

国際知財司法シンポジウム2026
The Judicial Symposium on Intellectual Property /TOKYO2026
(JSIP2026)

特許庁パート～パネルディスカッション JPO part～Panel Discussion

公然実施発明の認定判断の国際比較

International Comparison of the Assessment of Public Use Prior Art



Outline of the Panel Discussion

【目的】

秘密保持義務付き又は秘密保持義務なしの第三者提供、展示会での公開実演等の出願前行為が、欧州・米国及び日本において発明の新規性との関係でのどのように評価されるかを比較検討し、その違いを明らかにする。

Panel Discussion①

公然実施発明に関する各国・地域の法令、判断基準及び主要裁判例の紹介

Panel Discussion②

仮想事例を用いて、公然実施発明に関する各国・地域の実務を比較

注：本パネルディスカッションでの発言は、登壇者個人の見解であり、必ずしも所属組織を代表するものではありません。

Outline of the Panel Discussion

【Panel Discussion Objectives】

Through the panel discussion, we aim to compare how the same pre-filing activities, such as sales under confidentiality obligations, provision to third parties without confidentiality obligations, and public demonstrations at exhibitions are evaluated in relation to novelty of the invention in different jurisdictions and to highlight the similarities and differences in their approaches.

Panel Discussion①

Introduce the statutory frameworks, assessment criteria, and key decisions concerning public use prior art

Panel Discussion②

Compare practices in different jurisdictions for determining public use prior art through hypothetical cases

Disclaimer: Views expressed are those of the individual speakers and do not necessarily reflect those of their respective organizations.

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パネルディスカッション① Panel Discussion①

「公然実施発明に関する法令・判断基準・主要裁判例」
Statutory Frameworks, Assessment Criteria, and
Key Decisions on Public Use Prior Art



公然実施発明の要件・関連する審判決（欧州）

要件

54 条 新規性

- (1) 発明は、それが技術水準の一部を構成しない場合は、新規であると認められる。
- (2) 欧州特許出願の出願日前に、書面若しくは口頭、使用又はその他のあらゆる方法によって公衆に利用可能になったすべてのものは技術水準を構成する。
- (3) ～(5) (略)

関連審判決

① 製品・発明が公衆に利用可能となったか[T 84/83、T 194/86、T 232/89、T 602/91、T 1847/12]

- ・ 秘密保持義務を負わない者がアクセスし得たか
- ・ 実際に第三者が認識したことまでは必須ではない
- ・ 黙示の秘密保持義務は、当事者間の関係・取引状況から判断

② 公然実施が具体的に主張・立証されたか[T 600/90、T 78/90、T 522/94、T 927/98、T 805/05]

- ・ 使用の時期、対象、状況、相手方を具体的に特定
- ・ 証拠の信用性・整合性を評価
- ・ T 522/94、T 927/98は、特に異議申立ての適法性・具体的理由付けに関する審決

③ 製品から技術情報を取得できたか[T 461/88、G 1/92、T 952/92]

- ・ 製品の組成・内部構造等を当業者が認識できたか
- ・ 既知の分析技術による直接かつ明確な情報取得可能性
- ・ 分析の動機や実際に分析した事実は不要

④ 市販製品自体が技術水準に属するか[G 1/23]

- ・ 上市製品は、その組成または内部構造を当業者が分析及び再現ができなかったという理由だけでは技術水準から除外されない

Requirements for Public Use Prior Art and Related Judicial Decisions (Europe)

Requirements

Article 54 Novelty

- (1) An invention shall be considered to be new if it does not form part of the state of the art.
- (2) The state of the art shall be held to comprise everything made available to the public by means of a written or oral description, by use, or in any other way, before the date of filing of the European patent application.
- (3) ~ (5) (omitted)

Related judicial decisions

① Whether the product or invention has been made available to the public [T 84/83, T 194/86, T 232/89, T 602/91, T 1847/12]

- Whether a person not bound by a confidentiality obligation was able to gain access
- It is not necessary to establish that a third party actually became aware of the information
- An implied duty of confidentiality is determined based on the relationship between the parties and the circumstances of the transaction

② Was public performance specifically alleged and proven? [T 600/90, T 78/90, T 522/94, T 927/98, T 805/05]

- Specify the time, subject, circumstances, and the other party involved in the use
- Evaluate the credibility and consistency of the evidence
- T 522/94 and T 927/98 are decisions specifically concerning the legality of oppositions and the requirement for specific grounds

③ Were you able to obtain technical information from the product? [T 461/88, G 1/92, T 952/92]

- Whether a person skilled in the art could have recognized the product's composition, internal structure, etc.
- The possibility of obtaining direct and clear information using known analytical techniques
- The motivation for the analysis and the fact that the analysis was actually performed are not required

④ Whether a marketed product itself forms part of the state of the art [G 1/23]

- A marketed product shall not be excluded from the state of the art solely because its composition or internal structure could not be analysed and reproduced by the skilled person.

公然実施発明の要件・関連する審判決（日本）

要件

第29条 産業上利用することができる発明をした者は、次に掲げる発明を除き、その発明について特許を受けることができる。

- 一 特許出願前に日本国内又は外国において公然知られた発明
- 二 特許出願前に日本国内又は外国において公然実施をされた発明
- 三 (略)
- 2 (略)

関連審判決

- ・ 特許法29条1項2号にいう『公然実施』とは、発明の内容を不特定多数の者(*)が知り得る状況でその発明が実施されることをいい、商品が不特定多数の者に販売され、かつ、当業者がその商品を外部から観察しただけで発明の内容を知り得る場合はもちろん、外部からそれを知ることができなくても、当業者がその商品を通常の方法で分解、分析することによって知ることができる場合も公然実施となると解するのが相当とした裁判例が多数。[棒状ライト事件(知財高裁平成27年(行ケ)第10069号)、黒鉛素炭素素材事件(東京地裁平成31年(ワ)第7038号、第9618号)等]

(*)「公然」とは、公開的という程の意味である。したがって、その発明が秘密の範囲を脱出したことを意味する。…公然とは、必ずしも多数の者ということの意味しない。すなわち、きわめて少数の者が知っている場合であってもこれらの者が秘密を保つ義務を有しない者である場合は公然ということを妨げない。[特許法逐条解説]

加えて、以下のような判断をした裁判例もある。

- ・ 「当業者にとって当該実施品を完全に再現可能なほどに分析することが可能な状態にあることまでは必要ないが、当業者が利用可能な分析技術を用いて当該発明の実施品を分析することにより、特許請求の範囲に記載されている物に該当するかどうかの判断が可能な状態にあることを要するものと解するのが相当である。」「[ブラニュート顆粒事件(東京地裁平成15年(ワ)第19324号)]
- ・ 「発明の内容を知り得るといえるためには、当業者が発明の技術的思想を認識することが可能であるばかりでなく、その認識できた技術的思想を再現できることを要するというべきである」[作業機事件(知財高裁令和3年(行ケ)第10137号)]

Requirements for Public Use Prior Art and Related Judicial Decisions (Japan)

Requirements

Article 29(1) A person that invents an invention with industrial applicability may obtain a patent for that invention, unless the invention is as follows:

- (i) an invention that is **public knowledge** within Japan or in a foreign country prior to the filing of the patent application;
- (ii) an invention that is **publicly known to be worked** within Japan or in a foreign country prior to the filing of the patent application; or
- (iii) (omitted)

2 (omitted)

Related judicial decisions

- The term “publicly worked” as defined in Article 29, Paragraph 1, Item 2 of the Patent Act refers to **the working of an invention under a situation where the content of the invention is accessible to an unspecified number of people***. Numerous judicial precedents have held that this constitutes public practice not only when a product is sold to an unspecified number of people and a person skilled in the art can ascertain the content of the invention simply by observing the product from the outside, but also when, even if the content cannot be ascertained from the outside, a person skilled in the art can **ascertain it by disassembling or analyzing the product using ordinary methods**. [“Rod-Shaped Light” Case (2015 (Gyo-Ke) 10069, Intellectual Property High Court); “Graphite-Based Carbon Materials” Case (2019(Wa) 7038 and 9618, Tokyo District Court), etc.]

