Did TRIPS Spur Innovation?

An Empirical Analysis of Patent Duration and Incentives to Innovate

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How to structure IP laws in order to maximize social welfare by striking the right balance between incentives to innovate and access to innovation is an empirical question. It is a challenging one to answer, both because innovation is difficult to value and changes in IP protection are rare. The 1995 TRIPS agreement provides a unique opportunity to learn about this question for two reasons. First, the adoption of the agreement was uncertain until shortly before adoption, making it a plausibly exogenous change to patent duration. Second, the nature of the law change meant that the patent duration change was heterogeneous across patent classes. Using both patent counts and citation-weighted counts, I am able to take advantage of the TRIPS-induced law change to empirically estimate the impact of patent duration on innovation. I find evidence for an increase in innovation due to patent term extension following TRIPS. Both patent counts and citation-weighted counts increased more following TRIPS in those classes that received greater expected term extensions relative to classes receiving shorter extensions. While the precise calibration of innovation valuation is difficult, this paper provides the first attempt to empirically estimate its response to a major change to patent duration, from the TRIPS agreement.

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**Introduction**

In 1995, as part of the General Agreement on Tariffs and Trade (GATT) agreement that created the World Trade Organization (WTO), the United States made the largest change to patent term in over forty years.\(^1\) In order to conform to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the U.S. changed patent protection from seventeen years from grant date to twenty years from application date.\(^2\) This change affords the opportunity to learn about one of the most basic questions in IP: the relationship between the quantity of innovation and the duration of IP protection.

In this paper, I explore this relationship using U.S. patent application and citation data around the dates of the implementation of the TRIPS agreement. I use a difference-in-difference framework, exploiting the heterogeneous impact of the change across patent classes, based on Patent and Trademark Office (PTO) processing time. I find a statistically significant relationship between the magnitude of the term extension resulting from the TRIPS law change and patent count. Further, I find this relationship persists when using citation-weighted patent counts as the dependent variable, arguably a better proxy for value of innovation. I do not find a significant increase in the average number of citations to patents receiving longer extensions relative to those receiving shorter extensions following the change.

Standard theory argues that an increase in the duration of patent protection has two primary effects: 1) increased incentive to innovate created by monopoly profits, and 2)

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\(^2\) Id. § 154(c)(1), (a)(2).
increased deadweight loss due to exclusive rights. The optimal patent term is that point at which the marginal benefit from increased innovation is exactly offset by the marginal cost of the deadweight loss of the patent right.

Determining the optimal patent term is extremely important from a policy perspective because if patent protection lasts too long the monopoly-like deadweight loss due to the patent’s conferral of exclusive rights outweighs the additional innovation these rights spur. A patent term that is too short will yield underproduction of innovation, leading to a decrease in productivity and growth. In order to find the optimum empirically, it is necessary to estimate the elasticity of production of innovation with respect to the duration of protection. Previously, the ability to empirically estimate the optimal patent length was limited by a lack of data, a lack of computing power, and a change to patent length with which to estimate the elasticity.

Elasticity is a mathematical term often used in economics that is similar to the derivative in calculus. But whereas the derivative measures the absolute change in the dependant variable with respect to the independent variable, the elasticity is defined as the percentage change in the dependant variable with respect to the percentage change in the independent variable. Symbolically, it is:

\[ \epsilon = \frac{\% \Delta y}{\% \Delta x} = \frac{\Delta y}{\Delta x} \frac{y}{x} = \frac{\Delta y}{\Delta x} \frac{y}{x} \]

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In this article, I am interested in the elasticity of production of innovation with respect to patent duration. The elasticity I wish to estimate is % change in innovation divided by % change in patent duration.

This paper works towards estimating the elasticity of production of innovation by examining data from 1990 through 2000 in light of the 1995 change in patent protection. The change in duration provides the denominator for the elasticity calculation (which I calculate separately by patent class). Though the change was not completely unanticipated, it was part of a global trade accord that encompassed a myriad of issues beyond intellectual property. Thus the law change may be viewed as plausibly exogenous (this assumption will be examined more closely later in the paper) and allows the identification of the impact of a modification in patent duration.

The numerator in the elasticity calculation should ideally be the (percentage change in the) total social welfare derived from patented ideas, an exceedingly difficult quantity to measure. In this paper I take two approaches to approximating this quantity.\(^4\) The first approximation makes use of simple patent counts as a proxy for the value of innovation, examining the number of patents obtained prior to and after the 1995 change in the law by patent class. While this method should yield the correct sign for the elasticity, the magnitude could be substantially off unless the value of the marginal patentable innovation is constant, which seems very unlikely. Nevertheless, using patent counts as a measure of

\(^4\) There is also a third approach I make use of in future work, based on patent renewal data that I describe below. The full analysis is beyond the scope of this paper.
innovation has a long history and is informative about the response of innovators to incentives.  

Previous research has shown that patents vary widely in value. A closer approximation to total patent value may be obtained by weighting patents according to how many citations they receive from subsequent patents. This method accounts for some


7 See Bronwyn H. Hall, Adam Jaffe & Manuel Trajtenberg, Market Value and Patent Citations, 36 RAND J. Econ. 16, 19 (2005) (describing the valuable economic and technological information provided by patent citations); Dietmar Harhoff et al, Citation Frequency and the Value of Patented Inventions, 81 Rev. of Econ. and Stat. 511, 515 (1999) (finding that "patents reported to be relatively valuable by the companies holding them are more heavily cited in subsequent patents"); Adam B. Jaffe, Manuel Trajtenberg & Michael S. Fogarty, Knowledge Spillovers and Patent Citations: Evidence from a Survey of Inventors, 90 Am. Econ. Rev. 215, 218 (2000) (reporting that only about half of patents citations correspond to knowledge spillovers); Adam B. Jaffe, Manuel Trajtenberg & Rebecca Henderson, Geographic Localization of Knowledge Spillovers as Evidenced by Patent Citations, 108 Q.J. Econ. 577, 580-81 (1993) (measuring geographic causality among patents through patent citations); Jean O. Lanjouw & Mark Schankerman, Patent Quality and Research
of the heterogeneity in patent values and allows for weaker assumptions about the value of the marginal patentable innovation. I make use of the National Bureau of Economic

Productivity: Measuring Innovation With Multiple Indicators, 114 Econ. J. 441, 446-47 (2004) (developing a composite index of patent quality using multiple factors, including backward and forward citations); Jean O. Lanjouw & Mark Schankerman, The Quality of Ideas: Measuring Innovation with Multiple Indicators 22 (Nat’t Bureau of Econ. Research, Working Paper No. 7345, 1999), available at http://www.nber.org/papers/w7345 (finding that forward citations and claims are the least noisy indicators with claims, with backward citations following); Manuel Trajtenberg, A Penny for Your Quotes: Patent Citations and the Value of Innovations, 21 RAND J. Econ. 172, 173-75 (1990) (suggesting that patent citations should be used as an index of the value of patents).

