facebook Places or from any versions which - self-evidently or based on documentary evidence - proceeded "Faround".

- The activities of reproduction and/or elaboration were not necessary for the program's intended use, or in order to obtain the information required to enable the interoperability of different programs.
- Contractual clauses cannot waive legal restrictions on analysis activities, by permitting such analysis to take place for purposes other than the typical purposes associated with the use of the program - namely, in this case, to make new applications available to Facebook users by means of the mandatory review procedure.
- The provision "applicable to developers/operators of applications and websites", relied upon by the Defendants in order to support the legality of its conduct - namely, "We may analyse the applications, content and data for any purpose, including commercial" - is null and void, and it absolutely cannot legitimate activities of analysis for purposes other than those connected with the program's mandatory review.
- The purpose of delivering the executable copy was to verify the suitability of the "Faround" app to circulate in social networks, and not to be used for the development, production and marketing of a "program substantially similar in its outward form" or for other activities in violation of copyright.
- The provision by which "*we may create applications that offer functions and services which are similar to the developers' applications or which are in competition with those applications*" should be interpreted with a view to protecting their validity in accordance with the principle of good faith and, therefore, presupposes that programs are developed independently, which did not occur in this case.

14. *Unfair competition pursuant to Article 2598 No. 3 of the Civil Code.*

The Defendants' conduct is also unlawful pursuant to Article 2598 No. 3 of the Civil Code.

By drawing and elaborating upon the Plaintiff's program, the Defendant parasitically appropriated the investments of others in order to create a work of significant economic value.

This likelihood of the works in question being confused with one another is not an issue in this case, as the circumstances of unfair competition here do not involve this constituent element.

The Defendant, without excessive costs, realised the benefits of the developer's investments and the results of its research and development activities, which it had hosted on its platform ("free riding"). And it did this while abusing the relationship of trust and confidence generated by contacts and relations established with the developer. In fact, Facebook invited developers to subscribe to the site and provided them with the tools to develop original applications, which could be used by Facebook users. Following their review, the apps are registered as approved Facebook applications.

Facebook then established a "qualified social contact" with the developers from which obligations of good faith, reliance and fair dealing arose, implying a cast-iron duty to ensure fairness and to protect the interests of persons dealing with Facebook.

The right to conduct analyses, as we have seen, was restricted to the purpose of the mandatory app review and was aimed at the typical intended use of the program by Facebook users, whereas analyses conducted for commercial purposes in order to elaborate, develop and derive from another party's program are illegal and, in this case, also abuse relations established with the developers.

The purpose of the qualified relationship with independent developers could not include allowing the Defendants to abuse the right to analyse applications in order to develop a similar application destined for similar users.

Legislation, moreover, expressly provides that if contractual clauses are agreed in violation of the conditions of lawfulness of analysis activities, they are null and void. And analysis activities are lawful only if their purpose is to understand the operating mechanisms of programs, in accordance with their typical intended use which, in this case, is to assess the app's functionality for purposes of the mandatory review procedure and absolutely not for activities of elaboration/derivation for commercial purposes, which would involve (and which in this case do involve) parasitically exploiting the work and the considerable investments of others. Facebook's entitlement to create applications that offer functions and services similar to or in competition with developers' applications, exists only when the former applications are developed independently, and it should not be construed - if clause 9.19 is to remain valid - as legitimating an activity which in actual fact is unlawful, since competitive activities are lawfully exercised only when they are not unfair.

Therefore, developers' applications may be analysed only for legitimate reasons, but not for purposes of unfair competition, otherwise the good faith clause and the duty to protect persons dealing with Facebook will be violated.

15. *Joint liability of the Defendants.*

The Defendant Facebook Italy has disputed its capacity to be sued on the basis of not being involved in the “management” of the service and this, in its view, is confirmed by the fact that the source code is not to be found at the Italian head office.