* The term “publicly” means that an invention has become accessible to the public. Accordingly, it signifies that the invention had entered the public domain. ... The term does not necessarily imply that the invention is known to a large number of persons. Even if only a very limited number of persons are aware of the invention, it may nevertheless be considered publicly known, so long as those persons are not bound by any duty of confidentiality.
[Article by Article Description of the Industrial Property Act]

In addition, there are court decisions that have reached the following conclusions:

- “In order to conclude that the content of an invention is knowable, **it is necessary** not only for a person skilled in the art to be able to recognize the technical concept of the invention, but also **to be able to reproduce that recognized technical concept**.” [“Work Machine” Case (Tokyo High Court of Intellectual Property, 2021 (Gyo-Ke) 10137)]
- “**While it is not necessary for the product to be in a state that allows a person skilled in the art to analyze it to the extent of being able to completely reproduce it, it is reasonable to interpret that it is required that, by analyzing the product of the invention using analytical techniques available to a person skilled in the art, it be possible to determine whether it falls within the scope of the claims.**” [“Branut Granules” Case (Tokyo District Court, 2003 (Wa)19324)]

公然実施発明の要件・関連する審判決（米国）

要件

35 U.S.C. § 102 特許要件;新規性

(a) 新規性;先行技術 下記に該当する場合を除き、何人も特許を受ける権利を有する。

(1) 請求された発明が、その発明の有効出願日前に、特許され、印刷刊行物に記載され、公然実施され、販売され、又はその他公衆に利用可能であった場合。

(2) (略)

(b) 例外

(1) クレーム発明の有効出願日前の1年以内になされた開示であって、以下の各項に該当する開示は、(a)(1)項のクレーム発明に対する先行技術には該当しない。

(A)発明者、共同発明者、または発明者あるいは共同発明者から直接または間接的に開示された主題を得た他の者により開示がされた場合;

(B)開示された主題は、その開示前に、発明者、共同発明者、または発明者あるいは共同発明者から直接または間接的に開示された主題を得た他の者によって公衆に開示されていた場合。

関連審判決

公然使用(Public Use)

- **Egbert v. Lippmann, 104 U.S. 333(1881)**

発明が公衆から見えなくても、秘密保持の制限なく他者に使用させた場合、公然実施となり得る。

- **Motionless Keyboard v. Microsoft, 486 F.3d 1376(Fed. Cir. 2007)**

潜在的な投資家に対する試作品の提示に関して、公然の実施に該当するか否かを判断する上での重要なポイントは、当該の人々が発明の実施可能な形態にアクセスでき、かつ、秘密保持の制限なくそれを使用できたかどうかである。

- **Lough v. Brunswick, 86 F.3d 1113(Fed. Cir. 1996)**

試験的な使用 対 公衆利用: 試作品を他者に配布した場合、発明者による管理、秘密保持措置及び試験目的がなければ、公然実施と判断されやすい。

- **Beachcombers v. WildeWood, 31 F.3d 1154(Fed. Cir. 1994)**

開示の相手が少人数でも、秘密保持義務がなく、自由な開示又は利用が認められていれば、公然実施となり得る。

販売(On-Sale Bar)

- **Pfaff v. Wells Electronics, 525 U.S. 55(1998)**

基準日前に、(1)商業的な販売の申出があり、(2)発明が特許を受ける準備が整った状態であれば、販売による無効事由が成立する。

- **Helsinn Healthcare v. Teva, 586 U.S. 388(2019)**

発明の詳細が秘密にされていても、商業的な販売はAIA上の「販売」に該当し得る。

Requirements for Public Use Prior Art and Related Judicial Decisions (US)

Requirements

35 U.S.C. § 102 Conditions for patentability; novelty

(a) Novelty; Prior Art – A person shall be entitled to a patent unless –

(1) The claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention; or

(2) (omitted)

(b) Exceptions

(1) A disclosure made 1 year or less before the effective filing date of a claimed invention shall not be prior art to the claimed invention under subsection (a)(1) if –

(A) The disclosure was made by the inventor or joint inventor or by another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor; or

(B) the subject matter disclosed had, before such disclosure, been publicly disclosed by the inventor or a joint inventor or another who obtained the subject matter disclosed directly or indirectly from the inventor or a joint inventor.

Related judicial decisions

Public Use

- **Egbert v. Lippmann, 104 U.S. 333(1881)**

Even if an invention is not visible to the public, **allowing others to use it without any confidentiality restrictions may constitute public use.**

- **Motionless Keyboard v. Microsoft, 486 F.3d 1376(Fed. Cir. 2007)**

With regard to the **presentation of prototypes to potential investors**, the key issue in determining **public use** is **whether those people had access to the working invention and could use it without any restrictions on confidentiality.**

- **Lough v. Brunswick, 86 F.3d 1113(Fed. Cir. 1996)**

Experimental v. Public Use: If a prototype is distributed to others, **it is likely to be deemed a public use unless the inventor exercises control over it, implements confidentiality measures, and the distribution is for testing purposes.**

- **Beachcombers v. WildeWood, 31 F.3d 1154(Fed. Cir. 1994)**

Even if the number of people whom disclosure is made is small, **if there is no obligation to maintain confidentiality and free disclosure or use is permitted, it may constitute public use.**

On-Sale Bar

- **Pfaff v. Wells Electronics, 525 U.S. 55(1998)**

If, prior to the reference date, (1) **an offer to sell the invention on a commercial basis has been made**, and (2) the invention is **in a state ready for patenting**, then the ground for **invalidity** based on sale applies.

- **Helsinn Healthcare v. Teva, 586 U.S. 388(2019)**

Even if the details of an invention are kept confidential, commercial sales may constitute “sale” under the AIA(America Invents Act) .

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パネルディスカッション② Panel Discussion②

「仮想事例に基づく公然実施発明の認定」
Determination of Public Use Prior Art
Based on Hypothetical Cases



事例1 樹脂フィルムF100の提供

事例の概要

X社は、リチウムイオン電池用のフィルムを開発するメーカーであり、次の発明を完成させた。

発明1:リチウムイオン電池の内部部品である芯材を被覆する、新規な組成からなる樹脂フィルム(F100)

A社はX社との将来的な取引可能性を検討しており、F100の評価を希望した。そこでX社は、**F100の組成を分析・評価しない旨を含む秘密保持契約を締結した上で、F100をA社に無償で提供した。**F100は組成が複雑であり、当業者が分析することは不可能であった。

その後、X社は、上記提供から1年以上が経過した時点で発明1について特許出願し、特許査定を受けた。

仮想事例は、主催者側で独自に創作したもので、元になる特許出願などは存在しない。

Summary of Hypothetical Case 1

Summary of the Case

Company X, a manufacturer that develops films for lithium-ion batteries, completed the following invention:

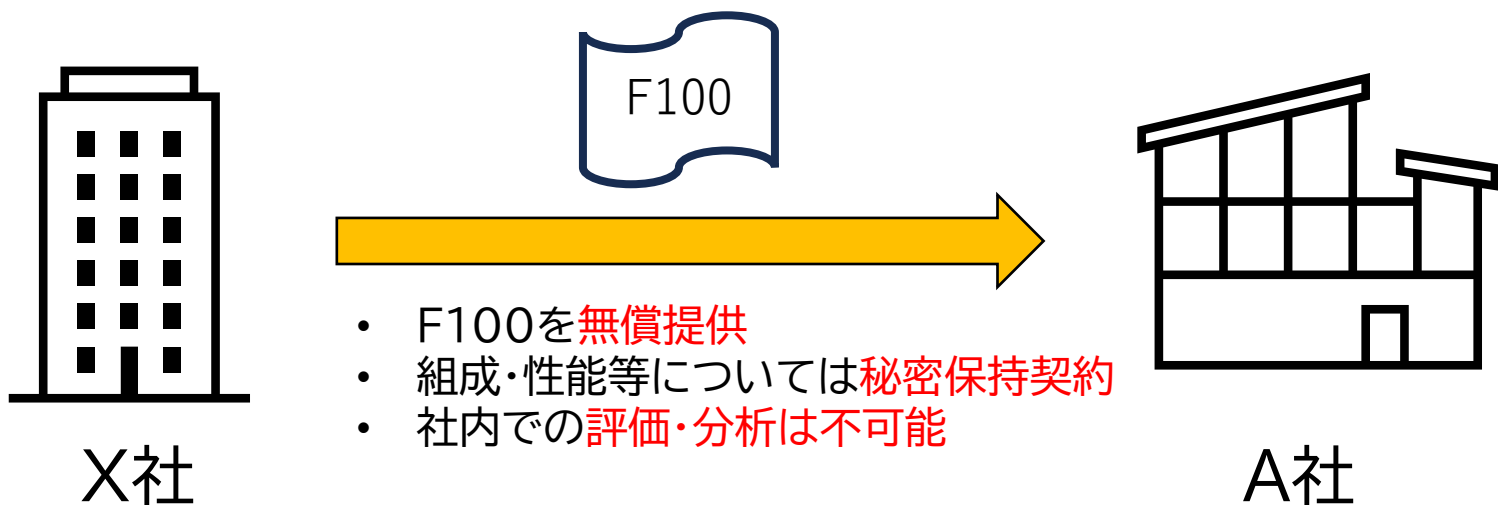
Invention 1: A resin film (F100) having a novel composition, used to cover a core material that is an internal component of a lithium-ion battery.

