The Intellectual Property Clause of the U.S. constitution identifies “progress” as the ends served by “exclusive rights to writings and discoveries.” We have tended to conceive of progress in essentially utilitarian terms, seeking more and better inventions and works of authorship. As a result, intellectual property law as the means to achieving progress is always linked to a market. Exclusive rights matter, and “promote the progress of science and the useful arts,” primarily when there is a market in which the rights holders can exploit the rights. But “progress” is a vague term, capable of being measured in a variety of ways. We argue that progress should be defined in part in terms of how well legal rules build the capacities of future generations, and that the inherent short-sightedness of the market necessarily makes IP less future-regarding than it could be. This is particularly disappointing because the subject matter of IP makes it particularly susceptible of leveraging for the benefit of future generations. Unlike tangible assets, works of authorship and inventions can be consumed non-rivalrously and can be used as productive inputs for a wide range of additional works. The subject-matter of IP, then, could be leveraged much more effectively to build capacities of future generations.

In this essay we suggest at a high level of generality a number of ways policymakers could address this short-sightedness and better account for future generations. First, IP law itself could make more space for productive use of intellectual assets, shortening terms of protection, or otherwise limiting the reach of IP. Second, given that IP protection is going to play a role in promoting innovation, the shortsightedness likely embedded within that system suggests that policy makers ought to be more future-regarding in the other policies they adopt in conjunction with IP protection - for example, in funding university and non-profit infrastructure and awarding grants for basic research.