

A Picture is Worth...? Considering the Legal Position in the UAE for Publishing Photographs Online

Fiona Robertson - Senior Counsel, Head of Media - Digital and Data
- Dubai International Financial Centre

October 2015

The legal landscape for content in the UAE, as with many territories, is complex. Each country has its own priorities in balancing the right of speech against the right to privacy and respect.

In this article we will review some of the UAE legislation that applies to online content and the penalties that may arise, focusing particularly on photographs.

There has been much written about the use of photographs in social media, most of which has left the public with more questions. Is it possible for a person to post a photograph of another person without their consent? How should that consent be obtained? If the person knows that the photograph is being taken, is that enough? What if they know it is being taken and that it is for the social pages of a magazine? Can you then publish?

To assist with understanding the law, we will look at the scenario where a person has taken a picture of a woman in a club in the company of a man and has published that picture. There are several laws that could apply to this scenario.

Publications Law

Federal Law No 15 for 1980 Concerning Publications and Publishing (“Publications Law”) contains the following Article (emphasis added by author):

- No news, pictures, comments about an individuals’ private life shall be published if their publication is meant to disgrace such individuals.

This law clearly is intended to protect a person from malicious use of an image; simply posting an image with no intent of causing harm to the person in the photograph will not be considered an infringing act. So, the publishing of a photograph of a woman arm in arm with a man at a Dubai club will not infringe this law - unless it can be shown that the person who posted it knew that the woman was (for example) of a religious or social background that would not have ordinarily permitted her to be in a club. Clearly, with that knowledge, the publication was intended to disgrace her in front of people that knew her.

Note that the Publications Law is, as one would expect, designed to control the conduct of entities such as magazines, newspaper publishers, cinemas and broadcasters. It was written in 1980, before the advent of the internet. We have not yet seen it applied in practice to online activities, but we do believe that this is entirely within its scope.

The UAE Penal Code

The relevant article in the Publications Law is similar in concept to Article 138 of the UAE Penal Code (again, emphasis added):

- A punishment of confinement and fine shall be inflicted on any person who attacks the sanctity of an individuals' private or family life by committing any of the following acts in other than the legally permitted cases or without the victim's consent:
- Eavesdropping or recording or transmitting by any system of whatever kind any conversation held at a particular place or via the phone or any other set.
- Picking up or transmitting by any system of whatever kind a person's picture at a particular place.

If the acts referred to in the above two cases occur during a meeting within the hearing or sight of the person attending, their consent shall be required.

The same punishment shall be inflicted on any person who publishes through any means of publicity news, pictures or comments pertaining to the secrets of people's private or familial lives even if the same is true.

Under the UAE Penal Code therefore, it is a crime to publish a picture that invades a person's privacy or family life. The fact that the matter is true is not a defence. Taking our example from above, would the taking of this image of a woman with a male friend in a club be an issue? On the surface, the answer would be no. But the woman's personal circumstances could readily change that answer. If she was married but shown with another male friend, this might change the circumstances of the publication considerably.

Cybercrimes Law

In both the laws noted above, it is clear that the publication must be done with the desire to reveal secrets or somehow tarnish the reputation of the person in question.

The law that is most often cited when it comes to activities online is Federal Law No 5 of 2012 On Combating Cybercrimes ("Cybercrimes Law"). Article 21 contains some familiar concepts:

Shall be punished by imprisonment of a period of at least six months and a fine not less than one hundred and fifty thousand dirhams and not in excess of five hundred thousand dirhams or either of these two penalties whoever uses a computer network or any electronic information system or any information technology means for the invasion of privacy of another person in other than the cases allowed by the law and by any of the following ways:

- Eavesdropping, interception, recording, transferring, transmitting or disclosure of conversations or communications, or audio or visual materials.
- Photographing others or creating, transferring, disclosing, copying or saving electronic photos.
- Publishing news, electronic photos or photographs, scenes, comments, statements or information even if true and correct.

The themes are familiar. The subject's privacy must be invaded for the crime to have been committed. It is clear that disclosure is enough, but so is copying or saving – so you do not have to post the photograph on social media to find yourself infringing this law. You can simply have the image in your hard drive. Interestingly, the concept of seeking consent is absent from this Article. But the inclusion of the words "other than the cases allowed by law" does appear to intend that a legal use under another law (for example, with consent in accordance with the Penal Code) will exempt the publication from the operation of this provision.

Does this mean that electronic disclosure of the photograph of our woman in the club may still be a problem under the Cybercrimes Law even if we were to have secured her consent to the publication? At this stage, the courts have not considered this argument so we await clarification.