Company A was considering the possibility of future business dealings with Company X and requested an evaluation of F100. **Accordingly, Company X entered into a confidentiality agreement that included a provision stating that Company A would not analyze or evaluate the composition of F100, and then provided F100 to Company A free of charge. The composition of F100 was complex, making it impossible for a person skilled in the art to analyze it.**

Subsequently, more than one year after the aforementioned provision, Company X filed a patent application for Invention 1 and the patent was granted.

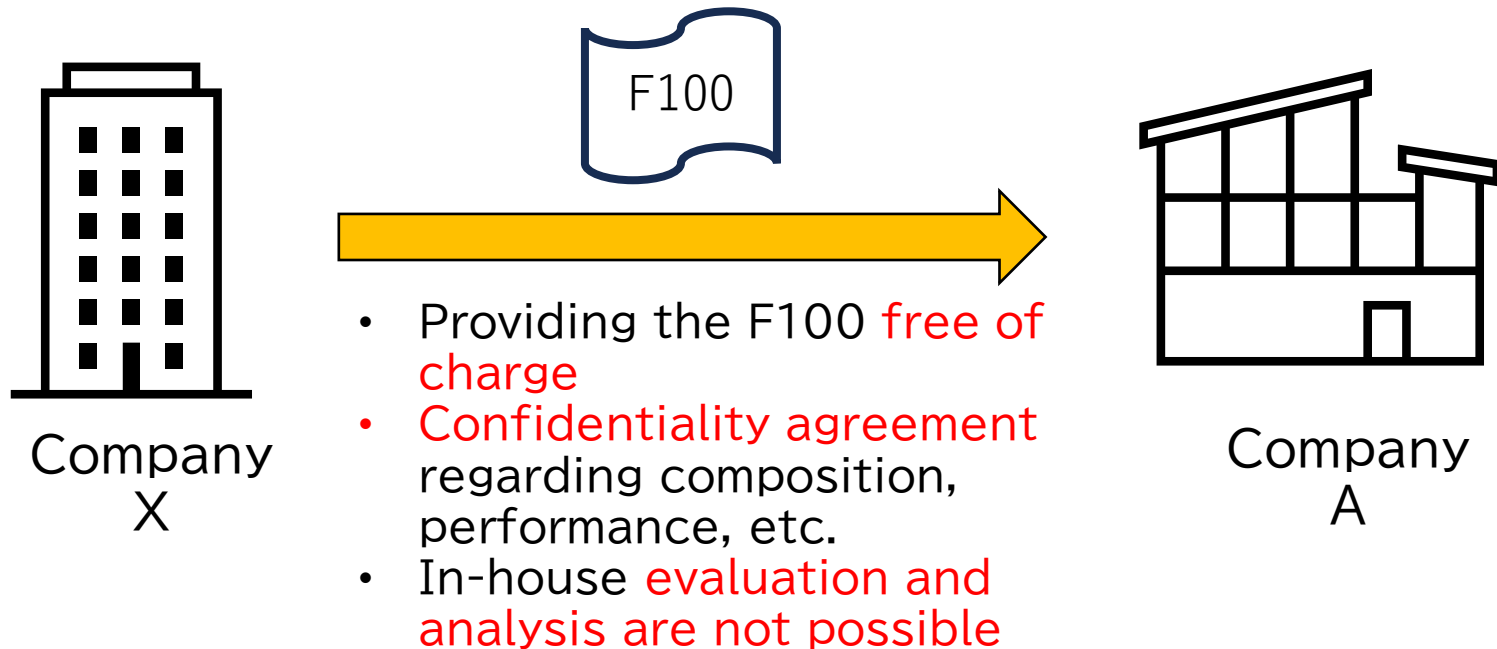
The hypothetical case is an original case created by the organizer and is not based on any existing patent application.

事例1-1 樹脂フィルムF100の提供(無償提供)



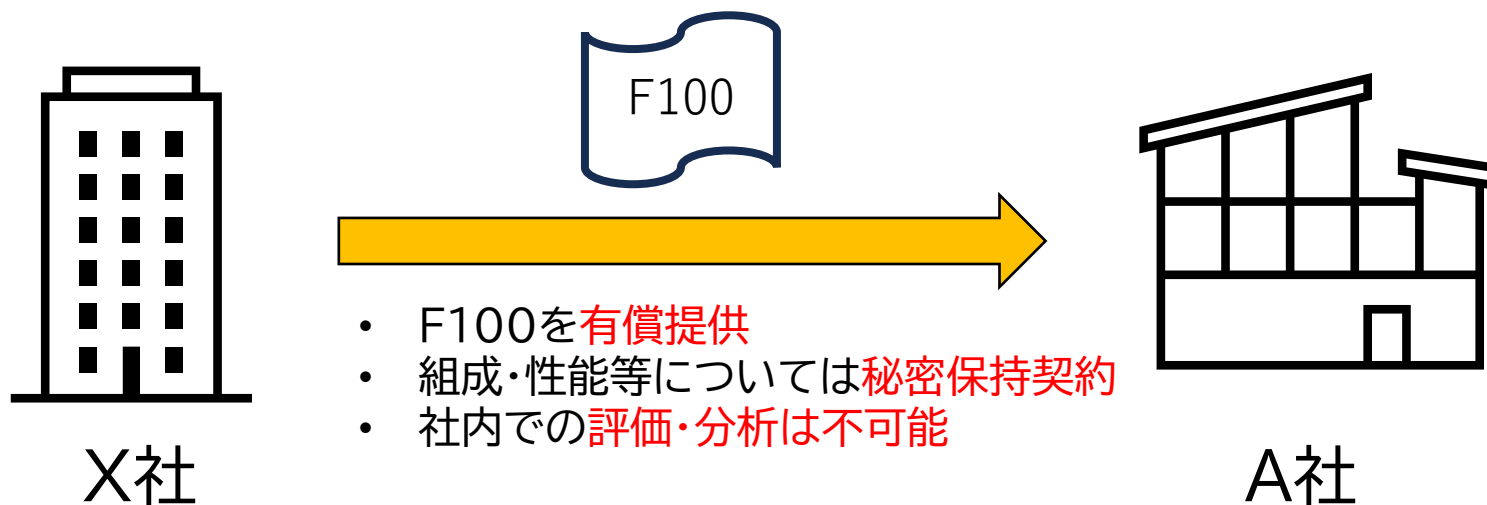
A社へのF100の提供は、発明1との関係で、公然実施に該当するのか？

Case Study 1-1: Provision of F100 Resin Film (Provided Free of Charge)



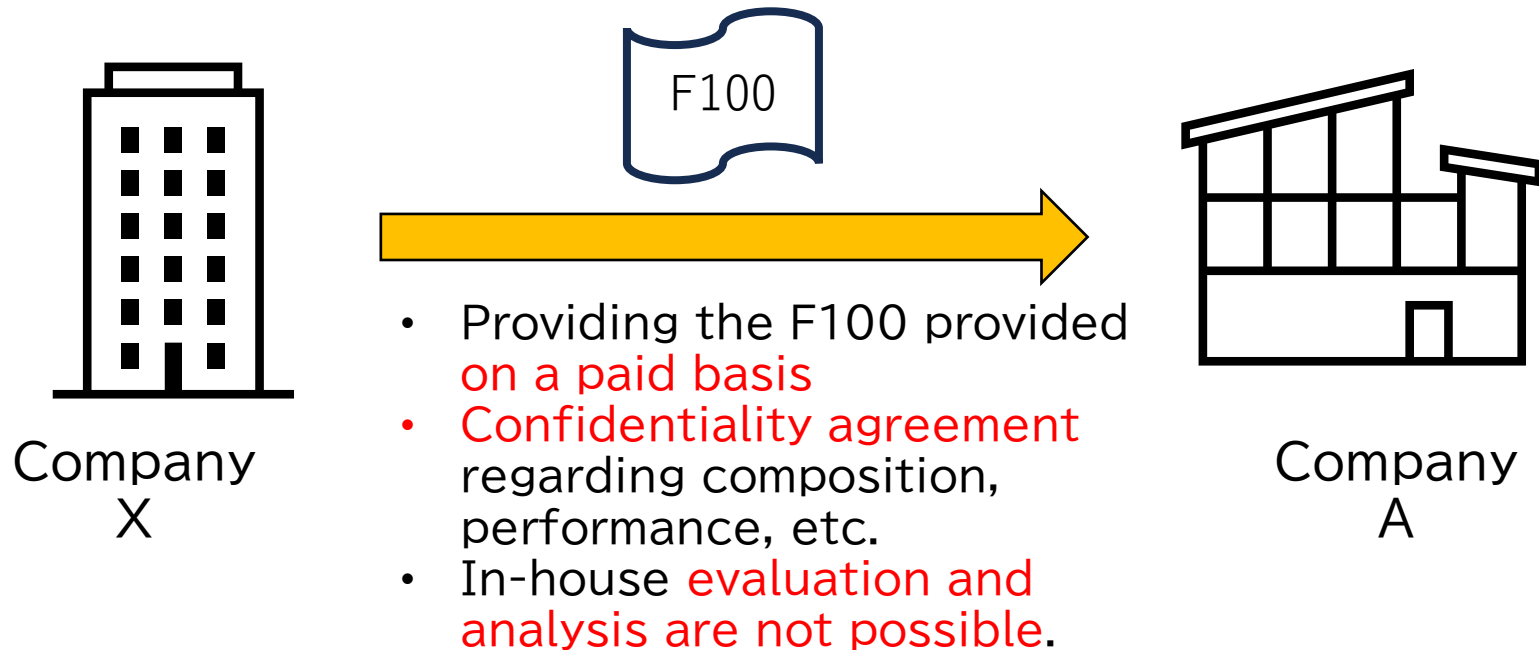
Does the provision of F100 described above constitute publicly working in relation to Invention 1?

