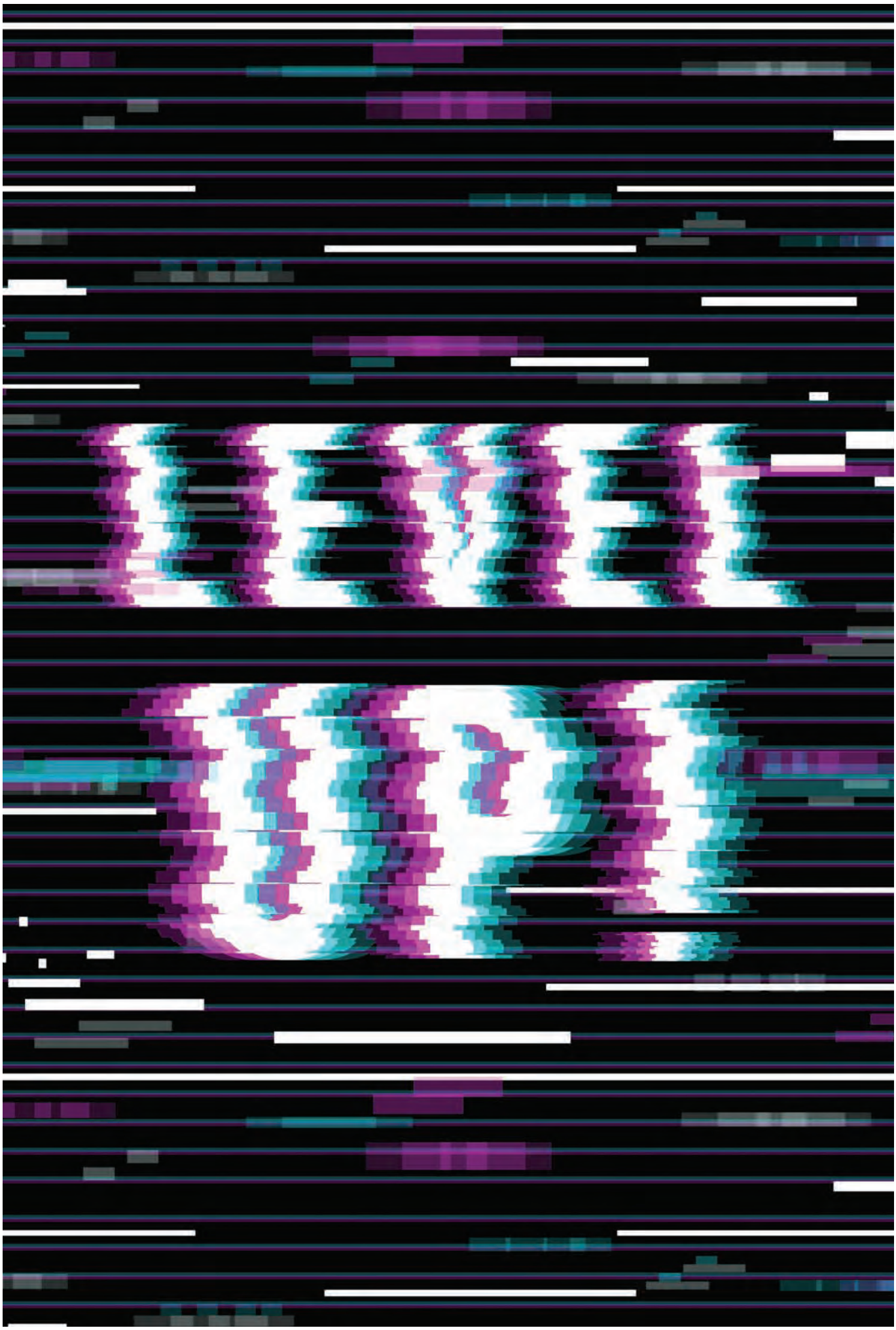

Games - an NFT-powered revolution?

A lot of what the metaverse is likely to look like can already be found in the world of video games. In the future, you may enter games through a headset and feel the game through a haptic suit, but at the core, the experience is likely to bear many resemblances to how players today immerse themselves in a game's universe and environment.

So what will change?

As discussed in this document, NFTs as a concept can be applied to pretty much everything that can be tokenized, including in-game assets. If there is an industry that is ripe for the "endowment effect of NFTs" to take hold, it is undoubtedly the games industry.

Games developers and games publishers have long used their players' desires to unlock special powers, features, and assets as ways of monetizing their games. A powerful technique that can sometimes become frustrating for players is realizing that their "purchases" only last for as long as they play the game the asset has been "bought" in. Open a new game, and all your shiny virtual objects disappear.