Assuming the matter of consent to be decided by the courts (one way or another), we still must consider if we have invaded the privacy of this woman by taking and then publishing the photograph. It may be the case the court considers that her privacy has been invaded because of the subsequent act of

disseminating the photograph – that is, the taking of the photograph was not an invasion, but the publication was an invasion of her privacy. Again, the outcome of any court action may rest entirely on specific facts about the woman and her life and these facts may not always be known when the photograph is being taken. In addition, can we rely on the fact that, for example, she knew that the photographer was from a well known local magazine and that the photograph would inevitably be published? Can the fact that she permitted a magazine to take her photograph be evidence that even she did not believe that her privacy was being compromised at that moment?

Copyright Law

One further law should be considered, and it is interesting because under this law, action can be taken without having to involve the police authorities. A person can simply lodge a claim in the Dubai courts to seek damages. Federal Law No. 7 of 2002 Pertaining to Copyrights and Neighbouring Rights (“Copyright Law”) contains the following provision in Article 43 (emphasis added).

Any person taking a photograph of another, in any manner, may not maintain, exhibit, publish or distribute the original or copies thereof, without permission from the person appearing in the photograph, unless otherwise agreed upon. Nevertheless, the photograph may be published:

- In incidents that have publicly taken place;
- If the photograph is related to official or public characters; or national or international celebrities; or
- If the competent public authorities have permitted such publication for the purpose of public welfare; with the proviso that the exhibition or circulation of such photograph, is not prejudicial to the status of the person appearing in the photograph.

Once again, in this law, we see the inclusion of the concept of consent – publication requires the consent of the subject unless taken under certain circumstances. Note particularly that, if the “incidents” (presumably those depicted in the image) took place “publicly” then publication can take place without the need for consent. So if we once again look at the woman in the club, she may struggle to stop publication using this law because the incident took place publicly. If the photograph was taken at a small private party, then she might successfully stop the publication but if it is at a ticketed event where any person could purchase tickets, then she may face difficulties. Note also that this law does not stipulate that the consent must be in writing so again, the circumstances regarding the taking of the image will be important. If she is smiling and waving at the camera, it might be difficult to convince a judge that she was not consenting to the photograph. Interestingly, under sub-article (ii) of this article, if she is a famous celebrity then she cannot stop the publication of the photograph, no matter where it is taken.

Summary

These laws have been part of life in the UAE for many years. Technology has made their operation slightly more interesting but fundamentally things have not altered. Our advice is to be pragmatic at all times. If you are the sort of person that likes to take surprise photographs of people and circulate them on Instagram, then you need to be careful about the friends that you choose to photograph. If someone does post images of you on-line, it is likely that they are unaware of your aversion to public images – it is fastest and easiest to send them a message and ask for it to be taken down.

The penalties for infringing these laws are high (see the reference chart) because they were intended to be implemented in circumstances where a person could suffer personal damage if photographs were used inappropriately. Personal privacy and community reputation are highly esteemed and protected in the UAE. Budding photographers as well as professionals are advised to act judiciously.

Reference Chart

This reference chart is intended as a guide only – it allows you to see the slight differences between the four laws that could apply to the use of a photograph on-line.

	Publications Law	UAE Penal Code	Cybercrimes Law	Copyright Law
<i>Is consent required before publication?</i>	Yes	Yes	Not mentioned, but refers to operation 'of the law' which will impact on interpretation	Yes
<i>Does the photograph have to breach privacy in order to infringe?</i>	Yes: "about an individual's private life"	Yes: "attacks the sanctity of an individual's private or family life"	Yes: "invasion of the privacy of another person"	No, the use image is enough
<i>Does it matter where the photograph is taken?</i>	No	No	No	Must not be 'public'
<i>Does there have to be intention or a malicious act?</i>	Yes, intention is required	Yes, intention is required	Not relevant	Not relevant but may be important in determining matter
<i>Is truth material to the matter?</i>	Not mentioned	Law applies even if the matter is true	Not mentioned	Not mentioned
<i>Penalties</i>	Prison for not less than 1 month and not more than 6 months. Fine between AED 1,000 and AED 5,000	Prison and a fine	Prison for at least six months and a fine between AED 150,000 up to AED 500,000. Note that Art. 42 allows a court to deport a foreigner who is convicted of any crime under this law.	Civil claim would be lodged, seeking to have the photograph removed and possible damages.

Al Tamimi & Company's Technology, Media & Telecommunications team regularly advises on content matters both on-line and in traditional media, acting for producers, creative agencies and broadcasters. For further information, please contact Fiona Robertson (f.robertson@tamimi.com)