事例1－2 樹脂フィルムF100の提供(有償提供)



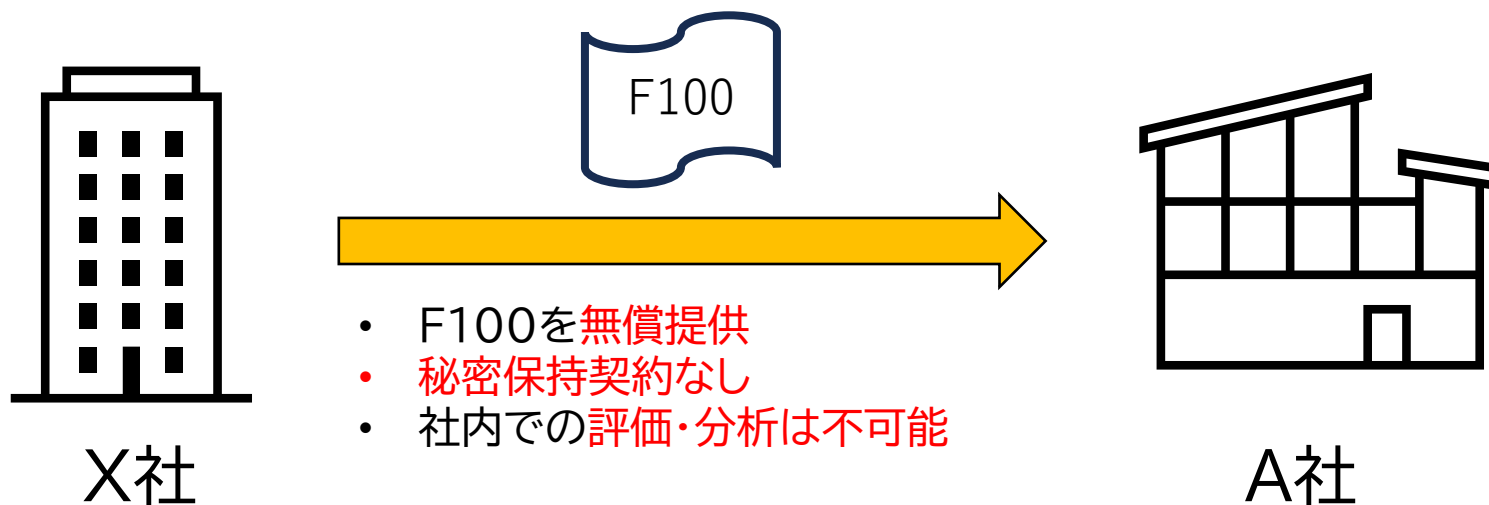
A社への提供が有償であった場合、結論は変わるか？

Case Study 1-2: Provision of F100 Resin Film (Provided for a Fee)



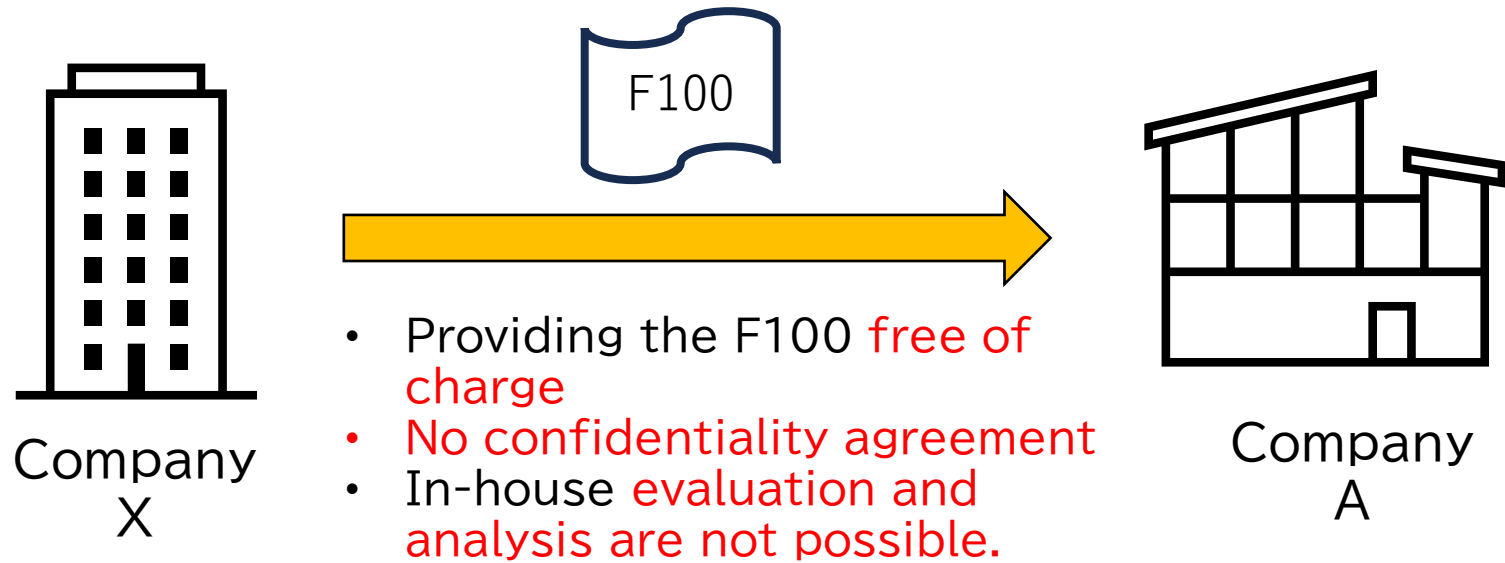
Would the conclusion have differed if F100 had been provided for a fee?

事例1－3 樹脂フィルムF100の提供(秘密保持契約なし)



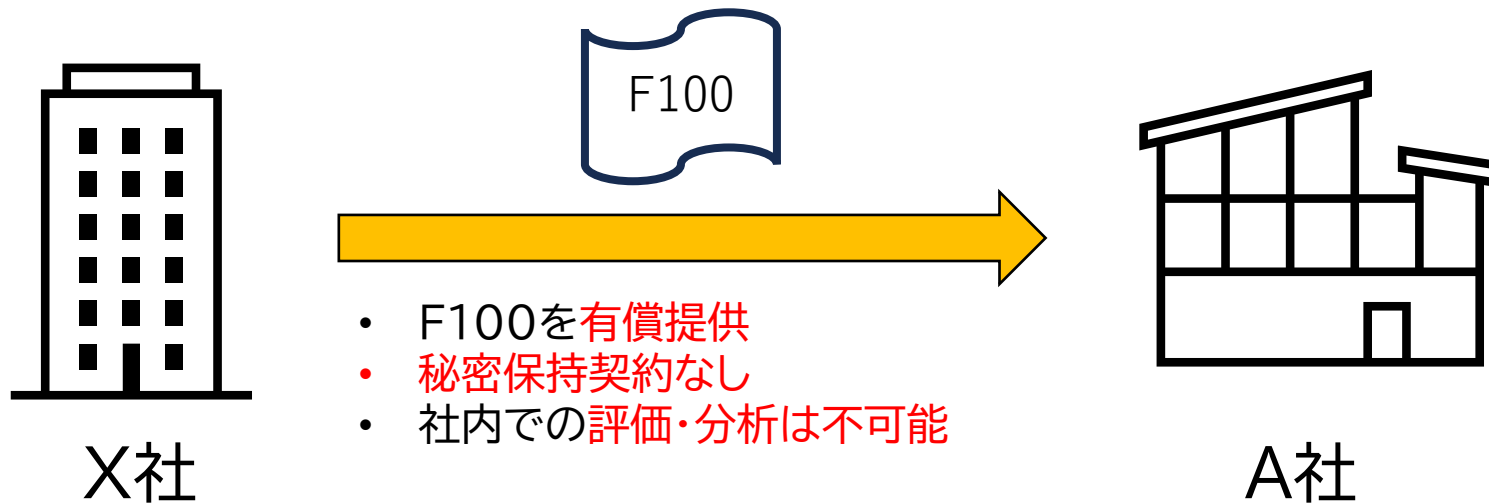
秘密保持契約が締結されていなかった場合、A社へのF100の提供は、発明 1 との関係で、公然実施に該当するのか？