8 In other work, I also take a third approach to estimating the change in production of innovation in response to the 1995 law change by making use of patent renewal data. This is the same method used by various other scholars on European data. See, e.g., Jean Olson Lanjouw, Patent Protection in the Shadow of Infringement: Simulation Estimations of Patent Value, 65 R. Econ. Stud. 671, 671-72 (1998); Pakes, supra note 6; Pakes et al., supra note 6, at 331; Mark Schankerman, How Valuable is Patent Protection? Estimates by Technology Field, 29 RAND J. Econ. 77, 78 (1998); Mark Schankerman & Ariel Pakes, Estimates of the Value of Patent Rights in European Countries During the Post-1950 Period, 96 Econ. J. 1052, 1052 (1986).

This approach has the advantage of using actual renewal decisions by patent holders to estimate the distribution of the private value of patents. In most countries patent holders must pay a maintenance fee to keep their patents in force. This fee implicitly forces patent holders to make a calculation regarding future expected returns from the patent. Since the value of intellectual property is inherently uncertain, calculating the distribution of patent valuations requires a stochastic framework. By making some structural assumptions, one may use data on the schedule of maintenance fee payments and whether they are paid to estimate a distribution of patent values. This may be done in the aggregate, see Pakes, supra note 6, or by technological field, see Schankerman, supra note 7. This analysis (forthcoming) will be the first application of the Patents as Options approach to U.S. data. It will also allow for the most sophisticated evaluation of the 1995 law change.
Research (NBER) patent database, which contains patent citations, in order to obtain a better estimate of the numerator.⁹

The rest of the paper proceeds as follows: Section I contains a background of the TRIPS agreement and the subsequent law change, related literature, and the theoretical framework. The data are found in Section II and econometric methodology in Section III. Section IV contains the main results from both the patent count and citation approaches. Section V discusses the results and their limitations.

I. Background

A. The TRIPS Agreement

The TRIPS agreement grew out of the Uruguay Round of GATT negotiations, lasting from 1986 through 1994, which led to the creation of the WTO.¹² TRIPS covers many...
aspects of intellectual property and requires harmonization of IP laws among developed, signatory countries. Within the realm of patents, the key requirements of TRIPS were that patents be made available without discrimination to citizens of TRIPS signatory nations on both products and processes and that the protection extend for a minimum of twenty years.

At the time of TRIPS’ passage, U.S. patent law provided for seventeen years of patent protection, as measured from the patent grant date. Thus TRIPS necessitated a modification of U.S. law. The seventeen years of patent protection in the U.S. was not arrived at through an economic calculation, as advocated in this paper. Initially U.S. law was modeled on English law, with an initial 14-year patent term based on the expected training period for two sets of apprentices. Nordhaus points out that

“After some further compromise it was decided for the United States that 2.43 apprentices, or 17 years, would be the proper length.”

For this analysis, there are three dates to consider that could have potentially affected innovative activity (see Figure 1). The first is the date the package negotiated

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13 Id.

14 Id.


16 Id. at 82
through the Uruguay Round was signed, April 15, 1994.\textsuperscript{17} The second is the date the U.S. Congress ratified the package, December 8, 1994.\textsuperscript{18} The third is the date the change became effective in the U.S., June 8, 1995.\textsuperscript{19} Based on news reports at the time, it is clear that while the April 15, 1994 signing of the agreement was symbolically important, it was far from assured that the agreement would come into force.\textsuperscript{20} It was not until the ratification by Congress that it was expected that TRIPS would be implemented.

Difference-in-difference is an economic technique that may be used to isolate the effect of a law change. One major application of the technique is to avoid ascribing a causal effect to a law change that is really due to a contemporaneous change or a time trend. This is a significant problem with the single difference, or before-after analysis. With the


\textsuperscript{19} See id. at 4990 (codified as amended at 35 U.S.C. § 154 (2000)). One may argue for a fourth relevant date, December 15, 1993, the date that negotiations of the Uruguay Round ended. See World Trade Organization, supra note 17.

difference-in-difference approach, one takes the before-after difference for a group that should be affected by the law change and takes a second difference with the before-after difference of a group that should be unaffected (or less affected). This is akin to creating an experimental and a control group.

For example, consider a law that becomes effective in January, 2010, that reduces the cost of bankruptcy, but which is phased out for individuals earning above $100,000. A comparison of bankruptcy rates between 2009 and 2010 show an overall increase of 10%, but the concern is that this may be due to factors other than the law. Now consider the difference-in-difference approach, comparing the before-after change in bankruptcy rates between those making over $100,000 with those making less. One finds that bankruptcy rates increased by 11% for those earning over $100,000 and increased 9% for those earning under $100,000. The difference-in-difference is 9% - 11% = -2%. Thus it seems likely that the law did not increase bankruptcy rates at all, as in fact bankruptcy rates slightly decreased for individuals impacted by the law, relative to those unaffected.