In a world where players feel that they "own" their in-game assets, NFTs are seen as a way of "fixing" this problem by making these special games assets sellable to others and portable from one game to another. Both concepts deserve a closer look.

Marketplaces for tokenized games assets. The idea that NFTs can transform a digital asset into something tradable needs to be corrected. In reality, what makes an in-game asset sellable to another player is whether or not the game's publisher agrees with tradability as a concept and has built the necessary in-game infrastructure to do so. A games publisher allowing in-game assets trading arguably would not need to tokenize its assets on the blockchain in order to do so. A far more simple (and less energy-consuming) solution may do the job just as well. What's more, by controlling their in-game marketplaces, games publishers would be able to commission each sale and continue to monetize their assets, albeit from a different angle.

From a legal point of view, this in-game solution would be far more in-line with the nature of the transaction really taking place when players "buy" and "sell" in-game assets, which of course has as little in common with a "sale" as Mario and Lara Croft. As discussed in the NFTs section, in-game assets cannot be sold separately from their intellectual property, and you can rest assured that games publishers are not in the business of selling their intellectual property lightly. Also as mentioned when we discussed art NFTs, in-games assets are licenses – not sales: they give you access to the asset for a limited time and within a particular context as (should be) explained in the game's terms and conditions.

> “It is worth remembering that most gamers couldn’t care less about the legal concepts involved when they spend money, as long as they can enjoy a seamless experience.”

Does it mean that in-game assets will never be traded on NFT marketplaces? Probably not. The hype around NFTs is far too intense for logic and reason to prevail, but we would urge caution as licenses are far less easy to trade than property rights and may well cause more than one game NFT to not be worth the digital ink it has been written with.

Portable game assets. Wouldn’t it be great to be able to use that rare sword you leveled up in one game in your next game, and is this something NFTs could make possible? Here again, there is more to the picture. You cannot just take your sword on a trip in the same way you would in the real world. If the sword is not coded in your host game, good luck beheading monsters with it. And why would a game publisher go through the trouble of coding a “foreign” sword when they have some perfectly sharp swords for you to use in their own game environment? Besides, would the maker of the sword (that is, the owner of the intellectual property in the sword) want you to use it outside its game? Unless the two companies agree on working together to enable portability, nothing is less certain. Of course, if the demand from players becomes loud enough, companies will take notice. But we suspect that for some time, in-game asset portability (which may extend to character portability) will be confined to the titles owned by the same games developer.

It is worth remembering that most gamers couldn’t care less about the legal concepts involved when they spend money, as long as they can enjoy a seamless experience. The endowment effect shows how much divergence is likely to continue to exist between what games are made of and what games are believed to be made of.

The infrastructure prerequisite. For the metaverse to be an alternative to the real world, it’s going to have to resemble it with almost complete verisimilitude. Luckily, there is no need for governments to pour trillions of dollars into this sort of infrastructure. The processor and graphics technologies have been incentivized by a red-hot video games market for years, and today we inch closer and closer to absolute realism. Intellectual property and licensing issues will increasingly dominate the conversation as publishers and console manufacturers design and build with those technologies.

Because one can look at video games as a prototype for the metaverse, one cannot escape the inherent limitations of that model when applied to a vision of interoperability. In some ways, the NFT and related tokenization issues are relatively more solvable than those that relate to the underlying infrastructure of the metaverse. Do we have any more reason to believe that the metaverse will resemble one planet on which all human life can love, hate, fight, reconcile, exploit, and heal than we believe one gamer account can be used across all games and all platforms? The intellectual property and attendant license are far more likely to result in multiple metaverses, divided at least by platform configurations if not also by content, genres, and publishing rights. The profit incentive that has ignited the development of the technology will be the very reason the technology will form walls around competing worlds. In this sense, the video game model for the metaverse foretells of the limits that are baked into the infrastructure that will form the metaverse.

There may be those who envision a metaverse that transcends the boundaries of jurisdiction and platform, but they will run headlong into the reality of intellectual property, antitrust, privacy regulation, and the capitalistic spirit that has powered the video game industry for decades. And, speaking of power, the infrastructure for the metaverse is again going to bring with it questions about the energy usage required to run the processors and graphics chips. Video games and the infrastructure providers who pave the way for the next generation of games and perhaps some version of the metaverse again provide a useful guide. Energy usage and issues surrounding sustainability and conservation will become distinguishing factors for companies competing for adoption in games and platforms. With public opinion on a global basis appearing to bend toward a joint goal of sustaining our planet, those seeking to drive the video game experience toward complete immersion will likely need to consider how to be ecologically responsible (both in terms of energy usage and use of sustainable construction materials) rather than just create larger and more voracious appetites for the earth’s resources.