Case Study 1-3: Provision of F100 Resin Film (No Confidentiality Agreement)



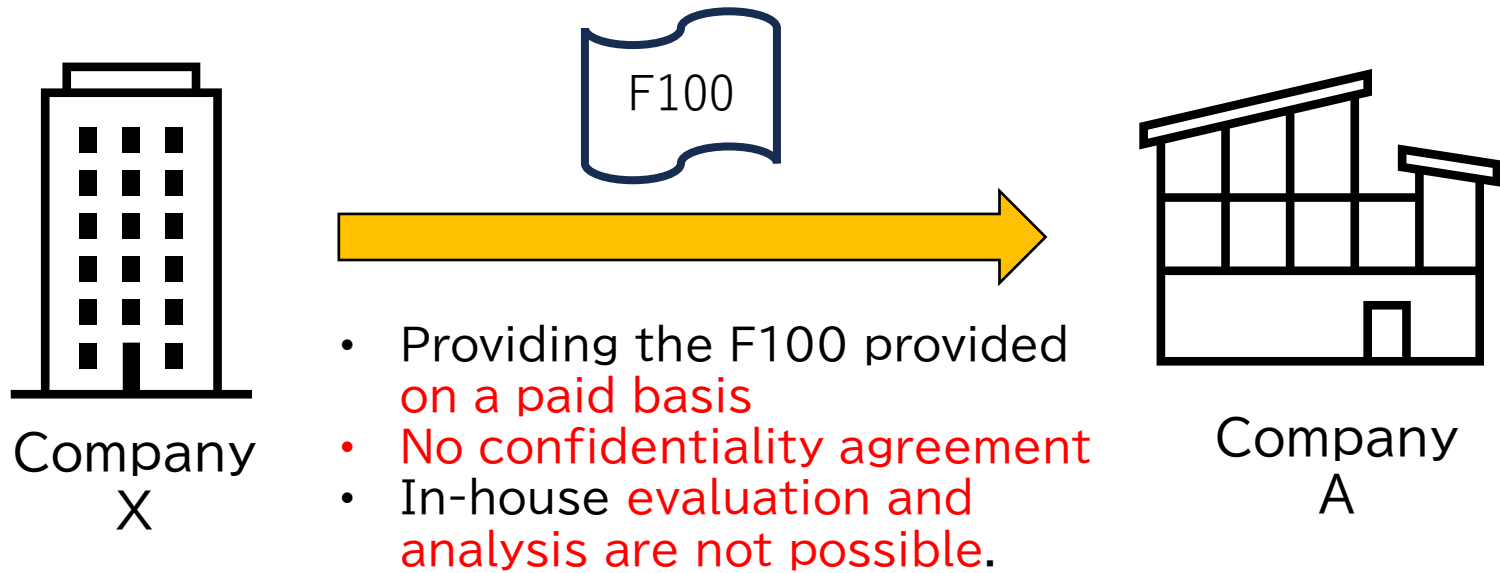
If no confidentiality agreement had been entered into, would the provision of the F100 to Company A have constituted publicly working with respect to Invention 1?

事例1－4 樹脂フィルムF100の提供(秘密保持契約なし・有償提供)



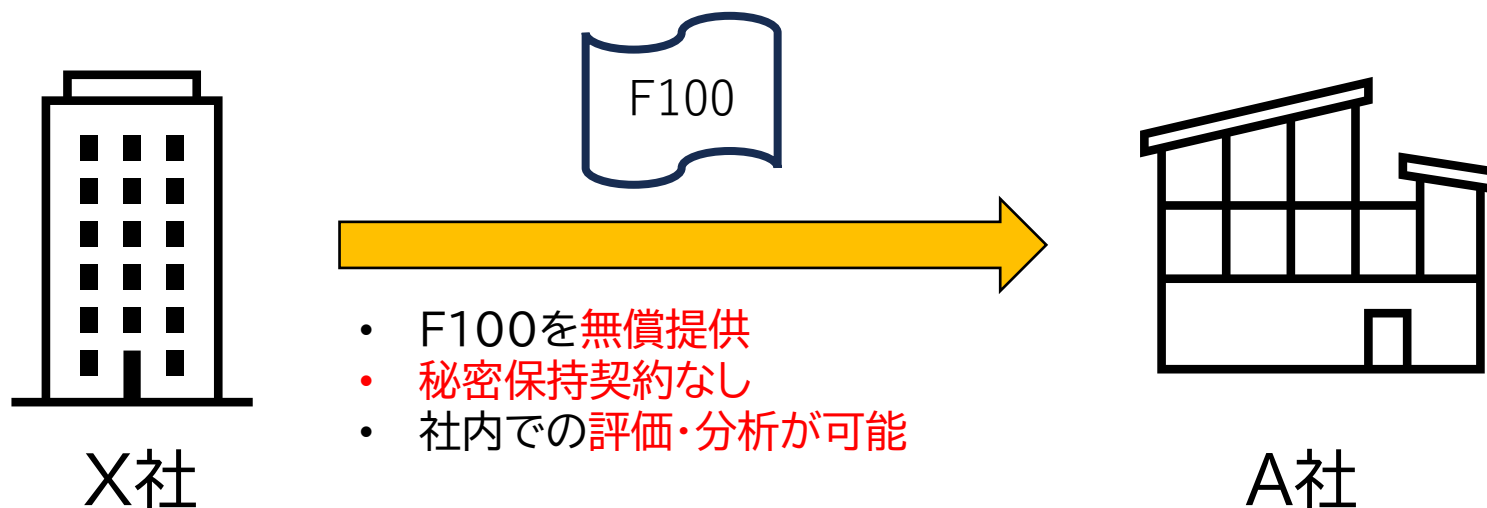
A社への提供が有償であった場合、結論は変わるか？

Case Study 1-4: Provision of F100 Resin Film (No Confidentiality Agreement•Provided for a FEE)



Would the conclusion have differed if F100 had been provided for a fee?

事例1－5 樹脂フィルムF100の提供(評価・分析可能性)



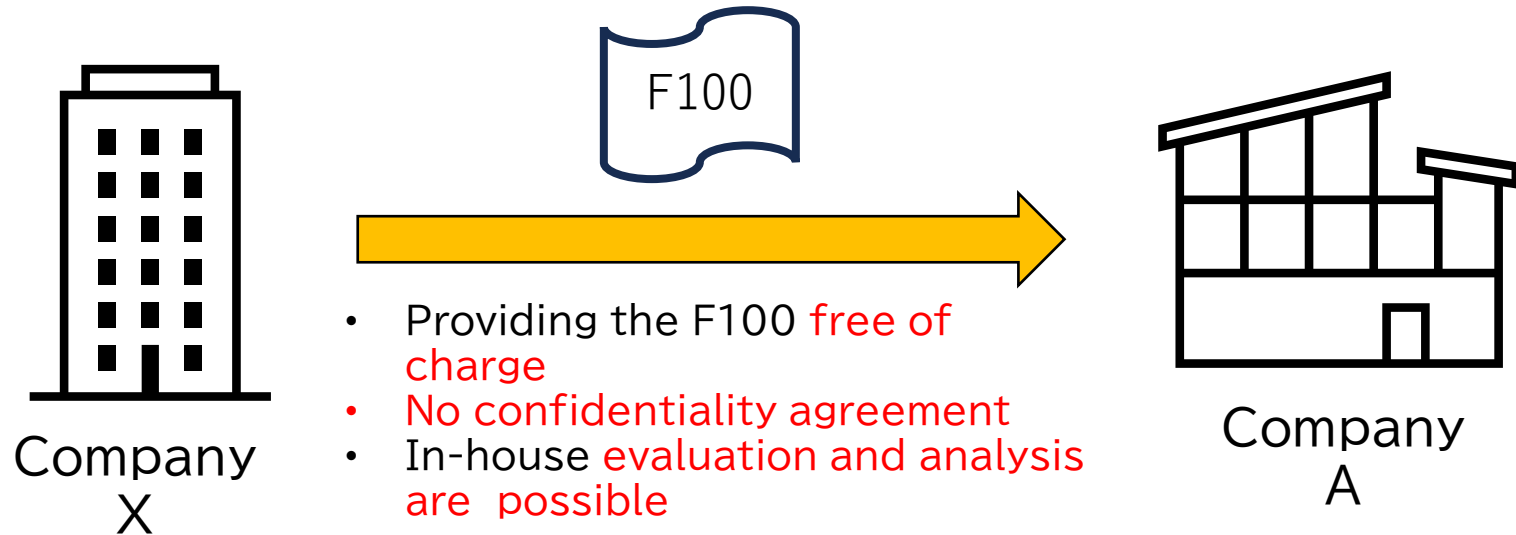
秘密保持契約がなく、かつ、当業者がF100を分析することが可能であった場合であって、以下の(1)～(3)のそれぞれの場合、発明1との関係で、公然実施に該当するのか？