It is important for the difference-in-difference approach used in this paper to understand the exact nature and timing of the changes in expectations of prospective innovators and how one might expect those to be reflected in patenting decisions. Prospective filers of patents could respond to the knowledge of the law change (December 8, 1994), or to the change itself, or both. There are two sections of 35 U.S.C. § 154\(^\text{21}\) that are relevant. The first section specifies patent term in the transition period:

\(^{21}\) (2006).
The term of a patent that is in force on or that results from an application filed before the date that is 6 months after the date of the enactment of the Uruguay Round Agreements Act shall be the greater of the 20-year term as provided in subsection (a), or 17 years from grant, subject to any terminal disclaimers.\textsuperscript{22}

The second section specifies patent term after the change:

TERM.-Subject to the payment of fees under this title, such grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application or applications under section 120, 121, or 365(c) of this title, from the date on which the earliest such application was filed.\textsuperscript{23}

Thus the change to the patent term had two dimensions. The first was a change in length from 17 to 20 years. The second was a change in how the length of protection was measured, from grant date to application date (see Figure 2). This had the important effect that the change in expected patent duration varied depending on the processing time between application and grant date. This is the variation that makes the difference-in-difference approach used in this paper possible. While on average, patent protection increased, it only did so for those patent applications that required less than three years processing time. Patent applications that took longer than three years between application

\textsuperscript{22} Id. § 154(c)(1).

\textsuperscript{23} Id § 154(a)(2).
and grant date ended up with a shorter time of protection under the new law than previously.

The Uruguay Round Agreements Act was enacted on December 8, 1994, making June 8, 1995 the date the patent term changed. Note that the wording of the law implicitly grants an option to those who filed their application before June 8, 1995, to receive the longer of seventeen years from grant date and twenty years from application date. Thus individuals who expected to have a decrease in patent duration should have applied ahead of the June 8, 1995, change. Those who expected to have an increase in duration did not need to wait until after the change, since they could opt into the new rule even before June 8, 1995. This should lead to a spike in applications prior to the rule change that is most pronounced among patent classes that will receive the lowest expected extension. This prediction is borne out by the data, as can be seen in Figure 3.

B. Related Literature

The framework for much economic analysis of patents is laid out by William Nordhaus in his 1969 work, *Innovation, Growth, and Welfare*.\(^{24}\) In this framework (described further in Section II), policy makers set patent terms to equalize the welfare gains from innovation due to longer patents with the welfare losses due to the grant of exclusivity. The estimation performed in this paper may be used to inform the policy makers from Nordhaus’s setup. Half of the calculation is provided here; the deadweight loss calculation is left for future research.

\(^{24}\) Nordhaus, *supra* note 3.
While the Nordhaus framework is the dominant approach, there are a number of papers that suggest alternative perspectives on the function of patents. In Nordhaus’s model, time of patent expiration is a monotonically increasing function of patent duration. This is a consequence of the fact that in the model, innovation cannot be sped up in response to changes to patent duration. John Duffy proposes a model which allows for varying innovation times that can be impacted by patent duration. He shows that the relationship between time of patent expiration and patent duration will then have a U-shape, and thus that the monopoly-innovation tradeoff need not exist if the patent duration is chosen optimally. This paper will not be able to distinguish between Duffy’s approach and that of Nordhaus, but Duffy’s perspective leads to a different interpretation of the estimates found in this paper.

In Rewards Versus Intellectual Property Rights, Steven Shavell and Tanguy Van Ypersele argue that an ideal rewards system would be superior to any kind of patent system since it would not suffer from deadweight loss of monopoly. They acknowledge that the practical difficulty with such a system is the determination by the government of correct award sizes. Instead, they propose that an optional rewards system layered onto a patent system would be superior to a simple patent system in encouraging innovation. The


26 Steven Shavell & Tanguy Van Ypersele, Rewards Versus Intellectual Property Rights, 44 J.L. & Econ. 525, 530 (2001) (“Reward, however, could be superior to patent, both because of a better average incentive to innovate . . . and because of avoidance of the deadweight loss from monopoly pricing.”).
difficulty of setting proper incentives for innovation either through rewards or subsidies to researchers is discussed by John Duffy and Louis Kaplow in separate papers. Kaplow states as the main argument for the patent system over a rewards system that it is thought to be too difficult to determine the appropriate level of reward fairly and accurately on a case-by-case basis.” Michael Abramowicz suggests a way to make a system of prizes more practical by obfuscating the determination of reward and thereby reducing inefficient rent-seeking behavior that prizes can cause.

Several recent papers suggest possible shortcomings of the basic economic model of patents. Alexander Tabarrok points out that although modern patent systems are premised on the notion of paying back innovators’ high fixed costs though grants of monopoly, in reality the law ignores fixed costs. He proposes modifications to patent law to address this disconnect. Nancy Gallini reviews the literature on the question of the relationship between strength of patents and quantity of innovation. She discusses


28 Kaplow, supra note 27, at 1844.


31 Id. at 10-11 (proposing that the patent system allow for multiple patent durations).

recent theories that differ from the Nordhaus model by accounting for follow-on inventions and does not predict an unambiguously positive relationship between patent duration and innovation. She notes that “[e]xtending patent life may increase an entrant’s incentives to introduce an imitation during the patent period . . . incentives to innovate may decline with increases in patent life.”

Gideon Parchomovsky and Polk Wagner suggest another shortcoming of the standard model in the modern environment: its failure to account for portfolios of patents. They argue that the relationship between value and number of patents is nonlinear among holders of patent portfolios, and thus even negative expected value patents could be pursued by such entities. In this environment, it is unclear what impact increased duration of protection would have.

Empirical research on the incentive effects of patent duration is quite difficult due to the scarcity of policy variation. Josh Lerner has assembled a large cross-country data set covering 150 years of IP changes. Although he finds little impact of strength of patent protection, the study suffers from the standard difficulties of cross-country comparisons and endogeneity. He attempts to confront the endogeneity concern by instrumenting for patent law changes with international agreements (including TRIPS) and still finds no significant impact on the number of patents filed.

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33 Id. at 136.


35 Id. at 28-29.


37 Id. at 27.
Petra Moser also uses historical data in one of the most creative recent papers on innovation, studying 19th Century World’s Fairs. By collecting data on the exhibits at the World’s Fairs and 19th Century IP laws, she attempts to determine the impact the laws have on field and magnitude of innovation. She finds significant cross-country differences in the distribution of innovation by technological field that grows stronger with increased patent duration. She also finds some evidence that there is a diminishing marginal incentive effect of patent duration.

