or Aurigin Systems, Inc., making a groundbreaking IP software program was relatively easy; convincing its investors to provide additional funding was much harder. So difficult, in fact, that on February 1 the Cupertino, California-based company’s creditors filed an involuntary Chapter 11 bankruptcy petition in the Northern District of California.

According to public records, Aurigin owed $1.25 million as of January 31. Investors were unwilling to pony up additional money on terms acceptable to management. “Some investors drove [financing] terms that were so harsh, the board could not sign up for them and perform its duties at the same time,” explains Kevin Rivette, cofounder of the ten-year-old software company and coauthor of Rembrandts in the Attic, a book that offers IP advice to executives.

Some of the company’s high-profile investors include American Express Company, International Data Group, Robertson Stephens, Inc., and Reuters. Several directors representing some of the company’s investors resigned at the end of last year.

In January, after the stalemate, Rivette resigned, along with the three other remaining members of the company’s board. The company’s employees are now running Aurigin while it tries to restructure. Many employees are currently working for minimum wage. “To my knowledge,” Rivette says, “Aurigin has yet to lose a customer.”

Aurigin’s customers include AT&T Corp., General Electric Company, and The Procter & Gamble Company.

The company’s intellectual asset management program is pricey—costing
$80,000 for the basic program and into the millions for company-wide access.

The software lets clients catalog and analyze their patent portfolios. It allows users to create maps that chart what companies own which patents in a technological market. It helps customers identify where their competitors are building patent portfolios and how they can avoid fights over technology.

While Aurigin attracted some of the biggest Fortune 500 companies as clients, it apparently could have had more. According to Patrick Sullivan, Sr., of ICMG, an IP management consulting firm in Palo Alto, "Aurigin created some truly revolutionary software. [But] they marketed the product's software attributes, not the capability it created for companies managing IP. They sold the steak and not the sizzle."

Industry sources say that Aurigin mistakenly targeted computer support professionals instead of executives. They also said that the company was slow to provide consulting support for the software. Rivette acknowledges these issues and says that a Web-based initiative introduced last December was designed to address them.

Says Q. Todd Dickinson, former director of the U.S. Patent and Trademark Office and currently cochair of the IP Practice at D.C.'s Howrey Simon Arnold & White: "Aurigin may have been a little too far ahead of the curve." —Ari Kaplan

PAY FOR PLACEMENT

Seek and ye shall find? The axiom may work in a library, but it gets tricky on the Internet. Many search engines use a "pay-for-placement" business model: Businesses pay to have their Web sites appear at the top of a list of results that appears when surfers search for certain terms. For example, a search for "auto repair," would return a link to Bob's Auto Shop, not because it is the best or most popular site for car information, but because Bob paid a fee.

Not all businesses are happy with this arrangement.

In February the company that makes the dietary supplement Body Solutions filed suit against four search engines—AltaVista Company, Kanoodle.com, FindWhat.com, and Overture Services Inc.—in federal court in San Antonio.

Mark Nutritional Inc., which produces Body Solutions, accused the search engines of selling placement rights to the trademarked term "body solutions" to its competitors. The company is suing for trademark infringement and dilution and unfair competition.

Allen Baden, an IP partner in the San Jose office of New York's Kenyon & Kenyon, is representing Mark Nutritional along with San Antonio-based Loeffler, Jonas & Tuggey. Baden says that when you search for "body solutions" on AltaVista, 35 competing companies appear before his client's site.

An Overture spokesman says that the company had not seen the suit and could not comment. Representatives for the other search engines either declined comment or did not return calls.

Internet law expert Mark Lemley, a professor at the Berkeley Center for Law and Technology at the University of California, Boalt Hall, says that the complaints could be a tough sell.

"With the exception of Google, people understand that they get a lot of noise from their search engine results. The key to trademark infringement is consumer confusion. If you can't prove consumers are confused, you can't win the case," Lemley said.

Playboy Enterprises lost a similar trademark suit filed in 1999. Playboy had sued Excite and Netscape for selling banner ads programmed to appear when words such as "playboy" were used as search terms. A judge dismissed the suit summarily. Playboy has appealed.

Estée Lauder, Inc., launched a similar suit against competitor Fragrance Counter and Excite, Inc., in 1999. In August 2000, Estée Lauder announced a settlement with Fragrance Counter, which agreed not to run banner ads for other companies when Estée Lauder's trademark terms were searched. Estée Lauder later settled with Excite in the United States.

Baden says that Body Solutions is the first to file suit over the pay-for-placement practice. Ralph Nader's consumer activist group, Commercial Alert, filed a complaint over the practice in July 2001 with the Federal Trade Commission. The complaint alleges that eight search engines—MSN, Netscape, Direct Hit, Hotbot, Lycos, AltaVista, LookSmart, and iWon—are duping consumers into thinking results are ranked by relevance. —Shannon Lafferty