(1)分析はできたものの、特許クレームに該当するか否かまでは判断できなかった場合

(2)特許クレームに該当することが分析により明らかになったものの、発明を再現できなかった場合

(3)特許クレームに該当することが分析により明らかになり、かつ、発明を再現できた場合

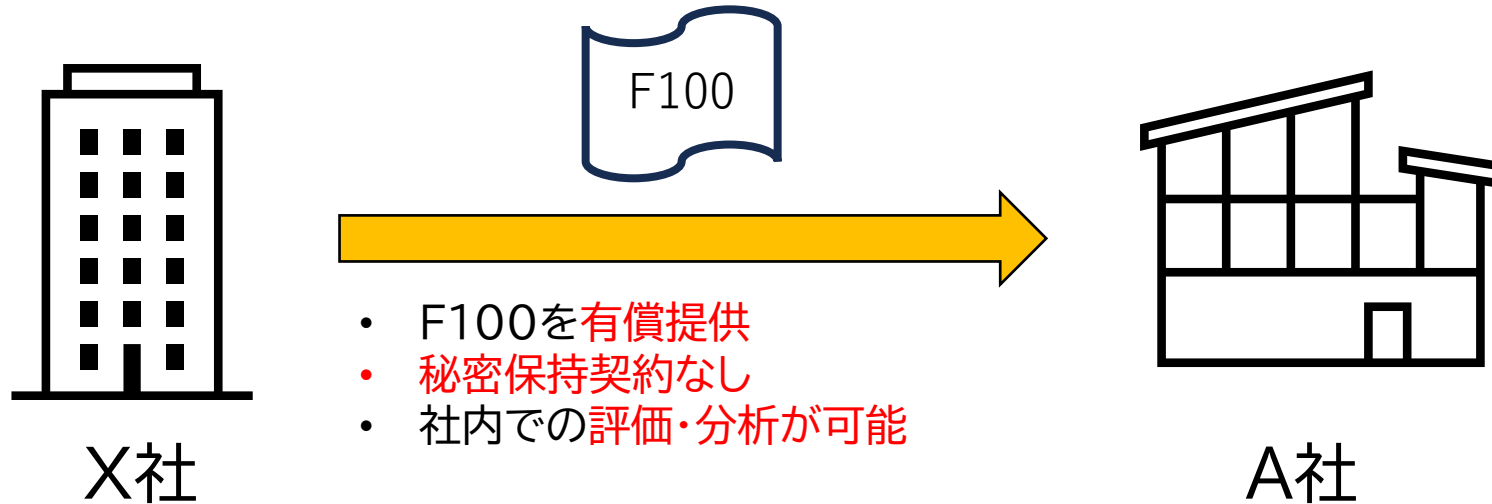
Case Study 1-5: Provision of F100 Resin Film (Possibility of Evaluation and Analysis)



If no confidentiality agreement had been entered into and a person skilled in the art had been able to analyze F100, would your conclusion have differed depending on the extent to which F100 could be analyzed and the invention reproduced, as described in scenarios (1) through (3) below?

- (1) F100 had been analyzed, but it had not been determined whether it fell within the scope of the patent claim.
- (2) Analysis had revealed that F100 fell within the scope of the patent claim, but the invention had not been reproduced.
- (3) Analysis had revealed that F100 fell within the scope of the patent claim, and the invention had been reproduced.

事例1－6 樹脂フィルムF100の提供(評価・分析可能性・有償提供)



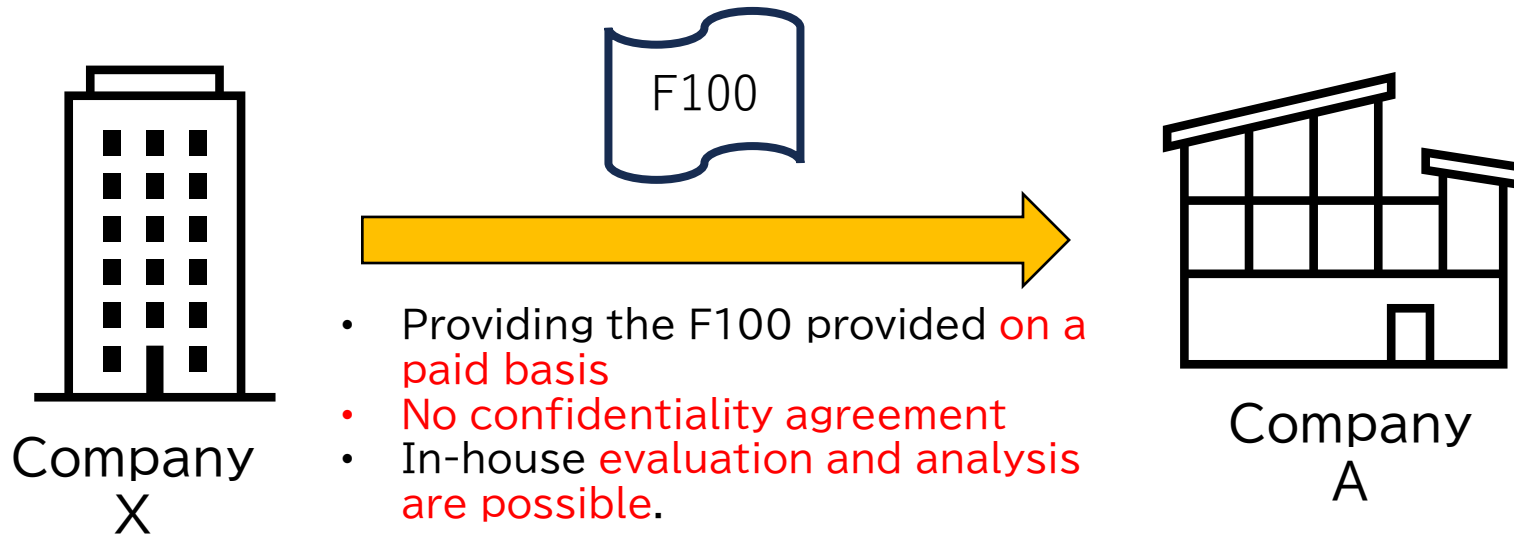
A社への提供が有償であり、秘密保持契約がなく、かつ、当業者がF100を分析することが可能であった場合であって、以下の(1)～(3)のそれぞれの場合、公然実施に該当するか？

(1)分析はできたものの、特許クレームに該当するか否かまでは判断できなかった場合

(2)特許クレームに該当することが分析により明らかになったものの、発明を再現できなかった場合

(3)特許クレームに該当することが分析により明らかになり、かつ、発明を再現できた場合

Case Study 1-6: Provision of F100 Resin Film (Possibility of Evaluation and Analysis•Provided for a Fee)



If F100 had been provided for a fee, no confidentiality agreement had been entered into and a person skilled in the art had been able to analyze F100, would your conclusion have differed depending on the extent to which F100 could be analyzed and the invention reproduced, as described in scenarios (1) through (3) below?

- (1) F100 had been analyzed, but it had not been determined whether it fell within the scope of the patent claim.
- (2) Analysis had revealed that F100 fell within the scope of the patent claim, but the invention had not been reproduced.
- (3) Analysis had revealed that F100 fell within the scope of the patent claim, and the invention had been reproduced.