Empirical work on patent duration is relatively scant, and work focusing on the impact of TRIPS in the U.S. is almost nonexistent save for an early piece by Mark Lemley. He collects data from a single issue of the PTO’s Official Gazette shortly after passage of the TRIPS legislation (but before its implementation) in order to estimate the likely impact of the law change on patent duration. He finds that the mean patent duration should increase, although not uniformly across classes (a finding which is subsequently borne out in the

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39 Id. at 1216.

40 Id. at 1224.

41 Adam Jaffe also examines recent developments in the U.S. patent system and surveys both the theoretical and empirical literature. While he touches on patent scope, he does not discuss any recent work on patent duration or the impact of the TRIPS agreement, perhaps because there has been relatively little. Adam B. Jaffe, The U.S. Patent System in Transition: Policy, Innovation, and the Innovation Process, 29 Res. Pol’y 531 (2000).

He further predicts that processing time should decrease due to increased incentives for patent attorneys to respond to office actions more quickly. This prediction does not appear to be borne out by the data, perhaps due to an offsetting increase in PTO processing times. Nevertheless, the paper is an important early contribution to the understanding of the impact of TRIPS in the United States.

C. Theoretical Background

So far the discussion has focused on the number of innovations, and we now turn to the magnitude. Following Nordhaus, one may write down a simple model of the profit-maximizing inventor. Under some rough assumptions, we find that magnitude of innovation should increase with increasing duration of patent protection. The exact timing of the response depends on the lag in time between research inputs and patentable outputs. If the lag is less than six months, then we should expect to see an increase in value of patent applications beginning June 8, 1995. If the lag is longer, we should expect to see the increased value of patents occurring later. This leads to a testable prediction (although one not examined in this paper): those industries with longer lags should see an increase in citation-weighted patents later than those in industries with shorter lags. But the key testable implication is straightforward: there should be an increase in the level of innovation--by whatever measure--following the implementation of the TRIPS agreement due to the overall term extension.

43 See id. at 392-93.

44 See id. at 415-16.

45 See Nordhaus, supra note, at 70-75 (establishing a framework for the economics of patents).
Another important approach to evaluating the shift in innovation around the TRIPS law change is by making use of citation data. Previously, the analysis has made use of patent counts alone, which may be a good proxy for aggregate innovation under certain assumptions. For example, if we assume that there is no correlation between innovation quantity and marginal patent value, then patent counts are an adequate proxy for aggregate value. However, it is easy to imagine instances where this would not be the case, such as a firm that can either produce two patentable goods worth one util each or one patentable good worth two utils. In this case, marginal patent value is inversely correlated to quantity of innovation, and aggregate value is uncorrelated to patent count.

One indicator that should correlate with a patent’s value is how frequently it is cited by subsequent patents. Presumably, patents with greater value, whether private or social, will have a greater impact on future inventors, and this should be reflected in their citations. There is literature on the relationship between patent citations and value that goes back at least to Manuel Trajtenberg’s 1990 RAND paper. In the paper, he relies on previous research of his in which he uses a structural approach to estimate the demand system for attributes of Computed Tomography (CT) scanners. The estimated parameters of the demand system are used to calculate a social value for innovation in CT scanner technology. He tests the correlation between these values and simple patent counts and citation-weighted patent counts, and he finds a substantially stronger correlation.

46 Trajtenberg, supra note 7. For further literature, see other sources cited supra note 7.

47 See id., at 177-78 (discussing demand for CT scanners as analyzed in Manuel Trajtenberg, The Welfare Analysis of Product Innovations, with an Application to Computed Tomography Scanners, 97 J. Pol. Econ. 444 (1989)).
correlation with the latter.\textsuperscript{48} He further finds that the correlation increases when the citation index used is slightly convex, indicating an increasing return to citations.\textsuperscript{49} The empirical analysis in this paper focuses on both patent counts and citation-weighted counts.

**II. Data**

All data originally comes from the U.S. Patent and Trademark Office, but was obtained for this research from two sources. Polk Wagner kindly made available data on all U.S. patents granted between 1976 and fall 2008, with information including patent class, processing time, and application date. Through the NBER patent citation program, I obtained data on all U.S. patents granted between 1963 and 2002, along with citations made to those patents between 1975 and 2002.\textsuperscript{50} This data includes such fields as patent category, number of claims, number of citations, information on the assignee, inventor, and year (but not date) of application.\textsuperscript{51} Since I am interested in a change occurring in 1995, I

\textsuperscript{48} See id. at 180-81 (finding that weighted patent counts are correlated with value measures of innovation and simple patent counts are not).

\textsuperscript{49} That is, when using a weighting factor of the form $c^\alpha$, Trajtenberg finds a higher correlation between the citation index and the measure of patent value when $\alpha>1$. See id. at 182 (“[T]he marginal informational content of [weighted patent counts] increases with the number of citations, strengthening the potential role for [weighted patent counts] as an indicator of the value of innovations.”).


\textsuperscript{51} See id.
chose various windows around that year for the analysis, the largest of which ranges ten years around June 8, 1995 (see Figure 4).\textsuperscript{52} Summary statistics of the data can be found in Tables 1 and 2.

The data summarized and used in the regressions include over one million patent applications submitted between 1990 and 2000 that were subsequently granted. I excluded patent classes that did not receive at least thirty subsequently granted applications in each year between 1990 and 2000 to ensure that the calculations are not overly influenced by outliers. Imposing this restriction excludes approximately 200,000 observations. The vast majority of these observations are actually in patent classes that are either established or abolished in the decade of interest, which causes zero observations for some years. These naturally tend to be classes relating to new or obsolete technology,\textsuperscript{53} and patenting behavior in these classes may be very different from established technology. In particular, it is likely that much else beyond duration of patent protection has substantial influence in these fields, and thus excluding them allows for a more focused examination of the phenomenon in question. There may also be a concern of truncation bias, namely, that patents with long processing times would be represented at a lower rate since the data was obtained in fall 2008. However, as Figure 5 indicates, a very small fraction of patents have processing times as long as eight years, so this should not have a significant impact on the results.

