

TurboHercules

TurboHercules SAS
Tour Ariane, 33ème étage
5, Place de la Pyramide
La Défense 9
92088 PARIS LA DEFENSE
FRANCE
Tél +33 (0)1 55 68 11 40 Fax +33 (0)1 55 68 10 00
www.turbohercules.com info@turbohercules.com

November 18, 2009

Mr Mark Anzani
IBM Corporation
2455 South Road
Poughkeepsie, NY 12601

Dear Mr. Anzani,

We have received your letter dated 4 November 2009, in which you decline TurboHercules' request that IBM license its mainframe operating system for use with Hercules open source software. We regret your decision, and ask that you reconsider.

As described in my previous letter, TurboHercules seeks to introduce a new commercial product to meet customer demand for running IBM-compatible mainframe workloads on Intel-based servers. TurboHercules cannot serve this customer need if customers are unable to obtain licences for IBM's mainframe operating systems and associated software for use with our product. As no other company exists that offers the capability of running IBM-compatible mainframe workloads on Intel-based servers, your decision would effectively force customers that have expressed an interest in TurboHercules' product to forego a new product that they desire. We find this surprising, given IBM's long history of supporting other open source initiatives.¹

We also were surprised at the suggestion that our TurboHercules product — which merely relies on Hercules open source emulation software to run z/OS on Intel-based servers — might infringe certain IBM intellectual property. Hercules has been widely used in the development community, as well as within IBM itself, over the past ten years. Prior to receiving your letter, we were not aware of any claim that Hercules might infringe IBM's intellectual property. If you believe that the Hercules open source project infringes any IBM intellectual property, please identify it so that we can investigate that claim.

In the unlikely event that IBM does believe that the Hercules open source project infringes any IBM intellectual property, we kindly ask you to add any such property to the portfolio of patents that IBM has already pledged for the free use of the open source community. We agree with IBM

¹ For example, see "IBM Statement of Non-Assertion of Named Patents Against OSS", published at <http://www.ibm.com/ibm/licensing/patents/pledgedpatents.pdf>.

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that the “disclosure of software inventions promotes collaboration among developers (such as open source development) and interoperability among software platforms (such as software interoperability standards)”.² Adding any such patents to IBM’s open source pledge would not just benefit the open source community; it also would offer IBM an opportunity to spread usage of your mainframe operating systems onto Intel-based platforms where mainframe workloads do not currently compete. Additionally, it would help both of our companies meet increasing demand for the secondary workloads identified in my original letter.

The concerns implied in your letter related to compatibility, functionality or quality are unfounded. Mainframe customers are sophisticated and have decades of experience working with Plug-Compatible Manufacturers before they exited the market. More importantly, to the extent that using Hercules to run z/OS raises compatibility problems, those could easily be remedied if IBM supplied interface information for the relevant (undocumented) features.

Finally, we cannot agree that the Hercules open source emulation technology, which we believe the phrase “mimicking IBM’s instruction set architectures” refers to, is not “in any way innovative.” The best indicator of Hercules’s innovative nature is its widespread use by developers and others, including many within IBM. The innovative nature of Hercules is further confirmed by IBM’s recent decision to introduce its own emulation product — zPDT — nearly a decade after Hercules was introduced. It is also validated by IBM’s recent decisions to invest in other emulation technologies, such as those offered by Platform Solutions and Transitive.

I hope that IBM will reconsider its decision based on the information provided in this letter. The offer in my original letter, to have our executives meet with IBM to discuss the possibilities for customers of obtaining licenses for IBM’s operating systems to run on TurboHercules, remains open.

Sincerely,



Original signed by R. Bowler

Roger Bowler
President, TurboHercules SAS

² Brief Amicus Curiae Of IBM in Support of Neither Party, *Bilski v. Doll*, at 29 (U.S. 2009).