Human nature and the limits of moderation. Another lesson from the online world of video games and platforms that host and promote them is that unchecked, they can devolve into dangerous places. For example, the amendments to the EU Directive 2010/13/EU seek to align the regulation of nonlinear services with linear TV restrictions with respect to the protection of minors and harmful content and contain specific requirements on video sharing platforms (VSPs) to protect minors from harmful content (plus additional issues, including protecting the public from incitement to violence or hatred or content constituting criminal offenses). Among the measures that must be implemented are the inclusion of requirements in the terms and conditions to protect minors and limit incitement to violence; adoption of age verification mechanisms with regard to content that may impair mental, physical, and moral development of minors; creation of a content-rating system where users can rate harmful content; provision of parental control systems; operation of an accessible, transparent system to deal with complaints about videos; and promotion of media literacy.

In the UK, the ICO Age Appropriate Design Code, which becomes effective in September 2021, focuses on the processing of personal data of children (up to the age of 18) and recommends certain default settings for services that are likely to appeal to children, including taking into account the best interests of children when designing any data processing in services; providing a child-appropriate service to all users by default, with an option of age verification mechanism to enable adults to opt out from these safeguards; identifying the age of the children by using robust age-verification measures; providing all relevant privacy information, clearing terms, and community standards by using age-appropriate design codes and appropriate content presentations that will be easily read and understood by a child; and prohibiting the use of data that is detrimental to children's physical or mental health and well-being, or goes against industry codes and government regulatory provisions.

In Germany, the Federal Protection of Young Persons Act (Jugendschutzgesetz - JuSchG), effective in May 2021, is aimed at the protection of children and young persons against harm resulting from media use and to ensure that media is only distributed or made available in accordance with applicable age rating. This includes media and other publications with, among other things, immoral and violent content; presentation in detail of acts of violence, murder, and massacre for their own purpose; or a recommendation of the "law of the jungle" as the only proven tool by which to obtain supposed justice.

In France, there are several laws that relate to online behavior, and one initiative of particular note is a pending French audiovisual reform draft law that provides for the merger of the Conseil Supérieur de l'Audiovisuel (CSA) and the Haute Autorité pour la Diffusion des Oeuvres et la Protection des Droits sur Internet (HADOPI) into a new entity. This new "super-regulator," which will be called the Audiovisual and Digital Communication Regulatory Authority (ARCOM), would have a wide range of new powers, including the ability to regulate online platforms, combat harmful content on the Internet, and improve the fight against piracy.

In the United States, the Child Protection and Sexual Predator Punishment Act (CPPA) and amendments via the Securing Adolescents From Exploitation-Online Act (SAFE) create several duties for online service providers, including a duty to report evidence of apparent child exploitative activities of which the provider becomes aware. The penalty for knowingly and willfully failing to report can result in an initial fine of $150,000 with subsequent violations carrying a fine of $300,000. The law provides a limitation of both civil and criminal liability for providers performing reporting or preservation responsibilities under the statute. Beyond this specific law that focuses on sexual predators who might be engaged in criminal acts in a context such as a virtual world, the U.S. Congress appears to have an appetite to revisit the

Communications Decency Act, section 230. Possible changes to section 230 could include incentives to online platforms to address illicit content and create exemptions for immunity in the areas of child abuse, terrorism, and cyber stalking.

The world of video games is increasingly being subjected to governmental oversight to address online harms – at least in the context of children and teens. We have also seen signs in some countries that suggest a willingness to push more liability onto platforms if the platform's programmatic moderation mechanisms fail to moderate content that is deemed to be offensive or unlawful. The fact that dangers can present themselves in various interactive media contexts, including interactive video games, and that regulators in many countries have taken affirmative steps to address them suggests that the metaverse would be subject to similar considerations.

Yet, in the metaverse, it is unclear whether governments could reasonably seek to regulate or promote the sort of moderation that they currently do in the context of video games. If the concept of "platform" becomes amorphous, what liability could attach to a developer who does not impose anti-online harm moderation guidelines? Would the regulators need to engage in the virtual world, almost like Agent Smith in The Matrix? The limitations of moderation in a metaverse conception pose interesting questions about the way the metaverse will address the dark sides of human behavior.

Sophie Goossens
Partner
London
sgoossens@reedsmith.com

John Feldman
Partner
Washington, D.C.
jfeldman@reedsmith.com