\textsuperscript{52} This paper only reports data for outer windows up to two years, but the results from larger windows are available from the author.

\textsuperscript{53} See infra Table 3.
One can see in Table 1 that the number of claims per patent application increases over the 1990s, with the median patent application having one extra claim in the latter half of the decade.\textsuperscript{54} “Forward citations” refers to the number of times a patent was cited by subsequent applications. I have data on citations contained in applications submitted through December 31, 2002. This measure will monotonically increase with time; thus it is not surprising to note that the mean number of forward cites decreases from 6.4 to 1.8 from the period before the law change to the period afterwards. The earlier group had an average of ten years to collect citations, versus five years for the later group.\textsuperscript{55}

In order to make comparisons of the value of patents, something must be done to normalize the citations data. The approach I take in this Article is a fixed-effects approach, predicated on the assumption that the expected present value of all patents in a month is time-invariant. Thus, the mean patent issued in July 1999 should have the same value as that in February 1991. This should be reflected by their having the same number of citations, if the number of citations were computed \(n\) years after the respective grant date for each mean patent. Of course, at any point in time, the mean 1991 patent will have more citations to it than the mean 1999 patent, simply because it has had more time to accumulate them. In the data, the citations are based on the total number each patent had received as of December 31, 2002. Using the fixed-effects approach, I normalize the citation counts by dividing the actual number of patents by the mean number of citations.

\textsuperscript{54} Note that there are approximately one-third the number of observations for claims for the five years following the law change as before. This is an artifact of the NBER data set, which is missing claims data for most of the later observations.

\textsuperscript{55} See infra Table 1.
received by all patents in that month. The advantage of this approach is that it allows for a non-parametric functional form for the citation-generating process. One disadvantage is that the renormalized distribution of patents will not necessarily have the same shape for all subsets, largely due to the fact that patents with zero citations will still have zero after renormalization.

A comparison of the summary statistics for the new measure of forward citations (FE adjustment) in panels A and B of Table 1 bears this out. The mean number of normalized forward citations is the same for both periods by construction, but the median is substantially lower after the law change. This is a direct consequence of the aforementioned problem with zeroes.

The key independent variable in this analysis is the expected length of term extension for a prospective innovator.\textsuperscript{56} It is important that there is enough dispersion in this variable that there is meaningful variation with which one may hope to identify an impact. Panel A of Table 1 indicates that the standard deviation of the term extension is approximately one year, so this study will mostly be limited to identifying the impact of relatively small percentage changes in patent duration (around five to ten percent). This is a potential concern of the study design and is discussed further in Part V. Figure 6 shows the full left-skewed distribution of the term extension by patent class. Almost all patent classes receive an increase in expected duration due to TRIPS. Even though there are few classes that receive actual reductions in expected duration, the variation in the regression

\textsuperscript{56} Its construction is described in detail infra Part III.
analysis comes from differences across classes in patent extension, so the actual magnitude of the extension is unimportant.

A comparison of the processing time for the full data set with the subset from after the law change indicates that PTO processing time is increasing. This should not present a major problem for this analysis unless the increase in processing time is anticipated and correlated with expected extension. That is a real possibility, however, and the impact on the analysis is discussed in Part V.

The researchers who assembled the NBER dataset have created a cruder categorization of patents than classes, which are determined by the PTO and number close to one thousand. These categories are used as controls for some of the analyses, as well as to look at broad subsets of the data. In Table 2, summary statistics are presented by category on term extension, citations, and simple counts. One point that is apparent from the table is that even across very broad technological categories, there is substantial variation of the impact of TRIPS, as measured by term extension. There is also substantial heterogeneity in citations by category, with computers and communication patents receiving the most on average. Finally, the categories--and the patent classes--differ in the total number of patents and their growth rate over the period examined. To account for this, some of the specifications described in the next section include class-specific time trends. This should isolate the changes in innovation that are due to the heterogeneous influence of TRIPS on patent term extensions.

57 See Hall, Jaffe, and Trajenberg, supra note 50, at 41-42, Appendix 1.
III. Econometric Methodology

The specifications used to empirically estimate the impact of the TRIPS law change follow from the theoretical framework discussed supra Part I.C. The first approach uses patent count as a proxy for innovation. An increase in duration of patent protection should lead to an increase in the number of patents following implementation of the TRIPS agreement. Further, the increase in patents should be greatest in those classes that receive the longest extensions. To test this, I make use of a difference-in-difference framework. The first difference is time: before/after the June 8, 1995, change of patent term (as indicated below by the $After_m$ dummy variable). The second difference is cross-sectional, and makes use of the variation across patent classes with regards to the expected effect of the law change on patent duration. Innovators with patents in classes with long processing times can expect a short extension or even a decreased length of protection in extreme cases. Those with patents in classes with rapid PTO processing times should expect a substantial extension due to the law change.

A question then arises: how do innovators form expectations about patent duration after the law change? The answer must be a function of PTO processing time, patent class, and perhaps other idiosyncratic effects. In this Article, I make the simplifying assumption that the expected patent duration is a function solely of recent PTO processing times within a given patent class. Thus I am able to calculate the expected patent extension (or reduction) due to the law change.

Even making this assumption, there are numerous ways to calculate the expected extension. To gain some insight into the problem, it is instructive to understand the stability of PTO processing times. Figure 7 presents processing time by technological
category averaged over the previous two years.\textsuperscript{58} The figure indicates that for most categories there is little change in the mean PTO processing time, with the possible exception of the Drugs and Medical category. This category experienced the most rapid increase in processing time of any category over the full period examined, and it occurred in the two years prior to the implementation of TRIPS. Even this rapid increase amounted to about one hundred days over two years. Even so, the categories keep their relative ordering over this period. To calculate the expected extension, I first calculate the mean processing time (averaged over a lagged two-year period) for each patent class. The value of this variable on December 8, 1994, is used for all classes.\textsuperscript{59} This is then subtracted from the three-year change in patent protection to obtain the variable $Extension_c$. The distribution of this variable can be found in Figure 6.