事例2 内部部品Mを収容した試作電池の展示 Summary of a Hypothetical Case 2

事例の概要

Y社は、芯材をフィルムで被覆したリチウムイオン電池用の内部部品を開発するメーカーであり、次の発明を完成させた。

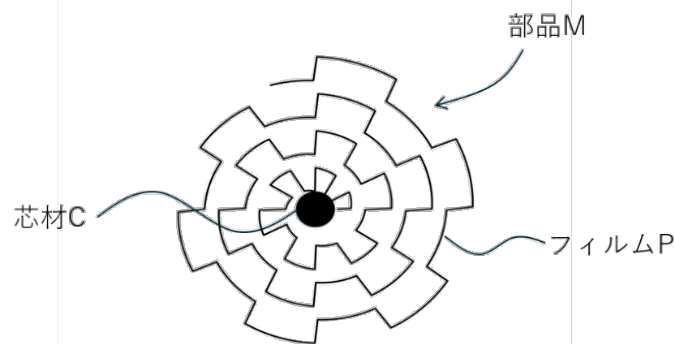
発明2:リチウムイオン電池に収容される内部部品であって、芯材Cに公知のフィルムPを特殊な巻き方で巻いた部品M

Y社は、一般来場者向けの展示会において、発明2に係る部品Mが内部に収容された試作電池を展示した。

会場では、試作電池の外観及び性能の説明、特徴に関する口頭説明並びに動作実演が行われた。

来場者は部品Mを直接観察できず、試作電池を分解又は持ち帰ることもできなかった。また、図面・仕様書その他の資料は配布されず、写真撮影も禁止されていた。試作電池は展示のみを目的としており、注文は受け付けていなかった。

その後、Y社は、上記展示から1年以上が経過した時点で発明2について特許出願し、特許査定を受けた。



図：部品Mの断面構成イメージ

仮想事例は、主催者側で独自に創作したもので、元になる特許出願などは存在しない。

The hypothetical case is an original case created by the organizer and is not based on any existing patent application.

Summary of a Hypothetical Case 2

Summary of the Case

Company Y, a manufacturer that develops internal components for lithium-ion batteries, in which a core material is covered with a film, completed the following invention:

Invention 2: Internal component M contained in a lithium-ion battery, comprising core material C wrapped with publicly known film P in a special manner.

At an exhibition open to the general public, Company Y displayed a prototype battery containing component M concerning Invention 2. At the venue, Company Y explained the external appearance and performance of the prototype battery, provided a verbal explanation of its features, and demonstrated its operation. However, visitors were not able to directly observe component M, nor were permitted to disassemble or take the prototype battery home. No drawings, specifications, or other materials were distributed, and photography was prohibited. The prototype battery was displayed solely for exhibition purposes, and no orders were accepted. Subsequently, more than one year after the exhibition, Company Y filed a patent application for Invention 2 and the patent was granted.

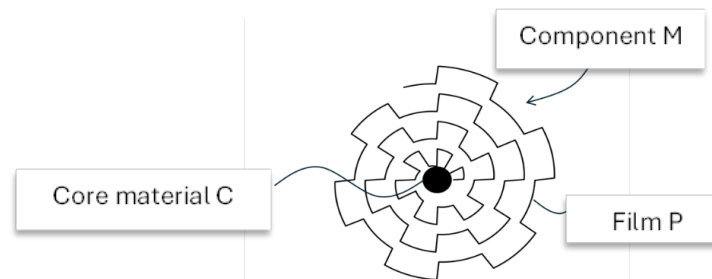
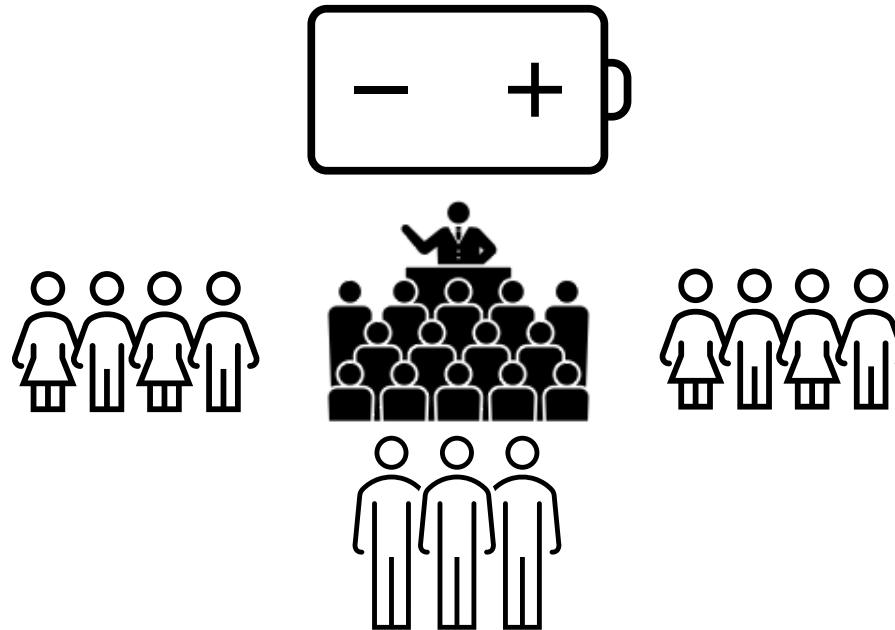


Figure: Illustrative cross-sectional configuration of component M

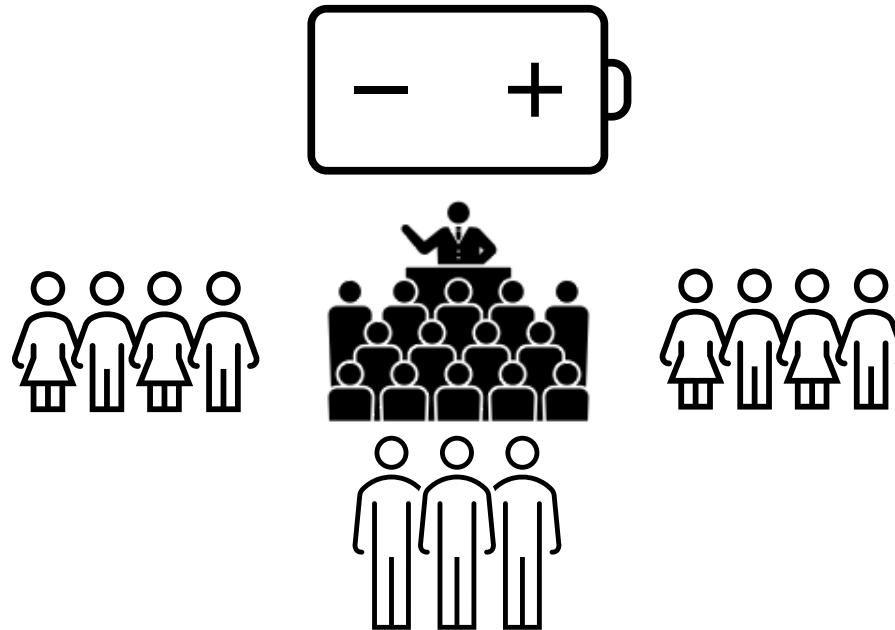
The hypothetical case is an original case created by the organizer and is not based on any existing patent application.

事例2-1 内部部品Mを収容した試作電池の展示 (内部構造は非開示)



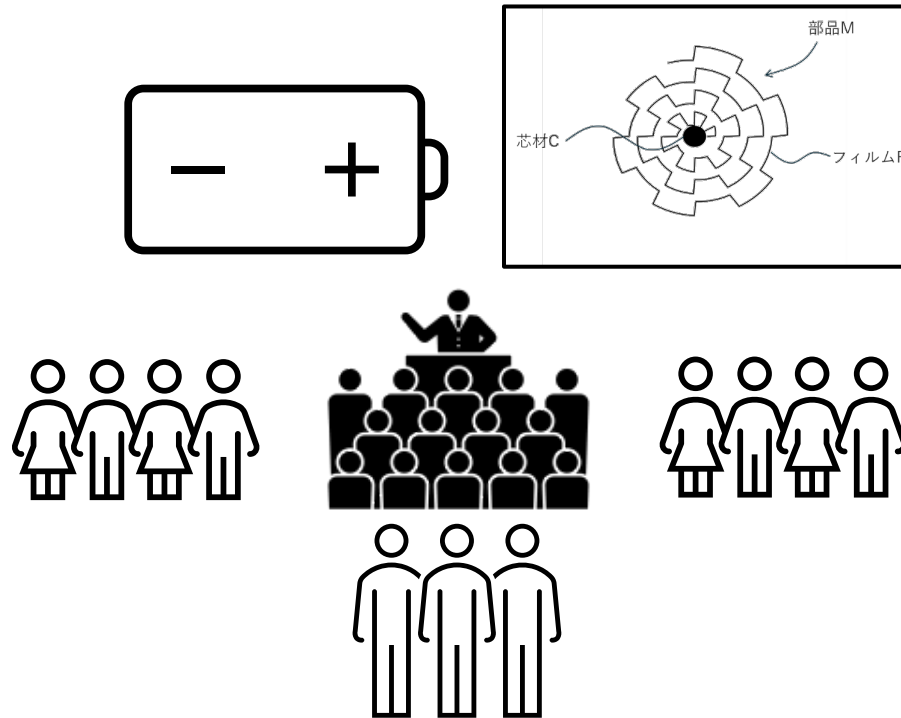
Y社による展示会での展示をもって、発明2は、公然実施発明に該当するか？

Case 2-1: Exhibition of a prototype battery containing internal component (Internal structure is not disclosed)