However, Facebook Italy must be held to be jointly liable with the other Defendant companies, and it expressly concedes that it contributes to marketing Facebook services in Italy, including geolocation services provided by “Nearby” which are incorporated into the Facebook social networking service, and also that it contributes to promoting those services (see Facebook's Entry of appearance and statement of defence, page 21 and closing application, page 33, where it is stated that: "Facebook Italy's activities include sales support, consultancy, public relations and communications").

16. *Injunctions and corrective measures.*

16.1. Having established that the Defendants are liable for infringement of copyright of the electronic database of the Plaintiff's “Faround” app and for unfair competition pursuant to Article 2598 No. 3 Civil Code to the Plaintiff's detriment, the Defendants should be enjoined from making any further use of the “Nearby” Facebook application: given the nature of the application, this measure assimilates and supersedes the order of withdrawal from the market.

16.2. The injunction against making any further use of the aforementioned application is supported by a monetary fine of Euro 5000 for each day of use of the application that is ascertained after 60 days have elapsed from service of this judgement.

16.3. Having regard to the purposes of the measure - whether injunctive or corrective - the publication of the operative part of the judgement is ordered, twice and in double-sized font in the national newspapers "Il Corriere della Sera" and "Il Sole 24 Ore", and also for at least 15 days on the (Italian version of the) home page of the website www.facebook.com: publications to be implemented within 30 days of service of this judgment. If the Defendant fails to so publish or to do so fully or in good time, the Plaintiff shall be entitled to do so in its stead and to claim back the relevant expenses upon simple submission of the invoice.

17. *General order to compensate damages and to schedule the case for re-listing.*

Having ascertained the unlawfulness of the conduct due to copyright infringement and unfair competition within the meaning of Article 2598 No. 3 Civil Code, the Defendants are ordered jointly to compensate the damages caused. Since a Court Technical Expert Report will be required (as already requested by the Plaintiff in the proceedings) in order to quantify the damages and/or the received profits that are causally linked with the unlawful conduct - the case is to be scheduled for re-listing, in accordance with the separate order (see Supreme Court of Cassation 9404/2011; Supreme Court of Cassation 15686/2005).

18. *The costs in the case.*

Since a non-final ruling is issued, the costs in this case will be liquidated at the end of the trial proceedings (Supreme Court of Cassation 28467/2013; Supreme Court of Cassation in United Chambers 711/1999; Supreme Court of Cassation in United Chambers 9441/2011).

FOR THESE REASONS

The Court of Milan, IP Chamber/Specialised Business Law Division A - withholding a final ruling on **BUSINESS COMPETENCE S.R.L.**'s applications against **FACEBOOK SRL**, **FACEBOOK INC.** and **FACEBOOK IRELAND LTD** - rules as follows:

1) the Defendants **FACEBOOK SRL**, **FACEBOOK INC.** and **FACEBOOK IRELAND LTD** are held liable for infringement of copyright of the electronic database of the Plaintiff's "Faround" app, and for acts of unfair competition pursuant to Article 2598 No. 3 of the Civil Code to the Plaintiff's detriment;

- 2) the Defendants are enjoined from making any further use of the "Nearby" Facebook app/utility;
3. the Defendants are ordered to pay a monetary fine of Euro 5000 for each day of use of the aforementioned application that is ascertained after 60 days have elapsed from service of this judgment;
5. the publication of the operative part of the judgment is ordered, twice and in double-sized font in the national newspapers "Il Corriere della Sera" and "Il Sole 24 Ore", and also for at least 15 days on the (Italian version of the) home page of the website www.facebook.com : publications to be implemented within 30 days of service of this judgment. If the Defendant fails to so publish or to do so fully or in good time, the Plaintiff shall be entitled to do so in its stead and to claim back the relevant expenses upon simple submission of the invoice.
- 6) the Defendants are jointly ordered to compensate the damages to be quantified hereafter in the proceedings, based on a separate order scheduling the case for re-listing.
- 7) Final costs.

Thus decided in Milan, in the Court convened in Chambers on 10 March 2016

Judge Rapporteur - Ms. Silvia Giani

The President - Ms. Marina Anna Tavassi