For the count regressions, I estimate the following base specification on monthly patent counts by patent class:

\begin{equation}
P_{mc} = \alpha + \beta_1 After_m + \beta_2 Extension_c + \beta_3 After_m * Extension_c + \beta_4 t + X_{mc} + \epsilon_{mc}
\end{equation}

where $m$ denotes month and $c$ denotes patent class. $P_{mc}$ is the patent count and $After_m$ is a dummy variable that is 0 before June 8, 1995, and 1 otherwise. $Extension_c$ is the expected extension by class, $t$ controls for a linear time trend, and $X_{mc}$ is a set of time-varying controls (not included in the base specification). These controls include type of entity to

\textsuperscript{58} That is, each point is the average of the PTO processing time for all subsequently granted patents applied for within the previous two years.

\textsuperscript{59} This date is used because it is the earliest inventors could have reasonably responded to the forthcoming change in the law, and thus the earliest they could have formed their expectations.
whom the patent was assigned, generality of patent,\textsuperscript{60} number of claims made, patent subcategory, and a quadratic function of time that can vary by pre-post period.

There may be a concern that there are differences across patent classes in their rates of growth of patenting. To address this concern, I run a specification of the following form, which allows for class-specific time trends:

\begin{equation}
(2) \quad P_{mc} = \alpha + \beta_1 After_m + \beta_2 Extension_c + \beta_3 After_m \times Extension_c + Class_c + \beta_c Class_c t + X_{mc} + \epsilon_{mc}
\end{equation}

The regressions are run on variable windows of data, with both an inner and outer window. The inner window is used to exclude data right around the change, which is likely to be impacted by the short-term effects discussed above. The outer window is varied in order to allow for tradeoffs between greater data and greater potential contamination from long-run secular trends (which may vary by patent class).

The second major approach to analyzing the impact of TRIPS on innovation uses patent citations, rather than simple counts, as an indicator of value. Citations data poses a challenge not present with simple count data, because while each granted patent has a weight of one at any time, citations are monotonically increasing over time. In Section II, I discussed the approach I have taken to computing a normalized citation count.

Once the renormalized citations are computed, I take two different approaches to analyzing the impact of TRIPS using citations as an indicator of patent value. The first approach is analogous to specifications 1 and 2, run at the month-class level, where citations replace patent count as the dependant variable. These specifications lose the

\textsuperscript{60} See Hall, Jaffe & Trajtenberg, supra note 50, at 21-23 (suggesting generality of a patent as an indicator of its widespread impact in the field).
patent-level variation, so I also analyze the impact of the law change on citations using patent-level data using the specification below.

\[
C_{itc} = \alpha + \beta_1 After_i + \beta_2 Extension_c + \beta_3 After_i * Extension_c + \beta_4 t + X_{itc} + \epsilon_{mc}
\]

Although the relationship between citations and extension is likely to be somewhat nonlinear, I use a linear model here since it is likely be a good approximation over the time period examined. The final specification combines information from citations with the count data. I run regressions using counts as the dependant variable (as in (1) and (2)) but weighted by citations. I discuss the results of the estimations of these regressions below.

IV. Results

The main findings from the regression analysis show that there was a statistically significant change in the number of patents applied for following the TRIPS agreement, but no significant difference in mean citations per patent. Additionally, when examining citation-weighted patent counts, the impact of TRIPS is found to be significant. These results are reported in Table 4 and Figures 8 through 10.

Table 4 contains results from three types of regressions: those with patent counts as the dependant variable, patent counts weighted by citations, and citations. The first two columns in Table 4 present results from the most basic specifications, leaving out almost all controls. In the first column (as with the next five), the dependant variable is monthly patent counts, by patent class. This regression is run on a data set with a six-month outer

\[\text{\footnotesize 61} \text{ Here and elsewhere I may use causal language about “the impact of the TRIPS agreement.” This language is used for simplicity, since the changes are not necessarily due to TRIPS. This is discussed in further detail in Section V.}\]
window and two-month inner window. The coefficient of interest (on the After*Extension interaction term) is significantly different from zero (p < 0.01). This indicates that patent classes with longer extensions due to TRIPS tended to have a greater increase in patents following TRIPS than those classes with shorter extensions. The second column reports results from the same regression run with a twelve-month outer window and two-month inner window. The findings are substantially the same, although the coefficient of interest is somewhat smaller in this specification (but still significantly different from zero).

The coefficient on After in all of the regressions with patent count as the dependant variable is negative, and significantly different from zero at p < 0.01. At first blush, this negative coefficient may be counterintuitive. But as might be expected from the option-like nature of the law change, there was a spike in applications just prior to the implementation of the law, followed by a subsequent dip (Figure 3). This is what leads to the negative coefficient on After, since it is precisely this window upon which the analysis focuses. The magnitude of the extension also has a negative relationship with patent counts. In some specifications it is statistically significant, and in others, it is not. The interpretation here must be that patent classes that receive longer extensions tend to have lower patent counts.

Columns 3 of Table 4 adds a larger set of controls, as compared to columns 1 and 2. The controls include measures of the citing patents, including the mean year of the citing patents, and the mean number of cites to the citing patents (a measure of their importance). There are two controls that make use of a measure of patent generality: one
of the citing patents and one of the patent in question.\textsuperscript{62} Two additional controls are included, the number of claims made on the patent and the number of “parents.” The control variables increase the $R^2$ of the regression from 0.16 to 0.46 for the 12-month outer window. The finding from this specification is the same as the first two: there is a statistically significant coefficient on the difference-in-difference interaction term.

Columns 4 and 5 present regressions of the form described above by Equation 2. The main difference with the previously described regressions is the addition of class-specific time trends. These trends account for the possibility that classes have varying trends in patenting that are unconnected with the TRIPS agreement. The difference-in-difference coefficients estimated in these specifications are somewhat larger than those estimated in the base specification. These coefficient estimates (along with one for a twenty-four-month outer window) are presented visually in Figure 8. The point estimates and standard errors are plotted and are relatively consistent.

