

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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August Term, 2006

Argued: November 16, 2006

Decided: August 1, 2007)

Docket No. 05-5585-cv

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NEW YORK MERCANTILE EXCHANGE, INC.,

*Plaintiff-Counter-Defendant-Appellant,*

—v.—

INTERCONTINENTAL EXCHANGE, INC.,

*Defendant-Counter-Claimant-Appellee.*

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Before:

KATZMANN, WESLEY, and HALL, *Circuit Judges.*

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Appeal from a judgment of the United States District Court for the Southern District of New York (Koeltl, *J.*) granting defendant's motion for summary judgment, denying plaintiff's cross-motion for partial summary judgment, and declining to exercise supplemental jurisdiction. Affirmed.

Judge Hall, Circuit Judge, filed a separate opinion concurring in part.

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HERBERT C. ROSS, JR., Olshan Grundman Frome  
Rosenzweig & Wolosky LLP, New York, NY; MARTIN I.

KAMINSKY, EDWARD T. McDERMOTT, Pollack & Kaminsky, New York, NY; SHEPARD GOLDFEIN, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, *for Plaintiff-Counter-Defendant-Appellant*

RICHARD H. KLAPPER, BRADLEY P. SMITH, Sullivan & Cromwell LLP, New York, NY; STEPHEN D. SUSMAN, SHAWN L. RAYMOND, Susman Godfrey L.L.P., Houston, TX, *for Defendant-Counter-Claimant-Appellee*

NICOLE GUERON, SUSAN S. NORMAN, Assistant United States Attorneys, *of counsel, for* Michael J. Garcia, United States Attorney for the Southern District of New York, New York, NY, *for Amicus Curiae United States of America in support of Defendant-Appellee IntercontinentalExchange, Inc.*

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KATZMANN, *Circuit Judge:*

This case calls upon us to decide whether the New York Mercantile Exchange, Inc. (“NYMEX”) can enforce a copyright in the settlement prices it produces to value customers’ open positions. We hold that even if these prices are created by NYMEX—a question we do not resolve—there has been no infringement because enforcing the copyright here would effectively accord protection to the idea itself. We also consider the district court’s dismissal of IntercontinentalExchange, Inc.’s (“ICE”) state law claims and conclude that it did not abuse its discretion in declining to exercise supplemental jurisdiction. The judgment of the district court is affirmed.

## I.

The New York Mercantile Exchange, Inc. is an exchange for the trading of futures and options contracts for energy commodities. It operates a physical trading floor in New York City

where brokers and traders transact. Two of its most successful futures contracts are those for Henry Hub natural gas and West Texas Intermediate crude oil. IntercontinentalExchange, Inc. operates an electronic, Internet-based, trading market for trading of physical commodities and over-the-counter derivative contracts.

A futures contract requires the delivery of a commodity at a specified price at a specified future time, though most contracts are liquidated before physical delivery occurs. For each day when the contract remains open (i.e. before delivery or liquidation), NYMEX's Clearing House<sup>1</sup> evaluates the change in value of its customers' open contracts. This process, known as "marking-to-market" the customer's open position, determines whether a customer must post additional margin or, instead, receives payments on margin. The settlement prices are used to value the open positions.

To that end, on a daily basis NYMEX determines the settlement prices for each futures contract. The Commodity Futures Trading Commission ("CFTC"), pursuant to the Commodities Exchange Act ("CEA"), requires NYMEX, as a Designated Contract Market, to record and disseminate these prices. *See* 17 C.F.R. 16.01(b). NYMEX defines a settlement price as "the value, at the end of trading each day, of a particular futures contract for a particular commodity for future delivery at a particular time." For example, today's settlement price for a October 2007 crude oil contract is the fair market value, today, of a contract obliging the purchase or sale of a specified amount of crude oil in October 2007.

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<sup>1</sup>A clearing house "assumes the credit risk of each party to the transaction by effectively guaranteeing each party's performance obligations," and "becomes the buyer to every seller and the seller to every buyer" through a process known as "clearing" the contract. *New York Mercantile Exch., Inc. v. IntercontinentalExchange, Inc.*, 323 F.Supp.2d 559, 562 (S.D.N.Y. 2004).