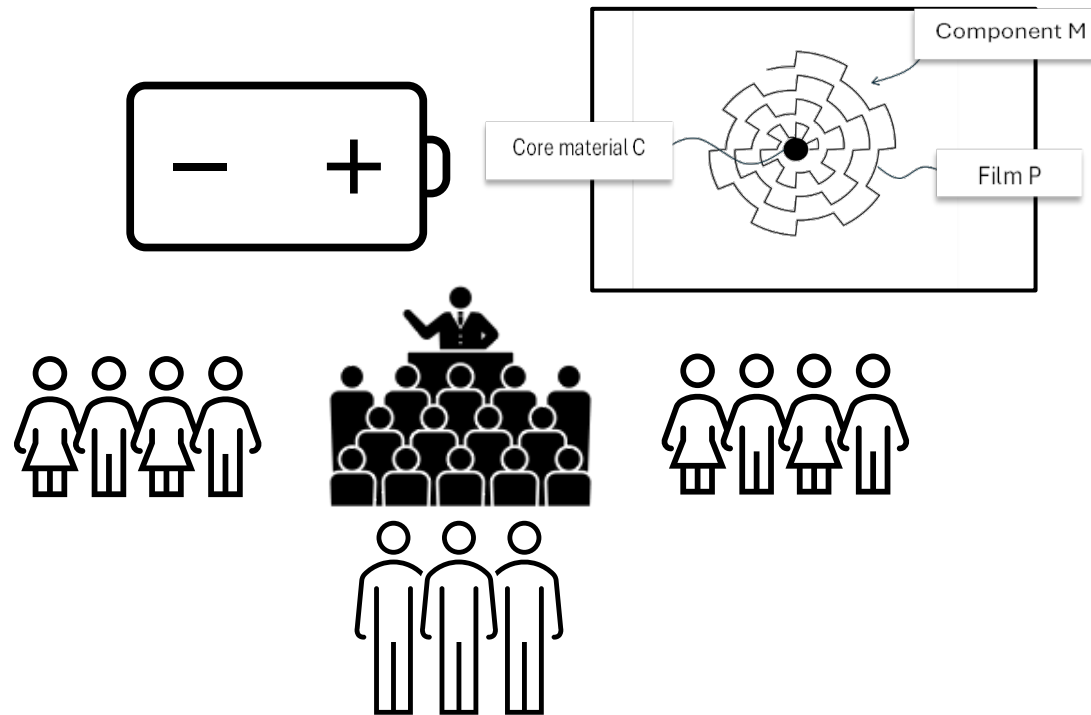
Does the exhibition by Company Y at the trade show constitute publicly working in relation to Invention 2?

事例2-2 内部部品Mを収容した試作電池の展示 (内部構造の図・断面模型あり)



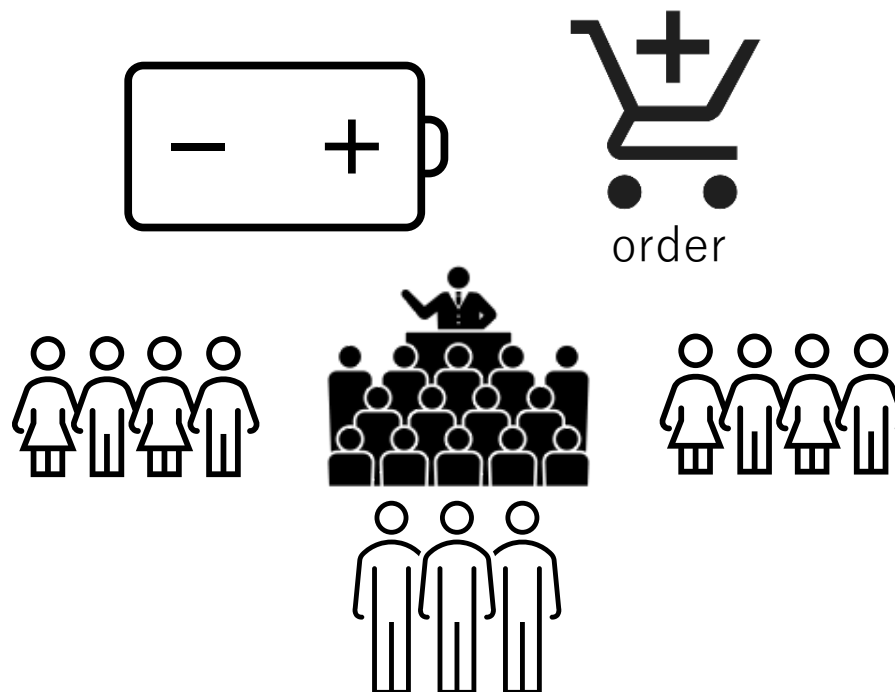
試作電池と併せてその内部構造を理解できる図や断面模型が展示され、フィルムの特殊な巻き方が理解できる場合、結論は変わるか？

Case 2-2: Exhibition of a prototype battery containing internal component (Includes a diagram of the internal structure and a cross-sectional model)



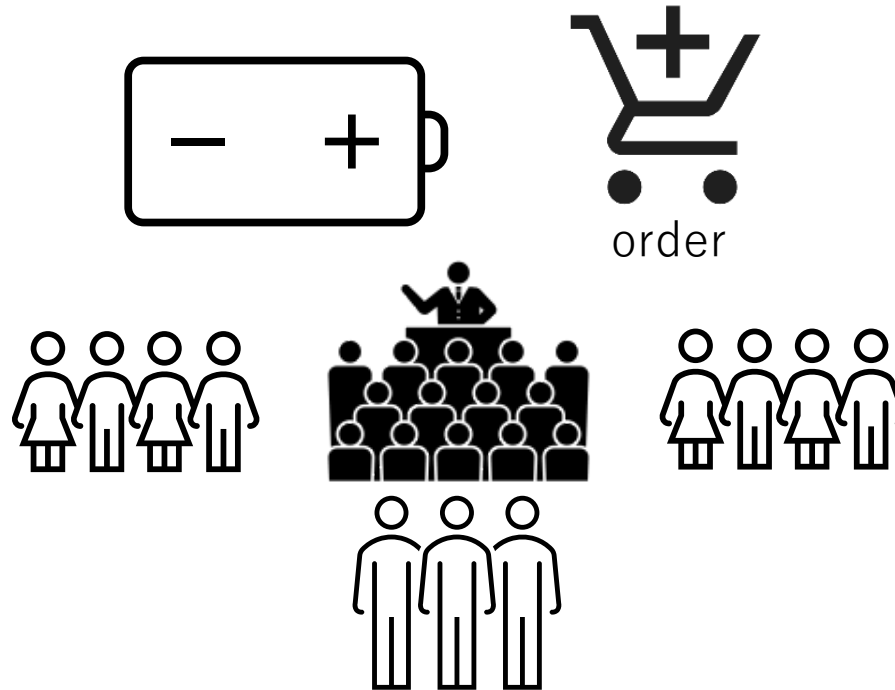
Would the conclusion have differed if a drawing or cross-sectional model enabling visitors to understand the internal structure of the prototype battery, including the special manner in which the film was wrapped, had been displayed together with the prototype battery?

事例2-3 内部部品Mを収容した試作電池の展示 (注文受付あり)



試作電池の展示と併せて電池の注文を受け付けていたが、出願までに販売されていなかった場合、結論は変わるか？
なお、部品Mの内部構造は引き続き来場者には開示されていないものとする。

Case 2-3: Exhibition of a prototype battery containing internal component (Orders accepted)



Would the conclusion have differed if orders for the battery had been accepted in conjunction with the exhibition of the prototype battery, but no battery had been sold before the filing date? Please assume that the internal structure of component M remained undisclosed to visitors.