Equation 3 above describes the regressions examining the impact of the TRIPS agreement not on patent counts, but on citations per patent. As discussed above, this is likely a better measure of the main quantity of interest--innovative output. Columns 7 and 8 in Table 4 and Figure 9 present results from the estimation of Equation 3. Unlike the previous regressions discussed, column 7 presents results from analysis of patent-level data. For the six-month outer window (and all other windows not reported) the coefficient on the After*Extension interaction term is statistically indistinguishable from zero. This is also the case when the data are analyzed at the class-month level, as in column 8. Figure 6

\textsuperscript{62} See Hall, Jaffe & Trajtenberg, supra note 50, at 21 (suggesting that a high generality score indicates widespread impact of the patent).
displays the coefficient and the standard error from this regression, along with three others with varying outer windows. All point estimates are insignificantly different from zero, with standard errors for most around 0.0001. In Section V, I return to these findings and discuss the implication of the zero coefficients.

The final approach I take to valuing innovation using patents employs citation-weighted patent counts. This approach is similar to those described in columns 1 through 5 of Table 4. The dependant variable is still patent count, but now each patent is weighted by the numbers of citations it had received as of December 31, 2002 (normalized according to the procedure described in Section III). This is the preferred specification, since it should get closest to the object of interest here, a measure of the value of innovation.

The results from the citation-weighted regressions are presented in column 6 of Table 4 and in Figure 10. When we examine relatively smaller windows, as in the Table or the first two observations in the figures, we find a statistically significant coefficient on the interaction term of around 0.06. The figure indicates that the size of the window is important, as the coefficient loses statistical significance as the outer window increases beyond half a year. This mixed finding is discussed further in Section V below.

V. Discussion

In order to gain a better understanding of the regression results, it is useful to perform some back-of-the-envelope calculations to understand the magnitude of the impact of the law change. The preferred specification is the citation-weighted regression, shown in column 6 of Table 4. The coefficient on the interaction term is 0.063, meaning a one-day greater extension for a patent category is associated with a 0.063 more patents
(citation weighted) after the implementation of TRIPS. Although Trajtenberg found somewhat increasing returns to citations, to be conservative, I will assume a linear relationship between value of innovation and citation weighted counts.

Let us consider the increase in value of innovation due to a one standard deviation increase in patent term extension. The standard deviation of the term extension (by class) is 114 days (see Figure 6 for the full distribution). Multiplying this by the coefficient above, we find that a standard deviation increase in patent term extension is associated with an increase of about seven monthly patents. From a mean of approximately thirty-four, in percentage terms this comes to a twenty-one percent increase in value of innovation, a very substantial value. It seems unlikely that the deadweight loss due to exclusive rights would be enough to offset this considerable gain, suggesting that an increase in patent terms could lead to greater welfare.

There are several impediments to drawing clear policy implications from this exercise. These include concerns about outliers, unobserved variation, misspecification, and external validity. The magnitude of the estimated effect seems inordinately high, given that the extensions are relative to base protections of seventeen years, and thus, the total extension is only on the order of seven percent, which would imply an elasticity of around three.

One potential explanation for the large point estimates is that the results are driven by a few very affected classes. Preliminary analysis indicates that it is likely that biological patents are responsible for the bulk of the observed impact of TRIPS. This finding is strengthened by the fact that the pharmaceutical industry was one of the most ardently opposed to TRIPS due to concern of shortened patent duration. A more detailed analysis of
the impact of TRIPS on pharmaceutical patents is beyond the scope of this paper, but is the subject of future research.

Unobserved variables are another potential confound to drawing a causal inference of the impact of patent term extension. I attempt to control for as many patent characteristics as possible, but there is still a relatively large amount of unexplained variation. Of particular concern is if there is a variable that is correlated with both term extension and patent counts. This is of particular concern since the law change came with six-month advanced notice. One mechanism by which this might occur is if innovators in patent classes with short expected extensions rushed to patent under the old law, and thus there was a spike in those applications prior to the change. Then those classes would show an artificially low number of applications immediately after the law change, as many that would have been filed then had been shifted earlier. This is exactly the pattern we see in Figure 3. Of course, this is the rationale behind excluding an inner window around the law change. But if the inner window is not long enough, the estimate will be biased upward.

Another potential problem with the interpretation of the findings is if innovators form expectations about the patent term extension differently from that assumed. In order to test the explanatory power of the lagged processing time variable, I regressed actual term extension on the computed extension. I found that the computed extension increases the explanatory power by eight percent relative to a regression on the other control variables ($R^2$ increased from 0.114 to 0.195). If the deviations between innovator’s beliefs about the extensions and the calculated extensions used in the analysis are correlated, then the estimates provided will overstate the magnitude of the impact, in equilibrium, where we assume people have rational expectations. Alternatively, people may have rational
expectations even in the transition, and PTO processing times may be changing in a way that is correlated with prior processing times (i.e., classes with longer initial processing times also have a greater increase in processing time than those with shorter initial processing times).

There are two final concerns about how well this exercise meets the aim of shedding light on the relationship between patent duration and the value of innovation. The first concern is whether the data used are on granted patent applications. Ideally, one would prefer data on all applications. If the grant rate changed differentially by magnitude of extension around the time of the TRIPS agreement, this could lead to a spurious result. A second concern is how well patent counts—or even citation-weighted counts—actually correspond to value of innovation. Much of the literature making use of citation-weighted counts is based on a small number of studies that try to obtain external measures of patent value, generally on a small set of data. To the extent that this relationship is not general, one cannot draw any strong conclusions about value of innovation here.

**Conclusion**

Understanding the incentive effects of patent protection is a core question in intellectual property scholarship about which almost nothing is currently known. This paper seeks both to advance our knowledge of the relationship between value of innovation and duration of patent protection and to point the way towards further research.
The TRIPS agreement was the biggest change in U.S. patent protection in over forty years.\textsuperscript{63} It altered not only the mean expected length of patent protection, but also the method by which it is calculated--from grant date to application date.\textsuperscript{64} This aspect of the law had a heterogeneous impact across patent classes, depending on the expected PTO processing time. I use this heterogeneity and compare patent counts, citations, and citation-weighted counts before and after the implementation of TRIPS.

My findings indicate that patent classes with longer extensions are associated with a statistically significant increase, relative to patent classes with shorter extensions, in patent counts and citation-weighted counts after the law change. There does not, however, appear to be any statistically significant association with mean citations per patent. Although this finding is striking, it must be understood in light of several potential confounds that may otherwise cause it to be overstated. While this study cannot determine conclusively the relationship between the duration of patent protection and the value of innovation, the insights gained here point toward even more powerful analyses for future research.

\textsuperscript{63} The prior change was Congress's enactment of 35 U.S.C. § 154 in 1952.

\textsuperscript{64} See supra text accompanying notes 21 through 23 (presenting relevant portions of 35 U.S.C. § 154).
**Figure 1**

Key Dates for the Uruguay Round of GATT

1/1/94  4/15/94  12/8/94  6/8/95  12/31/95

- Negotiations concluded
- Accord ratified by U.S. Congress
- TRIPS patent term changes become effective

**Figure 2**

Impact of TRIPS on Patent Duration

- Pre-1995 Rule: 17 Years
- Post-1995 Rule: 20 Years

Expiration

Processing Time

Application Date  Grant Date  Time
Figure 3

Bottom and Top 25% by Extension Time

Count

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<thead>
<tr>
<th>Months after January, 1982</th>
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<tbody>
<tr>
<td>140</td>
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<tr>
<td>2000</td>
</tr>
</tbody>
</table>

- Shortest Patent Extension
- Longest Patent Extension
Figure 4

Windows for Patent Count/Citation Analysis

June 8, 1995

Inner Window

Outer Window
Figure 5

PDF of Processing Time, Two Years Prior to Law Change
Figure 6

PDF of Patent Extension

Mean Extension for Patent Class (days)
Figure 7

Trailing 2 Yr PTO Processing Time by Patent Category

- Processing Time (days)
- Months since June, 1995

Legend:
- Chemical
- Computers & Communication
- Drugs & Medical
- Electrical & Electronic
- Mechanical
- Others
Figure 8

D in D Coefficient vs Outer Window
2 Month Inner Window  Class-Varying Trends
Figure 9

D in D Coefficient vs Outer Window
2 Month Inner Window  Citation Data - OLS, Full Data Set
Figure 10

D in D Coefficient vs Outer Window
2 Month Inner Window  Counts weighted by Citations
### Table 1

Summary Statistics

<table>
<thead>
<tr>
<th>Panel A: Before Law Change</th>
<th>Variable</th>
<th>Mean</th>
<th>Median</th>
<th>Std. Dev.</th>
<th>Observations</th>
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<tr>
<td>Forward Cites (through 2002)</td>
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<table>
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Summary statistics for all patents granted from 1990 through 2000 in classes that received at least thirty applications per year that were eventually granted. Some claims data are missing in original NBER patent files, with no claims data reported after 1998. See text for details.
### Table 2

Summary Statistics by Technological Category

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<th>Term Extension (years)</th>
<th>Forward Citations</th>
<th>Observations Before</th>
<th>Observations After</th>
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<tr>
<td>Drugs &amp; Medical</td>
<td>0.65</td>
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<td>Electrical and Electronic</td>
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</table>

Summary statistics by broad technological category (using NBER patents classification system) for all patents granted from 1990 through 2000 in classes that received at least thirty applications per year that were eventually granted. Term extension is calculated based on mean PTO processing time in that category prior to the law change. Before and After are relative to date of patent term change, June 8, 1995.
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<td>1977</td>
<td>1999</td>
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<td>347</td>
<td>8236</td>
<td>Incremental printing of symbolic information</td>
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<td>Data transferring</td>
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<td>1987</td>
<td>1997</td>
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<td>707</td>
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<td>Data processing: database and file management or data structures</td>
<td>1997</td>
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<td>701</td>
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<td>1996</td>
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</tr>
<tr>
<td>700</td>
<td>2358</td>
<td>Data processing: generic control systems or specific applications</td>
<td>1999</td>
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<tr>
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<td></td>
<td>Electrical computers and digital processing systems: processing</td>
<td></td>
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<tr>
<td>712</td>
<td>1987</td>
<td>Architectures and instruction processing (e.g., processors)</td>
<td>1999</td>
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<tr>
<td>216</td>
<td>1630</td>
<td>Etching a substrate: processes</td>
<td>1995</td>
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</table>

Table presents partial list of patent classes dropped due to having insufficient observations in a given year. All of the most populous dropped classes were either created or discontinued in the 1990's.
## Table 4

### Impact of TRIPS on Patent Counts

<table>
<thead>
<tr>
<th>Dependant Variable</th>
<th>(1)</th>
<th>(2)</th>
<th>(3)</th>
<th>(4)</th>
<th>(5)</th>
<th>(6)</th>
<th>(7)</th>
<th>(8)</th>
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<tr>
<td>After</td>
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<td>-37.1</td>
<td>-41.0</td>
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<td>-31.8</td>
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<td>0.063</td>
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<td>0.049</td>
<td>0.039</td>
<td>0.082</td>
<td>0.108</td>
<td>0.063</td>
<td>-1.76E-05</td>
<td>-9.36E-05</td>
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<td>Time (months)</td>
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<td>0.89</td>
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<td>-1.04</td>
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<td>-4.79</td>
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<td>-24.43</td>
<td>-0.92</td>
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<td>Mean Year of Citing Patents</td>
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<td>-0.43</td>
<td>7.08</td>
<td>0.34</td>
<td>0.12</td>
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<tr>
<td>Mean Cites to Citing Patents</td>
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<td>0.01</td>
<td>0.016</td>
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### Observation Level

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<th>Class-Month</th>
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</table>

All data from USPTO spanning different windows around June 8, 1995, as indicated (windows in months). Citations are total received per patent as of December 31, 2002. Extension is the expected increase in patent due to TRIPS, calculated by patent class. All standard errors are clustered by patent class. Dummies for technology subcategory included in all regressions. * indicates significance at p < 0.05 ** indicates significance at p < 0.01